Windsor Yearbook of Access to Justice
Recueil annuel de Windsor d'accès à la justice

The 2010 Amendments and Hryniak v Mauldin: The Perspective of the Lawyers Who Have Lived Them

Gerard J. Kennedy

Volume 37, numéro 1, 2020

URI : https://id.erudit.org/iderudit/1074869ar
DOI : https://doi.org/10.22329/wyaj.v37i0.6561

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Éditeur(s)

Faculty of Law, University of Windsor

ISSN

2561-5017 (numérique)

Découvrir la revue

Citer cet article

Kennedy, G. (2020). The 2010 Amendments and Hryniak v Mauldin: The Perspective of the Lawyers Who Have Lived Them. *Windsor Yearbook of Access to Justice / Recueil annuel de Windsor d'accès à la justice*, *37*(1), 21–67. https://doi.org/10.22329/wyaj.v37i0.6561

Résumé de l'article

Au moyen d'une enquête auprès de 90 avocats ayant de l'expérience en matière de litige, l'auteur a voulu déterminer les effets des modifications récemment apportées au droit procédural de l'Ontario (les « modifications de 2010 ») et d'un arrêt de principe de la Cour suprême du Canada (« Hryniak ») ayant interprété ces modifications. Les résultats ont été mitigés. Selon la plupart des répondants, l'arrêt Hryniaket les modifications de 2010 ont eu des effets positifs dans l'ensemble. Cependant, cette position était loin de faire l'unanimité. Bien que l'arrêt Hryniak ait certes eu des effets, la plupart des répondants étaient d'avis que l'efficacité de l'arrêt Hryniak et des modifications de 2010 était limitée, car d'autres facteurs sont apparus ou demeurés en place comme obstacles à l'accès à la justice. Même si, selon certains, un changement de culture a commencé à se manifester, la portée de ce changement s'est avérée limitée. Les réponses n'étaient pas sans aucun espoir, mais en définitive, elles donnent à penser que la lutte pour l'accès à la justice civile doit se poursuivre sur plusieurs fronts.

The 2010 Amendments and *Hryniak v Mauldin*: The Perspective of the Lawyers Who Have Lived Them

Gerard J. Kennedy*

*Through a survey of 90 lawyers with litigation experience, the author sought to determine the effects of recent amendments to Ontario procedural law [2010 Amendments] and a leading Supreme Court of Canada case [*Hryniak*] interpreting those amendments. The results were mixed. Most respondents viewed* Hryniak *and the 2010 Amendments as, overall, positive. But this was hardly a unanimous view. While* Hryniak *has certainly had effects, most respondents viewed the effectiveness of* Hryniak *and the 2010 Amendments to be limited, as other factors have intervened or remained as access to justice obstacles. While there was some perception that a culture shift has begun to emerge, the extent of that culture shift has been restricted. The responses did not lack all hope, but they ultimately suggest that the battle for access to civil justice must continue to be waged on multiple fronts.*

Au moyen d'une enquête auprès de 90 avocats ayant de l'expérience en matière de litige, l'auteur a voulu déterminer les effets des modifications récemment apportées au droit procédural de l'Ontario (les « modifications de 2010 ») et d'un arrêt de principe de la Cour suprême du Canada (« Hryniak *») ayant interprété ces modifications. Les résultats ont été mitigés. Selon la plupart des répondants, l'arrêt* Hryniak *et les modifications de 2010 ont eu des effets positifs dans l'ensemble. Cependant, cette position était loin de faire l'unanimité. Bien que l'arrêt* Hryniak *ait certes eu des effets, la plupart des répondants étaient d'avis que l'efficacité de l'arrêt* Hryniak *et des modifications de 2010 était limitée, car d'autres facteurs sont apparus ou demeurés en place comme obstacles à l'accès à la justice. Même si, selon certains, un changement de culture a commencé à se manifester, la portée de ce changement s'est avérée limitée. Les réponses n'étaient pas sans aucun espoir, mais en définitive, elles donnent à penser que la lutte pour l'accès à la justice civile doit se poursuivre sur plusieurs fronts.*

Access to justice is generally cited as the most pressing concern facing Canada's justice system, one that must be addressed through many different avenues.[1] One commonly proposed response is reforming

* Assistant Professor, Faculty of Law, University of Manitoba. This article is based upon Chapter Four of the author's doctoral dissertation, defended at York University on January 21, 2020. He thanks Janet Walker, Trevor Farrow, Lorne Sossin, B. David Kennedy, Ian Greene, Erik Knutsen, Janet Mosher, Asher Honickman, and two anonymous peer reviewers for their comments and thoughts on earlier drafts. The author's doctoral studies – and thus this article – were generously supported by the Pierre Elliott Trudeau Foundation, the Social Sciences and Humanities Research Council, and the estate of the late Willard Z. Estey, and they must be acknowledged and thanked. The author also thanks the editorial staff of the *Windsor Yearbook of Access to Justice*, particularly Professor Richard Moon, for helping see this project through to publication. The ninety lawyers who completed the survey that is the subject of this article need to be

procedural law. Accordingly, Ontario significantly amended its procedural law effective January 1, 2010, aiming to facilitate the timely and inexpensive resolution of civil actions on their merits, largely through expanding the availability of summary judgment and enshrining the principle of proportionality as applicable to all of Ontario procedural law.[2] In the 2014 decision *Hryniak v Mauldin*, the Supreme Court of Canada unanimously held that the 2010 Amendments should be interpreted generously to facilitate access to justice.[3] *Hryniak* and the 2010 Amendments were subject to significant praise at the time, recognizing the need for novel solutions to longstanding problems.[4] Moreover, empirical research has suggested that these changes have allowed the courts to resolve more cases more quickly and with less financial cost, through expanded availability of summary procedures.[5] But there have also been criticisms of these developments. These criticisms have taken two tracks. First, there are allegations that the changes have allowed for the "cutting of corners" on procedures that are necessary to achieve justice and/or its appearance.[6] Second, there have been suggestions that the changes have negatively impacted vulnerable parties who cannot explain their positions clearly through summary procedures.[7]

This article seeks to understand the experience of lawyers who have actually lived the recent developments in Ontario procedural law. Specifically, volunteer lawyers at Pro Bono Ontario's Law Help Centres, chosen given that they tend to have diverse experiences and clients from multiple socioeconomic groups in society, were surveyed. The lived experiences of these lawyers complement the theoretical and empirical study of case law that has been conducted elsewhere regarding *Hryniak* and the 2010 Amendments. Specifically, this article seeks to get a better sense of these lawyers' perceptions of the reforms on achieving access to justice in Ontario.

Part I of this article provides background on the access to justice crisis in Ontario and how the 2010 Amendments and *Hryniak* sought to address it. Part II explains the background and methodology of the survey that the volunteer lawyers were invited to complete. Part III describes what the survey showed. Part IV critically summarizes these results and what lessons they provide regarding *Hryniak* and the 2010

acknowledged for taking time out of their busy schedules to contribute to knowledge through completing the survey, the results of which are reported in this article. Finally, and most importantly, the author is forever indebted to Pro Bono Ontario in general, and Matt Cohen and Brian Houghton in particular, for facilitating this survey. The project could not have been completed without them. All mistakes are the author's.

1 *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at paras 1, 26 [*Hryniak*]; Trevor CW Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957 [Farrow 2014] reviews the literature in this area at fn 1. The various approaches to addressing this issue are discussed in more detail below in Part IA.

2 O Reg 438/08 [the "2010 Amendments"], amending the *Rules of Civil Procedure*, RRO 1990, Reg 194 [the "*Rules*"].

3 *Hryniak*, *supra* note 1.

4 See *e.g.* Shantona Chaudhary, "*Hryniak v. Mauldin*: The Supreme Court issues a clarion call for civil justice reform" (Winter 2014) 33 Adv J No 3.

5 See e.g. Brooke MacKenzie, "Effecting a Culture Shift: An Empirical Review of Ontario's Summary Judgment Reforms" (2017) 54:4 Osgoode Hall LJ 1275; Gerard J Kennedy, "Rule 2.1 of Ontario's *Rules of Civil Procedure*: Responding to Vexatious Litigation While Advancing Access to Justice?" (2018) 35 Windsor YB Access Just 243 [Kennedy Rule 2.1].

6 See e.g. Jonathan Lisus, "*Hryniak*: Requiem for the vanishing trial, or brave new world?" (Summer 2014), 33 Adv J No 1, 6; Colleen M Hanycz, "More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform" (2008) 27 CJQ 98.

7 See e.g. Julie Macfarlane, Katrina Trask & Erin Chesney, "The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?" (Windsor, ON: The National Self-Represented Litigants Project, The University of Windsor, November 2015).

Amendments specifically, and the potential of civil procedure reform as a means to facilitate access to justice more broadly.

The results were mixed. Most respondents viewed *Hryniak* and the 2010 Amendments as, overall, positive. But this was hardly a unanimous view. While *Hryniak* has certainly had effects, most respondents viewed the effectiveness of *Hryniak* and the 2010 Amendments to be limited, as other factors have intervened or remained as access to justice obstacles. While there was some perception that a culture shift has begun to emerge, the extent of that culture shift has been restricted. The responses did not lack all hope, but they ultimately suggest that the battle for access to civil justice must continue to be waged on multiple fronts.

I. BACKGROUND

A. The Access to Justice Crisis in Ontario

Access to civil justice has consistently been held to be an area where Canada's justice system falls short, resulting in considerable scholarship[8] and reports[9] attempting to address this issue. The word "crisis" is frequently used to describe the *status quo*.[10] Practically every Canadian will encounter a legal dispute at least once in their lifetime[11] even though most cannot afford a lawyer for a matter of any complexity,[12] unless the lawyers is acting on a contingency basis.[13] As individuals are unable to resolve legal issues, legal problems tend to multiply and the significant majority of these problems go unaddressed; this results in a host of social and health consequences.[14]

These broad phenomena – which have been documented elsewhere far more thoroughly than is possible here[15] – require multipronged responses. This in turn leads to multiple definitions of access to justice, varying in light of what is at stake. Some definitions are very broad, including philosophical analyses of

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8 Farrow 2014, *supra* note 1 significantly outlines the literature in this area at fn 1. See also Trevor CW Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020).

9 See e.g. Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) ["*Roadmap for Change*"]; Ontario, Ministry of the Attorney General, *Civil Justice Reform Project: Summary of Findings & Recommendations* by Honourable Coulter A Osborne, (November 2007).

10 But see Andrew Pilliar, "what will you do about access to justice this year" *Legal Aid Ontario Blog* (February 4, 2014), online: <http://blog.legalaid.on.ca/2014/02/04/andrew-pilliar-what-will-you-do-about-access-to-justice-this-year/>, who suggests "chronic problem" is a better term than crisis.

11 Trevor CW Farrow, *et al*, *Everyday Legal Problems and the Cost of Justice in Canada: An Overview Report* (Canadian Forum on Civil Justice, 2016), online: <http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>; *Roadmap for Change*, *supra* note 9; Farrow 2014, *supra* note 1 at 965-966.

12 Farrow 2014, *ibid* at 964, citing Beverley McLachlin, "Foreward" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at ix.

13 For a discussion of the pros and cons of this, see *e.g.* Noel Semple, "Regulating Contingency Fees: A Consumer Welfare Perspective" in Farrow & Jacobs, *supra* note 8 at, in particular, 309.

14 Farrow 2014, *supra* note 1 at 963; Trevor CW Farrow, "A New Wave of Access to Justice Reform in Canada" in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) ["Farrow 2016"] at 166-167.

15 See e.g. Farrow 2014, *ibid*.

"what is justice",[16] including those arguing for the need for transformative social justice.[17] Even when discussing access to justice vis-à-vis traditional legal disputes, much access to justice literature concentrates on how to deliver legal services in a more accessible manner[18] as well as alternative dispute resolution (ADR) such as mediation, arbitration, and administrative procedures that lessen the need for resort to courts.[19]

These approaches to improving access to justice are all important. But public civil litigation remains particularly important for a variety of reasons, including (but not limited to[20]) development of the common law and related democratic norms[21] and ensuring economically disadvantaged parties have a forum to adjudicate claims with basic procedural fairness.[22] If the public civil litigation system is inaccessible due to excessive delay and expense, these socially important goals remain unfulfilled. This can even jeopardize the rule of law for several reasons. Notably, an undeveloped common law leaves parties unable to order their affairs[23] and conflicts with the rule of law's requirement that there *be* law.[24] Moreover, such an inaccessible civil justice system results in one's legal fate possibly depending on his or her economic status, rather than the law.[25] Such an inaccessible civil justice system can lead to unprincipled settlement, also meaning that economics rather than law determines legal outcomes.[26] In the face of such considerations, notably the connection between access to justice and the rule of law, the Supreme Court of Canada gave constitutional protected to the principle of access to justice in its 2014 *Trial Lawyers* decision.[27]

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16 See e.g. Farrow 2014, *ibid* at 969; Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About?" (2008) 46 Osgoode Hall LJ 773.

17 See e.g. *ibid*; see also Sarah Buhler, "The View from Here: Access to Justice and Community Legal Clinics" (2012) 63 UNB LJ 427.

18 See e.g. Gillian K Hadfield, "The Cost of Law: Promoting Access to Justice Through the (un)Corporate Practice of Law" (2014) 38 Supplement Intl Rev L & Econ 43. Thanks to Thomas Cromwell for introducing me to this.

19 See e.g. Julie Macfarlane & Michaela Keet, "Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program" (2005) 42 Alta L Rev 677; Robert G Hann & Carl Baar, "Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report – The First 23 Months", described by Martin Teplitsky, "Universal mandatory mediation: A critical analysis of the evaluations of the Ontario mandatory mediation program" (Winter 2001) 20 Advocates' Soc J No 3, 10. See also Gary Smith, "Unwilling Actors: Why Voluntary Mediation Works, Why Voluntary Mandatory Mediation May Not" (1998) 36 Osgoode Hall LJ 847, expressing doubt about the wisdom and utility of mandatory mediation.

20 See e.g. Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) [Farrow Book] at, in particular, 219ff.

21 *Ibid* at 251-258; *Hryniak*, *supra* note 1 at paras 1, 26.

22 Farrow Book, *supra* note 20 at 219-232.

23 *Hryniak*, *supra* note 1 at paras 1, 26. The connection between allowing parties to order their affairs and the rule of law is noted in Malcolm Lavoie & Dwight Newman, "Mining and Aboriginal Rights in Yukon: How Certainty Affects Investor Confidence" (Fraser Centre Institute for Aboriginal Policy Studies, 2015) at 16, citing Friedrich A Hayek, *The Road to Serfdom* (London: Routledge Press, 1944).

24 See e.g. *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 747ff.

25 *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 39, [2014] 3 SCR 31 [*Trial Lawyers*]; Paul Vayda, "Chipping away at Cost Barriers: A Comment on the Supreme Court of Canada's *Trial Lawyers* Decision" (2015) 36 WRLSI 207 at 211-212.

26 Owen M Fiss, "Against Settlement" (1984) 93 Yale LJ 1073.

27 *Trial Lawyers*, *supra* note 25. This was not without controversy: see e.g. Asher Honickman, "Looking for Rights in the

So in the context of civil litigation, access to justice includes, at the very least, ensuring that civil litigation is prompt, affordable, and comprehensible to litigants, so that they are not discouraged from pursuing it or dissatisfied if they do,[28] beyond the extent that such discouragement and dissatisfaction is inevitable in litigation. While these characteristics are likely insufficient for a complete understanding of access to justice, they are nonetheless necessary.[29] Facilitating timeliness, minimal financial expense, and simplicity were the justifiable goals of the 2010 Amendments and *Hryniak*.

