LIST OF RULES POTENTIALLY AFFECTED BY REFORMS TO CIVIL JUSTICE SYSTEM, INCLUDING E-FILING AND VIRTUAL HEARINGS

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At the request of RSJs Firestone and MacLeod, we have reviewed the present *Rules of Civil Procedure* to try to identify provisions which might require revision as part of the reforms that are likely to be made to the Civil Justice System in Ontario. Our comments about specific rules appear below.

At a more general level, the nature of the reforms that should be made depends on how the Covid-19 crisis is viewed. We wholeheartedly share the views expressed by Chief Justice Morawetz in his "Fireside Chat" with the Advocates' Society on April 6, 2020: "If there is one positive that is going to come out of this crisis [it] is that we have been forced, and the Ministry has been forced, to accelerate its plans on moving to electronic hearings and also electronic filings and we cannot go back."[1]

In our view, the judicial system in the province can be improved, streamlined and made considerably more efficient through a paradigm shift away from in-person oral hearings. The latter will continue to have a place in our system for the foreseeable future. But now is the time to consider moving towards increased use of both written advocacy and virtual hearings, using videoconferences and teleconferences.

[1] "'Paper-based system is not going to exist anymore,' Chief Justice Morawetz says of post-COVID-19 court", The Lawyers Daily, April 15, 2020 (https://www.thelawyersdaily.ca/articles/18576)

Chief Justice Strathy recently warned that cost savings are going to have to be found in order to change our system. But we think that the sorts of reforms that we have discussed below are likely to lower costs, both for the court system and for litigants.

Therefore, in the chart that follows we have made two types of suggestions. There are technical changes required to allow for and promote remote and written hearings. In addition, there are a few, broader systemic suggestions to enhance the efficiency of the civil process generally that the pandemic has brought to the fore. We point specifically to the discussion below of Rules 13.1.01 (together with Rule 37.03) and Rule 14.02. All other proposals are changes needed to implement electronic filing and hearing.

Rule Number	**Text**	**Comments**
1.03	[No existing rule]	A definition of "file" should be added, to make it clear that e-filing is included. The precise language might need to await the selection by MAG of the software platform.
	"'hearing' means the hearing of an application, motion, reference, appeal or assessment of costs, or a trial"	It should be made explicit that included in this definition are hearings conducted in writing or virtually.
1.07(1)	"'practice direction' means a direction, notice, guide or similar publication for the purpose of governing, subject to these rules, the practice for proceedings"	We would suggest that this definition be broadened by adding a sub-rule saying that Practice Directions may impose regional default practices where the rules provide a discretion. (We note that Rule 37.05(1) already makes scheduling of motions subject to existing practice directions. Rule R. 38.03(2) has a corresponding provision for applications too.)

Rule Number	Text	Comments
1.08(1)	If facilities for a telephone or video conference are available at the court or are provided by a party, all or part of any of the following proceedings or steps in a proceeding may be heard or conducted by telephone or video conference as permitted by subrules (2) to (5):	Although this rule is already worded quite broadly, rather than list every step that can be taken by video conference or teleconference, we would suggest that it be re-worded to provide that any or all steps in a proceeding may be heard or conducted by telephone or video conference, as provided for in subrules (2) to (5). If specific steps are identified that should not be subject to this rule, they should be identified. We suggest that consideration be given to written or virtual the default mode for all steps except trials. Parties would retain a right to seek leave to have a traditional oral hearing in an appropriate case.
1.08	[No existing rule]	If no change is made to 1.07, add a sub-rule allowing a Practice Direction to provide a default process within a region.
1.08(5)	This subrule contains a list of factors governing the use of video or telephone hearings including: "(a) the general principle that evidence and argument should be presented orally in open court."	We feel that this list should be repealed. There should be a recognition that the "general principle" referred to in clause (a) no longer applies. Whether a new set of criteria is required is debatable. One possibility would be to leave the test fairly open-ended, such as "as is just and convenient". A proportionality-based test, aimed at saving expense and time, relative to the importance of the issues, might be another viable approach. Whatever set of criteria is chosen, it should be clear that presentation of evidence and argument orally in open court will no longer

