LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

BALANCING ACCESSIBILITY AND PROCEDURAL PROTECTION IN A SMALL ESTATES PROBATE PROCEDURE IN ONTARIO

Simplified Procedures for the Administration of Small Estates

January 2015

Commissioned by the Law Commission of Ontario

Prepared by

Christine M. Hakim

The LCO commissioned this paper to provide background research for its Simplified Procedures for the Administration of Small Estates project. The views expressed in this paper do not necessarily reflect the views of the LCO

TABLE OF CONTENTS

I. INTRODUCTION……………………………………………………………………………………………………1

II. PART ONE: THE PURPOSE OF PROBATE………………………………………………………………………3

A. A Brief History of Probate………………………………………………………………………………………3

B. The Policy Rationales Behind Modern Estate Administration……………………………………………4

C. Requirements for the Current Probate Application and How They Compare Across Jurisdictions……………………………………………………………………………………………………8

1. Basic Information, Estate Representative's Oath, and Affidavit of Execution……………………8

2. Affidavit of Execution………………………………………………………………………………………9

3. Notice of Application………………………………………………………………………………………9

4. Inventory or Valuation of the Estate……………………………………………………………………10

5. Renunciations and Consents……………………………………………………………………………13

6. Security or Bond……………………………………………………………………………………………14

III. PART TWO: KEY PRINCIPLES………………………………………………………………………………15

A. What is Accessibility?……………………………………………………………………………………15

B. The Key Principle of Proportionality……………………………………………………………………17

C. Why Proportionality is Important for Accessibility……………………………………………………21

D. Why Accessibility and Proportionality Matter in the Probate Application Procedure………..22

E. What Barriers do Ontarians Face in Accessing the Current Probate Application Procedure?……………………………………………………………………………………………………25

1. Cost and Delay……………………………………………………………………………………………25

2. Complexity…………………………………………………………………………………………………27

3. The Perception of Complexity……………………………………………………………………………29

4. Physical Accessibility……30

F. Are There Risks to Increased Accessibility?……32

IV. PART THREE: EXAMINING PROPORTIONAL PROCEDURES……37

A. Where Have Accessibility and Procedure Been Effectively Balanced?……37

1. Small Claims Court……38

2. Simplified Procedure – Rule 76 of the *Rules of Civil Procedure*……41

3. The Social Justice Tribunals Ontario……45

4. The Landlord and Tenant Board……51

5.The Land Titles Registry and Electronic Land Registration System……57

6. The *Children's Law Reform Act*……64

7. Other Processes Not Considered Here……65

B. Is There a Difference Between Adversarial and Non-Adversarial Processes?......66

V. PART FOUR: CONTRASTING THE PROBATE SYSTEM WITH CONTINUING POWERS OF ATTORNEY FOR PROPERTY……68

A. Functions and Features of the Continuing Power of Attorney for Property ……69

B. Contrasting the Functions and Features of an Attorney With Those of an Estate Representative ……74

C. Contrasting the Risk of Misuse and Fraud in the Two Regimes……76

D. What Can the Differences Between the POA Regime and the Probate Regime Tell Us?....78

VI. PART FIVE: SUGGESTIONS FOR CHANGE……81

A. Streamlining and Simplifying the Procedure……82

B. Simplification of the Forms and Their Delivery……84

C. Encouraging Discretion and Flexibility……91

D. Increasing Physical Accessibility……………………………………………………………………………………94

E. Providing More, and Better, Legal Self-Help Services and Materials………………………………..96

F. Moving to a Non-Court Model……………………………………………………………………………………98

G. Creation of an Electronic Document Generator and Registration System………………………102

H. Using the Suggestions for Change Together…………………………………………………………….107

VII. CONCLUSION………………………………………………………………………………………………….109

VIII. END NOTES…………………………………………………………………………………………………….111

I. INTRODUCTION

Ontario currently has one common procedural system through which estate representatives apply for a grant of probate, which in Ontario is called a Certificate of Appointment of Estate Trustee (hereinafter a "COA"), regardless of the value or complexity of the deceased's estate. This paper seeks to contribute to the Law Commission of Ontario (the "LCO")'s examination of whether Ontario should adopt a simplified probate application procedure for estates under a certain value. The goal of such a simplified probate procedure would be to increase the average Ontarian's ability to access the probate application procedure. This paper specifically seeks to understand whether the desire for increased accessibility can be balanced with the procedural protections that the current probate application procedure provides.

