COVID-19 and Ontario's court system:
***How to seize the pandemic's silver lining*[1]**

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I. INTRODUCTION

[1] I wish to thank the Thunder Bay Law Association for the kind invitation to participate in your annual conference. I am very disappointed that I could not come up to Thunder Bay in person.

[2] The organizers have graciously allowed to me talk about the topic of my choice. Given current circumstances, I have decided to call my talk: "COVID-19 and Ontario's court system: How to seize the pandemic's silver lining".

II. THE PAST SIX MONTHS

[3] This past June, someone reminded me of remarks that I made back in 2014 during a talk at an Ontario Bar Association conference.[2] At that time I proposed a "thought experiment". I mused:

> What if some extraordinary event occurred, and one day we woke up to find that all our courthouses had crumbled to the ground and we had to replace every courthouse in this province? What would we re-build in their place? Well, not the edifices we now have. Two questions would have to be asked before any spade hit the ground.
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> First, how would this newly re-built court communicate with its customers? I daresay the answer won't be: "by paper". Re-casting the flow of data into and out of the courthouse from paper to digital would radically alter the need for physical bricks-and-mortar space.
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> So, too, with the second, question: what would the new courtrooms look like? That, I suspect, would prompt folks to ask whether we even need courtrooms for all

[1] I would like to thank my excellent law clerk, Sean Grassie, for his assistance in conducting the research for this paper.
[2] *Some Thoughts on Creating a Sustainable Public Civil Justice System*, Ontario Bar Association Civil Litigation and Insurance Sections End of Term Dinner, June 11, 2014.

hearings - would the default be some sort of on-line hearing, with attendance in a physical courtroom required only for exceptional circumstances?

[4] When I made those remarks back in 2014, I did not have a particular event in mind – it was truly a "thought experiment". But, the COVID-19 pandemic certainly seems to fit the bill of an extraordinary event that has presented an existential challenge to our courts.

[5] Since the week of March 16, our courts have passed through several phases.

- First, a brief closure in response to the novel disease;
- Then, by early April, the courts fashioned ways to deliver urgent adjudication services;
- That quickly segued into a period of very creative thinking by the courts and the Bar to figure out how courts could deliver adjudicative services in a way that would allow them to ramp back up to pre-March volumes;
- By July and August, the working assumption was that the early Fall might bring a return to "normal";
- Obviously, that assumption has proven incorrect. We now face the reality that our courts most likely will not return to normal volumes of business until the second or third quarter of 2021.[3] Even then, to do so will require that certain pieces fall into place on the vaccine side of things.

[6] That being the case, how should we approach the future? I propose to offer some thoughts by breaking the future into two time periods. I will spend most of this talk looking at the next nine months or so, until June 2021. I will conclude with some brief comments about some strategic issues that I think the courts should address during the balance of 2021 and early 2022. After that, my crystal ball fogs up.

III. THE NEXT NINE MONTHS – UNTIL JUNE 2021

[7] Perhaps by June 2021 the pandemic will have subsided sufficiently that our courts can resume their usual volume of business. What should be our main goals until then? I propose three main goals, two of which echo the comments I made back in 2014.

[3] Based on my examination of the number of decisions reported monthly on CanLII by the Ontario Court of Appeal and the Superior Court of Justice, we still have quite a way to go before we resume our normal volumes of output. On a year-to-date basis, the volume of decisions released by the Court of Appeal through the end of September was only 79% of that released in 2019; for the SCJ the number was 80%. So, we seem to be operating at about 80% of the norm, as compared to 2019.

Goal No. 1: We must discard the culture of complacency that has plagued the way Ontario's courts have been run for decades and replace it with a business culture of urgency, innovation, experimentation, and vastly enhanced customer service.

[8] In recent years, the Supreme Court of Canada has described the mind-set in our court system as one marked by "complacency" and a willingness "to tolerate excessive delays": *R. v. Jordan*, 2016 SCC 27, at paras. 4 and 29. In both *Hryniak v. Mauldin*, 2014 SCC 7 and *Jordan*, the Supreme Court called for a "culture shift" (*Hryniak*, at para. 2) and a "change of direction" (*Jordan*, at para. 5).