Rule Number	Text	Comments
		be considered the default or even a superior mode. The default should be the mode that is most expeditious and affordable, having regard to the nature of the case.
2.03	The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.	This is also a good place to allow regional practice directions to provide default processes including dispensing with compliance with any rule as a starting point.
3.04(4)	(4) If a party fails to comply with a timetable, a judge or case management master may, on any other party's motion,…	We would suggest that this rule be modified to add that the powers of the judge or case management master are also exercisable on the Court's own initiative at a case conference. Consideration could also be given to making it clear that case conference orders under rule 50.13(6) do not require a party to bring a motion despite any other rule.
4.01(3)	A document that is issued or filed electronically in accordance with these rules is sufficient, despite subrule (1), if it meets the standards of the software authorized by the Ministry of the Attorney General for the purpose.	Court standards will need to be created, based on whatever the new platform is. We would also suggest standardizing naming protocols for the same types of e-documents across all courts. This rule, like many others, deals with the form of paper documents as the default. (E.g., "one side or both sides of the paper".) We think that, throughout, the Rules should make e-documents the default and paper an alternative (for now).
4.03	"On the requisition of a person entitled to see a document in the court file under section 137 of the *Courts of Justice Act*	Some thought should be given to what a "certified copy of a document" would look like, when in electronic form.

Rule Number	Text	Comments
	and on payment of the prescribed fee the registrar shall issue a certified copy of the document."	
4.05(1.1)	If these rules permit or require a document to be issued electronically, the software authorized by the Ministry of the Attorney General for the purpose shall be used for the issuance.	Again, e-filing should be the standard. At present, that is done at https://www.ontario.ca/page/file-civil-claim-online) That might or might not continue to be the case, depending on what software is chosen by MAG. It would be preferable if the format, software etc. could be specified within the rule, rather than forcing litigants to track that information down elsewhere.
4.05(4.1)	If these rules permit or require a document to be filed electronically, the software authorized by the Ministry of the Attorney General for the purpose shall be used for the filing.	See above.
4.05.1	Online Portal	This provision might need revision or repeal, depending on the platform needs and the comprehensiveness of the foregoing amendments.
4.06(1)(e)	"[Affidavits shall] be signed by the deponent and sworn or affirmed before a person authorized to administer oaths or affirmations"	At present, it is our understanding that the issue of remote swearing of affidavits is being addressed by the Law Society: https://lso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/commissioner-for-taking-

Rule Number	Text	Comments
		affidavits-and-notary-publ/virtual-commissioning It appears likely that there will be amendments to the *Commissioners for Taking Affidavits Act* that will deal with this issue. Right now, this seems to be something of a work in progress but when the issue is resolved, this rule should conform.
4.06(3)	An exhibit that is referred to in an affidavit shall be marked as such by the person taking the affidavit and where the exhibit,..	The phrase "attached to" might need attention, to make it clear that physical "attachment" is no longer required.
4.07	"4.07 (1) Records for motions, applications, trials and appeals shall have a light blue backsheet. O. Reg. 219/91, s. 2. (1.1) Front covers of records for motions shall be, (a) green, in the case of a responding party's motion record" etc.	This is another example of a rule that contemplates paper documents, in various colours, as the default. Again, we recognize that the use of paper documents might continue for some time, but we think that that format must be subordinate to e-documents. In this case, subrule 4.07(7) makes the other subrules of r. 4.07 inapplicable to e-documents. The rule should be re-worded to make it clear that the provisions dealing with the colours of various types of paper documents are an exception to the default format: electronic.
4.09	Evidence shall be transcribed on paper 216 millimetres by 279 millimetres in size with a margin 25 millimetres wide on the left side delimited by a vertical line.	At present, this rule requires that "evidence be transcribed on paper". We see no reason to retain that requirement and in fact, suggest that filing of transcripts in electronic format now be made mandatory. Transcripts have been available in e-formats for a long time. Typically, examiners provide them in Word or, sometimes, as PDFs.

Rule Number	Text	Comments
		Neither works well with transcript management software, such as TextMap https://www.lexisnexis.com/en-us/litigation/products/textmap.page or CaseFleet: https://www.casefleet.com/features/deposition-transcript-reviewer Those programs require that the transcript be in plain text ("ASCII") so that the formatting in the document does not throw off the pagination. If possible, a standardized format should be specified.
13.1.01(2)	"(2) If subrule (1) does not apply, the proceeding may be commenced at any court office in any county named in the originating process.	We both feel that as litigation becomes electronic, some thought should be given to ways in which the judicial system can be liberated from the constraints that were formerly imposed by paper files. One possibility is that instead of documents being e-filed in Pembroke, Sudbury or Toronto, they will be filed in "the Superior Court of Justice", which would maintain a single registry of court files for the entire province. That would allow, for instance, counsel practising in Belleville to file documents for a motion in Ottawa with the same ease as would an Ottawa lawyer. With the exception of trials which, in most cases, will probably continue to have a specific geographical location, it should be possible to take every other step remotely. We anticipate that having a central registry of court files would reduce cost for MAG, as it would avoid having such a registry in every municipality across the province.