This paper will begin with a brief overview of the history of the probate process, and looks at the requirements of the current probate application procedure in Ontario, so as to better understand any potential suggestions for change. It will also discuss which of the procedural requirements are common in other jurisdictions in Canada, in order to understand if there are any that are unique to Ontario. In Part Two, this paper will discuss the foundational principles of accessibility and proportionality that have guided the research. It will discuss why accessibility is important for a probate application procedure. Using accessibility research generally, as well as the literature surrounding probate procedure reform in other jurisdictions, it will extrapolate regarding some of the barriers Ontarians currently face in accessing the probate application procedure. It will then draw conclusions about how, in general, a simplified probate application procedure may increase accessibility. Finally, Part Two will address whether

or not there are any risks associated with increasing accessibility through a simplified probate application procedure.

Part Three will look more closely at some examples of processes and procedures that have already undertaken the balancing between accessibility and procedural protection, in order to look for lessons and suggestions for a simplified probate application procedure. Specifically, this paper will look at Small Claims Court, Ontario's Simplified Procedure for civil litigation in Rule 76 of the *Rules of Civil Procedure*, the Social Justice Tribunals Ontario generally, as well as the Landlord and Tenant Board specifically, the Ontario Land Titles Registry and the Electronic Land Registration System (E-LRS), and finally, the *Children's Law Reform Act*. Part Three will draw some conclusions, from these examples, regarding ways forward in designing a simplified probate application procedure in Ontario.

In Part Four, this paper will compare the requirements in the current probate application procedure with the requirements involved in becoming a grantor's attorney under a Continuing Power of Attorney for Property, in order to contrast the risks involved in probate with the risks involved in granting an attorney the ability to manage the entirety of one's property. It will suggest that the financial risks, and risk for fraud, inherent in having an attorney may be greater than the risks associated with the administration of one's estate, yet the procedural rigour required for the estate representative to obtain access and control of the estate is disproportionate to this increased risk.

Finally, in Part Five, this paper will make some specific recommendations for simplification of the probate application procedure in Ontario. First, this paper will suggest that Ontario simplify the probate application forms, and streamline the process of creating and

serving those forms on the necessary parties. Specifically, this paper will suggest that a simplified probate application could include an altered procedure for the Notice of Application that is served on beneficiaries, by eliminating the separate Notice form in Ontario and instead serving beneficiaries with a copy of the Application for a Certificate of Appointment. While this suggestion is aimed at a simplified probate application procedure, it could, in theory, be useful for all probate applications, regardless of value. Secondly, and more specifically for this project, this paper will suggest that Ontario develop an online, electronic probate application registry or, at a minimum, an online, electronic probate application document generator for small value estates, similar to the model currently in use in New York State.

II. PART ONE: THE PURPOSE OF PROBATE

A. A Brief History of Probate

It is important to understand the origins of probate and how it developed in order to properly situate future changes in their historical context. Without this, we are unable to understand what functions probate serves and whether we need to retain, alter, or eliminate them in the search for a procedure that remains robust, but is more easily accessible for Ontarians today.