B. The 2010 Amendments and *Hryniak*

In 2007, Coulter Osborne, retired Associate Chief Justice of the Court of Appeal for Ontario, presented a report to the Ontario government recommending numerous reforms to the justice system to help facilitate access to justice. Many of his recommendations were enacted as the basis of the 2010 Amendments.[30] Perhaps the most notable of the 2010 Amendments concerned when a court may grant "summary judgment" – that is, disposing of all or part of a case on a motion, with affidavit evidence, and without a full trial.[31] Also important was enshrining the principle of proportionality, which seeks to ensure that the costs and expenses incurred by procedure are proportionate to their benefits in achieving substantively just results, throughout civil procedure.[32] These amendments can be normatively criticized, whether due to conceptual problems with the proportionality principle[33] or belief in the merits of the traditional trial.[34] However, this article largely seeks to learn the 2010 Amendments' effects rather than justify them. In *Hryniak*, the Supreme Court came down firmly on the side of viewing the proportionality principle, as well as the expanded ability to seek summary judgment, as positive. Karakatsanis J, authoring the Court's unanimous judgment, held that excessive reliance on traditional methods of litigation can hinder access to justice and she called for a "culture shift" in the conduct of litigation.[35] Specifically, she noted that "undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes"[36] and she thus encouraged greater use of active judging and summary judgment, which can allow individuals to "get on with their lives".[37] Moreover, she noted the importance of the public civil litigation system for upholding the rule of law.[38]

Despite the focus on proportionality and summary judgment, there were other aspects of the 2010 Amendments. These included mandating discovery plans and the principle of proportionality in discovery,

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All the Wrong Places: A Troubling Decision from the Supreme Court" (30 October 2014), online (blog): *Advocates for the Rules of Law* <http://www.ruleoflaw.ca/looking-for-rights-in-the-all-the-wrong-places-the-supreme-courts-troubling decision-in-trial-lawyers-association/>.

28 See e.g. Farrow 2014, *supra* note 1 at 978-979.

29 See e.g. Farrow 2016, *supra* note 14 at 166.

30 See e.g. MacKenzie, *supra* note 5 at 1280-1281; Janet Walker, "Summary Judgment Has Its Day in Court" (2012) 37 Queen's LJ 697 at 700-701 and 707-708.

31 Rule 20 of the *Rules*, *supra* note 2, analyzed in *Hryniak*, *supra* note 1.

32 Trevor Farrow, "Proportionality: A Cultural Revolution" (2012) 1 J Civil Litigation & Practice 151.

33 Hanycz, *supra* note 6.

34 Lisus, *supra* note 6.

35 *Hryniak*, *supra* note 1 at paras 23-33.

36 *Ibid* at para 24.

37 *Ibid* at para 25.

38 *Ibid* at para 26.

aiming to ensure that discovery does not cause disproportionate expense and/or delay.[39] The 2010 Amendments also prescribed automatic striking of actions not on the trial list after certain delay,[40] incentivizing the progress of actions. Case management was also expanded, allowing a more active role for judges[41] and pre-trial conferences were directed to resolve actions, including the requirement of a report.[42] Moreover, simplified procedure was made mandatory for cases with up to $100,000 at stake.[43]

The spirit of the 2010 Amendments and *Hryniak* have been frequently held by appellate courts[44] and scholarly commentators to apply more broadly.[45] This is apparent, for instance, in Rule 2.1 of Ontario's *Rules*, which came into effect after *Hryniak* and allows a court to dismiss potentially abusive actions through a very summary written procedure. Case law and commentary have noted how Rule 2.1 was clearly influenced by the spirit of *Hryniak* and its call for novel uses of procedural law to resolve cases on their merits with minimal delay and minimal financial expense.[46]

II. THE SURVEY[47]

A. Background

In order to do better on the access to justice front, we need to understand if our efforts are working – not just theoretically, but practically. Surveyed lawyers can give us insight into that, especially given that previous work analyzing *Hryniak* and the 2010 Amendments has, as noted above, been mixed on whether these amendments have been positive developments. Specifically, by asking questions concerning lawyers' experiences with *Hryniak*, the 2010 Amendments, and how this has affected civil practice in Ontario, this survey contributes to the practical knowledge of the perception of civil procedure's evolution in Ontario throughout the 2010s.

Qualitative surveys remain relatively rare in legal scholarship,[48] perhaps because they are difficult to orchestrate, and perhaps due to Langdellian views that law is a science to be discovered through primary sources and as such surveys have little to add.[49] And it is indeed true that obtaining a sample of judges or

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39 *Rules*, *supra* note 2, Rules 29, 29.1.
40 *Ibid*, Rule 48.14.
41 *Ibid*, Rule 77.
42 *Ibid*, Rule 50.
43 *Ibid*, Rule 76.02(1). This has since been increased to $200,000.
44 See e.g. *Iannarella v Corbett*, 2015 ONCA 110, 124 OR (3d) 523 at para 53, concerning discovery; *Canadian Natural Resources Limited v ShawCor Ltd*, 2014 ABCA 289, 580 AR 265 at para 5, concerning the intersection between discovery and claims of privilege.
45 See e.g. Stephen GA Pitel & Matthew Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014) 43 Advocates' Quarterly 344 at 344-346; Kennedy Rule 2.1, *supra* note 5 at 246; Gerard J Kennedy, "Jurisdiction Motions and Access to Justice: An Ontario Tale" (2018) 55:1 Osgoode Hall LJ 79 [Kennedy Jurisdiction] at 85.
46 Described in depth in Kennedy Rule 2.1, *ibid*; *Gao v Ontario (Workplace Safety and Insurance Board)*, 2014 ONSC 6100, 37 CLR (4th) 1 (SCJ) [*Gao*] at paras 7, 9.
47 The structure of this section of this article borrows heavily from Farrow 2014, *supra* note 1 at 965.
48 Urszula Jaremba & Elaine Mak, "Interviewing Judges in the Transnational Context" (2014) 5:3 Law and Method 1 at 1.
49 See e.g. the discussions in David Sandomierski, *Canadian Contract Law Teaching and the Failure to Operationalize: Theory & Practice, Realism & Formalism, and Aspiration & Reality in Contemporary Legal Education* (SJD Thesis, Faculty of Law, University of Toronto, 2017) [unpublished] at 51-52.

lawyers that would be representative in the eyes of a statistician was not realistic, at least in the absence of data kept by the courts themselves.[50] But this is also an area where personal, small-scale ethnographical impressions matter a great deal.[51] Scholars such as Julie Macfarlane[52] and Trevor Farrow[53] have learned invaluable insights through interviewing those who interact with the justice system as litigants. Such scholarship builds upon a large body of work, perhaps developed most prominently in Canada by Roderick Macdonald, attempting to place the person who experiences the law at the heart of legal analysis.[54] Moreover, previous work, notably that of Brooke MacKenzie,[55] has sought to look at the "raw numbers" of how Ontario procedural law has (not) changed in its application in the aftermath of *Hryniak*. There is only so much dispassionately reading case law can show – this article attempts to consider the lived experiences of those who experience the justice system.

Admittedly, this project surveyed legal service providers while it may be preferable to speak to litigants – those who experience the justice system on a day-to-day basis more acutely. However, the impressions of these providers are still important in access to justice analysis.[56] More importantly, finding a group of litigants who had experienced the civil justice system pre- and post-*Hryniak* and/or the 2010 Amendments is unrealistic.

B. Methodology

In June through August of 2019, lawyers who volunteer at Pro Bono Ontario [PBO] Law Help Centres were surveyed. The questions, many of which are repeated below and all of which appear in Appendix A, mostly fall into three categories: a) specific questions on the effects of *Hryniak* and the 2010 Amendments;

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50 See e.g. Tim Roberts & Associates, "A Supreme Lack of Information" (March 2019), online: UVicACE, <https://ajrndotco.files.wordpress.com/2019/03/48fa3-attritionfollow-upreport-feb2019.pdf>, noting that courts can collect better data on what actually happens to cases and parties.

51 Farrow 2014, *supra* note 1 at 966.

52 Julie MacFarlane, *Final Report*, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants" (May 2013), online: <https://representingyourselfcanada.com/wp content/uploads/2015/07/nsrlp-srl-research-study-final-report.pdf>.

53 Anne Griffiths, "Using Ethnography as a Tool in Legal Research: An Anthropological Perspective" *Law Explorer* (20 May 2017), online: <https://lawexplores.com/using-ethnography-as-a-tool-in-legal-research-an-anthropological-perspective-anne-griffiths/>; Farrow 2014, *supra* note 1 at 966, citing Anne Griffiths "Using Ethnography as a Tool in Legal Research: An Anthropological Perspective" in Reza Banakar & Max Travers, eds, *Theory and Method in Socio-Legal Research* (Portland: Hart Publishing, 2005) 113.

54 See e.g. Roderick A Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century – The Way Forward* (Toronto: LSUC, 2005) at 19; Martha-Marie Kleinhans & Roderick A Macdonald, "What is a Critical Legal Pluralism?" (1997) 12 Can J L & Soc 25; Farrow 2016, *supra* note 14 at 170; Justice Thomas A Cromwell, Address (Remarks delivered at the PLEAC Conference, 26 October 2012) [unpublished] at 2 as reported in Mary Eberts, "'Lawyers Feed the Hungry:' Access to Justice, The Rule of Law, and the Private Practice of Law" (2013) 76 Sask L Rev 115 at 120, fn 32.

55 MacKenzie, *supra* note 5. See also Kennedy Rule 2.1, *supra* note 5; Kennedy Jurisdiction, *supra* note 47.

56 Farrow 2014, *supra* note 1 at 965.

b) follow-up questions allowing the respondents to explain the answers;[57] and c) questions about the respondents' demographics.[58]

PBO is a registered charity that provides legal services to Ontarians who cannot afford a lawyer.[59] PBO has done this through a variety of projects, ranging from: providing assistance to the parents of sick children at Toronto's Hospital for Sick Children;[60] a call centre where individuals can to speak to a lawyer via telephone;[61] acting as duty counsel in Civil Practice Court, the Divisional Court, and Court of Appeal for Ontario;[62] and running "Law Help Centres" adjacent to the Superior Court in Toronto and Ottawa and the Small Claims Court in North York, where individuals can speak to a lawyer in person.[63] When the Law Help Centres were in jeopardy of closing in late 2018 due to a funding shortfall, a massive campaign emerged among the bar to "Save Law Help" and keep the centres open.[64] The Law Society of Ontario [LSO] recognizes PBO's unique role in facilitating access to justice. For instance, LSO-licenced lawyers are asked on their annual report whether they volunteer for PBO.[65] In addition, lawyers may also practise law while providing *pro bono* services for PBO despite not paying the level of insurance or dues to the LSO that would normally be required to provide analogous services outside of the *pro bono* context.[66]

During their volunteer shifts, as well as through multiple emails sent to approximately 670 lawyers who volunteer at PBO's Law Help Centres, lawyers were invited to respond to the questions asked in this survey. They were given the opportunity to: a) complete the survey on their own time and return through email; b) complete in person during or adjacent to a volunteer shift; or c) fill out the survey through PBO's website. PBO lawyers are almost all litigators, who are likely to be familiar with *Hryniak* and the 2010 Amendments. Many of them have a private practice in their "day jobs" while also working with economically disadvantaged persons through PBO. This diversity of experience is valuable for a survey

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57 The importance of which is noted in Farrow 2014, *ibid* at 967.

58 Clearly essential in critical race scholarship: Shanthi Elizabeth Senthe & Sujith Xavier, "Re-Igniting Critical Race in Canadian Legal Spaces: Introduction to the Special Symposium Issue of Contemporary Accounts of Racialization in Canada" (2013) Windsor YB Access Just 1; Faisal Bhabha, "Towards a Pedagogy of Diversity in Legal Education" (2014) 52 Osgoode Hall LJ 59 at 87.

59 Pro Bono Ontario, "About PBO", online: <https://www.probonoontario.org/about/>; Jacques Gallant, "Pro Bono Ontario help centres to remain open with funding from Ottawa, donations from lawyers" *Toronto Star* (27 November 2018), online: <https://www.thestar.com/news/gta/2018/11/27/pro-bono-ontario-help-centres-to-remain-open-with-funding-from-ottawa-donations-from-lawyers.html>; Pro Bono Ontario, "Pro Bono Ontario Funding Backgrounder and History" (17 May 2019), online: <https://probonoontario.org/voices-for-pro-bono/wp-content/uploads/2019/05/PBO-Funding-Backgrounder-and-History-May-17-2019.pdf> [Funding Backgrounder].

60 Lorne Sossin, "The Helping Profession: Can *Pro Bono* Lawyers Make Sick Children Well?" in Dodek & Woolley, *supra* note 14 at 150; Funding Backgrounder, *ibid* at 13.

61 Pro Bono Ontario, "Hotline", online: <https://www.probonoontario.org/hotline/>; Funding Backgrounder, *ibid* at 10-11.

62 Funding Backgrounder, *ibid* at 10.

63 Gallant, *supra* note 59; Gabrielle Giroday, "Support builds in effort to stop closure of pro bono centres" *Canadian Lawyer* (12 November 2008), online: <https://www.canadianlawyermag.com/news/general/support-builds-in-effort-to-stop-closure-of-pro-bono-centres/275633>; Pro Bono Ontario, "Going to Court", online: <https://www.probonoontario.org/lawsuits-and-disputes/>; Funding Backgrounder, *ibid* at 9-10.

64 Extensively reported in Gallant, *ibid*; Giroday, *ibid*; Funding Backgrounder, *ibid* at 22-23.

65 Law Society of Ontario, "Blank Copy 2018 Annual Report", online: <https://portal.lso.ca/wps/PA_AnnualReport/resources/pdf/en/mar_draftform.pdf>, Question 8(c).

66 Funding Backgrounder, *supra* note 61 at 6.

such as this one. Of approximately 670 lawyers on PBO's volunteer roster for its Law Help Centres, 90 responded to the survey[67] – a take-up rate of approximately 13.4%. Each respondent was assigned a number, prefaced by "L" (for "lawyer") during recording of the results. Individual substantive responses will be referenced by those numbers for the duration of this article. The responses were not amended, even to correct typographical errors.[68]

All answers to the qualitative questions were copied into Word documents, and common themes were grouped. All substantive comments are reflected below. In the interests of brevity, many of these comments are paraphrased, but the number of respondents who made similar qualitative comments is noted in Part III.

Superior Court judges were also sought to be surveyed to add a different and important perspective. Trial judges deal with the *Rules* on a day-to-day basis. While there has been praise of *Hryniak* and the 2010 Amendments in the case law,[69] there is also concern that increased summary judgment[70] adds to the work of trial judges to read the evidence rather than hear it in a trial. This is sometimes derisively called "trial in a box".[71] However, the Office of the Chief Justice (prior to the appointment of Chief Justice Morawetz) declined to facilitate this request. While this is understandable given concerns about the judiciary speaking extrajudicially or otherwise performing extrajudicial activities,[72] it is nonetheless a point of view that could not be explored.

C. Limitations of Methodology

Since the Law Help Centres are in Toronto and Ottawa, the respondents are disproportionately from those cities. This does limit the extent to which the lessons can be drawn from the lawyers' impressions, which are likely to be tailored to their particular experiences. And despite the respondents' diversity of experience, it cannot necessarily be said to mirror that of the Ontario bar, especially given the geographic limitations. Nor does 90 lawyers constitute a particularly large sample. The results of the survey also depend on the accuracy of respondents' memories and/or impressions of periods prior to *Hryniak* and the 2010 Amendments. It would accordingly be ill-advised to change public policy/the law based *only* on the responses to this survey. However, that does not mean that the respondents' impressions are uninteresting or cannot complement other work in this area.

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67 78 respondents used the website, 5 responded electronically but not via the website, and 7 filled out hard copies.

68 One exception: L85's year of call to the bar was recorded as "1015". It seemed a safe assumption that it was obviously 2015.

69 See e.g. *Gao*, *supra* note 46 at paras 7, 9.

70 Documented by MacKenzie, *supra* note 5.

71 See e.g. *Hamilton v Desert Lake Family Resort Inc*, 2017 ONSC 1382, 2017 CarswellOnt 2874 (SCJ) [*Hamilton*] at para 1, per Mew J.

72 See e.g. the case of Justice Patrick Smith, being controversially found to have committed misconduct by having accepted an interim deanship of a law school: Colin Perkel, "Canada's chief justice urges 'major reforms' to judge oversight" (31 March 2019), online: *City News* <https://toronto.citynews.ca/2019/03/31/canadas-chief-justice-urges-major-reforms-to-judge-oversight/>. This was later overturned on judicial review: *Smith v Canada (Attorney General)*, 2020 FC 629, 68 Admin LR (6th) 214.