[9] To borrow a phrase used by long-term planners, the pandemic offers the Ontario court system a "once-in-a-hundred-year" opportunity to change direction and effect a culture shift. To do so, we must discard the traditional change-resistant culture embedded in Ontario's courts in favour of one that encourages and rewards innovation, experimentation, and risk-taking in the way courts deliver their adjudicative services to the public.

[10] The need for this change in direction must be embraced by those in leadership positions within our court system – the administrative judges, heads of legal organizations, and senior bureaucrats in the Ministry of the Attorney General. A culture shift will not occur without strong buy-in and leadership from the top.

[11] But the drive for a changed culture must primarily come from the bottom. In a paper I delivered back in 2013, I argued that all judges must act as the *stewards of the health of the civil and criminal justice system* in our country.[4] This pandemic offers each and every non-administrative judge – the so-called puisne judges – the opportunity to discharge our duties as stewards of the health of the justice system by exposing the illnesses in the public court system, proposing cures, and actively administering the remedies through experimenting with new ways of doing things.

[12] The pandemic offers us an extraordinary opportunity to change the way our courts work so that they better serve the public. We will not have another opportunity like it in our lifetimes. We must seize the opportunity. If we do not, we will slip back into the "old ways". And, as much as some may viscerally desire to return to the comfort of the "good old days", let us not forget that the "good old ways" are the very ways that the Supreme Court in *Hyrniak* and *Jordan* charged us to discard and change.

[13] "Job 1" for the next nine months must be to embrace, urgently and without reservation, a culture of changing the ways our courts serve the public and throw into the g-can forever the culture of complacency that has plagued Ontario's court system for far too long.

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[4] *If not monks, then what? The role of justice in improving access to justice*, The Advocates' Society Fall Convention, November 15, 2013.

Goal No. 2: We must use the next nine months to ensure that the members of both the Bench and the Bar are proficient in the use of digital records to adjudicate cases in our courts.

[14] I wish to tell a story.

[15] I was appointed to the Superior Court of Justice in September 2006. In August 2006, my wife and I took a vacation to Oxford. One problem. I had to finalize and file an important submission for a client with the National Energy Board in a proceeding where a lot of money was at stake. Solution? One day I took the train from Oxford down to our firm's office in London. I contacted the client. We finalized the draft submission I had prepared, going back and forth by email. I then: filed the submission electronically with the NEB, as they had full e-filing at the time; took the train back to Oxford; and went out for dinner with my wife.

[16] One month later I landed in the Superior Court of Justice. It was like turning the clock back to the 1970s. The kind of digital infrastructure the NEB was using in 2006 simply did not exist in the SCJ.

[17] Over 14 years have passed since my appointment to the Bench. While neither the SCJ nor the OCA has the kind of "end-to-end" case information and e-filing system that the NEB had back in 2006, lights are beginning to appear at the end of what has been a very long, dark tunnel.

[18] The OCA has contracted with Thomson Reuters to install a modern case information and document management system. There is every prospect that by the end of 2021 the OCA will have an end-to-end case information management system with true e-filing.

[19] And the SCJ is pushing hard to make up for lost time, rolling out the Caselines system as an interim means by which to offer more accessible case-specific filing and information than previously existed. It is not an "end-to-end" system, but it is getting there.

[20] So, both the OCA and the SCJ are moving to build modern case information management infrastructures. What then? **Well, we must use the new digital infrastructures in our daily work**.

[21] What does that mean? It means that the courts must stop using paper records and start using digital records to adjudicate all cases.

[22] Will that happen? At this point of time the answer is unclear; frankly, I am skeptical that it will. Whether it does happen will depend upon whether judges and lawyers develop the skills to use digital records as the primary means to adjudicate cases.

[23] How do we do that?

[24] The starting point is quite simple. **We must finally get serious about using technology in our daily court work.** Both the Bench and Bar must formally acknowledge that technological competence is part of the necessary skill set possessed by each judge and lawyer who operates in Ontario's courts.

