THE CANADIAN
BAR ASSOCIATION
British Columbia Branch

Pathway Forward: Electronic Litigation in BC

Report of the CBABC Court Services Committee (2016)

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INTRODUCTION

In 2015 the CBABC Court Services Committee prepared an online survey with 14 questions that was circulated in March and April 2015 to CBA members via the weekly *News and Jobs* email.

The survey was designed to gauge the interest of members in, and identify suitable areas for, electronic civil litigation. The topics covered were:

1. Access and Security;
2. Suitability of certain types of civil applications in Provincial Court;
3. Suitability of certain types of civil applications in Supreme Court (Registrar);
4. Suitability of certain types of civil applications in Supreme Court (Master).

139 lawyers responded to the survey. Each respondent was also offered the option to provide individualized responses. The survey results and individual member responses are analyzed and summarized in this report. The report also considers how other jurisdictions have tackled electronic civil litigation. Finally, our report provides recommendations for potential changes to the current civil litigation model.

The authors of the report readily acknowledge the high value of other stakeholders offering their comments and perspectives on this topic; namely, the executive branch of the provincial government and our judiciary. It is our hope that this report will serve as a catalyst for further consideration and discussion by the CBA and other stakeholders involved in the civil justice system in BC.

ANALYTICS

In this section we have reproduced the original questions put to the membership and analyzed their feedback.

Access

1. In the interest of simplifying the process, should the system only be accessible by counsel of record and self-represented parties?

Yes: 108/139 (77.7%)

No: 31/139 (22.3%)

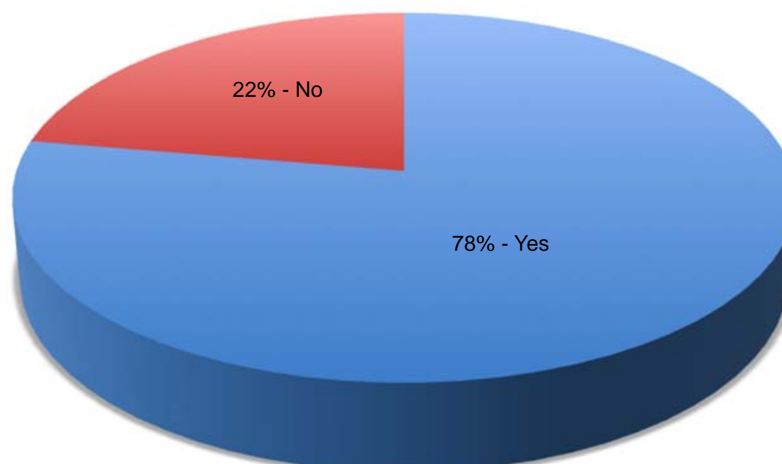
The overwhelming majority of members surveyed are clearly in favour of some form of limited access.

The members who answered "no" appear to be largely concerned with maintaining the accessibility, transparency and openness of the system for all members of the public. These members expressed the view that the public should be able to access court documents and access their "legal records" and "legal files."

In terms of how access can be limited, some members stated that parties should have "read-only" access – similar to how members of the public are currently able to electronically access filed court documents. PACER in the United States Federal Court system was presented as an example of a system that is "accessible by everyone and… works well." Another member opined that the system proposed in the survey question is akin to the publicly-accessible Registry. Some members suggested a potential solution is for the document to be inaccessible while it is being prepared, but accessible once it has been filed. Some members expressed the view that other counsel and potential intervenors should too be afforded the opportunity to access the system.

A practical concern raised involved access by the lawyer's legal team (paralegals, junior counsel, etc.). A member noted this is an important consideration because a lawyer may be out of the office when an urgent filing needs to take place and senior lawyers often delegate filing tasks to their legal assistants.

In the interest of simplifying the process, should the system only be accessible by counsel of record and self-represented parties?



2. In the interest of verifying the authenticity of online submissions, should the lawyers and self-represented parties go through a screening check before being able to access the system? For example, provide their Law Society Member ID number or Driver's Licence number.