Rules and laws about probating a deceased's estate have existed, in some form, since at least the Middle Ages in England. Estates used to be dealt with under the authority of the Church.[i] A special ecclesiastical office was created to administer the affairs of a person who died without a will, and to appoint someone to deal with the estate of persons who died testate.[ii] The biggest difference between the functions and powers of an executor (of a testate estate) and an administrator (of an intestate estate), whose role was performed by a church

official, was that executors could sue or be sued in the name of the deceased, whereas administrators could not[iii]. This suggests, as will be seen later, that being able to represent the deceased in legal disputes may have been, and may remain, a defining function of the office of an estate representative. Over time, the rules surrounding each of these offices merged, such that the administration of an estate, whether testate or intestate, came to have common procedures and regulations.[iv] Eventually, an Ecclesiastical Court emerged, with a dedicated Ecclesiastical Judge given special powers relating to the administration of estates. The Court of Probate in England, established in 1857, is the successor of that Ecclesiastical Court and the ancestor of modern-day probate courts.[v]

In Ontario, the development of probate law varied from England in the early years of Upper Canada. A Court of Probate was established in Ontario as early as 1793, with responsibility for the granting of probate or administration to an estate representative. However, Ontario had no courts of equity. Therefore, no equitable doctrines were available for estate matters until the establishment of the Court of Chancery in 1837.[vi] Over the years, Ontario's legislation has been updated to grant estate representatives similar, if not the same, powers in Ontario as exist in England.[vii] Ontario's Surrogate Court, which existed until 1989, was founded on the civil law courts in England.[viii]

B. The Policy Rationales Behind Modern Estate Administration

The roles and functions of the modern estate representative have evolved as the complexities of modern estates, and the legislation that governs them, have grown. The policy rationales for probate in its current form have been thoroughly discussed in the LCO's Consultation Paper for this project[ix] and so will only be addressed very briefly here.

The over-arching rationale behind probating estates seems to be safeguarding the estate against fraud and mismanagement. Whether by way of an unsanctioned representative, by way of falsely reporting or mishandling estate assets, or by probating a testamentary document other than the true last will of the deceased, the rationale behind estate administration today is to protect the deceased's estate from being mishandled, wasted, or otherwise misused.[x] While protection of a beneficiary's entitlements plays a significant role, the rationales of probate and the functions of the administrator are also designed to ensure that proper procedure in the administration is followed, and that the estate is adequately protected and distributed according to the testator's wishes (or, failing those, according to his or her legal and moral obligations).

Probate also serves a protective function for the estate representative. Estate representatives can incur much liability in that role. A COA ensures that they are not at risk from decisions or actions taken by other persons. That is, having a COA confirms their appointment as the estate representative and protects their authority to act.[xi] It insulates them from claims that they do not have the proper authority to act as that representative, or from liability for actions taken by others who may claim to have that authority.[xii]

It also insulates the estate representative from liability for acts undertaken with a COA if that will is later set aside. For example, if an estate representative obtains probate of a will and begins acting as the estate representative, and later a subsequent will is discovered, the estate representative is not liable for the dispositions or acts they undertook while under the authority of the original grant of probate. Without a grant, the estate representative could be made liable for such actions. As such, the grant itself protects them from that liability.[xiii]

Finally, the grant of probate is required to start the limitation period for certain claims against the estate. The ability to make a dependant's relief claim, or spousal claim for property, is generally subject to a limitation period, which begins to run from the date of the grant of probate. If an estate representative does not obtain a grant of probate, the ability to make such claims against the estate never expires. This leaves the estate representative, and the estate, at further risk for liability.[xiv]

As well, the COA serves several practical functions for estate representatives and a protective function for other institutions. First, it is often required before estate representatives can access, or exchange, confidential information about the deceased. Financial institutions, such as banks and credit unions, public corporations, and government agencies may not be willing to disclose confidential or personal information about the deceased, or accept or receive confidential information about the deceased, to or from any person who does not have a COA.[xv] The policy rationale behind this is clear: institutions in receipt or custody of personal, confidential information have a legal responsibility to respect privacy rights by not disclosing or sharing that information with the public. Furthermore, the institutions risk liability if the person they release information to, or transfer money or other assets to in the name of the estate, is not actually the authorized estate representative.[xvi] Therefore, they must be certain that the individual with whom they are sharing that information is, in fact, the proper legal representative of the estate. Otherwise, they themselves risk incurring liability for violating privacy laws.