III. FINDINGS

A. Demographics of Sample

Respondents were asked whether they wished to identify their gender, whether they identified as a racialized person, a member of the LGBT+ community, a person with a disability, or an Indigenous Canadian. Respondents were also asked to state when they were called to the bar. 36 of the respondents self-identified as female while 51 identified as male. No one identified as "Other" (despite the option to do so), although three preferred not to say. 14 respondents identified as racialized, 71 identified as non-racialized, and five preferred not to say. Two respondents identified as a person with a disability, and one identified as an Indigenous Canadian. None identified as members of the LGBT+ community. There were 45 respondents called prior to 2010 and 42 called in or after 2010, with three not answering. 2010 was chosen as a cut-off date for recent calls as it was when the 2010 Amendments came into force. It is unsurprising that there were nearly as many lawyers called within the past ten years as before in light of the greater likelihood of junior lawyers to gain experience through *pro bono* work[73] and the well-known phenomenon of lawyers stopping the full-time practice of law after gaining some experience.[74] All quantifiable questions were analyzed to assess whether there were any notable differences in respondents' answers in light of their gender, racialization, or year of call. This will be returned to in Part III.I.

B. Effects of *Hryniak* and the 2010 Amendments

1. Respondents regarded *Hryniak* as more impactful than 2010 Amendments

The survey's first questions addressed the fundamental issues of the survey, with Question One asking whether "the Supreme Court's Decision in *Hryniak v Mauldin* [has] affected your approach to and/or experience in practice in recent years?" 48.9% (44 respondents) said that *Hryniak* had affected their practice experiences, while 28.9% (26 respondents) said that it had not. 20% (18 respondents) were not sure. The remaining 2.2% (2 respondents) indicated unawareness of *Hryniak*. Among those with an opinion, therefore, there was an approximately 5:3 ratio of believing that *Hryniak did* have an impact.

Question Three followed up with "Have the 2010 amendments to the Ontario *Rules of Civil Procedure* affected your approach to and/or experience in practice in recent years?" 33.3% (30 respondents) percent said that the 2010 Amendments had affected their practice experiences, while 48.9% (44 respondents) said that they had not. 16.7% (15 respondents) were not sure. A single respondent (1.1%) indicated unawareness of the 2010 Amendments (though one wonders whether respondents who were unaware of the decision would acknowledge as much in a survey of this nature). In other words, there was an approximate 2:1 ratio asserting that the 2010 Amendments did *not* have an impact.

Hryniak is the leading case interpreting large parts of the 2010 Amendments. So why is there a difference in respondents' impressions of *Hryniak* vis-à-vis the 2010 Amendments? Even though no respondents explicitly said so, a hypothesis worth exploring might be that a seminal case such as *Hryniak*

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73 Francis Regan, "Legal Aid Without the State: Assessing the Rise of *Pro Bono* Schemes" (2000) 33:2 UBC L Rev 383 at 398, cited in Mary Jane Mossman, Karen Schucher & Claudia Schmeing, "Comparing and Understanding Legal Aid Priorities: A Paper Prepared for Legal Aid Ontario" (2010) 29 WRLSI 149 at 195.

74 A phenomenon that disproportionately impacts women: Fiona M Kay, Stacey Alarie & Jones Adjei, "Leaving Private Practice: How Organizational Context, Time Pressures, and Structural Inflexibilities Shape Departures from Private Law Practice" (2013) 20:2 Indiana J Global Leg Studies 22.

becomes a particularly acute symbol that now must be cited whenever a party finds itself within a summary judgment motion. This will be returned to below in Part IV. But much of the difference in impressions of the effects of *Hryniak* and the 2010 Amendments is clearly attributable to respondents who were called to the bar for less than ten years not feeling qualified to comment on the state of things prior to 2010, with twenty-two respondents (24%) stating something to this effect.[75] Overall, there were 37 respondents who answered Questions 1 and 3 differently despite the relationship between *Hryniak* and the 2010 Amendments: of these, 63.9% were called in or after 2010. Among those called to the bar in or after 2010, only 16.7% felt the 2010 Amendments had impacted their practice compared to 32.6% of all respondents and 48.9% of those called prior to 2010. Nowhere near a similar gap existed in light of year of call for opinion on the effects of *Hryniak* itself, where 53.3% of those called before 2010 said it affected their practice compared to 42.9% of those called afterwards.

Other respondents suggested they had limited ability to comment on the 2010 Amendments as they rarely came into contact with summary judgment (L84), or otherwise had a specific area of practice such as regulatory litigation (L80),[76] tax litigation (L03),[77] ADR (L79), or practising litigation only in conjunction with PBO (L05) that rendered *Hryniak* and/or the 2010 Amendments of limited applicability.

2. Respondents' Qualitative Experiences with *Hryniak* and 2010 Amendments

Questions Two and Four asked the lawyers to explain their responses to Questions One and Three. Overall, there was consensus that *Hryniak* makes parties more inclined to bring summary judgment motions and clarified the framework for doing so. Twenty-two respondents (24%) explicitly indicated that they or other lawyers are more likely to bring summary judgment motions,[78] including earlier.[79] L86 even noted encountering "boomerang" summary judgment motions where summary judgment is awarded *against* the party originally seeking it,[80] though the appropriateness of this is now in doubt after recent Court of Appeal case law.[81] Other respondents praised "much needed clarity" in terms of the applicability of summary judgment. These exact words of L04 were similar to sentiment expressed by six other respondents who indicated how *Hryniak* now permeates discussions of summary judgment and how they frame their arguments concerning its appropriateness.[82]

Not all respondents agreed, however. Indeed, eleven respondents indicated increased willingness to bring summary judgment motions in the immediate aftermath of *Hryniak*, but with that frequency

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75 L08, L12, L14, L16, L22, L24, L25, L37, L45, L51, L52, L55, L57, L59, L60, L64, L70, L74, L78, L83, L84, L88.

76 Which the *Rules* do not specifically apply to, and where different considerations apply: Lorne Sossin, "Chapter Seven: Access to Administrative Justice and Other Worries" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Publications, 2013).

77 Governed by the *Tax Court of Canada Rules* (*General Procedure*), SOR/90-688a.

78 L08, L12, L13, L23, L31, L35, L37, L38, L39, L40, L51, L52, L53, L55, L58, L65, L66, L69, L77, L81, L86, L87.

79 L13.

80 See e.g. the discussion in *Drummond v The Cadillac Fairview Corp Ltd*, 2018 ONSC 4509, [2018] OJ No 4704 [*Drummond*], discussed in Jordan Katz, "Beware The Boomerang: Summary Judgment For Responding Parties" (31 August 2018), online: *Mondaq* <https://www.mondaq.com/canada/civil-law/731876/beware-the-boomerang-summary-judgment-for-responding-parties>.

81 *Drummond v Cadillac Fairview Corp*, 2019 ONCA 447, [2019] OJ No 2802, rev'g, *Drummond*, *ibid*.

82 L10, L46, L42, L36, L47, L50, L62.

decreasing in recent years due to impressions that Superior Court or Court of Appeal judges are less likely to grant it.[83] (Whether these impressions are borne out in the case law is beyond the scope of this article.) Four additional respondents indicated some increased willingness to bring summary judgment motions but also hesitation due to risks of being impractical in particular cases and/or derailing litigation if not successful.[84] This indicates the double-edged nature of summary judgment as a means to facilitate access to justice. L39's lengthy response summarized many of these impressions:

> The decision initially had me considering how best to set up my cases for possibly using summary judgment. […] I was emboldened by the *Hyrniak* decision initially until it became clear that Courts were still reluctant to grant summary judgment in anything but the clearest possible cases. The risks (and costs) in proceeding outweighed the possible benefits in most cases. Similarly I felt that the amendments to the *Rules of Civil Procedure* would allow for a more robust taking control of actions by the courts. This has not been the case as courts are reluctant to use the powers given under the amendments where it might make scheduling mini trials or trails of issues difficult.

Impressions on case management were also divided. Case management in Ontario is now prescribed pursuant to Rule 77 of the *Rules*, applies in the Cities of Ottawa and Toronto and the County of Essex, and gives more powers to judges in determining appropriate procedures.[85] While L39 and L68 lamented its absence, L63 indicated frustration with the *extent* to which courts have taken control of particular matters. L72 was more sympathetic to courts, noting that even when parties have acted promptly, the Court may not have the resources to facilitate effective movement.

A handful of respondents indicated objections to the premise that summary judgment is an effective means to facilitate access to justice. L54, for instance, believed that summary judgment could be as expensive as a short trial. L61 thought such motions "more complicated and time-consuming", and L23 expressed the view that they included "an oppressive amount of paper". L82 further opined that increased summary judgment and mediation meant that the "vanishing trial" is vanishing even more.[86]

Even among the vast majority of respondents who seemed to indicate greater – but not absolute – openness to summary judgment as an effective means to facilitate access to justice, there was emphasis that certain types of litigation are not amenable to summary judgment. While emphasizing being "mindful of proportionality" (also noted by L90), L07 indicated that "summary judgment [is] not worth it unless there's a well-funded litigant". This is interesting, given that one may have thought that inability to afford a whole trial would make summary judgment particularly attractive, but this could also reflect a risk-adverseness in case the summary judgment motion is unsuccessful. L09's practice usually involves more than two parties in the litigation and recent Court of Appeal case law restricting "partial summary judgment" (*e.g.*, seeking to obtain summary judgment on behalf of a single defendant in a multi-defendant case) means summary judgment is now not an option in this particular type of practice. L88 also indicated

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83 L08, L16, L19, L28, L32, L30, L48, L68, L75, L88, L39.
84 L52, L58, L26, L39.
85 *Rules*, *supra* note 2.
86 In line with Jonathan Lisus's critique: Lisus, *supra* note 6.

that inability to pursue partial summary judgment limited *Hryniak*'s effectiveness. This will be returned to in Part IV.D.

The area of law and type of question before the Court also affected respondents' impressions. L27 noted that the determination of a limitation period was a quintessential example of where summary judgment is appropriately sought post-*Hryniak*, presumably due to minimal disputes over facts. Multiple employment litigators also cited increased use of summary judgment as being both appropriate and helpful.[87] L22 wrote:

> Post-*Hryniak*, summary judgment has become the standard process for wrongful dismissal cases that go to litigation. This means pressuring employers more effectively, getting to mandatory mediation early, and, when necessary, getting a judgment within 6 months instead of 1-2 years.

Another employment lawyer (L21) also noted that discoveries have become more streamlined in the aftermath of the 2010 Amendments. On the other side, however, two lawyers who practise personal injury/insurance litigation indicated distrust of summary judgment motions, and/or that increased attempts to use them have had significant costs and minimal benefits.[88]

Respondents' impressions on Question One (the effects of *Hryniak*) and Question Three (the effects of the 2010 Amendments) were overwhelmingly – but not exclusively – confined to impressions regarding summary judgment. Among those who shared their experiences more broadly, for instance, L15 noted that, outside the summary judgment context, discovery rules, which were also amended to mandate discovery plans and enshrine proportionality in discovery, have been interpreted in ways to expand availability of discovery in a way that has decreased the value of the rule change.[89] L26 and L31 noted that the 2010 Amendments mandating discovery plans through Rule 29.1.03 has mostly been ignored, despite L21's view that discovery has become more streamlined. L35 felt that expanded use of the simplified *Rules* and the Small Claims Court's jurisdiction were effects of the 2010 Amendments that could facilitate access to justice. Lamenting that the 2010 Amendments have not been more applicable outside the summary judgment context, L83 wrote that "I have made efforts to use the 'culture shift' argument on a number of occasions outside of the summ[ary] judgment [context]. No judge has picked up on the argument."

C. Speed

Turning to the access to justice variable of speed, emphasized by Karakatsanis J in *Hryniak*,[90] Question 5 asked respondents whether "there [had] been a noticeable change in how quickly you have resolved civil cases in recent years". A majority – 52.2% (47 respondents) – said there had been no change. The next

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87 In particular, L67 and L22.

88 L31, L73.

89 Attempts to restrict parties to seven hours of discovery have led to attempts to seek leave to exceed that, which these respondents seem to feel are granted not infrequently. This is defensible from a fairness perspective but still has the consequences of leading to more discovery. See the discussion in *Osprey Capital Partners v Gennium Pharma Inc et al*, 2010 ONSC 2338, 93 CPC (6th) 256, per Master Glustein (as he then was).

90 *Hryniak*, *supra* note 1 at para 25.

most common response – 31.1% (28 respondents) – was one of uncertainty. Of those who substantively responded, only 4.4% (4 respondents) felt matters were being resolved more quickly while 12.2% (11 respondents) felt things were taking longer.

The belief that there had been little change was reflected in responses to Question 6's request for an explanation to the answer to Question 5. L13 said there was "no discernible change" despite *Hryniak* and the 2010 Amendments while L10 added that the process "[s]till takes too long and [is] too expensive". Explaining why there has been no change, L68 wrote: "The delay in resolving cases is attributable to three things: (1) lack of urgency by counsel, (2) very few judges who are willing to actively and aggressively manage and push a case forward; and (3) long delays in getting court time for multi-day civil hearings."

Other impressions, however, were more complicated than simply believing that the *status quo* had remained. Several respondents indicated that some cases are being resolved more quickly post-*Hryniak* but others are not. These included:

- a belief that case management leads to quicker resolution but for cases that go to trial, the process takes even longer, so the average remains the same (L39);
- an impression that there are fewer settlements, but also more decisions resolved by way of summary judgment, which have "more or less" balanced out the delay of matters (L65);
- the employment of the proportionality principle can lead to cases being resolved more quickly (L90);
- feeling that the attitude of the particular judge towards dispositive motions matters enormously, with some cases being resolved quicker and others not (L36);
- believing that financial costs are increasing, despite being uncertain about whether litigation is taking longer (L16); and
- believing that "very strong and very weak cases can be resolved somewhat more quickly" but there has been no change for most (L48).

The belief that *Hryniak* and the 2010 Amendments have led to some, albeit limited, effects was also shared by L70, who viewed *Hryniak* as "somewhat helpful" and L77, who viewed the expanded ability to seek summary judgment as a way to reduce the length of litigation.

The attitude of the respondents towards summary judgment – and the apparent uncertainty about whether it would be granted – also shone through some responses. L23 wrote that "A long motion takes longer to schedule than a short trial. If summary judgment is appealed then there is a 2 year delay in the prosecution of the action." L28 added that "Courts are blocking summary judgment. Any attempt to make such a motion often results in wasted time and effort" while L63 wrote "Everything takes at least as long as before but with more pointless interactions with the court." This highlights Karakatsanis J's acknowledgment in *Hryniak* that summary judgment motions themselves can be an unnecessary source of delay and expense.[91]

[91] *Ibid* at para 74.

D. Costs

The questions on delay were followed by questions on financial expense: "Adjusting for inflation, has there been a noticeable change in the financial expense (in terms of legal fees and disbursements) required to resolve civil actions in recent years (since 2010)?" The results were as follows:

- 38.9% (35) answered expenses had increased;
- 2.2% (2) responded that they had decreased;
- 20.0% (18) said there had been no change; and
- 38.9% (35) said they were not sure.

Two respondents viewed *Hryniak* and the 2010 Amendments as leading to "slight improvements",[92] such as: "increasing the threshold for simplified rules cases up to [$100,000] has made it more affordable to litigate low value matters" (L50). Ultimately, however, these were dwarfed in most respondents' eyes by other factors, such as:

- more pre-trial steps that are in theory designed to decrease costs but can be a source of increased expense in themselves (L39), such as non-summary judgment motions (L37) and mandatory mediation (L38);
- cases being more complex (L56, L81);
- increased hourly rates for lawyers (L14) and the billable hour model itself (L15);
- costs of document production, identified by four respondents,[93] partially due to a proliferation of relevant documents due to increased electronic communications (though paradoxically, L30 said the ability to "outsource" document production can make litigation less expensive[94]);
- increased costs of running a law firm (L31), the costs of which get passed on to clients;[95] and
- increased costs of disbursements (identified by four respondents[96]) and, in particular, experts, which six different respondents identified as increasing the costs of litigation.[97] (This will be returned to in more detail in Part IV.B.)

The lack of improvement in most respondents' eyes – and the worsening of the *status quo* in the view of almost 40% – therefore appears attributable to many factors, unrelated to *Hryniak* and the 2010 Amendments. The occasional respondent (*e.g.*, L63) did feel that *Hryniak* and the 2010 Amendments were

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92 These exact words of L56 were similar to the sentiment expressed by L77.

93 L16, L18, L25, L81.

94 The outsourcing of document production, frequently offshore, has been ongoing for over a decade: see e.g. Alexandra Hanson, "Legal Processing Outsourcing to India: So Hot Right Now!" (2009) 62 SMU L Rev 1889.