Yes: 122/139 (87.77%)

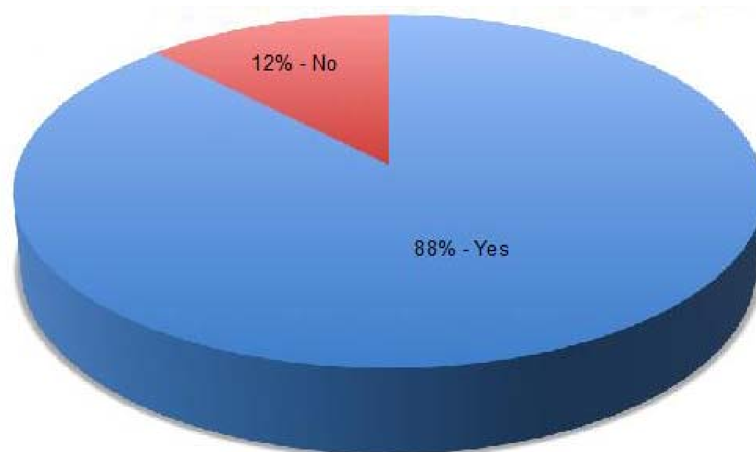
No: 17/139 (12.23%)

The overwhelming majority of members surveyed are clearly in favour of some form of security screening.

However, privacy concerns were raised with respect to the repeated entry of one's Driver's Licence number. Other members shared their view that this step would result in a hurdle that would vitiate the user-friendliness of the system. Some expressed concern about self-represented individuals who may lack the necessary identification. Others answered this concern by proposing these persons present themselves at the registry for initial registration to the online system.

The members did not focus their concerns on identity theft as a result of logging into the system. However, to prevent this potential circumstance, a member proposed that rather than using a Law Society number or Driver's Licence at every log-in, it be used for the initial registration only allowing the users to create an account and be assigned a unique log-in ID and password for subsequent use of the system.

In the interest of verifying the authenticity of online submissions, should the lawyers and self-represented parties go through a screening check before being able to access the system? For example, provide their Law Society Member ID number or Driver's Licence number.



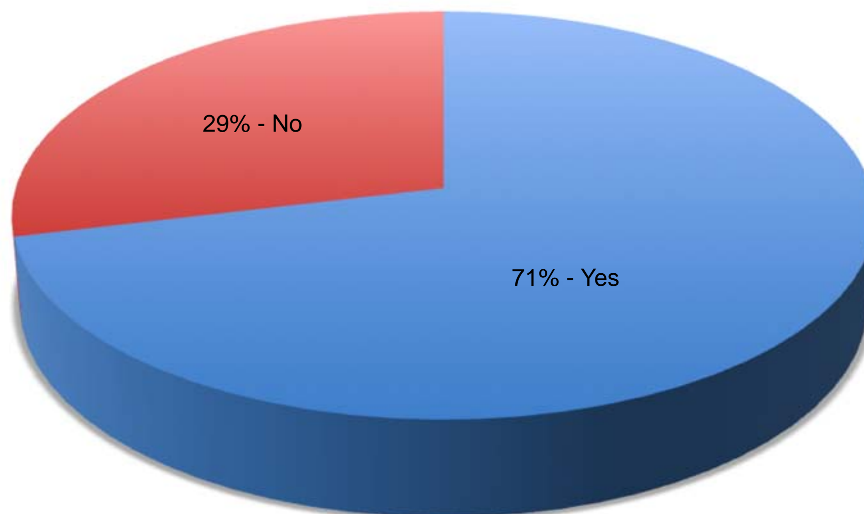
3. In the interest of avoiding serial submissions, should the system limit the number of electronic submissions a lawyer or self-represented party can make for each court application?

Yes: 99/139 (71.22%)

No: 40/139 (28.78%)

The overwhelming majority of members surveyed are clearly in favour of some form of limits to electronic advocacy.

Those who answered "no" echoed previous comments about the need for accessibility to the system and maintaining its user-friendliness. A further concern was ensuring some flexibility is built into the system to allow, for example, online submissions to be amended. An alternative option to the system of auto-limiting responses was keeping it open, but where any abuses from excessive filings can attract an award of costs. The members advocating this school of thought reminded us that chambers applications and filings are not generally limited and therefore neither should its online equivalent. It was further noted that the *Rules of Court* provide for time limits during the course of the litigation and these are more effective than "arbitrary numerical limits." They conceded however, that such limits could be imposed if needed once the system is underway and more data supports its implementation. Other members suggested there should be an initial restriction followed by a mechanism to allow for further submission by agreement or leave of the court.