On a further practical note, a grant of probate is required to deal with real property. Except for circumstances between joint owners, it is not usually possible for an estate

representative to take any actions regarding real property, and have those actions registered against title, without having a grant of probate. Typically, Land Titles Offices will require a grant before allowing the estate representative to make any changes to the title.[xvii] Therefore, in any estate, of any size, that contains real property or an interest in real property, a grant of probate will be required.

Finally, a grant of probate serves the practical function of allowing the estate representative to represent the deceased, and the estate, in court. As we have seen, this historically emerged during the Middle Ages as a function of the executor and it continues to be important today. Estates often end up in front of a court for one reason or another, even in non-contentious situations; formal passing of accounts is one example. The estate representative may require further guidance from the court, or approval or an order from the court regarding any number of estate matters. The estate representative may need to continue court actions begun by the deceased before death. On the other hand, the estate may be sued or may be required to respond to an action. In any circumstance where the estate comes before the court, the estate representative will not be permitted to represent the estate in court or in legal proceedings without a grant of probate.

We can see from this discussion that a COA does perform an important protective and administrative function for the estate, and for the estate representative. Where a simplified application procedure is to be considered, it will be important that any such procedure does not nullify or otherwise hinder these functions. The policy rationales of fraud protection, estate representative protection, and privacy protection are of equal importance to large estates as to small estates, and should not be watered down based solely on dollar value. Rather, a

procedure that can simplify access to the probate system, while maintaining the robustness of the protections it engenders, should be the goal.

C. Requirements for the Current Probate Application and How They Compare Across Jurisdictions

The current probate application process in Ontario involves multiple court forms that the applicant must complete. The forms must be substantively complete, to satisfy the judge reviewing the application, and they must be formally complete, to satisfy the Estates clerk, who reviews the form, but not necessarily the substance, of the material provided. The Estates clerk is the first gatekeeper of the probate application process. He or she ensures that the applicant has filled out the forms correctly, has properly commissioned or notarized them, and has not missed any required information before the clerk will accept the application for registration.

While the forms themselves vary across Canada, the substance of the requirements, and the information the forms seek to elicit, are relatively common across the country.[xviii]

1.Basic Information and Estate Representative's Oath

All of the common-law jurisdictions require the applicant to cover the basic information such as naming the deceased, the date and place of death, and provide, if applicable, the original last will that is being probated. All jurisdictions also require details about the applicant and their relationship to the deceased.

All require some form of estate representative's oath. In some jurisdictions this is a separate form on its own, and in others it is a mandatory statement contained in the application form or executor/petitioner affidavit. It is an oath requiring the estate

representative to swear they will administer the estate faithfully, follow the law, and notify the court of any changes to the information initially provided in the application.

2. Affidavit of Execution

All jurisdictions require information about the formalities followed when the will was signed, but only the provinces require a formal affidavit from one of the witnesses detailing the procedure followed. The Affidavit of Execution[xix], as required by the Ontario *Rules of Civil Procedure*[xx] Rule 74.04(1)(c), does not need to be sworn at the time of execution of the will, but must be in included in the probate application. If one was not sworn at the time of execution, or at any subsequent time before the death of the testator, the estate representative must attempt to locate one of the witnesses to the execution of the will, and have him or her swear the Affidavit at the time of probate. If no witness can be located, or both have died, the estate representative may be asked to provide "such other evidence of due execution as the court may require".[xxi]

In the northern territories, this is not an absolute requirement for an application for probate to be submitted to court.[xxii]

3. Notice of Application

All jurisdictions, except Manitoba[xxiii], require the applicant to service notice on the estate beneficiaries of the application. In almost all jurisdictions, notice is required before the application for probate can be completed and accepted for registration. The exception is Nova Scotia, which requires the estate representative to serve notice on the beneficiaries within 30 days after the grant of probate has been given,[xxiv] with proof of service to be filed within 60 days of the date of the grant.[xxv]

There is a wide variety in the content of these Notices. Some jurisdictions, like the Yukon[xxvi] and Prince Edward Island[xxvii] simply require a notice detailing that the applicant is applying, or in what county. Some, like Ontario[xxviii] require a listing of all the beneficiaries and those entitled to the estate, and all other parties who are receiving notice. Some, like the Yukon[xxix], Alberta[xxx], and Nova Scotia[xxxi], require a copy of the will to be included for all beneficiaries, while in other jurisdictions, as in Ontario, only the relevant portion of the will or no will at all need be included.