95 John S Dzienkowski, "The Future of Big Law: Alternative Legal Service Providers to Corporate Clients" (2014) 82:6 Fordham L Rev 2995 at 3017, citing Edward Poll, "Under Water from Overhead? Here Are Ways to Keep Afloat" in *Law Practice Today* (March 2008), online: <http://apps.americanbar.org/lpm/lpt/articles/mtt03081.shtml>.

96 L53, L36, L82, L87.

97 L27, L28, L31, L38, L53, L74.

themselves the source of increased expense, claiming more money was being "spent on unnecessary steps." But regardless of the reason for the (lack of) change, it would appear that most respondents would agree with L79's observation that "Litigation has become a forum for the wealthy. The exception being the Small Claims Court."

E. Settlement and ADR

1. Rates and Timing of Settlement

Questions 9, 11, and 13 asked about settlement and ADR. Question 9 asked "has there been an increase or decrease in the rate of settlement in recent years (since 2010)?" Nearly 85% opined either that there had been no change (40% or 36 respondents) or they were not sure (44.4% or 40 respondents). Of the remainder, there was division as to whether there was an increase (8.9% or 8 respondents) or decrease (6.7% or 6 respondents) in rates of settlement. L90, explaining an increase in rates of settlement, wrote that proportionality now factors into settlement decisions. The overwhelming majority of results, however, suggest that the situation had not changed much, exemplified in L37's response that "I tell my clients that 99% of cases settle and that has not changed." L19 suggested that "Everything is settling. The vast majority of young lawyers have virtually no chance of ever going to trial."

On the specific issue of timing of settlement, respondents had opposite impressions. Believing that settlement takes place later, L31 (who clearly acts regularly against insurance companies) lamented that "insurers take things to the eve of trial" only to have settlement then and L73 (who also clearly litigates against insurance companies) opined that insurance companies suspect juries will not give plaintiffs large settlements and are now willing to go to trial more often. However, L39 wrote that while the rate of settlement has remained the same, this frequently occurs earlier due to mandatory mediation. L79 even wrote that the summary judgment rule has been used in arbitration with the consent of all parties, resulting in earlier resolution.

2. Satisfaction with Settlement

Question 11 asked a related question about whether there has "been an increase or decrease in the quality of settlements and/or clients' satisfaction from settlements in recent years (since 2010)?" The results were not very different. Again, over 85% were either unsure (39.3% or 36 respondents) or thought that there had been no change (48.3% or 43 respondents). One respondent did not answer. That leaves only eleven respondents opining on the question, a particularly unrepresentative sample. These respondents were almost evenly divided on whether satisfaction had increased (6 respondents or 6.9%) or decreased (5 respondents or 5.7%).

Giving their impressions, L23 and L87 believed that satisfaction with settlement had decreased because settlement results from litigants' inability to afford to continue. L74 suggested that changes to deductibles in insurance policies was the reason for the decreased satisfaction. Among those who thought satisfaction had increased was the belief from L77 that *Hryniak* and the 2010 Amendments had reduced costs. But another respondent (L15) observed that there is no satisfaction in litigation, even when settlement occurs. Expressing many respondents' conflicting emotions, L36 described that *Hryniak* could help to avoid some unprincipled settlements, but with settlement remaining by far the norm given the costs of not settling:

> My clients are typically reluctant to settle. When they do, […] I have really encouraged them to – and they aren't happy about it. They settle because court is too expensive and they cannot afford it. I do not know if that is different from years past. Maybe. I recently resolved a case (by getting judgment without a trial) and maybe I would have encouraged a settlement if a trial seemed more likely.

3. Use of ADR

Question 13 asked about ADR, which frequently leads to settlement, specifically: "Has there been an increase or decrease in the use of alternative dispute resolution in recent years (since 2010)?" This question was included because, despite the benefits of ADR, we do not wish for its prevalence to increase to the level that virtually no one uses the public civil litigation system – a scenario that would, as noted above, come with numerous negative consequences.[98] Here, respondents had slightly stronger opinions. The majority were either uncertain (32.2% or 29 respondents) or felt there had been no change (38.9% or 35 respondents). 26.7% (24 respondents) felt the use of ADR had increased. Only two respondents (2.2%) felt the use of ADR had decreased.

This view that ADR remains either very common or is increasing even further appears to exist for a variety of reasons, including:

- clients not wanting to pay for trial (L38);
- legal fees and disbursements being lower with the view that ADR is less expensive (expressed by five respondents[99]) with multiple mediations being used in complex matters (L39);
- the view that litigation is uncertain (L16); and
- mandatory mediation is present in three locations in Ontario[100] (as noted by five respondents[101] – this is not related to the 2010 Amendments *per se*).

Three respondents[102] also emphasized that "sophisticated" clients were particularly likely to use or be interested in using ADR. L23 was nonetheless cognizant of the trade-offs entailed in this:

> Sophisticated parties use ADR because it is speedier and increases control. Yet this comes at the expense of development of the jurisprudence. The parties who can afford to make full and thoughtful argument are opting for ADR. Self-reps generally can't afford ADR, and they are not in a position to make an argument in front of a judge that will lead to valuable jurisprudence.

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98 See Farrow Book, *supra* note 20 at 219-232.

99 L10, L16, L35, L39, L68.

100 *Rules*, *supra* note 2, Rule 24.1.04. These three locations are the Cities of Toronto and Ottawa, and the County of Essex.

101 L15, L61, L21, L87, L28.

102 L16, L23, L48.

Some respondents were nonetheless skeptical of ADR, with L66 opining, "If lawyers cannot resolve the problem between themselves, [I'm] not sure how another lawyer can help keep it out of court."

F. Self-Represented Litigants

The National Self-Represented Litigants Project has suggested that summary procedures have negatively affected self-represented litigants particularly acutely.[103] And respondents were less ambivalent about the effects of self-represented litigants, as discerned through Question 15: "Do your answers to the foregoing questions change depending on whether a self-represented litigant is involved in a proceeding?". One respondent did not answer. Of those who did, 31 (34.4%) answered that their approach to litigation and experience in recent years *did* change depending on whether a self-represented litigant was involved in the proceeding. But 30 (33.3%) said it did *not*. 29 (32.2%) were unsure. Five respondents said their lack of opinion was due to the fact that they did not frequently interact with self-represented litigants.[104]

Despite the division on whether the involvement of self-represented litigants affected their approach to litigation, those who felt that self-represented litigants did affect the litigation had strong opinions, and offered many views. A very interesting impression from nine respondents[105] suggested that self-represented litigants were less likely to settle and/or more likely to take more "principled" stances. This may be a contributing factor to their greater presence in court.[106] Though one respondent (L83) put "principled" in scare quotes and added that this "results in a more drawn out litigation process to the detriment of the often innocent defendant." Though understanding of the need to be flexible and generous with self-represented litigants, L83 cited an example of needing to win four motions against a self-represented litigant before a master was willing to award even nominal costs.

Twelve different respondents also felt that the presence of self-represented litigants increased challenges, costs, and/or time required to resolve an action due to a combination of the self-represented litigants' need for more formalized processes and the difficulties that they had in understanding the process.[107] For instance, L23 and L66 wrote that ADR is very difficult if only one party has a lawyer while L32 wrote that "Claims by self-reps are almost always dealt with by trial or motion. Other mechanisms do not work." L79, who has worked as a mediator and arbitrator, wrote: "A self rep has a more difficult time in putting their best case forward. [This p]uts the mediator and arbitrator in [a] difficult position." This underscores Farrow's observation that the public civil litigation system has a particularly important role with respect to vulnerable parties.[108]

These problems that lawyers felt they encountered with self-represented litigants did not necessarily arise for lack of trying to prevent them. L44 wrote that "[o]ur firm approach is to offer to settle early and more often with self-reps". L90 said that "While it is easier to deal with another lawyer, the same offers

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103 Macfarlane, Trask & Chesney, *supra* note 7.

104 L18, L35, L56, L62, L73.

105 L02, L19, L23, L32, L38, L39, L47, L57, L83.

106 The prevalence of self-represented litigants in Court is noted by Trevor CW Farrow, *et al*, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System, A White Paper for the Association of Canadian Court Administrator*s (Toronto and Edmonton: 27 March 2012) at 14-16, online: <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Addressing%20the%20Needs%20of%20SRLs%20ACCA%20White%20Paper%20March%202012%20Final%20Revised%20Version.pdf>; Macfarlane, *supra* note 54.

107 L10, L25, L47, L23, L32, L37, L40, L50, L53, L60, L68, L87.

108 Farrow Book, *supra* note 20 at, *e.g.*, 232-251.

[on] the same basis are extended to self-reps." L55 explained that, "When dealing with self-reps, I try to provide multiple opportunities to try to resolve the issue. I also use motions only as a last resort unless the plaintiff's position is unwarranted. I also use Rule 2.1 letters to the Court [if] a self-represented claim is clearly vexatious."[109]

Despite a disproportionate amount of abusive litigation by a relatively small number of self-represented litigants,[110] there was an acknowledgment from respondents such as L07 that many self-represented litigants were in difficult situations with serious issues in disputes. L27 summarized many respondents' conflicting impressions:

Self-represented litigants result in delays, sometimes through no fault of their own. They get many additional opportunities to meet deadlines, file material, comply with orders etc. Many often move from self-represented to represented over and over again, which also creates significant delays. My practice is in civil litigation, so it is essentially unheard of for them to [have] legal aid assistance.

L64 offered a rare note of hope: that availability of simpler procedures post-2010 should help self-represented litigants.

G. Effects of *Jordan*

In 2016, the Supreme Court of Canada released its decision in *R v Jordan*.[111] In order to protect the right to a trial within a reasonable time, prescribed by s 11(b) of the *Canadian Charter of Rights and Freedoms*,[112] the decision imposed strict timelines on criminal trials: 18 months in provincial courts, and 30 months in superior courts. If these deadlines are not met, criminal proceedings are to presumptively be stayed.[113] Question 19 inquired about the effects of this on civil justice through asking, "Do you believe that the Supreme Court of Canada's 2016 decision in *R v Jordan* has had any effects on access to civil justice?" Exactly half of respondents (45, or 50%) felt that *Jordan* has hurt access to civil justice, while only 3.3% (3 respondents) felt that *Jordan* had helped access to civil justice. 31.1% (28 respondents) were uncertain while 7.8% (7 respondents) were unaware of the *Jordan* decision. 7.8% (7 respondents) viewed *Jordan* as having had no effects on access to civil justice, with four respondents citing *Jordan* being a criminal case as the reason for this.[114]

The 15:1 ratio of believing *Jordan* has hurt as opposed to helped in civil justice is reflected in impressions, such as the following:

- Twenty-three respondents[115] – over a quarter of the total sample – had the impression that *Jordan* had exacerbated delay in civil matters as resources had been diverted to criminal matters with L48 succinctly describing this state of affairs as "Where there are

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109 Rule 2.1 is discussed in Kennedy Rule 2.1, *supra* note 5.
110 *Ibid* at 263.
111 2016 SCC 27, [2016] 1 SCR 631 [*Jordan*].
112 Part I of the *Constitution Act, 1982*, being Schedule B of *Canada Act 1982* (UK), 1982, c 11.
113 Discussed in Palma Paciocco, "The Hours are Long: Unreasonable Delay after *Jordan*" (2017) 81 SCLR 233.
114 L54, L64, L77, L84.
115 L01, L23, L48, L11, L18, L26, L38, L42, L50, L51, L55, L59, L63, L65, L68, L70, L74, L79, L81, L82, L87, L39, L73, L15, L19.

not dedicated courts (*i.e.*, outside of Toronto[116]), prioritizing criminal cases has made it much more difficult to get access to courts for civil justice";

- at least three respondents[117] were told by court staff or judges that motions or trials need to be delayed to ensure compliance with *Jordan*, and that there were insufficient judges to manage the criminal list under *Jordan*, let alone the civil system; and
- through courts' de-prioritizing civil matters, it is even harder for self-represented litigants to have their day in court (L08).

L73, writing in Summer 2019, gave a particularly poignant observation: "As of today the next available court date for a trial is in 2022. This is beyond what we have ever seen before."

L39, who is a member of a committee with many judges, summarized many of these concerns:

> the Bench is consumed with the *Jordan* case and assuring that criminal justice is provided in a timely fashion to the detriment of civil justice. Criminal justice has priority followed by family and child protection followed lastly by civil. Times to get lengthy civil trials has increased to the point where you can wait up to 3 to 4 years for your trial date once you are ready to set the matter down.

Some criticism was levelled more directly at the Supreme Court. L15 expressed opposition "to any cap […] The system is bloated and slow and has been for decades. Placing a cap/timing for trial in favour of rights of [the] accused may have the effect of rewarding delay in the system." L19 synthesizes frustration even more succinctly:

> *R. v. Jordan* is terrible for civil justice. The Supreme Court should not have instituted a "legislative regime" that cannot be overturned by elected officials. When faced with allowing a murderer or fraudster to walk free, or to delay or force the settlement of a whiplash claim, the [motor vehicle accident] claimant loses out 100% of the time.

At the same time, there was equivocation from some respondents. L07, for instance, wants spirit of *Jordan* to be applied in criminal and family law. L44 thought *Jordan* may have been a positive influence on "accelerating and keeping the system moving." And L28 felt *Jordan* has had positive effects on *quasi*-criminal matters.

H. Presence of a Culture Shift?

Question 21 asked whether respondents believed a "culture shift" has been occurring this decade [the 2010s] in the conduct of civil litigation oriented towards promoting access to justice?" 28.9% (26 respondents) felt there had been while 46.7% (42 respondents) felt there had not. 24.4% (22 respondents) were unsure.

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[116] Presumably this refers to the Toronto practice of "dedicating" judges to various areas of law such as class proceedings (see Kennedy Rule 2.1, *supra* note 5 at fn 196) and commercial litigation (see Warren K Winkler, "The Vanishing Trial" (Autumn 2008) 27:2 Advocates' Soc J 3 at 4).

[117] L51, L53, L70.

This could suggest that the majority of respondents felt that things have not changed, or not changed much, and that appears to be the case to some extent. But Question 22 sought impressions based on the above question, and also asked what a culture shift might look like. These impressions were valuable in illustrating the responses. Among those who thought there were signs of a culture shift, impressions included:

- a shift towards private arbitration (L59), and a recognition of the need to look for solutions to problems outside the courts (L35);
- lawyers and judges becoming more patient with self-represented litigants (L57);
- benefits from the enactment of the proportionality principle (L90);
- "Judges increasingly promot[ing] settlement through judicial mediation and blocking access to hearing time" (L22);
- "People seem[ing] to care more as the years go by" (L70); and
- PBO allowing parties who cannot afford lawyers to nonetheless have access to legal advice that allows them to appear more organized when in Court (L38).

Others felt that there had been small movement, seen in increased acknowledgment and/or discussion about the importance of civil justice (*e.g.*, L60). Others felt that the judiciary is more cognizant about the problem than lawyers (L45, L53). L15 felt that the greater awareness around the need for access to justice has produced effects:

I have seen a shift in lawyers' perceptions of access to justice and a need to give back by volunteering or supporting the shift in other ways (support of legal aid funding) that was not as accepted as a few decades ago. I recall when even volunteering at clinics outside of practice was frowned on (taking away from billable hours and insurance issues for giving such advice outside of firm control); now it is strongly supported by most firms. But that has more to do with volunteer programs and education than any change in the law or Rules of procedure [sic].

Many more impressions indicated the belief in little to no progress, however. This is perhaps best exemplified in L34, who answered Question 21 "Yes" (*i.e.*, there has been a culture shift) but then answered Question 22 with "NOWHERE NEAR ENOUGH" (capitalization in original). Other comments in this vein include:

- "There certainly should be a culture shift, but too many lawyers tend to delay cases either intentionally or out of an abundance of caution. There are simply not enough judges, and will never be enough judges, to control this behaviour" (L48);
- "In my view the Court has attempted to make access to justice for the public, however many factors have intervened" (L79);
- "The amount of grunt work in civil litigation is crazy and shoots up the cost to the client" with examples including lengthy paper productions, cuts to legal clinics, and practice directives changing from judicial district-to-judicial district across the province (L25);

- "The existence of access to justice would constitute a cultural shift. I don't see that any meaningful progress has been made" (L46);
- "In my experience, lawyers have continued to approach litigation the same way" (L50), shared by L75, who wrote: "Legal aid does not extend to civil claims and therefore the same issues that existed 20 years ago when I started to practice still exist today [with] lots of self-represented litigants trying to navigate a complex court system"; and
- "I believe there have been many more references to a culture shift, but in practical terms, the profession is resistant to change. I have frequently been frustrated in attempts to resolve matters more efficiently by senior counsel or the bench as they are uncomfortable with creative approaches to dispute resolution" (L51).