[25] At present, no such acknowledgement exists.

[26] On the Bench's side of the courtroom, the current version of the Canadian Judicial Council's ("CJC") *Ethical Principles for Judges* does not contain any requirement for judicial technological competence. Last year, the CJC released a draft of a revised version of the *Ethical Principles*. In it the CJC proposed including the following in the commentary to the chapter concerning a judge's diligence and competence:

> Judges should develop and maintain ***some*** proficiency with technology relevant to the nature and performance of their judicial duties.

[27] I did not think that went far enough. In submissions that I made earlier this year to the CJC, I proposed that the revised *Ethical Principles* should require that all federally-appointed judges should "develop and maintain ***full*** proficiency with technology relevant to the nature and performance of their judicial duties."

[28] Given that the pandemic has required judges over the past half year to rely heavily on technology to keep the courts open and given that the pandemic likely will affect court operations for at least another half year, I think that we need to work, in a concerted and co-ordinated fashion, to achieve broad judicial technological competence by June of 2021.

[29] The CJC has not yet released its revised version of the *Ethical Principles*. It will be interesting to see whether the pandemic changes the CJC's lukewarm approach to date on the issue of judicial technological competence.

[30] On the Bar's side of the courtroom, the Law Society of Ontario's *Rules of Professional Conduct* still do not contain a duty of technological competence.[5] An extraordinary state of affairs.

[31] In October 2019, before the pandemic hit, the Federation of Law Societies of Canada proposed that its *Model Code of Professional Conduct* contain a competence requirement that "a lawyer should develop an understanding of, and ability to use, technology relevant to the nature

[5] Law Society of Ontario, Technology Task Force: Update Report, November 29, 2019, at pp. 19-21; https://lawsocietyontario.azureedge.net/media/lso/media/about/convocation/2019/convocation-november-2019-technologytaskforce-report.pdf. By contrast, for many years the American Bar Association's Model Rules of Professional Conduct have contained a commentary to its professional competence rule that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology": rule 1.1, Comment 8.

and area of the lawyer's practice and responsibilities."[6] Yet, the Law Society of Ontario still has not adopted a similar provision.

[32] I commend the Thunder Bay Law Association for showing leadership by including a most useful technology component in this morning's program. However, in my respectful view, the Law Society of Ontario must get with the times and send out the message, in no uncertain terms, that technological competence is an essential element of each and every lawyer's overall competence.

[33] I do not think that these comments improperly stray over the boundary separating the Bar from the Bench. I say that because I do not understand why I, as a judge, must continue to suffer through appeals where the digital materials filed by licensed lawyers:

(a) are not text searchable;

(b) are not bookmarked;

(c) are not hyperlinked; and

(d) often are scanned in a fashion that makes the documents illegible.

[34] These types of defective materials are filed by both big firms and small firms. They should all know better, if for no other reason than our website contains specific Practice Directions explaining how lawyers must prepare materials. But judicial Practice Directions are ignored by far too many licensed lawyers.

[35] I think that it is reasonable for the members of the public who use our court system to expect that in the year 2020 the professionals involved in the justice system now possess basic technological competence.

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[6] Federation of Law Societies of Canada, *Model Code of Professional Conduct*, as amended October 19, 2019, r. 3.1-2, Commentary [4A] and [4B]:

> [4A] To maintain the required level of competence, a lawyer should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3.
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> [4B] The required level of technological competence will depend on whether the use of understanding of technology is necessary to the nature and area of the lawyer's practice and responsibilities and whether the relevant technology is reasonably available to the lawyer. In determining whether technology is reasonably available, consideration should be given to factors including: (a) The lawyer's or law firm's practice areas; (b) The geographic locations of the lawyer's or firm's practice; and 17 (c) The requirements of clients.

Goal No. 3: We must use the next nine months to ensure that the members of both the Bench and the Bar are proficient in the use of a variety of modes for hearing and adjudicating cases.