The Notice of Application serves an important function in alerting beneficiaries to their entitlement. This acts as an important check on the power of estate representatives, as beneficiaries often fulfill the function of overseeing how the estate representative is managing the estate. It also ensures that the COA is granted to the person with the correct entitlement to apply, especially in circumstances where there is no will. All jurisdictions that require a notice of application therefore also require the applicant to swear in an affidavit, or otherwise provide proof to the Court, that they have provided the required notice to all the affected beneficiaries and/or entitled parties.

4. Inventory or Valuation of the Estate

All jurisdictions require some calculation of the value of the deceased's estate, although the level of detail required, and the timing of this disclosure to the court, varies across the country. Value is used as a threshold mechanism for determining eligibility for any simplified application procedure that may exist, for calculating application fees, and for calculating estate administration tax in jurisdictions where such a tax exists. Typically, the value calculation does not include assets passing by way of joint ownership with right of survivorship, or insurance

proceeds or other registered plans that have been specifically designated or assigned to a named beneficiary.

In Ontario,[xxxii] this is a simple valuation of the deceased's assets, less only encumbrances secured by land, making the values of estates appear large even where there may be significant debt or other financial issues that may reduce the actual net value of the estate.[xxxiii] This calculation exists in the other provinces as well. However, in the northern territories,[xxxiv] the value calculation is net all liabilities, and the court fees associated with the probate application are based on the net value of the estate. This presents a more accurate picture of the estate, as it takes into account all the financial issues at play. Governments in jurisdictions where there is a probate or estate administration tax may find this net calculation undesirable, as it would reduce the amount of tax revenue collected.

Ontario requires a short-form valuation in Form 74.4, while other provinces such as Saskatchewan,[xxxv] the Yukon,[xxxvi] and Manitoba[xxxvii] require a more complete inventory of the estate and valuation of each individual asset or liability listed. This is a more accurate reflection of the size and complexity of an estate and also more accurately reflects an estate representative's duty to properly inventory and value the estate. It can also serve as a basis for any future passing of accounts that may be required, and ensures that both the estate representative and any other interested person or party is satisfied with the calculus of the estate value and how the estate representative arrived at such a value.

However, the disadvantage of such an inventory is that it is more complex and more time-consuming for an estate representative to prepare. In my practical experience, it can be a lengthy proposition to ascertain all of a deceased's assets and liabilities, and obtain valuations

of them. If disclosure from financial institutions is required for such valuation to occur, or where the deceased's estate may require valuations of stock, corporate shares or personal property, or if the estate representative has low financial literacy, the requirement of the valuation and/or inventory can be a bar to accessibility, as it can present too many difficulties for estate representatives to complete without professional assistance.

The required timing of the valuation or inventory can also play a role in accessibility to the probate process. In all jurisdictions except Nova Scotia, the valuation or inventory is required to form part of all probate applications. Therefore, where valuing the assets is complex or time-consuming, as described above, the estate representative is actually prevented from accessing the probate application process unless and until such a valuation is complete. If financial institutions refuse to disclose information about the deceased's assets held with those institutions without first receiving a COA, it can mean that the estate representative must, essentially, prepare a valuation and file it with the Court twice: once, with estimated values to obtain the COA, and a second time to update the Court with any new information that becomes known after the COA allows financial institutions to disclose the information in their possession.