Many respondents picked up on emphases on "talk" or "lip service" about access to justice, which perhaps has a positive effect on consciousness-raising,[118] but lacks accompanying significant change:

- "More lip service for access to justice but the system is at least as complex and expensive for unrepresented parties as it was before" (L63);
- "Culture shift sounds nice but not sure cases are being resolved any faster" (L12);
- "[M]y peers and colleagues at law school and at work nearly universally profess to be concerned about access to justice [but] my overall impression is that while most recognize there is an access to justice problem, only a small fraction of the profession are actually doing anything about it (and I would not count myself among their ranks)" (L01);
- "[W]hile people talk a big game, I wouldn't say I've seen a marked increase in people actually working towards access to justice. The culture shift has been limp [sic] service without tangible action" (L18);
- "For all the talk by LSO and the courts about A2J, […] Unless the case is worth hundreds of thousands of dollars or more, it simply is becoming cost-prohibitive to litigate" (L87);
- "There is a lot more lip service. […] It is too expensive for most clients to go to trial so they settle for less than they deserve or give up." (L78);
- "Certainly people talk about access to justice all of the time, but recent provincial [government] policies and cuts seem to be moving in the opposite direction" (L84);
- "It's all lip service. Nothing has really changed." (L54); and
- "The discussion has simply become more vocal." (L55).

Even among those who believe there has been change, there is a view that this is not always positive. For instance, L23 felt *Hryniak* and the 2010 Amendments have led to changes that are not necessarily positive:

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[118] Seen in L60's response. Consciousness-raising is not unimportant, as has been particularly noted in feminist scholarship: see e.g. Janet E Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton, NJ: Princeton University Press, 2006).

"I sense a desire by judges to dispose of litigation whenever possible. The civil justice system will provide an outcome, but not necessarily justice."

The frustration seemed particularly acute among three personal injury lawyers (L31, L73, L74) who emphasized the particularly devastating consequences of being unemployed or underemployed while needing to seek treatment to recover from an injury for which one should be compensated.

Turning to what a culture shift *should* look like, respondents suggested:

- Being "[c]oncerned with fairness to self-represented plaintiffs and non-institutional plaintiffs re[garding] cost, time and expense of court processes and proceedings" (L49);
- "increased support for PBO within and without the Bar" (L14);
- "[PBO] should operate like legal aid with proper funding for civil cases limited to the income testing which is now done. They receive hundreds of calls daily and can respond to only a handful" (L77);
- "We're all taught at law school that trials are bad and ADR is good. That's a bad thing." (L82);
- "Faster turnover of disputes [and] expeditious hearings to reduce fees" (L21);
- "We need to turn our minds to a more flexible system that can address the different types of litigation, not just one size fits all" (L04);
- a less adversarial system of litigation, especially in Toronto (L28); and
- "The system requires increased careful independent expert assessment in the early stages of any dispute – maybe the process would equate to 'eliminating claim(s)' with […] parties involved in an informal, more affordable, lower risk environment" (L07).

Some specific suggestions were given, such as:

- "Access to justice would increase if we reduced court time allocated to procedural matters and enacted tighter procedural rules. No court time should be spared on costs, for example" (L36);
- "E-filing and service of documents should be prioritized. Active case management must be aggressive" (L68); and
- Courts operating for longer hours and increasing limits to access the Small Claims Court and Simplified Procedure (L19).

L54 cynically dismissed the project of attempting to improve access to justice, proclaiming "It is and will always be about the money". L37 felt that the problem was not solvable without government involvement: "Until the government funds or subsidizes civil litigation, there is no access to justice." Putting both of these impressions together, L66 wrote that incentives are misaligned for change: "Lawyers benefit from delay. Courts are public institutions run by public servants without much incentive to make things efficient."

L39 seemed to channel many different responses, recognizing that there is greater awareness of the problem, but being skeptical as to how much change has actually occurred, in light of legal uncertainty and competing pressures on lawyers:

> I think the profession and the government pays lip service to access to justice but that access to justice itself is difficult if not impossible when the economic pressures of practice on lawyers; in particular sole practitioners and small firm lawyers, are such that promoting a culture shift is difficult. In addition the government is increasing the disbursement costs and the courts themselves appear to chastise lawyers for failing to be extremely well prepared and covering all possible angles while at the same time criticizing lawyers for their large legal bills to their clients. Appella[te] courts and trial courts decisions are such that certainty in law is difficult to discern. Where there is uncertainty, costs increase as those with deep pockets can exploit the uncertainty while those without deep pockets must "cave" or run a risk that they cannot afford to run. The deck is stacked against those who need access to justice most being those with few resources. […] Steps should be taken to encourage access to justice through a robust legal aid funding and court fees; particularly for those having to defend against claims, should be lowered.

I. Demographic Variables

1. Demographics of the Client

The vast majority of respondents felt that litigants' demographic characteristics (such as race or gender) did not affect the litigants' experiences with *Hryniak* and the 2010 Amendments (55% or 49 respondents), or they were unsure (36% or 32 respondents). Among those who gave these responses, most did not give explanations but among those who did, impressions included "see[ing] no change based on the demographic status of the litigants in my practice" (L39) and having "[n]ever thought about it that way" (L37). Two respondents – one racialized, one not – responded somewhat tersely to the question being asked with L54 writing "I deal with the merits of the case; not the race or gender of the client" and L55 similarly stating "I report to my clients on the merits of the claim, not demographic status".

Only 9% of respondents (8 persons) viewed litigants' demographics as having an impact on those litigants' experiences interacting with *Hryniak* and the 2010 Amendments. However, it is worth observing that 50% of those who felt so were racialized lawyers themselves (though they were still a minority, albeit 28.6%, of the fourteen racialized lawyers in the sample). Explaining their answers, some respondents emphasized economic (L07) or language (L36, L50, L57) barriers as being more important than the listed examples of race or gender *per se*. L79 similarly wrote: "As long as they can clearly articulate their position race or gender does not matter".

Other observations, though very much in the minority, were more profound and concerning, however. L19, for instance, wrote how the shortcomings of the civil justice system (including what they viewed as the limited effects of *Hryniak* and the 2010 Amendments) can perversely incentivize *very* low-income racialized individuals to remain in the court system while pushing out the lower-middle class. L61 added "There has been an increasing number of poor litigants, mostly from the immigrant population that is ignorant of their rights and are often taken advantage of." L31, whose practice clearly includes many actions against insurers and was also the sole respondent who self-identified as an Indigenous Canadian,

wrote that "There is no question in my mind that insurers are racist. They offer less and litigate more against immigrants." L74, who also clearly practiced in the personal injury area, similarly wrote:

> Generally juries are more favourable to English speaking Caucasians. This inherent bias in society then effects [sic] access to justice for racialized communities. Judge alone trials should become the standard or more common place in civil litigation even for the regular procedure. It's great that now it is for simplified procedure.

L23's concern about the intersection of marginalized populations and lack of access to civil justice was more profound, citing the lack of case law caused by a lack of access to the civil court system: "In a constitutional democracy judges protect minorities. Our society will not develop in a way that is favourable to minorities without the development of jurisprudence." It is worth emphasizing that these impressions were not common – but they are still concerning.

2. The Demographics of the Lawyers

As noted above, only two respondents identified as persons with disabilities, only one identified as an Indigenous Canadian, and no one identified as a member of the LGBT+ community. It accordingly could not be observed whether there were notable differences in lawyers' impressions of *Hryniak* and the 2010 Amendments based on these characteristics. However, whether respondents' year of call affected their answers was a subject of analysis, as was whether there were any noticeable differences in responses in light of race and gender. Given that the entire sample surveyed cannot be considered representative of the population of Ontario litigators, and the subsets of years of call, gender, and race are even smaller, caution must be emphasized in looking at these numbers.

a. Relevance of Year of Call

By far the most striking difference between respondents called before and after (or in[119]) 2010 was the extent to which the more senior lawyers had stronger opinions on the changes (or lack thereof) in civil litigation in recent years. To every single question, a larger number of post-2010 calls indicated they were "unsure" about the answer. This is perhaps unsurprising given the comparative lack of pre-*Hryniak* experience of the more recently called lawyers. This "agnosticism gap" did range from question-to-question: *i.e.*, there is a 6.5:1 gap on the question of whether the 2010 Amendments have affected experience but only a 1.18:1 gap on whether there has been a culture shift. But it was substantial in many questions, such as the effects of *Hryniak* (2.58:1), views about the length (3.58:1) and expense (3.48:1) of litigation, and the use of ADR (3.94:1). Nor are any of these attributable to particularly small sample sizes – all of these questions led to at least fifteen (and as many as forty) lawyers answering they were "unsure" about the answers. The number of more recent calls being uncertain seems to have resulted in the more senior lawyers being likelier to have substantive views on the answers to the questions, including that:

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[119] Those called to the bar in 2010 will be referred to as "post-2010 calls" for ease of reference. Given that the 2010 Amendments became effective January 1, 2010, they did not experience practice prior to 2010 (though they may have had articling experience).

- *Hryniak* and the 2010 Amendments have affected their experience/approach to practice (53.3% and 48.9% among the pre-2010 calls compared to 42.9% and 16.7% among the post-2010 calls);
- litigation had become longer and more expensive (24.4% and 53.3% among pre-2010 calls compared to 4.8% and 23.8% among post-2010 calls) – admittedly, the only respondents who felt litigation had become less expensive were also pre-2010 calls but they were only two individual respondents;
- settlement and ADR have become more prevalent (11.1% and 31.1% among pre-2010 calls compared to 7.1% and 21.4% among post-2010 calls); and
- *Jordan* has hurt access to civil justice (62.2% among pre-2010 calls compared to 40.5% among post-2010 calls).

To be fair, in some questions, the older calls were likelier to have opinions and therefore likelier to be split in their opinions: being likelier to believe both that satisfaction from settlement had increased *and* decreased compared to the newer calls, for example. Overall, however, it is fair to say that the older calls believed that there had been more change. All differences in answers based on year of call can be found in Appendix B.

b. Relevance of Gender

As illustrated in Appendix C, there were not many notable differences in responses in light of a lawyer's gender. Among the more notable disparities were female lawyers being likelier to opine that settlement had increased (13.9% compared to 5.9%), as well as satisfaction from settlement (13.9% compared to 2%). Male lawyers, by contrast, were likelier to believe that *Hryniak* had affected their experience in and/or approach to practice (54.9% compared to 38.9%). But there do not appear to be any consistently connected differences analogous to what could be found among the lawyers' years of call. As such, more methodological research would be necessary to be certain that gender does or does not affect lawyers' impressions of changes to Ontario litigation in recent years.

c. Relevance of Race

The sample size of 14 racialized lawyers, and no more than eight racialized individuals answering any question in the same manner, renders it particularly unsafe to draw conclusions about differences in responses based on race.[120] This is amplified in light of the results, the entirety of which are found in Appendix D, where variations (insofar as there are any) between respondents based on their race could be reduced significantly by adding just one more racialized lawyer to the sample. In any event, most answers to most questions did not reveal a notable gap between racialized and non-racialized lawyers.[121]

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[120] David M Dietz, Christopher D Barr & Mine Cetinkaya-Rundel, *OpenIntro Statistics*, 3d ed (2015), online: <https://www.openintro.org/stat/textbook.php?stat_book=os> at 178, noting that a sample size of less than thirty is particularly vulnerable.

[121] For example, it is worth noting that racialized lawyers were more likely to view that the rate of settlement has increased (28.6% compared to 7%), though also more likely to view it as having decreased (14.3% compared to 5.6%), with the reason being non-racialized lawyers viewing it as more likely not to have changed (42.7% compared to 28.6%). Another

The one notable possible exception to this was the increased likelihood of racialized lawyers to view litigants' experiences with *Hryniak* and the 2010 Amendments as having differed in light of the litigants' demographic status. 28.6% of racialized lawyers believed this to be the case compared to 5.8% of non-racialized lawyers. Moreover, 63.8% of the non-racialized lawyers asserted that the litigants' demographics did *not* affect their experience in the civil justice system in recent years compared to only 21.4% of racialized lawyers. The remaining gap can be attributed to 50% of racialized lawyers being unsure compared to only 30.4% of non-racialized lawyers. Indeed, as many racialized lawyers (in absolute numbers) viewed demographics to be as relevant to litigants' experiences as did non-racialized lawyers despite there being five times as many non-racialized lawyers in the sample.

The difficulty of drawing conclusions relating to the impact of race based on these results (as is done for many other issues in Section IV) arises not only from the small sample size but also because this project is ill-suited to delve into critical race scholarship in depth. However, this is an issue worthy of further study, with two considerations underscoring this. First, the survey asked respondents whether the effects of recent changes to procedural law differed in light of litigants' demographics status. This is a different and more narrow question than asking about the extent to which racialization affects interactions with the civil justice system more broadly, something also worthy of study.[122] Second, racialized lawyers responding in notably different ways even to the more narrow question suggests this area of study may contribute to recent discussions of the value of diversity in the bar.[123]

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gap that appears large also appears likely attributable to coincidence (no causal rationale jumps to mind, in any event): racialized and non-racialized lawyers essentially having inverted statistics on being unsure whether litigation's length is increasing (57.1% of racialized lawyers and 26.8% of non-racialized lawyers) or believing there is no change (28.6% of racialized lawyers and 59.2% of non-racialized lawyers).

122 See e.g. Sara Sternberg Greene, "Race, Class, and Access to Civil Justice" (2015) 101 Iowa L Rev 1263.

123 This has most obviously been an issue recently in the debate over the "Statement of Principles" at the LSO: see, *e.g.*: Justin P'ng, "The Gatekeeper's Jurisdiction: The Law Society of Ontario and the Promotion of Diversity in the Legal Profession" (Spring 2019), 77 UT Fac L Rev 82; Omar Ha-Redeye, "My Friends Muddy the Waters: How a Statement of Principles Became a Public Fiasco" (2017) *Ethics Primer at King Law Chambers*; and Lorne Sossin, "Slouching towards Inclusion: The Law Society's Statement of Principles" (24 October 2017), online: *Dean Sossin's Blog* <https://deansblog-osgoode-yorku-ca.ezproxy.library.yorku.ca/2017/10/slouching-towards-inclusion-the-law-societys-statement-of-principles/>, *contra*: Léonid Sirota, "The Law Society of Upper Canada should stick to its statutory knitting" (7 November 2017), online: *CBA National* <http://nationalmagazine.ca/en-ca/articles/law/ethics/2017/articles-november-2017-the-law-society-of-upper-c?lang=FR>; Murray Klippenstein & Bruce Pardy, "How Social Justice Ideologues Highjacked a Legal Regulator" *Quillette* (11 February 2019), online: <https://quillette.com/2019/02/11/how-social-justice-ideologues-hijacked-a-legal-regulator/>; and Arthur Cockfield, "Limiting Lawyer Liberty: How the Statement of Principles Coerces Speech" (March 15, 2018) (Queen's Law Research Paper Series no. 2018-100, 2018). Available at SSRN <https://ssrn.com/abstract=3141561>. But the issue is broader: see e.g. Challenges Faced by Racialized Licensees Working Group, *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions* (Toronto: The Law Society of Upper Canada, 2016), online: <https://wwwlsuconca.ezproxy.library.yorku.ca/uploadedFiles/Equity_and_Diversity/Members/Challenges_for_Racialized_Licensees/Working-Together-for-Change-Strategies-to-Address-Issues-of-Systemic-Racism-in-the-Legal-Professions-Final-Report.pdf> [perma.cc/DS8L-LZ2A].