[36] For generations, Ontario's courts have used a very simple customer service model: you come to us for service; we certainly are not going to reach out to you. By and large, litigants and their counsel have had to trek to their local bricks-and-mortar courthouses to receive service.

[37] The pandemic has changed that. Necessity has seen the emergence of the extensive use of two previously neglected modes of hearing: the videoconference or remote hearing; and the written hearing.

Videoconference or remote hearings

[38] When the pandemic hit in March, the courts finally embraced the benefits of videoconference technology. Videoconferencing is not a new technology by any means, but it is one long neglected by Ontario's courts. Videoconferencing is now used by the courts to provide a wide range of services: case management and settlement conferences, as well as the hearing of motions, trials, and appeals.

[39] Through videoconference technology, Ontario's courts are now reaching out to their customers, instead of requiring their customers to come to them.

[40] I would expect that videoconference hearings offer significant benefits in a region such as the North-West where the population and judicial centres are so widely dispersed and the weather can make travel challenging, if not down-right dangerous. As well, videoconference hearings mean that lawyers from the North no longer have to travel down to Toronto, the self-proclaimed centre of the world, to argue a one-hour appeal.

[41] As well, I would think that one of the most customer-friendly results of using videoconferencing is that hearing times are now set in advance of the hearing day. No more need for a bunch of lawyers on a bunch of cases to show up at the same time, in the same courtroom, and only then be told the precise time their matter will be heard – a traditional practice that was extraordinarily inefficient and wasteful. In our court, videoconference appeals are now assigned specific start times. No doubt clients save money by such an organized approach.

[42] The use of videoconference hearings does require the Bench and Bar to adopt new approaches to conducting hearings and advocacy. I am delighted to see that two of the other sessions this morning will discuss videoconference advocacy.

[43] Back in May, a very helpful document titled "*Best Practices for Remote Hearings*" was published by a joint task force of lawyers from The Advocates' Society, OBA, Federation of Ontario Law Associations, and the Ontario Trial Lawyers Association. I commend it to you.[7]

[44] To those best practices, might I add two tips about how counsel should approach remote hearings.

[45] First, treat them as you would an in-person hearing at a courthouse. That is to say:

- Don't have as your background your unmade bed; and
- Don't let your cat walk back and forth across your desk as you are making submissions.

[46] We have witnessed both kinds of conduct in recent appeals.

[47] Set up a virtual courtroom in an office boardroom or at home from which you can make your submissions. Ideally, your virtual courtroom set up should allow you to stand when you make submissions, a much more effective style of advocacy than sitting at a desk or boardroom table.

[48] Second, if you have filed digital materials with the court, then the judges will be using digital materials when hearing your submissions. In that case, when making your arguments you should use the same materials that the judges have – that is to say, make your submissions using digital materials not paper copies. As a judge, there is nothing more frustrating than trying to locate information in digital materials when counsel is using hard copies that are not cross-referenced to the digital materials. Counsel literally must be on the same page as the judge in order to argue effectively using a videoconference platform.

[49] Finally, the pandemic requires counsel to be more focused and efficient in their advocacy. If oral advocacy is to remain part of our court system, more counsel must become more effective in their advocacy. To that end, I have included in your conference materials some remarks that I made a few weeks back during a debate on oral advocacy sponsored by The Advocates' Society. The remarks are titled: *"Effective Advocacy in a Post-Pandemic World"*.

Written hearings

[50] In addition to videoconference hearings, our court has used another new mode of hearing to adjudicate appeals – the written hearing, in which the panel decides a case on the written record, usually without hearing oral submissions from counsel.

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[7] E-Hearings Task Force, "Best Practices for Remote Hearings" (13 May 2020), online: <www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/BestPracticesRemoteHearings/Best_Practices_for_Remote_Hearings_13_May_2020_FINAL_may13.pdf>

[51] I am a big fan of increasing the use of written hearings, not only for appeals, but also for interlocutory motions. Indeed, I think written hearings should be the default mode of hearing for the lion's share of interlocutory motions at the SCJ level.