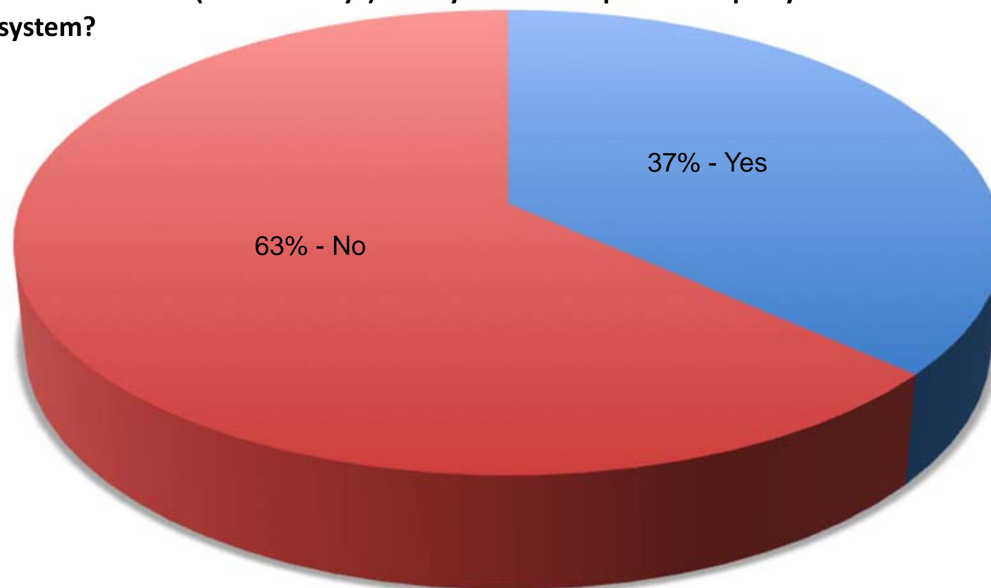
4. In the interest of achieving a timely submission process, should the system limit the amount of time (hours or days) a lawyer or self-represented party can access the system?

Yes: 51/139 (36.69%)

No: 88/139 (63.31%)

The overwhelming majority of members surveyed are clearly not in favour of restricting temporal access. The key concern of accessibility is apparent here as well. The members noted that unforeseen circumstances may result in a need to file late submissions. Self-represented litigants as well as counsel may also wish to access the system during off-hours to review documents. It is noted that the *Rules of Court* already provide for deadlines and moreover, placing limits on when the system could be accessed eliminates the benefit of an electronic system where access is enhanced 24/7.

Some members expressed confusion about the survey question. Some thought that the question related to the global time limit an applicant could use to access the system. Others thought the question was eliciting their opinion on whether the system should maintain regular hours of operation like a physical registry.



5. If such a system were available, would you voluntarily opt in?

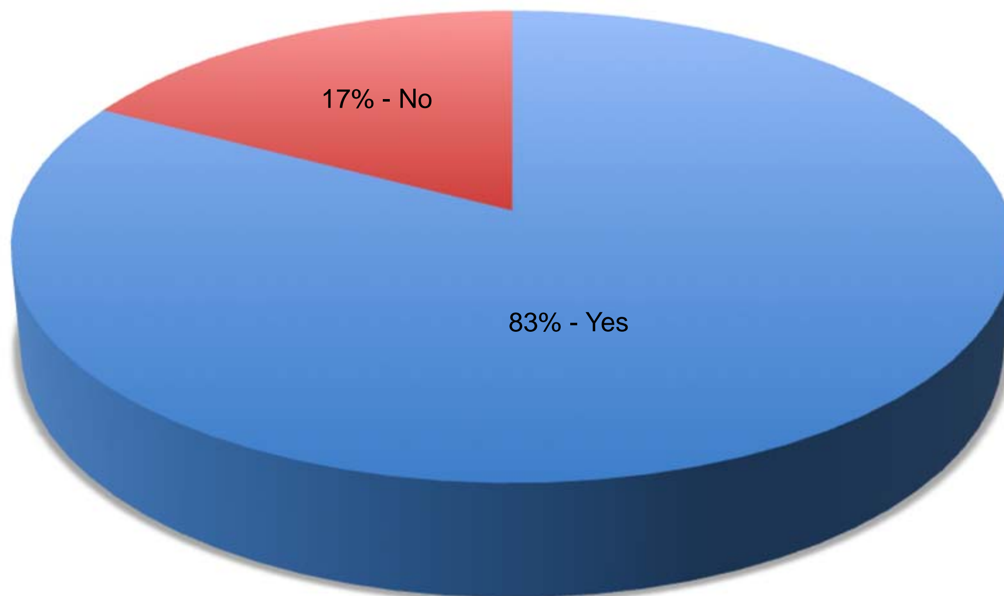
Yes: 115/139 (82.73%)

No: 24/139 (17.27%)

The overwhelming majority of members surveyed were inclined to use an electronic litigation model if available.