IV. SUMMARY AND LESSONS

The previous section reported primarily on the survey's responses with minimal annotations, which is the primary contribution of this paper. This final section nonetheless seeks to draw lessons in eight areas where the responses appear worthy of independent analysis and/or complement other work in the field. First, it is posited that the surveys' responses suggest that *Hryniak* and the 2010 Amendments have had some, albeit limited, effects, on resolving certain types of cases more quickly. Second, a superficial contradiction will be addressed given the prevalence of responses suggesting that there has been little-to-no-change. Third, it will be emphasized that a substantial minority of respondents view increased summary judgment and case management to be unfavourable as there are trade-offs that come even with the benefits. Fourth, the necessity of exploring whether there has been a drop in the use of summary judgment in very recent years will be discussed. Fifth, it will be proposed that the responses suggest that explicit prescriptions in particular areas of practice are likelier to facilitate access to justice than more general consciousness-raising. Sixth, the respondents' impressions on the effects of legal uncertainty will be analyzed. Seventh, the responses regarding self-represented litigants will be revisited and summarized from a policy perspective, leading to the eighth and final area: the role of legal aid, *pro bono* work, and government support to facilitate access to civil justice.

A. Effects of *Hryniak* and the 2010 Amendments

1. Effects Present, if Narrow

The responses to Questions One and Three suggest that a substantial number of litigators view *Hryniak* and, to a lesser extent, the 2010 Amendments, to have affected their experience in and/or approach to practice in recent years. This complements previous analysis, both by Brooke MacKenzie[124] and myself,[125] that the 2010 Amendments and *Hryniak* (or their spirit) have led to resolving at least some cases more quickly and with less financial expense.

To be sure, it is not suggested that this has been universal. Many respondents suggested little-to-no effects of *Hryniak* and the 2010 Amendments, with the needle moving even less (or in the opposite way of intentions) on questions of costs, delay, and settlement. This will be returned to below. But even if a substantial minority of lawyers view their practice to have changed, that suggests that change has occurred in a substantial number of cases, and is noteworthy in itself.

2. Effects Depend on Area of Law and Legal Issue

The area of law and legal issue at stake certainly seem to affect the appropriateness of summary judgment in particular. Three employment lawyers noted that summary judgment is particularly common in their field post-*Hryniak*, and they view this as positive, being able to resolve litigation quicker and with

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124 MacKenzie, *supra* note 5.

125 The discussion of Rule 2.1 in Kennedy Rule 2.1, *supra* note 5. For further reading, see Gerard Joseph Kennedy, *Hryniak, the 2010 Amendments, and the First Stages of a Culture Shift?: The Evolution of Ontario Civil Procedure in the 2010s* (PhD Dissertation, Faculty of Graduate Studies, York University, 2020), online (pdf): <yorkspace.library.yorku.ca> [perma.cc/M2WK-TLTJ] [Kennedy Dissertation].

less expense.[126] This has been observed in case law[127] and is not altogether surprising: employment litigation, particularly wrongful dismissals where just cause is not alleged, typically involves facts that are relevant to determining issues, such as appropriate pay in lieu of notice, but the areas of factual and legal controversy tend to be discrete.[128] The ability to get a judgment more quickly can benefit both employees[129] and employers.[130] Determining a limitation period is another type of legal question that both respondents (*e.g.*, L27) and case law[131] have repeatedly held is appropriate for summary judgment post-*Hryniak*. In this sense, the responses complemented what case law already shows: that these legal issues are being decided summarily saves resources for courts and litigants, in addition to contributing to valuable jurisprudence.[132] This is a good in itself.

This does not extend to other areas of law, however. Three different respondents emphasized personal injury/insurance litigation[133] as an area where the 2010 Amendments and *Hryniak* have had little if any effect and may in fact have been counterproductive. This too is unsurprising. Some insurance litigation – such as interpretation of insurance contracts[134] – may be appropriate for disposition by summary judgment. But much personal injury litigation contains a great deal of expert testimony and complicated assessments of damages[135] that seem particularly ill-suited for what has been critically called "trial in a box".[136]

B. One Step Forward, Two Steps Back?

The conclusion that there have been some, albeit limited, effects of *Hryniak* and the 2010 Amendments may seem contradicted by the answers to Questions Five and Seven, which suggest that litigation is becoming neither less expensive (and, indeed, may be becoming more expensive) nor quicker (though there is more equivocation on that front). Similarly, respondents thought that there had been little change to the rates of settlement while the use of ADR is, if anything, increasing. Given that *Hryniak* and the 2010 Amendments sought to achieve different objectives, it may seem as though they have had no – or even contrary – effects.

This seeming contradiction between responses is explained by the follow-up questions, asking why lawyers felt this way. Their responses revealed that this view was not usually held because respondents viewed *Hryniak* and the 2010 Amendments to have been ineffectual or counterproductive (though a few felt this way, as discussed in the next subsection). Rather, they had other reasons for feeling that, for

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126 L22, L67, and (to a lesser extent) L21.

127 *Peticca v Oracle Canada ULC*, 2015 CarswellOnt 5450, [2015] OJ No 198 (SCJ) at paras 1-2, per Myers J.

128 *Ibid*.

129 *Ibid*.

130 See e.g. *Betts v IBM Canada Ltd/IBM Canada Ltée*, 2016 ONSC 2496, 31 CCEL (4th) 60 (Div Ct), aff'g 2015 ONSC 5298, [2015] OJ No 4461 (SCJ) [*Betts*].

131 See e.g. *Demide v Canada (Attorney General)*, 2015 ONSC 3000, 47 CLR (4th) 126 (SCJ) at para 134.

132 *Betts*, *supra* note 130 has become a leading case on abandonment of employment: see e.g. *Sutherland v Messengers International*, 2018 ONSC 2703, 46 CCEL (4th) 201 (Div Ct) at para 24, per Thorburn J (as she then was) and Howard Levitt, *Law of Dismissal in Canada*, 3d ed (Toronto: Canada Law Book, 2019) at 12:20.

133 L31, L73, L74.

134 See e.g. *Stantec Consulting Ltd v Altus Group Ltd*, 2014 ONSC 6111, 2014 CarswellOnt 14842 (SCJ), noting the appropriateness of summary judgment to resolve issues of contractual interpretation.

135 See e.g. *Griva v Griva*, 2016 ONSC 1820, 2016 CarswellOnt 4019 (SCJ).

136 *Hamilton*, *supra* note 71. See also David M Brown, "Summary Judgments: The Appellate Experience," *2016 36th Annual Civil Litigation Conference Conference* 14A, 2016 CanLIIDocs, 4391, <http://canlii.org/t/ssr4>.

instance, the costs of litigation had stayed the same or increased. There were numerous reasons for this, six of which bear repeating as they complement hypotheses that have been raised elsewhere.

The most prominent among these was the increased use and prevalence of expert witnesses, which six different respondents[137] cited as a reason for litigation's increased costs. The proliferation of experts is sometimes defended as necessary to ensure that judges have knowledge to which they normally would not have access.[138] However, it has also led to the phenomenon of "trial by expert" where parties try to "out-expert" each other through finding an expert who will testify to whatever the party wants,[139] advantaging parties who can afford to hire more experts.[140] There are also infamous instances of attempting to call an "expert" who is actually opining on a legal issue.[141] That so many respondents (unprompted) cited this as a reason for increasing costs of litigation is an additional reason to be hesitant to accept increased expert testimony.

Second, four respondents cited costs of document production as the reason for the increased cost of litigation.[142] The cost of discovery as an access to justice impediment has been chronicled extensively[143] and it may be that increased electronic communications lead to even more documents being relevant for production.[144] While this can be defended as essential for fairness,[145] it may be worthwhile asking whether the extent of unfairness caused by more limited documentary discovery is worth the costs of extensive discovery. This is especially the case given that unfairness can be mitigated through the ability of a judge

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137 L27, L28, L31, L38, L53, L74.

138 This has been argued for particularly strongly in sexual assault cases: see e.g. *R v Ennis-Taylor*, 2017 ONSC 5797, 2017 CarswellOnt 16533 (SCJ), not admitting the expert evidence due to concerns about prejudice to the accused and qualifications of a particular expert, but agreeing such evidence would be helpful to a jury. For an example in the civil context, see *Alfano v Piersanti*, 2012 ONCA 297, 291 OAC 62 at para 104.

139 See e.g. *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, [2015] 2 SCR 182 at para 18, per Cromwell J; David M Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009) 35 Queen's LJ 565.

140 The expense of extensive expert evidence was acknowledged in Binnie J's dissenting opinion in *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38 at para 128.

141 See e.g. *Apotex Inc v Pharmascience Inc*, 2004 FC 1198, 36 CPR (4th) 218, per Blais J (as he then was), aff'd 2005 FCA 144, 332 NR 389.

142 L16, L18, L25, L81.

143 Justice Thomas Cromwell noted the counterproductivity of expanding discovery rights in extrajudicial comments in 2013 while still serving on the Supreme Court: Beverley Spencer, "The Road to Justice Reform: An Interview with Supreme Court of Canada Justice Thomas Cromwell" (July-August 2013), online: *The National* <http://nationalmagazine.ca/Articles/Recent4/The-road-to-justice-reform.aspx>. This is also a common hypothesis in the United States: see e.g. Judge (as he then was) Neil Gorsuch, "13th Annual Barbara K. Olson Memorial Lecture" (Address Delivered at the Federalist Society for Law and Public Policy's 2013 National Lawyers Convention, The Mayflower Hotel, Washington, DC, 15 November 2013), online: <https://www.youtube.com/watch?v=VI_c-5S4S6Y> at 6:15-10:30. See also *Hryniak*, *supra* note 1 at para 29.

144 This is become subject to the *Sedona* Canada Principles on e-discovery, as described in Ken Chasse, "The Admissibility of Electronic Business Records" (2010) 8 Can J L & Tech 105 at 130, 149, *etc*. These are incorporated in the *Rules*, *supra* note 2, Rule 29.1.03(4).

145 This varies in light of the circumstances: EDD Tavender, "Considerations of Fairness in the Context of International Commercial Arbitrations" (1996) 34 Alta L Rev 509 at 522, cited in *ENMAX Energy Corporation v TransAlta Generation Partnership*, 2019 ABQB 486, 2019 CarswellAlta 1340.

to draw an adverse inference against a party that fails to produce a relevant document.[146] While the 2010 Amendments attempted to enshrine the principle of proportionality in discovery, six respondents suggested that this had little impact[147] and will be discussed further in Section IV.E. This is a problem that international commercial arbitration has also attempted to solve in recent years.[148]

Three respondents also brought up, in various ways, the billable hour model for providing legal services as reason for litigation's increasing costs. The billable hour model's incentivization of inefficiency has been noted for years.[149] The rise of alternative fee arrangements[150] may not be at the centre of civil procedure reform and is clearly another area of importance in access to justice discussions. But as long as fee structures are tied to litigation steps, the more procedural steps must be undertaken, and the more litigation costs will be incurred.

Fourth, three respondents (L53, L36, L87) brought up increased court fees as a reason litigation has become more expensive. These are frequently defended as a user tax that disincentivizes needless filings[151] and can be recovered at the end of litigation.[152] However, they also adversely impact economically disadvantaged litigants[153] and an application (causing time and expense) needs to be brought for a litigant to be absolved of the need to pay them.[154] The necessity and amount of filing fees can certainly be questioned, therefore, especially as the enactment of Rule 2.1 allows courts to very summarily address facially abusive matters.[155]

Fifth, dozens of respondents cited the *Jordan* case as having diverted resources from the civil court system,[156] with half of respondents believing *Jordan* has negatively impacted access to civil justice. As a constitutional case, *Jordan* cannot be legislated away (as noted by L19) unless the notwithstanding clause is invoked. As such, it is understandable for courts to try to divert limited resources to the criminal system to avoid having criminal prosecutions stayed. However, it should be acknowledged that an unintended consequence of *Jordan* could be decreased access to civil justice.

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146 See e.g. *Ontario (Attorney General) v $11,633.21 in Currency (In Rem)*, 2009 CarswellOnt 9261 [*Currency in Rem*] at para 4, per Matlow J.

147 L16, L18, L25, L26, L31, L81.

148 See e.g. Michele Curatola & Federica De Luca, "Document Production in International Commercial Arbitration: A 'Trojan Horse' for Uncontrolled Costs" (2018) Transnational Dispute Management 4, online:l: < www.transnational-dispute-management.com/article.asp?key=2576>; Courtney Lofti, "Documentary Evidence and Document Production in International Arbitration" (2015) 4 YB on Intl Arbitration 99.

149 Brooke MacKenzie, "Better value: Problems with the billable hour and the viability of value-based billing" (2013) 90 Can Bar Rev 677.

150 Carla Swansburg, "Artificial Intelligence and Machine Learning in Law: The Implications of Lawyers' Professional Responsibilities for Practice Innovation" (2018) 60 CBLJ 385; *Spiteri Estate v Canada (Attorney General)*, 2014 ONSC 6167, 2014 CarswellOnt 14831 (Master) at para 25.

151 See the dissenting reasons of Rothstein J in *Trial Lawyers*, *supra* note 25.

152 See e.g. *Henderson v Canada* (2008), 238 OAC 65 (Div Ct) at paras 28 and 30, per Molloy J.

153 Discussed by the majority in *Trial Lawyers*, *supra* note 25, and Vayda, *supra* note 25.

154 See e.g. *Samuels v Canada (Attorney General)*, 2016 ONSC 6706, 2016 CarswellOnt 17204 (SCJ) at para 16. See also Shannon Salter, "Court Fee-waiver Processes in Canada: How Wrong Assumptions, Change Resistance and Data Vacuums Hurt Vulnerable Parties" (2020) 96 SCLR (2d) (forthcoming).

155 Kennedy Rule 2.1, *supra* note 5.

156 L01, L23, L48, L11, L18, L26, L38, L42, L50, L51, L55, L59, L63, L65, L68, L70, L74, L79, L81, L82, L87, L39, L73, L15, L19.

Sixth, the lack of using technology was noted by those who cited paper productions and lack of e-filing as sources of unnecessary expense (L25, L68). This complements a significant body of work on the ability to use technology to facilitate access to justice.[157] Fortunately, amendments in 2020 (after the survey was conducted) in the aftermath of the COVID-19 pandemic seem to be resulting in changes in this area.[158]

Each of these six can be – and has been – subject to important scholarship, which is only superficially addressed above. However, this article's survey nonetheless suggests that each of these is posing impediments to access to civil justice in Ontario. This underscores the need for a multipronged approach to achieving access to civil justice.

C. Not All Effects Positive

Some respondents were not convinced that *Hryniak* and the 2010 Amendments could even be considered "one step forward" in facilitating access to civil justice. Some (*e.g.*, L54) believed that short trials could be less expensive than summary judgment motions. This aligns with a fear, acknowledged in *Hryniak* itself,[159] that summary judgment could itself be a source of unnecessary delay and expense. But that was not the only objection to *Hryniak* and the 2010 Amendments. L23 felt that something important is lost when trials become less common. A less paper-intensive way to litigate with more human interaction is preferred by many lawyers, even when it is more expensive.[160] This supports the view of some trial judges[161] and commentators[162] that trials represent better procedural justice. One could even fear that a departure from trials – with their greater procedural protections – decreases the likelihood of the court coming to the "correct" result in a particular case.[163] Trials clearly exist for a reason – being constitutionally guaranteed in criminal law[164] – and there is a fear among respondents such as L19 that young civil litigators are unlikely to ever go to trial. This aligns with Colleen Hanycz's concern that the proportionality principle leads to "more access to less justice"[165] and is summarized by L23's sensing "a desire by judges to dispose of litigation whenever possible. The civil justice system will provide an outcome, but not necessarily justice."

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157 See e.g. Jane Bailey, Jacquelyn Burkell & Graham Reynolds, "Access to Justice for All: Towards an 'Expansive Vision' of Justice and Technology" (2013) 31 Windsor YB Access Just 181; Anthony J Casey & Anthony Niblett, "Artificial Intelligence, Big Data, and the Future of Law" (2016) 66 UTLJ 429; Christopher P Naudie & Gerard J Kennedy, "Ontario Court of Appeal Divided on Permissibility of Hearings Outside Ontario in Multi-Jurisdictional Class Actions" (August 2015) 4 CALR 33; Benjamin Alarie, Anthony Niblett & Albert H Yoon, "Law in the Future" (2016) 66 UTLJ 423; Ken Chasse, "Electronic Discovery in the Criminal Court System" (2010) 14 Can Crim L Rev 111; Ken Chasse, "'Records Management Law'—A Necessary Major Field of the Practice of Law" (2015) 13 Can J L & Tech 57.

158 See e.g. The Canadian Press, "COVID-19 pandemic forces an Ontario justice system 'stuck in the 1970s' to modernize" (29 April 2020), online: *CBC News* <https://www.cbc.ca/news/canada/toronto/ontario-courts-modernize-1.5549850>.