[52] Although the majority of the appeals heard in our court since Labour Day have used Zoom videoconferencing, that was not the case during the early months of the pandemic. Based on decisions reported on CanLII, from April through July our court released reasons in 177 cases that were argued after March 17, when the court suspended normal operations. Of those reported cases, 100 (56%) were the product of written hearings, 53 (30%) the result of videoconference hearings, and 21 (12%) of telephone conferences.

[53] I think it fair to say that the use of written hearings for appeals allowed the Court of Appeal to get back up on its feet following the onset of the pandemic.

[54] Using written hearings also dramatically improved our level of productivity. Of the decisions we released this past June that involved cases argued after March 17, 65% resulted from written hearings. That same month, our court released more decisions on CanLII than we did in June 2019: 99 decisions vs. 93, to be precise. Were we able to be so productive because we began to hear a large number of appeals using only the written record? I strongly suspect so.

[55] I recognize that some judges and lawyers have strong reservations about written hearings. I suspect that part of the reservation simply stems from the fact that written hearings mark a departure from Ontario's long tradition of oral advocacy. Yet, part of the reservation may also stem from uncertainty about how the judge or panel could ask any questions that might arise from a review of the written record. I have no doubt that ways exist to address those concerns. For example:

- On appeals, we could make greater use of reply factums so that the issues in dispute are truly joined on the written record, leaving fewer dangling issues; and

- A written hearing should always be conducted on the basis that if a judge or panel has questions following the review of the written record, a follow-up with counsel through a short, focused videoconference will be arranged.

[56] Last year, six months before the pandemic struck, I proposed to my colleagues that the Court of Appeal should establish a means by which to screen appeals for different modes of hearing. The mechanism would identify which appeals could be decided on the written record and which merited some oral argument. I envisaged that a standard sitting week for a panel of our court would consist of a combination of written hearings and oral hearings for appeals, with three of the five days devoted to oral argument of various kinds and the other two set aside to deal with written hearings.

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[57] Other jurisdictions use screening criteria to determine which appeals merit an oral hearing. The most well-known mechanism is that found in the American *Federal Rules of Appellate Procedure*, rule 34(a).[9]

[58] I think there are two main things that we must do in order to satisfy the public and counsel that when appeals are heard in writing we are honouring the principle of the "right to be heard."

[59] First, we must develop and publish, through a rule, the criteria that we use to screen cases for oral argument so that the process is more transparent. I think the rule might provide that:

(i) A written hearing for an appeal would be scheduled where:

- The state of the record will determine the outcome and the sole issue is either the sufficiency of the evidence to support the key factual findings, the adequacy of jury instructions, or rulings as to admissibility of evidence AND, and this is a BIG AND, the factums adequately refer to the record; or

- The outcome is clearly controlled by precedent.

(ii) An oral hearing would be scheduled where:

- The case raises a substantial and novel legal issue, or an important public interest is affected;

- The factual record is extraordinarily complex; or

- After reviewing the written record, members of the panel have questions that they want to ask counsel or the parties about an issue.

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[8] The remarks in paras. 57 through 60 did not form part of the oral presentation.

[9] Rule 34. Oral Argument

(a) In General.

(1) *Party's Statement.* Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) *Standards.* Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

[60] Second, we must ensure that our reasons for judgment acknowledge and address the main arguments made by the parties. If we specifically respond to the parties' arguments in our reasons, that is pretty tangible evidence that we have "heard" them or "get" their points when deciding the appeal using only the written record.

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[61] Written hearings pulled the Court of Appeal through the shock of the pandemic. I have not heard anyone say that the quality of our appellate adjudication suffered by using written hearings. In my view, we should continue using them. They should be an option available to any litigant in our court.