Those who answered "no" were not satisfied that they had adequate information to answer the question. Others considered an electronic system inferior to an oral hearing either for reasons of accessibility, credibility or the professional development of junior counsel. It was also seen as a hurdle to networking and fostering relations with other lawyers. Those who were reticent were open to the concept of allowing electronic litigation for uncontested matters or where written submissions are required. Other members wanted assurances that the system would maintain the roles of judges and masters as decision makers in this online system.

If such a system were available, would you voluntarily opt in?

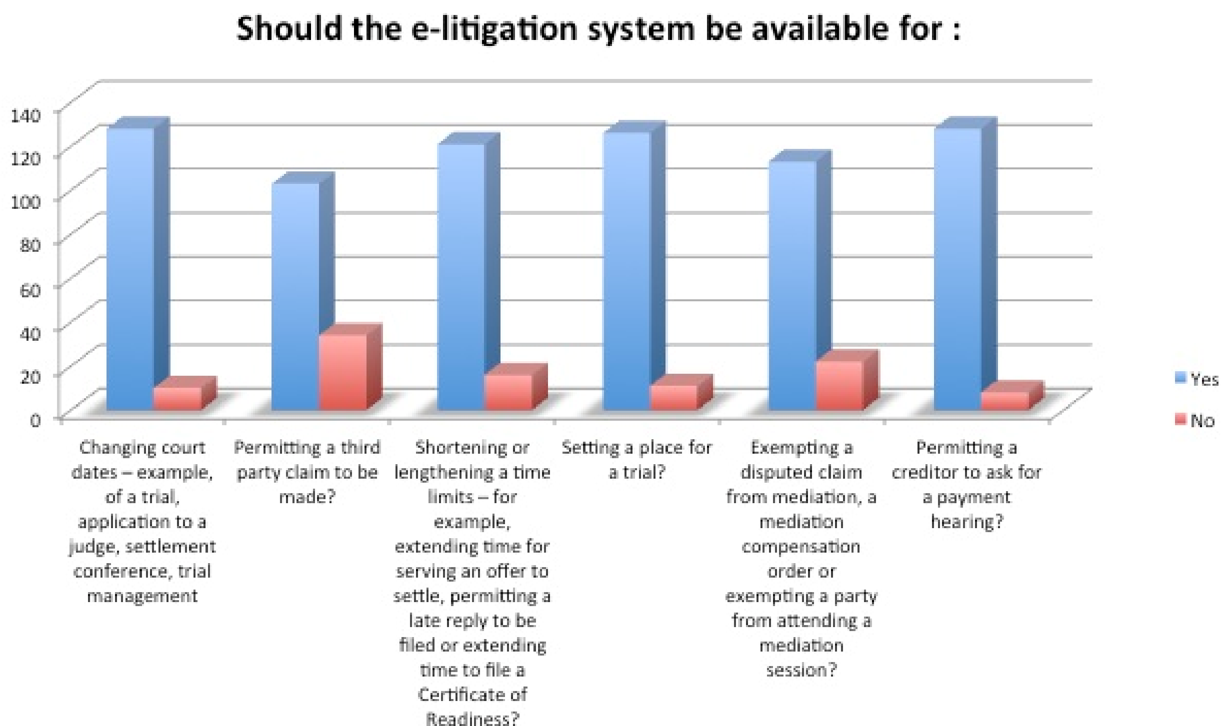


Application Provincial Court (Small Claims)

The members surveyed were asked what types of applications and scenarios could an electronic litigation model work for small claims. The members agreed by an overwhelming majority that the system could address applications involving: changing court dates, permitting a third party claim, shortening or extending time limits, setting a place for trial, exempting a party from the mediation process and permitting a creditor to ask for a payment hearing.