Rule Number	Text	Comments
		From an administrative standpoint, all court files within a particular region could be perhaps be overseen by the RSJ for that region. That RSJ would be best-positioned to assign judicial resources to the particular case. But to do so, he or she would not need the "court file" to be physically within the region.
13.1.02	"If subrule 13.1.01 (1) applies to a proceeding but a plaintiff or applicant commences it in another place, the court may, on its own initiative or on any party's motion, order that the proceeding be transferred to the county where it should have been commenced."	As a corollary of our comments about r. 13.01.01(2), there should no longer be much need for this rule. The one aspect of the litigation process to which it would continue to have application is changing the place of *trial*. But there should no longer be any need to transfer "*the proceeding*".
14.02	"Every proceeding in the court shall be by action, except where a statute or these rules provide otherwise."	Rule 14 has the potential to be a significant paradigm shift. As various Superior Court judges have advocated for some time, why not make applications the default way of commencing proceedings? That would force parties to think about the theory of their case, plead accordingly and collect their evidence at the front end of the case. Why not reverse this and require that parties have to show some reason for their dispute to be litigated by an action? The reforms made by r. 14.05(3), extending applications to "any matter where it is unlikely that there will be any material facts in dispute requiring a trial", is already a step

Rule Number	Text	Comments
		in that direction. If, as we suggest, the use of written and virtual hearings is substantially increased, making applications the default mode proceeding would dovetail well with such an approach. As we conceive the process, trials would still be available in suitable cases. But parties would have to show why a trial is necessary for the fair, expeditious and affordable adjudication of their disputes. We also anticipate that this sort of change would give rise to the sorts of costs savings that Chief Justice Strathy has said we will need to find.
15.04(4)	"The order removing a lawyer from the record shall include…"	Email addresses should be added here and should be the default manner of communication. (There are some who would welcome the outright abolition of mail and fax as modes of communication.)
16.01(4)	Any document that is not required to be served personally or by an alternative to personal service…if the parties consent or the court orders under 5, by e-mailing a copy to the party or person in accordance with subrule 16.06.1 (1),	The requirement for consent or leave should be removed for documents that do not require personal service. Parties should be entitled to effect service of other sorts of documents by email, as of right.
16.02	Where a document is to be served personally, the service shall be made, **Individual**	Consideration should be given to adding to this rule service by email, perhaps by some threshold requirement that would establish its likelihood to be effective. Possibilities would be an email address that can be proven

Rule Number	Text	Comments
	(a) on an individual, other than a person under disability, by leaving a copy of the document with the individual;	to have been used by the recipient recently or a "delivery receipt" provided by the sender.
16.05(1)(f)	Service of a document on the lawyer of record of a party may be made...(f) if the parties consent or the court orders under subrule 16.06.1 (2), by e-mailing a copy to the lawyer's office in accordance with subrule 16.06.1 (1), but, where service is made under this clause between 4 p.m. and midnight, it is deemed to have been made on the following day.	See above. But, since personal service is not required and there is some assurance that lawyers' emails are attended to, there should be no need for proof that the email account is live or that the email is received.
16.06.1(2)	If parties do not consent to the service of a document by e-mail, the court may, on motion, make an order directing that the document be served by e-mail, on such terms as are just.	This rule should be repealed. No order should be required.
30.04(3)	A party on whom a request to inspect documents is served shall forthwith inform the party making the	We think that document inspection should become electronic, at least as the default. For a while, there will continue to be some cases in which a party needs to inspect an original paper document. The court should be able to