Where the valuation plays a role in determining the associated fees and taxes, it remains integral to the probate application process. Nova Scotia solves this dilemma by requiring a short-form valuation of the estate on initial application[xxxviii], and then requiring the estate representative to submit a far more detailed inventory of the estate not later than three months after the grant of probate.[xxxix] If the value of the estate is, on inventory, less than the estimated value in the initial application, the Probate Court will issue a refund on the overpaid

estate administration taxes.[xl] This allows more time for the estate representative to solve financial disclosure issues, although even three months can be a short time-frame for obtaining disclosure from certain financial institutions. It also allows the estate representative to have more flexibility in when they choose to apply for probate, in that they do not necessarily have to wait for complete disclosure from all financial institutions in order to apply. While two required court filings, as opposed to one, can be an additional burden for estate representatives, as we have seen two filings are sometimes needed in practice, regardless. Furthermore, the benefits of requiring the two filings, in terms of accuracy, timing, and ease of information-gathering for the estate representative may outweigh the additional burden of the extra filing. It is my opinion that the two-form system in place in Nova Scotia may be easier for estate representatives to navigate, and alleviates some of the accessibility issues involved in the valuation where financial disclosure is not initially available.

5. Renunciations and/or Consents

Renunciations or consents are not required in every application for probate. However, where they are necessary, failure to obtain them can be a bar to applying. In situations where someone other than the estate representative named in the will, or the estate representative named first in the will, is applying for probate, the earlier person so named must sign a Renunciation, in Ontario called a Renunciation of Right to a Certificate of Appointment of Estate Trustee (or Succeeding Estate Trustee) with a Will.[xli] This allows the court to know that all the required people have been notified of the death, demonstrates that the hierarchy of named representatives has been followed, and provides some confirmation that the correct person is

applying to be the estate representative; that is, that there is not someone with a greater entitlement to apply.

Consents[xlii] are required from the beneficiaries of an estate in similar circumstances as those described above, both for probate and on administration where there is no will. Where no estate representative has been named in the will, where the individual applying is not the estate representative named in the will, or where there is no will, the beneficiaries of an estate must give their consent to the person applying for probate as the estate representative. Without the consents of those beneficiaries, the estate representative may not be permitted to apply. Consents serve a similar function to Renunciations, in that they help ensure that the correct person is applying and provide further proof that all of the required individuals have been properly notified of the applying.

6. Security or Bond

Estate representatives are sometimes required to post a bond or other security, sometimes secured by a personal surety or sureties, with the court in an amount equivalent to the value[xliii] of the estate. This most often applies to estate representatives not named in the will, those applying on administration, or those not resident in the jurisdiction of probate or else outside Canada.[xliv] This is done as an additional protective mechanism, to protect the estate from a fraudulent applicant, from the value of the estate being absconded with outside the country, or from estate representatives who fail to properly discharge their duties and cause a loss to the estate as a result. All jurisdictions[xlv] have rules of court or procedure that make mention of the requirement for such security or bond. The practice of requiring it, however, appears to vary both across the country and within individual jurisdictions, and seems

situational. A bond or other security is more likely to be required where beneficiaries request or require it, or on intestacy.[xlvi] On the other hand, beneficiaries can also, on consent, waive the requirement for bond, or the court can waive the requirement where it is satisfied that the estate is somehow otherwise protected.[xlvii] It may be more likely to be waived, for example, where the value of the estate is small or where there are no debts, and/or where the estate representative is also the beneficiary.[xlviii] Where required, bond or security can be a significant barrier to the probate system, as they can be difficult and expensive to obtain.

The requirements in the forms discussed above provide a solid foundation to understanding how the probate application process in place in Ontario currently functions. We can now turn to a discussion of accessibility and proportionality generally, before examining how they are balanced in certain judicial processes and procedures.