159 *Hryniak*, *supra* note 1 at para 74.

160 See e.g. Lisus, *supra* note 6.

161 See e.g. *Hamilton*, *supra* note 71, noting the dangers of "trial in a box".

162 See e.g. Lisus, *supra* note 6; see also the comments of David Rankin in Gerard J Kennedy, "Justice for Some" *The Walrus* (November 2017) 47 [Kennedy, *Walrus*] at 49-50.

163 See e.g. Alan B Morrison, "The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System" (2011) 90 Or L Rev 993 at 1024-1025.

164 *Charter*, *supra* note 112, s 11(b).

165 Hanycz, *supra* note 6.

From the perspective of time and costs – incurred by parties and the courts – one should acknowledge that summary judgment is not a panacea. But this is not a new insight, and can be mitigated by recognizing, as noted above, that certain types of claims lend themselves to summary judgment more than others. Many other respondents viewed summary judgment as an effective costs-savings tool if used appropriately. It may be that the respondents who emphasized costs of inappropriately sought summary judgment have simply encountered those costs more often than typical.

It is difficult to compare the possible sacrifice to procedural justice as trials become rarer, especially when compared to the more objectively quantifiable effects on time and cost.[166] But it should be acknowledged that this loss is likely to occur as more summary procedures are used. Most respondents seem to feel this trade-off is worth it – at least in many cases. However, a cautionary flag should be planted regarding unintended consequences[167] as we depart from an institution – the trial – that has been viewed as the paradigm of dispute resolution in the common law world for so long. In the meantime, one should acknowledge that the benefits of *Hryniak* and the 2010 Amendments may come with costs that are not easily quantified.

D. Initial Boom Followed by a Decline?

Part IV.B set aside an issue that repeatedly came up as a reason for the limited effects of *Hryniak* and the 2010 Amendments: namely, that an impression that there was an initial boom in summary judgment motions in the immediate aftermath of *Hryniak* and the 2010 Amendments that has been followed by a lull in recent years as the Superior Court and Court of Appeal have been more reluctant to grant summary judgment. Two respondents[168] attributed this to the Court of Appeal holding that pre-*Hryniak* rationales for restricting partial summary judgment apply with equal force post-*Hryniak*.[169] However, other respondents implied that this is not the only reason that lower courts have been more reluctant to grant summary judgment.[170]

More research, akin to MacKenzie's analysis of 2004-2015 summary judgment motions,[171] would be required to confirm the scope of this phenomenon. L19 suggested that it is particularly prevalent in Hamilton. But the impressions suggest a waning interest in summary judgment except in clear cases. This could be the result of the experience with summary judgment indicating that not all claims are suited for summary judgment. This would be a positive development with only cases likely to have summary judgment granted proceeding down that route. In this vein, not all respondents viewed courts' reticence as negative – L16 explicitly noted that lower courts were "appropriately" skeptical of their powers. This is putting aside the above-noted view of a vocal minority that the move towards summary judgment is *per se* a negative development. But many other respondents (*e.g.*, L39, L19, L28) viewed courts as being

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166 Grégoire Webber has made an argument in a similar vein, that Parliament should be able to criminalize assisted dying to preserve the sanctity of life, utilitarian concerns about mitigating suffering notwithstanding: "The Remaking of the Constitution of Canada" (1 July 2015), online (blog): *UK Constitutional Law Association* <https://ukconstitutionallaw.org/2015/07/01/gregoire-webber-the-remaking-of-the-constitution-of-canada/>.

167 A concern expressed by Edmund Burke that is essential to conservative thought: see Edmund Burke, *Reflections on the Revolution in France* (New York: Oxford University Press, 1999 [1790]) at 96-97.

168 L88, L09.

169 *Butera v Chown, Cairns LLP*, 2017 ONCA 783, 137 OR (3d) 561.

170 E.g. L30, L39.

171 MacKenzie, *supra* note 5.

inappropriately sheepish in recent years. It is hard to know which of these theories is correct. But it could indicate that more explicit guidance from appellate courts as to when summary judgment is appropriate is necessary, as will now be discussed.

E. Explicit Guidance More Effective than Broad Statements

Many respondents discussed summary judgment as being at the core of the 2010 Amendments' effectiveness, to the comparative exclusion of considerations of proportionality (though L90 was a notable exception in this regard) and changes to discovery rules (which two respondents suggested were ineffective[172]). Eight respondents[173] went out of their way to state that they view the broader discussion surrounding access to justice to be one of "talk", "lip service", or something to that effect. It is likely not coincidental that summary judgment reforms are represented in the seminal case of *Hryniak*. Its status as a Supreme Court of Canada decision can be viewed in this regard as a binding appellate decision that is more effective than more general statements that a "culture shift" is necessary.

This builds on previous work, suggesting that changes to procedural law have been most effective where legislation/regulations (Rule 2.1,[174] the new appellate jurisdiction legislation in British Columbia[175]) or directly applicable appellate jurisprudence (*Van Breda* on jurisdiction,[176] *Hryniak* on summary judgment[177]) have been promulgated. This is not to suggest that the consciousness-raising has not been real – respondents certainly feel it has been. Nor is it unimportant.[178] However, in and of itself, it does not appear to have been particularly effective.

This may indicate that more explicit regulatory changes and/or appellate decisions are necessary.[179] The example of document production should illustrate. This is an area where four respondents continued to believe needless expense is incurred.[180] Even though the 2010 Amendments introduced the principle of proportionality in discovery and mandated discovery plans, some respondents viewed these changes as having been ignored.[181] Lawyers' concern about being sued for malpractice if a stone is left unturned – no matter how expensive the unturning, or how unlikely it is to yield anything consequential[182] – also leads to L48's impression of "delay out of an abundance of caution". Given these impressions, a more explicit rule regarding documentary discovery may be advisable. In the Small Claims Court, for instance,

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172 L26, L31.
173 L01, L12, L18, L51, L55, L63, L84, L87.
174 Kennedy Rule 2.1, *supra* note 5.
175 Gerard J Kennedy, "Final v. Interlocutory Civil Appeals: How a Clear Distinction Became so Complicated—Its Purposes, Obfuscation and a Simple Solution?" (2020) 45(2) Queen's LJ 243 at 270, citing: RSBC 1996, c 77, s 7, as am; *Court of Appeal Rules*, BC Reg 297/2001.
176 Kennedy, "Jurisdiction", *supra* note 45 and its analysis of *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572.
177 MacKenzie, *supra* note 5.
178 Halley, *supra* note 118. *e*
179 Proposed by Lucinda Vandervort in "Access to Justice and the Public Interest in the Administration of Justice" (2012) 63 UNB LJ 125.
180 L16, L18, L25, L81.
181 L26, L31.
182 L39 had the impression that judges paradoxically berate lawyers for not covering every conceivable angle in a case, while simultaneously expressing the view that bills are too high.

documents need only be disclosed if a party is relying on them,[183] and this is deemed to be acceptable from a fairness perspective, especially as a trier of fact may draw an adverse inference if a party refuses to produce a document deemed relevant.[184] This practice, which is frequently found in civilian legal traditions and arbitration,[185] is worthy of consideration.

Having said that, there may be an understandable and deep-seated reason for the limited effects of *Hryniak*'s call for a "culture shift" compared to areas where more tailored interventions occurred: the inherent conservatism of law.[186] "Conservative" in this sense does not refer to modern right-wing politics but rather an enduring preference for the *status quo*, and the view that change should come gradually, with time to learn and absorb its unintended consequences. This view is defensible: *Jordan* is an instance where a serious change was made suddenly and quickly and appears to have had unintended negative consequences. The story is the same with respect to the expansion of discovery rights in the 1980s.[187] As such, it may be more realistic to expect change to be gradual, even when the amount of progress seems less than one would hope.

F. Uncertainty in the Law

At least six respondents, in various ways, cited uncertainty in the law as a factor that increases legal costs, even in the aftermath of *Hryniak*. This emerges in various ways, including:

- wealthy parties exploiting that uncertainty to the detriment of poorer resourced parties (L39) with this uncertainty pushing parties out of the public court system (L16);
- a lack of case law leaving parties, particularly vulnerable minorities, unable to order their affairs (L23);
- the belief that the identity of a particular judge will matter enormously in determining whether they will be amenable to summary procedures (L36); and
- practice directives differing across the province, increasing work on lawyers who need to prepare in light of modified procedures, increasing costs to clients (L25).

The uncertainty – or, at least, complexity – in the law in some of these areas may be worthwhile. Differing practice directives from one judicial district to another enable pilot projects[188] and may also be necessary

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183 *Rules of the Small Claims Court*, O Reg 258/98, Rule 18.02.

184 *Currency in Rem*, *supra* note 146.

185 See e.g. Rolf Trittmann & Boris Kasolowsky, "Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions - The Development of a European Hybrid Standard of Arbitration Proceedings" (2008) 31:1 UNSW LJ 330; Practical Law Arbitration, "Document production in international arbitration" (London: Thomson Reuters, 2019), online: <https://uk.practicallaw.thomsonreuters.com/4-382-1150?transitionType=Default&contextData=(sc.Default)&firstPage=true>.

186 Something critical scholars have noted for at least eighty years: see e.g. Moses J Aronson, "Mr Justice Stone and the Spirit of the Common Law" (1940) 25 Cornell L Rev 489 at 494.

187 Spencer, *supra* note 143.

188 See e.g. "Practice Advisory Concerning the Provincial Civil Case Management Pilot – One Judge Model" (effective 1 February 2019), online: <http://www.ontariocourts.ca/scj/practice/civil-case-management-pilot>.

given the different resources in the different judicial districts.[189] Judges need to exercise judgment,[190] especially as the pursuit of a just outcome may require a level of discretion and lack of perfect predictability.[191] And even though excessive settlement has negative consequences, settlement is, in the overwhelming majority of cases, something to be encouraged.[192] But respondents noted that these benefits come with negative consequences, all of which have been theorized before, from an underdeveloped jurisprudence (L23) to the need for lawyers to use differing procedures (L25) to the inability to reach principled resolution as parties with deep pockets exploit legal uncertainty (L39).

G. Self-Represented Litigants

At least twelve respondents[193] noted that self-represented litigants require more formalized processes, more use of court time, and greater costs needing to be incurred by the non-self-represented parties.[194] It has long been recognized that lack of access to legal counsel, leading to self-represented litigants, has negative effects for the self-represented litigant,[195] but respondents' answers suggest that these negative consequences extend to the court,[196] mediators/arbitrators,[197] and other parties to litigation.[198]

A small minority of self-represented litigants who are truly behaving vexatiously can have their claims disposed of pursuant to Rule 2.1.[199] L55 acknowledged its utility in this regard. But the threshold to use Rule 2.1 is appropriately very high[200] and it rightly does not apply to the overwhelming majority of cases with self-represented parties. Indeed, respondents such as L07 and L27 acknowledged that many self-represented litigants have genuine legal issues with the delay and expense that they cause not being their fault.

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189 For example, Toronto and Ottawa have dozens of resident judges while Kenora has only one: Helen Burnett, "Kenora left without a full-time judge" (23 April 2007), online: *The Law Times* <https://www.lawtimesnews.com/article/kenora-left-without-a-full-time-judge-8795/>.

190 As Jacob S Ziegel wrote in "Judicial Free Speech and Judicial Accountability: Striking the Right Balance" (1996) 45 UNB LJ 175 at 179, "Judges are individuals, not robots" (paraphrasing Sopinka J in John Sopinka, "Must the Judge be a Monk?" (Address to Canadian Bar Association, 3 March, 1989)).

191 Julia Black, "Critical Reflections on Regulation", CARR Discussion Papers (DP 4), Centre for Analysis of Risk and Regulation, London School of Economics and Political Science, London, UK, cited in, *inter alia*, Dimity Kingsford Smith, "What Is Regulation – A Reply to Julia Black" (2002) 27 Australian J of Leg Philosophy 37 at 42; Michael Sobkin, "Residual Discretion: The Concept of Forum of Necessity Under the *Court Jurisdiction and Proceedings Transfer Act*" (2018) 55:1 Osgoode Hall LJ 203 at 205, arguing for a "forum of necessity" in jurisdictional disputes, despite recognizing that this will increase litigation.

192 See e.g. *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37, [2013] 2 SCR 623 at para 11, per Abella J, citing Callaghan ACJHC (as he was then) in *Sparling v Southam Inc* (1988), 66 OR (2d) 225 (HC).

193 L47, L23, L32, L10, L25, L37, L40, L50, L53, L60, L68, L87.

194 Viewed to be the case by nine respondents: L02, L19, L23, L32, L38, L39, L47, L57, L83.

195 Macfarlane, *supra* note 52.

196 L27, L23.

197 L79.

198 L02, L19, L23, L32, L38, L39, L47, L57, L83.

199 Kennedy Rule 2.1, *supra* note 5 at 263.

200 Kennedy Rule 2.1, *ibid* at 251, citing *Scaduto v Law Society of Upper Canada*, 2015 ONCA 733, 343 OAC 87 at para 12, leave to appeal ref'd, [2015] SCCA No 488 and *Raji v Borden Ladner Gervais LLP*, 2015 ONSC 801, [2015] OJ No 307 (SCJ).

There is no easy solution to this problem apart from attempting to deliver legal services more accessibly – another important element of access to justice conversations.[201] Though the lack of access to legal representation could also potentially be addressed by further government funding of the civil justice system: the subject of the next subsection.

H. Government Funding

When discussing potential solutions to the access to justice crisis, at least seven lawyers[202] recommended some combination of additional government funding, legal aid in civil cases, and/or an expanded role for and more funding of PBO. This is in line with the view that civil litigation, though ostensibly dealing with "private" disputes, actually performs an important public service. As noted in Part I, this includes vindicating legal wrongs and developing democratic norms. It can also prevent health and/or social problems that end up costing the public purse in other ways.[203] As such, not only would more government funding assist in facilitating access to justice, but it would also further valuable public purposes.[204]

At present time, however, Ontario's provincial government appears reluctant to invest more in this area, at least prior to the COVID-19 pandemic.[205] And to be fair, the public value of civil litigation also exists on a spectrum, from cases of great constitutional importance[206] to developing an important new common law doctrine[207] to vindication of legal rights on an individual scale but where a wrongdoer needs to have an example made of it[208] to lawsuits brought as a matter of business practice[209] to petty disputes that should not be the concern of the justice system.[210] Gillian Hadfield and Thomas Cromwell have also convincingly questioned the extent to which inadequate government funding is a primary access to justice obstacle, without denying that it is one.[211] So as valuable as further funding and support from the government may be, it is not likely to be forthcoming as a total solution – and may not always be desirable or effective in any event. That does not mean that it should not be pushed for in appropriate cases.

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201 See e.g. Hadfield, *supra* note 18.

202 L39, L37, L84, L77, L14, L75, L27.

203 See e.g. Farrow 2016, *supra* note 14 at 166-167; Sossin, *supra* note 60.

204 An example is the Court Challenges Project to support certain constitutional challenges: Gerard J Kennedy & Lorne Sossin, "Justiciability, Access to Justice & the Development of Constitutional Law in Canada" (2017) 45(4) FLR 707 at 716.

205 See Nicole Brockback, "Free civil legal service to close, despite study showing it saves Ontario $5M a year" (7 November 2018), online: *CBC News* <www.cbc.ca/news/canada/toronto/free-civil-legal-service-to-close-despite-study-showing-it-saves-ontario-5m-a-year-1.4894963>.

206 See e.g. the discussion of the law of costs in *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 at paras 133-146.

207 Such as a general duty of good faith, found in *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 494.

208 See e.g. *Whiten v Pilot Insurance*, 2002 SCC 18, [2002] 1 SCR 59.

209 The construction industry's litigiousness jumps to mind: see e.g. R Bruce Reynolds, "The Impact of the Global Financial Crisis on the Construction Sector and the Construction Bar: Version 2.0" (2011) J Can Construction Law 1 at 23.

210 See e.g. *Morland-Jones v Taerk*, 2014 ONSC 3061, 2014 CarswellOnt 6612 (SCJ).

211 The Honourable Thomas A Cromwell & Siena Antsis, "The Legal Services Gap: Access to Justice as a Regulatory Issue" (2016) 42 Queen's LJ 1 at 3-4; Hadfield, *supra* note 18 at 43.