They answered the survey question as follows:

6. Should the e-litigation system be available for:



- Changing court dates – example, of a trial, application to a judge, settlement conference, trial management conference or mediation? **92.75% Yes and 7.25% No**
- Permitting a third party claim to be made? **75.18% Yes and 24.82% No**
- Shortening or lengthening a time limits – for example, extending time for serving an offer to settle, permitting a late reply to be filed or extending time to file a Certificate of Readiness? **88.32% Yes and 11.68% No**
- Setting a place for a trial? **91.97% Yes and 8.03% No**
- Exempting a disputed claim from mediation, a mediation compensation order or exempting a party from attending a mediation session? **83.70% Yes and 16.30% No**
- Permitting a creditor to ask for a payment hearing? **94.12% Yes and 5.88% No**

7. If any of your answers from the previous question were no, please provide your reasons here:

The minority of members who were not in favour of the electronic litigation model for small claims raised the following concerns:

- Literacy and writing skill gaps of self-represented litigants who may be less comfortable with written advocacy;
- Risk of inviting further demands on the traditional model where electronic advocacy is determined by the court to be inappropriate; and
- Ease of being able to opt out of the mediation process.

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8. Are there other applications, which you think would be appropriate for such a system? If yes, please provide details here:

The members who answered this question, offered other types of applications which may be suitable for electronic litigation in small claims including:

- Third party document production applications;
- Applications to extend discovery time;
- Any uncontested applications or applications on consent;
- Small Claims Court applications;
- All probate applications;
- Applications to amend Pleadings;
- Applications to have a Petition moved to the Trial list;
- Applications to cancel or reschedule Trial Management Conferences and/or Settlement Conferences;
- Procedural family law applications;
- Applications for leave to serve interrogatories;
- Applications for alternative service onto a party; and
- Applications to vary and/or setting down hearing times before the Registrar.

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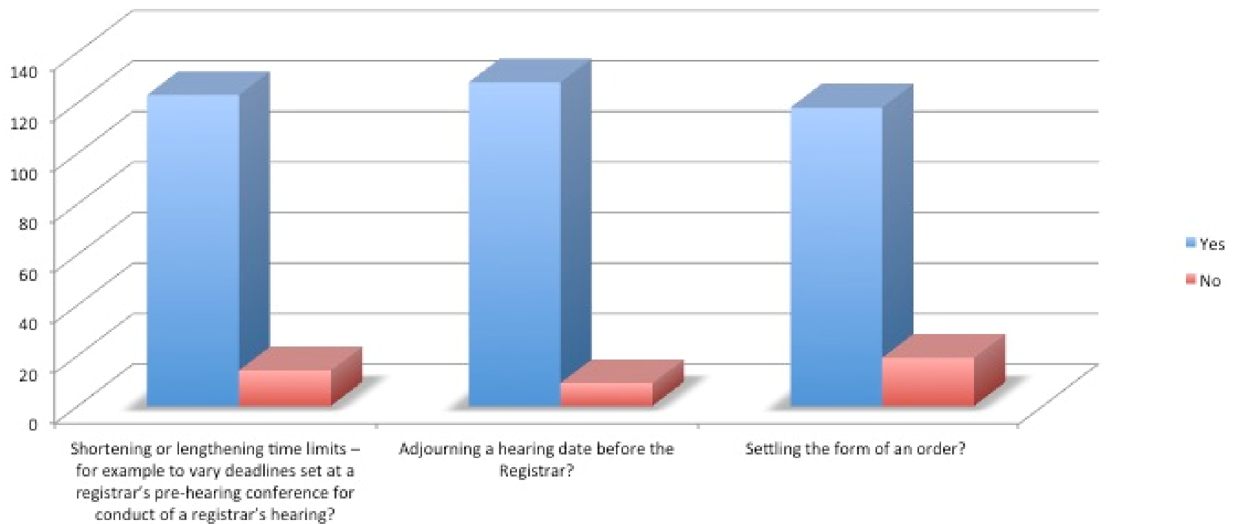
Application BC Supreme Court (Registrar)

The members surveyed were asked what types of applications before a BCSC Registrar could be serviced by an electronic litigation model. The members agreed by an overwhelming majority that the system could address applications involving: shortening or lengthening time limits, adjourning a hearing date and settling the form of an order.

They answered the survey question as follows:

9. Should this system be available for:

- Shortening or lengthening time limits – for example to vary deadlines set at a registrar's pre-hearing conference for conduct of a registrar's hearing?
89.78% - Yes and 10.22% No
- Adjourning a hearing date before the Registrar? **93.43% Yes and 6.57% No**
- Settling the form of an order? **86.13% Yes and 13.87% No**



10. If any of your answers from the previous question were no, please provide your reasons here:

The members who were not in favour of using electronic litigation for certain applications before the Registrar centered mostly on questions relating to settling the terms of the order. They observed these types of applications are often contested and electronic litigation should apply only to orders made by consent.