Rule Number	Text	Comments
	request of a date within five days after the service of the request to inspect documents and of a time between 9:30 a.m. and 4:30 p.m. when the documents may be inspected at the office of the lawyer of the party served, or at some other convenient place, and shall at the time and place named make the documents available for inspection.	order such an inspection, where good grounds are shown. The precise mechanics of electronic production remain to be determined. There should certainly be a move away from the already-dwindling practice of sending e-documents through multiple emails (because of size limitations). Use of portals should be strongly encouraged.
30.04(4)	Unless the parties agree otherwise, all documents listed in a party's affidavit of documents that are not privileged and all documents previously produced for inspection by the party shall, without notice, summons or order, be taken to and produced at, (a) the examination for discovery of the party or of a person on behalf or in place of or in addition to the party; and (b) the trial of the action.	Examinations for discovery now are all being done in some sort of virtual format. We anticipate that use of such formats will continue, in many cases, even post-covid. That being so, it is not clear in what way a party, whose productions are all in electronic form, "takes" those productions "to" the examination and "produces" them. The rule should be re-written to focus on electronic documents as the default. There should also be a provision added that requires parties to produce documents electronically without altering the metadata of those documents. That might require that the documents be produced in their native format. As mentioned above, so long as paper documents exist, parties should continue to have the right to ask for an order, allowing them to inspect "the original".

Rule Number	Text	Comments
34.02(1)	An oral examination to be held in Ontario shall be held at a time and place set out in the notice of examination or summons to a witness, before a person assigned by, (a) an official examiner; (b) a reporting service agreed on by the parties; or (c) a reporting service named by the examining party.	While we do not suggest that oral, in-person examinations should be abolished, we do recommend that the use of virtual examinations be strongly encouraged. We would suggest that a party be entitled, as of right, to examine or be examined virtually, subject to the right of the other party to show cause why an in-person examination should be held.
34.03	Where the person to be examined resides in Ontario, the examination shall take place in the county in which the person resides, unless the court orders or the person to be examined and all the parties agree otherwise.	In this situation, the case for a virtual examination is particularly strong, since otherwise, the lawyers will have to travel to the county in which the witness resides. Whatever the threshold is for being entitled to have an oral examination in person in the same city, it should be higher where travel to another city is involved.
34.04(5)	When a summons to witness is served on a witness, attendance money calculated in accordance with Tariff A shall be paid or tendered to the witness at the same time.	If examinations are held virtually, there will usually be no need for witnesses to be paid for "mileage". (There will continue to be some cases in which such payments will be appropriate though, such as when a witness lives in a remote area and has to travel to his or her lawyer's office for a virtual examination.) There is probably still a good reason to pay some amount for attendance.

Rule Number	Text	Comments
		However, the exact language of the rule and the Tariff might need to be revisited. another amount for "mileage".
34.10(2)(b)	The person to be examined shall bring to the examination and produce for inspection... (b) on any examination, including an examination for discovery, all documents and things in his or her possession, control or power that are not privileged and that the notice of examination or summons to witness requires the person to bring	Again, this language is a legacy of documents being produced in paper form. It should no longer be necessary to "bring" e-documents to an examination. However, it might be desirable to word the rule such that the witness being examined has access to his or her productions while being examined. Again, we think that there should be an obligation not to alter the documents' metadata.
34.17 and 34.18	Preparation and filing of transcripts of examinations	As discussed above, we can see no reason for transcripts ever being filed in paper form.
37.03(1)	All motions shall be brought and heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the court orders otherwise.	This rule should be repealed. As mentioned above, "the county where the proceeding was commenced" is an idea whose time has passed. The use of e-documents would allow a single central registry for court filings or at least one central registry for each region. Other than the place of trial, there should no longer be any need to seek permission to transfer a proceeding or to have a motion heard in a different "county".

Rule Number	Text	Comments
		All proceedings (short of trials) should be capable of being heard remotely without the need of judicial intervention. This should result in a reduction in the need for judges (and lawyers) to travel to other centres to hear motions, with concomitant cost savings to the parties and the system.
37.06	Every notice of motion (Form 37A) shall:	The form of a notice of motion should change to make provision for the mode of hearing to include teleconference or videoconference details. Amend **Form 37A** too. As discussed above, we think that written or virtual modes of hearing should become the default for motions, with the right of a party to seek leave to have an oral, in-person hearing. We gave some thought to what the appropriate criteria might be for such an order, but we could not come up with any good reason to require an oral, in-person hearing for the argument of a motion. However, we agree that judges and masters should have the discretion to make such an order, where they believe that it will facilitate an expeditious, cost-effective and just resolution.
37.12.1	Motions in Writing	As we have already discussed, we are in favour of very significant expansion of the use of motions in writing. We should suggest that that be the default format, followed by virtual hearings and, in exceptional cases, oral, in-person hearings. It might be reasonable to establish a threshold of some sort, such that motions meeting that threshold would default to a virtual hearing