Summary

[62] Those, then, are the three main goals that I recommend our court system should focus on during the next nine months:

- Work hard to discard the culture of complacency that has plagued the way Ontario's courts have been run for decades and replace it with a business culture of urgency, innovation, experimentation, and vastly enhanced customer service;

- Ensure that the members of both the Bench and the Bar are proficient in the use of digital records to adjudicate cases in our courts; and

- Ensure that the members of both the Bench and the Bar are proficient in the use of a variety of modes of hearing for adjudicating cases;

IV. THE LONGER TERM: Q3 of 2021 to Q3 of 2022

[63] And what of the period of time after June 2021, assuming that by then the pandemic has subsided? Time does not permit me to offer detailed remarks. But let me conclude by making three points.

[64] First, the court system has suffered a lot of pain as a result of the pandemic. We must ensure that we do not leave the period of pandemic without showing some gain. Lots of pain without any gain would mean that we would have wasted the silver lining offered by the pandemic - a "once-in-a-hundred-years" opportunity to change direction and effect a culture shift in Ontario's courts.

[65] Come 2021, Ontario's courts should begin a co-ordinated, structured examination of the lessons learned from the pandemic: Which new processes worked? Which did not? What did we do well? Where did we make mistakes? What more do we need to do to improve the quality of our service to the public? The courts should enlist outside professional help to conduct such an examination, which should be formal, empirically-based, feature broad consultation with those who use our courts and, above all else, be open and transparent to the public.

[66] Second, we should take advantage of the shock of the pandemic to institute a re-thinking of the criminal trial process from the ground up. It has now been a decade since the publication of the *LeSage-Code Report of the Review of Large and Complex Criminal Case Procedures*. That report was instrumental in expanding the use of case management in criminal proceedings. We need an updated look at the criminal trial process that considers how it should change in light of two key factors:

(i) The widespread availability of technologies that can streamline criminal proceedings; and

(ii) The constitutional time limits that *Jordan* placed on criminal proceedings. The initial response to *Jordan* was to shift judicial bodies from civil cases to criminal cases. Robbing Peter to pay Paul is not a viable long-term strategy. The criminal process must adopt procedural changes that will make more efficient use of scarce judicial time.

[67] Finally, we should also take advantage of the disruption of the pandemic to re-design our civil process from the ground up. Over the years I have offered some thoughts on subject, which are summarized in a paper that I gave last year to the Middlesex Law Association titled, "*Red Block, Yellow Block, Orange Block, Blue: With So Much Competition What Do We Do?*" The paper is included in your conference materials.

[68] More recently, Professor Suzanne Chiodo of the Western Law School proposed a framework for restructuring our civil justice system in her paper, "*Ontario Civil Justice Reform in the Wake of COVID-19: Inspired or Institutionalized?*"[10] I strongly recommend that you read Professor Chiodo's paper; it brings a needed fresh perspective to the issue of civil court reform in Ontario.

[69] Where would such a re-think of the civil court system end up? Any re-think should result in an adjudication system that moves civil cases in and out of the court system much faster and at much lower costs than the present system. In broad terms, what I would like to see emerge is a civil court system roughly structured along the following lines:

- For claims under, say, $100,000, let's convert our "trial-like" Small Claims Court into an on-line court like the British Columbia Civil Resolution Tribunal that focuses on mediating, not litigating, such disputes. An on-line system would be one in which lawyers play a minor role;

- For claims between $100,000 and $500,000, we could use a modified Simplified Procedure-like process, which limits discoveries, contains strong curbs on interlocutory motions, and uses a hybrid-style trial;

[10] (2020) Osgoode Hall Law Journal (forthcoming): <papers.ssrn.com/sol3/papers.cfm?abstract_id=3686181>.

- We would only resort to the Cadillac-like high cost, time consuming process in the rest of the *Rules of Civil Procedure* for claims in excess of $500,000, where the current high costs litigation might actually bear some proportionality to the amount at stake; and

- Single-judge case management would be used for all claims over $100,000.

[70] By re-structuring the civil justice process in that fashion, we might finally have some hope of achieving the fundamental goal of the civil justice system articulated in r. 1.04(1) of the *Rules of Civil Procedure*, which is to provide the public with courts that secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[71] On that note, I put down my crystal ball and my wish list.

[72] Once again, thank you for the privilege to participate in your conference.