11. Are there other Supreme Court proceedings within a Registrar's jurisdiction, which you believe should be available online using such a system? If yes, please provide details here:

The members who answered this question, offered other types of applications which may be suitable for electronic litigation before the Registrar including:

- Third party document production applications;
- Applications to extend discovery time;
- Any uncontested applications or applications on consent;
- Small Claims Court applications;
- All probate applications;
- Applications to amend Pleadings;
- Applications to have a Petition moved to the Trial list;
- Applications to cancel or reschedule Trial Management Conferences and/or Settlement Conferences;
- Procedural family law applications;
- Applications for leave to serve interrogatories;
- Applications for alternative service onto a party;
- Applications to vary and/or setting down hearing times before the Registrar;
- Costs hearings – taxing bill of costs;
- TP production orders;
- Alt. service applications;
- Settling orders;
- On consent applications;
- Compelling examination for discovery answers;
- Production of documents; and
- Adjournment applications.

Geography may play a factor in how lawyers evaluate the merits of certain types of applications of electronic litigation. For instance, the lawyers residing outside Victoria and Metro Vancouver tended to focus their attention on how electronic litigation could facilitate:

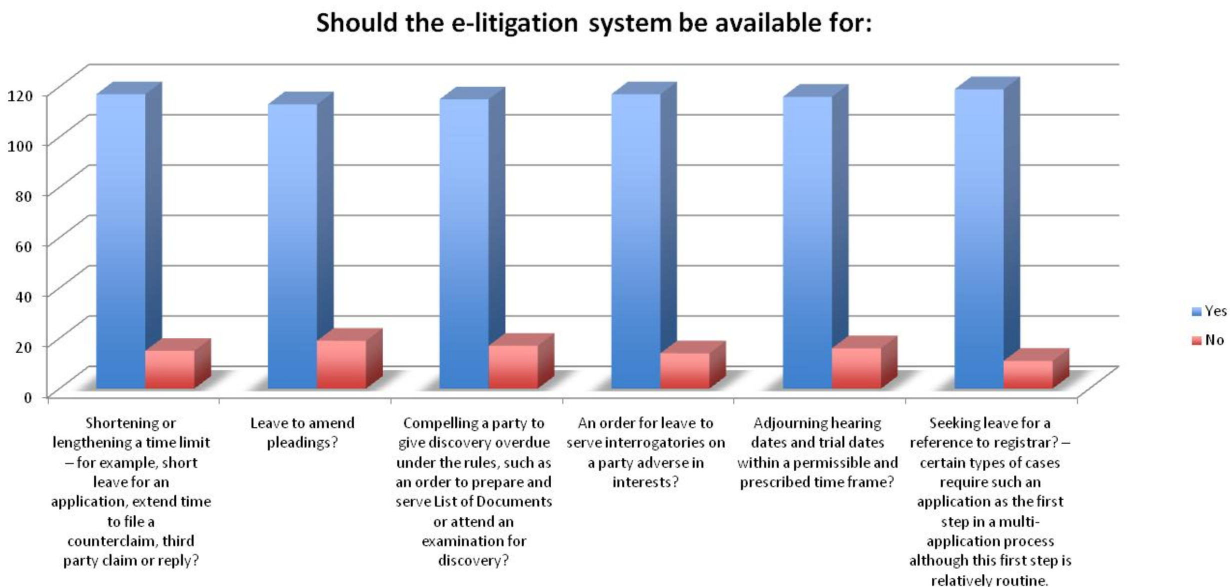
- third party document production applications;
- applications to extend discovery time;
- applications for alternative service;
- consent applications;
- adjournment applications; and
- costs/taxing bill of costs assessments before the Registrar.

Application BC Supreme Court (Master)

The members surveyed were asked what types of applications before a BCSC Master could be serviced by an electronic litigation model. The members agreed by an overwhelming majority that the system could address applications involving: shortening or lengthening time limits, leave to amend pleadings, compelling discovery, serving interrogatories, adjourning hearing dates and trial dates and leave for reference to Registrar.