Rule Number	Text	Comments
		(rather than a written one). Obvious candidates would be motions under rr. 20 and 21. Provided that judges and masters are given adequate time to deal with motions in writing, we think that the use of that tool can produce better and more predictable scheduling, allocation of judicial resources and cost savings, both to litigants and the court. We would propose the addition of the following paragraphs to r. 37.12.1: (7) A judge may at any time, on his or her own initiative or at a party's request, require that a motion be heard in writing. (8) A practice direction may provide for certain motions or types of motions to presumptively be determined in writing despite anything in this rule. [depending on changes to R. 1.07]
38.03(1.1)	(1.1) The application shall be heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the court orders otherwise.	We have somewhat the same comments here as for motions. However, for applications, virtual hearings should probably be the default.
38.04	Every notice of application (Form 14E, 14E.1, 68A, 73A, 74.44 or 75.5) shall state	Here too, call-in details for teleconferences and video confrences should be added: **Forms 14E, 14E.1, 68A, 73A, 74.44 or 75.5**.

Rule Number	Text	Comments
51.01	"authenticity" includes the fact that, (a) a document that is said to be an original was printed, written, signed or executed as it purports to have been, (b) a document that is said to be a copy is a true copy of the original, and (c) where the document is a copy of a letter, telegram or telecommunicatio n, the original was sent as it purports to have been sent and received by the person to whom it is addressed.	Emails should be added to (a) and (c).
52.04(1)	Exhibits shall be marked and numbered consecutively, and the registrar attending the trial shall make a list of the exhibits, giving a description of each exhibit, and stating by whom it was put in evidence and, where the	Provision should be made for e-documents to be made exhibits. A protocol will need to be established for this process, but it will probably be somewhat dependent on how e-documents are to be placed before the court.

Rule Number	Text	Comments
	person who produced it is not a party or a party's lawyer, the name of that person.	
53.01(1)	Unless these rules provide otherwise, witnesses at the trial of an action shall be examined orally in court and the examination may consist of direct examination, cross-examination and re-examination.	Add the entitlement of the trial judge to order virtual hearing of witnesses or her own motion. Once our courts gain some experience with virtual trials, it will probably become possible to refine the rules governing the way in which such trials should take place. But it is probably still too early to formulate those requirements now.
53.04(1)	A party who requires the attendance of a person in Ontario as a witness at a trial may serve the person with a summons to witness (Form 53A) requiring him or her to attend the trial at the time and place stated in the summons, and the summons may also require the person to produce at the trial the documents or other things in his or her possession, control or power relating to the matters in question in the action that are specified in the summons.	This rule should be revised to expressly provide for remote attendance. Amend **Form 53A** [Note this Rule is incorporated into summonses used under R. 39 through R. 34 too.]

Rule Number	Text	Comments
59.02(1)	An endorsement of every order shall be made on the appeal book and compendium, record, notice of motion or notice of application by the court, judge or officer making it, unless the circumstances make it impractical to do so. ;	Electronic endorsements should be provided for.
59.04(5)	Where all the parties represented at the hearing have approved the form of the order, the party who prepared the draft order shall, (a) file the approval of all the parties represented at the hearing, together with a copy of the order; and (b) leave the order with the registrar for signing	This rule should be updated to provide for e-signing and entry.
59.05(1)	Every order shall be entered in accordance with subrules (2) to (6) immediately after it is signed and the party having the order signed shall give to the registrar the original and a sufficient number of	Multiple drafts should no longer be required. An e-draft should be all that is needed.

Rule Number	Text	Comments
	copies for the purpose of entering and filing it.	
Rule 60	Enforcement	Several sub-rules allow electronic filing of various steps of enforcement. Will need to be conformed to new platform.
76.10(5)	The pre-trial conference judge or case management master shall, (a) fix the number of witnesses, other than expert witnesses, whose evidence each party may adduce at trial; (b) fix dates for the delivery of any witness affidavits, including any outstanding expert affidavits; (c) fix a date for trial, subject to the direction of the regional senior judge; and (d) approve the parties' proposed trial management plan, with any changes to the order or time of presentation,	We wonder whether specific provision should be made for simplified procedure summary trials to default to being done virtually. Again, we think that there would be resulting costs savings to litigants in these smaller cases.

Rule Number	Text	Comments
	or any other changes, that the pre-trial conference judge or case management master may specify, subject to the requirement that the duration of the trial not exceed five days.	