V. CONCLUSION

The 2010 Amendments and *Hryniak* have not solved the challenges of access to civil justice in Ontario.[212] Some lawyers criticized *Hryniak* and the 2010 Amendments directly as counterproductive. More often, however, respondents cited a reluctance to change, misaligned incentives, and new additional sources of litigation expense as reasons for the continued barriers to access to civil justice. But there are still signs of hope: surveying lawyers suggests that some cases are being resolved more efficiently in recent years. There is also a genuine awareness of the need to facilitate access to justice, which lawyers such as L15 consider to not have been present earlier in their careers. This empirical, survey-based work illustrates how lawyers – and, through them, their clients – have experienced recent amendments to procedural law in Ontario. This qualitative work captures the types of experiences and nuanced impressions that can be missed through merely reading case law or assessing rule changes from a theoretical perspective.

What is the upshot of such conclusions? The profession must recognize that access to justice is not a problem that admits of a single solution. After all, so many of the anecdotes that the lawyers shared in response to the survey questions revealed openness and attraction to many hypothesized solutions to the access to justice crisis. One hopes that this sharing of experiences will lead to action on all of these avenues.

APPENDIX A – SURVEY QUESTIONS

1. Has the Supreme Court's decision in *Hryniak v Mauldin* affected your approach to and/or experience in practice in recent years (since 2014)?

    a) Yes
    b) No
    c) Not sure
    d) What is *Hryniak v Mauldin*?

2. Explain your answer to Question 1.

3. Have the 2010 amendments to the Ontario *Rules of Civil Procedure* affected your approach to and/or experience in practice in recent years?

    a) Yes
    b) No
    c) Not sure

[212] This should be unsurprising, as this problem dates to the time of Dickens and was notably described in *Bleak House*. As noted in Kennedy Dissertation, *supra* note 125 at 34, this has been noticed before: see e.g. The Honourable J Roderick Barr, QC, "The Cost of Litigation: *Bleak House* in the 1990s" (March 1993) 12 Advocates' Soc J No 1, 12; William Kaplan, QC, "The Derivative Action: A Shareholder's 'Bleak House'" (2003) 36 UBC L Rev 443; Kennedy *Walrus*, *supra* note 162 at 48; Gorsuch, *supra* note 143 at ~ 3:49-4:14.

d) What amendments?

4. Explain your answer to Question 3.

5. Has there been a noticeable change in how quickly you have resolved civil cases in recent years (since 2010)?

    a) Yes – they are being resolved more quickly
    b) Yes – they are taking longer to resolve
    c) No change
    d) Not sure

6. Explain your answer to Question 5.

7. Adjusting for inflation, has there been a noticeable change in the financial expense (in terms of legal fees and disbursements) required to resolve civil actions in recent years (since 2010)?

    a) Yes – even adjusting for inflation, litigation is becoming more expensive
    b) Yes – adjusting for inflation, litigation is becoming less expensive
    c) No change
    d) Not sure

8. Explain your answer to Question 7.

9. Has there been an increase or decrease in the rate of settlement in recent years (since 2010)?

    a) Increase
    b) Decrease
    c) No change
    d) Not sure

10. Explain your answer to Question 9.

11. Has there been an increase or decrease in the quality of settlements and/or clients' satisfaction from settlements in recent years (since 2010)?

    a) Increase
    b) Decrease
    c) No change
    d) Not sure

12. Explain your answer to Question 11.

13. Has there been an increase or decrease in the use of alternative dispute resolution in recent years (since 2010)?

    a) Increase
    b) Decrease
    c) No change
    d) Not sure

14. Explain your answer to Question 13.

15. Do your answers to the foregoing questions change depending on whether a self-represented litigant is involved in a proceeding?

    a) Yes
    b) No
    c) Not sure

16. Explain your answer to Question 15

17. Do your answers to the foregoing questions change depending on the demographic status of the litigants involved (*e.g.*, their race and/or gender)?

    a) Yes
    b) No
    c) Not sure

18. Explain your answer to Question 17

19. Do you believe that the Supreme Court of Canada's 2016 decision in *R v Jordan* has had any effects on access to civil justice?

    a) Yes – *Jordan* has helped access to civil justice
    b) Yes – *Jordan* has hurt access to civil justice
    c) No – *Jordan* has had no effects on access to civil justice
    d) Not sure
    e) I do not know what *Jordan* is

20. Explain your answer to Question 19.

21. Do you believe a "culture shift" has been occurring this decade in the conduct of civil litigation oriented towards promoting access to justice?

    a) Yes
    b) No
    c) Not sure

22. Explain your answer to Question 21. If you answered "Yes", please explain what the culture shift looks like. If you answered "No", please explain whether you believe there *should* be a culture shift and what it should look like.

23. Do you self-identify as:

    a) Male
    b) Female
    c) Other
    d) Prefer Not to Answer

24. Are you a member of a racialized community?

    a) Yes
    b) No
    c) Prefer Not to Answer

25. Do you self-identify as a member of the LGBT+ community?

    a) Yes
    b) No
    c) Prefer Not to Answer

26. Do you identify as a person with a disability?

    a) Yes
    b) No
    c) Prefer Not to Answer

27. Do you identify as an Indigenous Canadian?

    a) Yes
    b) No
    c) Prefer Not to Answer

28. When were you called to the bar?

APPENDIX B – RESPONDENTS' ANSWERS BY YEAR OF CALL

QUESTION	**GROUP**	**ANSWERS**			
1 (*Hryniak*'s Effects)	TOTAL	48.9% Yes	28.9% No	2.2% What is *Hryniak*?	20% Not Sure
	Pre-2010	53.3%% Yes	35.6% No	0 What is *Hryniak*?	11.1% Not Sure
	Post-2010	42.9%Yes	23.8% No	4.8% What is *Hryniak*?	28.6% Not Sure
3 (2010 Amendments' Effects)	TOTAL	33.3% Yes	48.9% No	1.1% What Amendments?	16.7% Not Sure
	Pre-2010	48.9% Yes	46.7% No	0 What Amendments	4.4% Not Sure
	Post-2010	16.7% Yes	52.4% No	2.4% What Amendments?	28.6% Not Sure
5 (Length of Litigation)	TOTAL	12.2% Longer	4.4% Quicker	52.2% No Change	31.1% Not Sure
	Pre-2010	24.4% Longer	4.4% Quicker	57.8% No Change	13.3% Not Sure
	Post-2010	4.8% Longer	0 Quicker	47.6% No Change	47.6% Not Sure
7 (Cost of Litigation)	TOTAL	38.9% More	2.2% Less	20% No Change	38.9% Not Sure
	Pre-2010	53.3% More	4.4% Less	24.4% No Change	17.8% Not Sure
	Post-2010	23.8% More	0 Less	14.3% No Change	61.9% Not Sure
9 (Rate of Settlement)	TOTAL	8.9% Increase	6.7% Decrease	40% No Change	44.4% Not Sure
	Pre-2010	11.1% Increase	6.7% Decrease	48.9% No Change	33.3% Not Sure
	Post-2010	7.1% Increase	7.1% Decrease	31% No Change	54.8% Not Sure
11 (Satisfaction with Settlement)	TOTAL	6.7% Increase	5.6% Decrease	48.3% No Change	39.3% Not Sure
	Pre-2010	6.7% Increase	8.9% Decrease	60% No Change	24.4% Not Sure
	Post-2010	4.8% Increase	2.4% Decrease	38.1% No Change	54.8% Not Sure

QUESTION	**GROUP**	**ANSWERS**				
13 (Use of ADR)	TOTAL	26.7% Increase	2.2% Decrease	38.9% No Change	32.2% Not Sure	
	Pre-2010	31.1% Increase	4.4% Decrease	51.1% No Change	13.3% Not Sure	
	Post-2010	21.4% Increase	0 Decrease	26.2% No Change	52.4% Not Sure	
15 (Relevance of a Self-Rep)	TOTAL	34.4% Yes	33.3% No	32.2% Not Sure		
	Pre-2010	33.3% Yes	40% No	26.7% Not Sure		
	Post-2010	35.7% Yes	28.6% No	35.7% Not Sure		
17 (Relevance of Litigants' Demographics)	TOTAL	9.1% Yes	55.7% No	35.2% Not Sure		
	Pre-2010	13.3% Yes	68.9% No	17.8% Not Sure		
	Post-2010	5% Yes	45% No	50% Not Sure		
19 (Effects of *Jordan*)	TOTAL	3.3% Helped	50% Hurt	7.8% No Effect	7.8% Unaware of *Jordan*	31.1% Not Sure
	Pre-2010	4.4% Helped	62.2% Hurt	8.9% No Effect	2.2% Unaware of *Jordan*	22.2% Not Sure
	Post-2010	2.4% Helped	40.5% Hurt	7.1% No Effect	9.5% Unaware of *Jordan*	40.5% Not Sure
21 (Presence of Culture Shift)	TOTAL	28.9% Yes	46.7% No	24.4% Not Sure		
	Pre-2010	24.4% Yes	53.3% No	22.2% Not Sure		
	Post-2010	33.3% Yes	40.5% No	26.2% Not Sure		

APPENDIX C – RESPONDENTS' ANSWERS BY GENDER

QUESTION	**GROUP**	**ANSWERS**			
1 (*Hryniak*'s Effects)	TOTAL	48.9% Yes	28.9% No	2.2% What is *Hryniak*?	20% Not Sure
	Male	54.9% Yes	25.5% No	2% What is *Hryniak*	17.6% Not Sure
	Female	38.9% Yes	36.1% No	0	25% Not Sure
3 (2010 Amendments' Effects)	TOTAL	33.3% Yes	48.9% No	1.1% What Amendments?	16.7% Not Sure
	Male	33.3% Yes	51% No	2.4% What Amendments?	13.7% Not Sure
	Female	33.3% Yes	44.4% No	0	22.2% Not Sure
5 (Length of Litigation)	TOTAL	12.2% Longer	4.4% Quicker	52.2% No Change	31.1% Not Sure
	Male	15.7% Longer	2.0% Quicker	56.9% No Change	25.5% Not Sure
	Female	8.3% Longer	5.6% Quicker	47.2% No Change	38.9% Not Sure
7 (Cost of Litigation)	TOTAL	38.9% More	2.2% Less	20% No Change	38.9% Not Sure
	Male	45.1% More	3.9% Less	23.5% No Change	27.4% Not Sure
	Female	30.6% More	0 Less	16.7% No Change	52.7% Not Sure
9 (Rate of Settlement)	TOTAL	8.9% Increase	6.7% Decrease	40% No Change	44.4% Not Sure
	Male	5.9% Increase	5.9% Decrease	41.1% No Change	47.1% Not Sure
	Female	13.9% Increase	8.3% Decrease	38.9% No Change	38.9% Not Sure
11 (Satisfaction with Settlement)	TOTAL	6.7% Increase	5.6% Decrease	48.3% No Change	39.3% Not Sure
	Male	2% Increase	6% Decrease	52% No Change	40% Not Sure
	Female	13.9% Increase	5.6% Decrease	44.4% No Change	36.1% Not Sure

QUESTION	**GROUP**	**ANSWERS**				
13 (Use of ADR)	TOTAL	26.7% Increase	2.2% Decrease	38.9% No Change	32.2% Not Sure	
	Male	23.5% Increase	2% Decrease	39.2% No Change	33.3% Not Sure	
	Female	33.3% Increase	0 Decrease	38.9% No Change	27.8% Not Sure	
15 (Relevance of a Self-Rep)	TOTAL	34.4% Yes	33.3% No	32.2% Not Sure		
	Male	33.3% Yes	39.2% No	27.5% Not Sure		
	Female	36.1% Yes	25% No	38.9% Not Sure		
17 (Relevance of Litigants' Demographics)	TOTAL	9.1% Yes	55.7% No	35.2% Not Sure		
	Male	6.3% Yes	62.5% No	31.2% Not Sure		
	Female	13.9% Yes	50% No	36.1% Not Sure		
19 (Effects of *Jordan*)	TOTAL	3.3% Helped	50% Hurt	7.8% No Effect	7.8% Unaware of *Jordan*	31.1% Not Sure
	Male	5.8% Helped	56.9% Hurt	9.8% No Effect	2.0% Unaware of *Jordan*	25.5% Not Sure
	Female	0 Helped	44.4% Hurt	2.8% No Effect	16.7% Unaware of *Jordan*	36.1% Not Sure
21 (Presence of Culture Shift)	TOTAL	28.9% Yes	46.7% No	24.4% Not Sure		
	Male	27.4% Yes	45.1% No	27.4% Not Sure		
	Female	33.3% Yes	44.4% No	22.2% Not Sure		

APPENDIX D – RESPONDENTS' ANSWERS BY RACE

QUESTION	**GROUP**	**ANSWERS**			
1 (*Hryniak*'s Effects)	TOTAL	48.9% Yes	28.9% No	2.2% What is *Hryniak*?	20% Not Sure
	Racialized	50% Yes	14.3% No	0 What is *Hryniak*?	35.7% Not Sure
	Non-Racialized	46.5% Yes	33.8% No	1.4% What is *Hryniak*?	18.3% Not Sure
3 (2010 Amendments' Effects)	TOTAL	33.3% Yes	48.9% No	1.1% What Amendments?	16.7% Not Sure
	Racialized	42.9% Yes	28.6% No	0	28.6% Not Sure
	Non-Racialized	31% Yes	52.1% No	1.4% What Amendments?	15.5% Not Sure
5 (Length of Litigation)	TOTAL	12.2% Longer	4.4% Quicker	52.2% No Change	31.1% Not Sure
	Racialized	14.3% Longer	0 Quicker	28.6% No Change	57.1% Not Sure
	Non-Racialized	12.7% Longer	1.4% Quicker	59.2% No Change	26.8% Not Sure
7 (Cost of Litigation)	TOTAL	38.9% More	2.2% Less	20% No Change	38.9% Not Sure
	Racialized	35.7% More	0 Less	14.3% No Change	50% Not Sure
	Non-Racialized	40.8% More	1.4% Less	22.5% No Change	35.2% Not Sure
9 (Rate of Settlement)	TOTAL	8.9% Increase	6.7% Decrease	40% No Change	44.4% Not Sure
	Racialized	14.3% Increase	14.3% Decrease	28.6% No Change	42.9% Not Sure
	Non-Racialized	7.0% Increase	5.6% Decrease	42.7% No Change	42.7% Not Sure
11 (Satisfaction with Settlement)	TOTAL	6.7% Increase	5.6% Decrease	48.3% No Change	39.3% Not Sure
	Racialized	0	15.4% Decrease	38.5% No Change	46.2% Not Sure
	Non-Racialized	5.6% Increase	4.2% Decrease	52.1% No Change	38% Not Sure

QUESTION	**GROUP**	**ANSWERS**				
13 (Use of ADR)	TOTAL	26.7% Increase	2.2% Decrease	38.9% No Change	32.2% Not Sure	
	Racialized	28.6% Increase	0 Decrease	21.4% No Change	50% Not Sure	
	Non-Racialized	28.2% Increase	2.8% Decrease	42.3% No Change	26.8% Not Sure	
15 (Relevance of a Self-Rep)	TOTAL	34.4% Yes	33.3% No	32.2% Not Sure		
	Racialized	35.7% Yes	7.1% No	57.1% Not Sure		
	Non-Racialized	35.2% Yes	36.6% No	28.2% Not Sure		
17 (Relevance of Litigants' Demographics)	TOTAL	9.1% Yes	55.7% No	35.2% Not Sure		
	Racialized	28.6% Yes	21.4% No	50% Not Sure		
	Non-Racialized	5.8% Yes	63.8% No	30.4% Not Sure		
19 (Effects of *Jordan*)	TOTAL	3.3% Helped	50% Hurt	7.8% No Effect	7.8% Unaware of *Jordan*	31.1% Not Sure
	Racialized	14.3% Helped	42.9% Hurt	7.1% No Effect	7.1% Unaware of *Jordan*	28.6% Not Sure
	Non-Racialized	1.4% Helped	54.9% Hurt	5.6% No Effect	8.5% Unaware of *Jordan*	29.6% Not Sure
21 (Presence of Culture Shift)	TOTAL	28.9% Yes	46.7% No	24.4% Not Sure		
	Racialized	21.4% Yes	42.9% No	35.7% Not Sure		
	Non-Racialized	31.0% Yes	45.1% No	23.9% Not Sure		