They answered the following question as follows:

12. Should this system be available for:



- Shortening or lengthening a time limit – for example, short leave for an application, extend time to file a counterclaim, third party claim or reply? **88.64% Yes (117) and 11.36% No (15)**
- Leave to amend pleadings? **85.61% Yes (113) and 14.39% No (19)**
- Compelling a party to give discovery overdue under the rules, such as an order to prepare and serve List of Documents or attend an examination for discovery? **87.12% Yes (115) and 12.88% no (17)**
- An order for leave to serve interrogatories on a party adverse in interests? **89.31% Yes (117) and 10.69% no (14)**
- Adjourning hearing dates and trial dates within a permissible and prescribed time frame? **87.88% yes (116) and 12.12% no (16)**
- Seeking leave for a reference to registrar? – certain types of cases require such an application as the first step in a multi-application process although this first step is relatively routine. **91.54% yes (119) and 8.46% no (11)**

13. If any of your answers from the previous question were no, please provide your reasons here:

The members who were not in favour of using electronic litigation for certain applications before a Master centered mostly on reservations about how nimble or quick the system will be in responding to "rush" applications made on short notice or seeking short leave or its suitability for dealing with contentious matters such as substantive amendments. An additional concern raised by a member was over the electronic system being vulnerable to abuse by institutional parties making high volume document production applications.

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14. Do you have any suggestions for what other types of Supreme Court applications within Master's jurisdiction that should be available online? If yes, please provide details here:

The members who answered this question, offered other types of applications which may be suitable for electronic litigation before a Master including:

- Substitutional service;
- Extension/renewal of Notice of Civil Claim;
- Time extensions for examinations for discovery;
- Orders compelling parties to answer discovery questions;
- Foreclosures, orders of conduct of sale (unopposed); and
- Orders to dispense with Judicial Case Conferences.

Here again, geography may play a factor in how lawyers evaluate the merits of certain types of applications of electronic litigation. For instance, the lawyers residing outside Victoria and Metro Vancouver tended to focus their attention on how electronic litigation could facilitate the processes for:

- applications for alternative service;
- consent applications;
- adjournment applications; and
- costs and taxing bills of costs.

OTHER JURISDICTIONS

Canada

While it is clear that the members surveyed were overwhelmingly supportive of some type of electronic litigation model for civil litigation in BC, regard should be given for how other jurisdictions consider this. Accordingly, we reviewed and considered the different Canadian jurisdictions for their use of technology for contested litigation and found that "electronic litigation" was being used in limited circumstances for example, submissions on the issue of costs. We could find no jurisdictions in Canada that are currently using electronic litigation for contested applications.

Elsewhere

Our inquiries and online searches did not reveal any examples of American courts employing fully electronic hearings for contested civil applications - at least insofar, as technology supplanting the traditional oral hearing model. Although the U.S. federal courts (appellate, trial and bankruptcy) rely heavily on technology for records management and e-filing[1], they do not appear to go as far as facilitating fully electronic hearings for contested civil matters.

Similarly, the civil court systems beyond Canada and the United States do not appear to use electronic litigation as a means of resolving contested civil matters. The use of technology appears to be limited to facilitating the traditional oral advocacy model to allow for remote appearances by Video or telephone Conference or Skype. The international jurisdiction that appears to have implemented the greatest degree of electronic litigation is Singapore whose e-Litigation program includes e-filing and online access to court documents, case management and scheduling. Although some of the government's materials promoting this system indicated online adjudication of civil applications (without oral argument) our review of the system suggests that functionality has not been activated[2].

[1] Public Access to Court Electronic Records or PACER

[2] Materials can be found at: https://www.elitigation.sg/home.aspx

RECOMMENDATIONS:

In writing this section of our report, we are cognizant of the myriad of issues that will arise when looking to add or change technology for the civil justice system in British Columbia.

First and foremost are the stakeholders, including the government, judiciary, court staff, lawyers and the general public. Any technological change must recognize judicial independence and continue the separation of the judiciary from the executive and legislative branches of government.[3]

Another significant group of stakeholders are the more vulnerable members of the public. The needs of individuals with lower income and education, physical and mental differences, language or cultural barriers, and those living in rural areas remote from physical court and legal services must be considered distinct from the needs of the middle class or represented litigants. Such people may have more privacy and information security concerns arising from the use of public or shared computers and may need human assistance to navigate the technology.[4]

While the digital divide may be narrowing, any implementation of the technology for the justice system must take into consideration that some individuals will have limited internet access and lower technological skills[5] and due regard for human rights and *Charter* protections.

Further considerations include proper training and support for court staff, proceeding with smaller projects over more complex initiatives, creating an overall "vision" for the justice system technology, and the development of corresponding policy hand-in-hand with the implementation of the technology.[6]

As was noted in the section above, other jurisdictions have addressed the growing popularity and use of internet-based platforms for electronic court filing. In BC, lawyers and notaries can use digital signatures to support the move toward electronic real property registration[7]. The Civil Resolution Tribunal's use of an online platform to triage and potentially resolve strata and small claims disputes will likely provide important lessons for stakeholders keen on enhancing access to justice by taking advantage of elitigation systems.[8] It is arguable whether an electronic model for further civil litigation is an extension of the evolution of the legal system. However, the authors of this report are not at all suggesting that the e-litigation platform should ever serve to replace all in-

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[3] Bailey, J. and Jacquelyn Burkell. "Implementing Technology in the Justice Sector: A Canadian Perspective" (2013) 11:2 CJLT 253-282.

[4] Bailey, J., Jacquelyn Burkell and Graham Reynolds, "Access to Justice for All: Towards an 'Expansive Vision' of Justice and Technology" (2013) 31(2) Windsor Yearbook on Access to Justice 181.

[5] Bailey, J. and Jacquelyn Burkell. "Implementing Technology in the Justice Sector: A Canadian Perspective" (2013) 11:2 CJLT 253-282.

[6] Ibid.

[7] See www.juricert.com

[8] https:\\www.civilresolutionbc.ca

person appearances. There will always be inherent value in addressing legal matters through traditional forms of advocacy in person.

That being said, and with the above noted considerations kept in mind, the survey data indicates widespread support for an electronic civil litigation model. Accordingly, we have distilled from that data recommendations in support of such a model offering the following features, functionality and limitations:

1. Only parties of record and their counsel/staff are permitted to file in a particular proceeding, but that the system remains open to the public – similar to Court Services Online.

2. A user (lawyer or party) must complete an identification verification system (requiring at least two pieces of identification) before accessing the electronic platform is granted. Once the user completes the verification process they can register for an account to access the electronic litigation platform. Once registered, the user should apply a log-in ID and password to access the electronic platform. Parties that lack identification required by the system could appear at the registry for registration purposes.

3. The roll out of any pilot project involving electronic civil litigation should initially involve the simplest types of applications made by consent or seeking substitutional service followed by more complex but still fairly routine applications e.g. additional time for discovery or trial, adjournment applications, costs assessments before the Registrar or settling the form of an order.

4. The parties must not be allowed to abuse the system by filing serial submissions to unnecessarily prolong the process and such abuses may be met with an award of costs. However, access should not be limited to a specific number of submissions.

5. Any applicable deadlines set out in the Court's Rules of Procedure should apply to the electronic litigation model. However, the system should be more accessible in accepting submissions during non-business hours. The system should also have the flexibility to allow parties to agree to alter deadlines and any such agreement should be registerable on the system.

6. To assist and support self-represented litigants, legal stakeholders should allocate resources to offer in-person training over use of the electronic system at the law libraries across the province in addition to, prerecorded training webinars available online.

CONCLUSION

The CBA and other justice stakeholders have focused much time and attention on access to justice issues for the poor and middle class citizens of our province. This report looked at survey data taken from our members last year about their interest in **speedier** access to justice in the form of electronic civil litigation. The survey data reveals widespread support for some type of electronic civil litigation model while recognizing the enduring value of maintaining traditional in person advocacy. The members surveyed offered thoughtful and considered feedback about issues relating to security, access and application for an electronic civil litigation model. We have attempted to distill that feedback into recommendations supported by the survey data.

If the CBA and other key stakeholders find favour in moving forward with some type of electronic civil litigation model our province would be a leader in some respects of this type of justice reform, and a follower in others. For example, the United States and Singapore already have impressive electronic court filing systems. However, our research has also revealed that no other jurisdiction currently uses an electronic platform to adjudicate even the most simple or routine applications. Before BC positions itself as a trailblazer in this type of justice reform thoughtful and considered discussion must occur. This of course requires the involvement of key stakeholders, including the government, judiciary and court staff and the development of a model which both recognizes and ensures judicial independence.

Speedier justice is necessary to ensure access to justice. We want to avoid a civil justice system that does not engage the public because of its slowness and where our citizens share the views expressed by Charles Dickens to:

> **Keep out of Chancery. It's being ground to bits in a slow mill; it's being roasted at a slow fire; it's being stung to death by single bees; it's being drowned by drops; it's going mad by grains.**

The implementation of some type of electronic civil litigation model may be one of several tools the public needs to maintain its confidence in the administration of justice through speedier access. The survey data analyzed in this report suggests our members are in agreement.