III. PART TWO: KEY PRINCIPLES

A. What is Accessibility?

Accessibility is one broad measure of the functioning and universal application of a justice system.[xlix] For the purposes of this paper, accessibility may be defined as access to the dispute resolution process most appropriate in the circumstances, whether that be the court system or another forum. Access to the court system is not the only realm where accessibility is important in a justice system generally, and not the only realm through which accessibility issues should be tackled.[l] Despite this, one of the chief elements, and primary measures, of accessibility remains an individual's ability to have their claims determined, and rights protected, by an impartial, independent court.[li] As a result, being able to access the legal process is a critical element of accessibility.[lii]

Access to dispute resolution has become a major focus of scholarship, legal opinion, and law reform in recent decades,[liii] and litigation, as one mechanism for dispute resolution, is the lens through which accessibility is most often discussed. By many accounts, Canada is facing a court accessibility crisis[liv] as the costs of litigation rise beyond reachable levels for all but the very wealthy, or the very low-income that qualify for legal aid.[lv] This has led to a rise in self-represented parties who may not be able to properly interpret and apply the law or rules of court, making their chances of success limited. Complexity has also contributed to a lack of accessibility, as the increased complexity of the law has meant increasingly complex rules and procedures that, in turn, cause delay, drive up cost, and reduce the lay person's ability to navigate the court system without professional assistance.[lvi] As procedures have become more complex, efforts to create efficiency and widen a population's ability to access and navigate that procedure have become more common. Examples include small claims courts, simplified or summary civil litigation procedures, and a rise in self-help legal guides and manuals. All of these have been undertaken with the aim of increasing efficiency and reducing cost and delay.[lvii]

However, physical access to the actual sites of dispute resolution remains a barrier for many people. Looking at the court system, many people may not be able to access a courthouse or court registry, or read or understand guides and forms. Furthermore, the time delays associated with pursuing a court claim can mean multiple return visits to the courthouse, which may become prohibitively expensive for some in rural or remote areas not served by their own courthouse.[lviii] Increasing accessibility therefore requires a multi-pronged approach, as lack of access is a multi-faceted problem. Because there are a multitude of barriers to

probate, discussed in depth in Part Two, Section E of this paper, addressing them may require a different approach for each. As will be discussed, simplifying the mechanisms for applying for probate is only one part of that approach. In Part Five, this paper will suggest a multi-pronged approach to increasing accessibility in the probate application system by addressing issues relating to form and procedure, physical accessibility, legal self-help guides and services, and accessibility services that take place outside the courtroom, such as online or electronic document generators.

B. The Key Principle of Proportionality

One of the critical pieces in Ontario's effort towards increased accessibility of the court system has been the effort to enshrine the principle of proportionality in Ontario court practice and procedure, as well as in newly-formed or reformed legal processes.

Proportionality describes a balancing between a dispute on the one hand, and the process and procedure for resolving that process on the other. At a preliminary level, proportionality in a broader legal system generally requires providing the appropriate dispute resolution process for each individual circumstance or case. This may imply that the most minimally complex process required, as well as that with the greatest accessibility, be used. For example, disputing a parking ticket should not entail a full two-day trial in an upper-level court. By contrast, a major and heavily disputed class-action lawsuit should not be resolved by desk order or in chambers, and may not be suited for mediation or alternative dispute resolution, depending on the circumstances.

Once the appropriate dispute resolution process is employed, proportionality then implies a balancing between the complexity, monetary value, and legal importance of the issues

involved, and the formality, orders, and procedure imposed within that dispute resolution process.[lix] In court cases where small values are at stake, or where issues are not legally complex or novel, proportionality implies that the court may not need to devote enormous resources, expense, or time to them. Alternatively, where cases are highly complex or of legal importance, or the amounts involved very large, the court may need to devote more energy and time to reaching a solution or settlement.[lx] Therefore, it follows that cases where the issues are simple, or the amounts involved small, proportionality encourages a lesser consumption of the court's time and effort.

Outside the court context, proportionality requires the same balancing to be applied to administrative processes or alternative dispute resolution processes. It encompasses myriad rules of procedure, evidence, and standing, includes the formality of required forms, and can encourage flexibility in both form and substance of orders and decisions made. It extends from the decision-maker to the parties and the administrative clerks, as well as the accessibility and formality of the buildings themselves. Proportionality is the principle behind a legal system's attempt to devote its resources to areas where they are most needed and where they can be of most use.

The principle of proportionality has been given great weight and credence by courts in Canada, and in Ontario specifically. The Supreme Court of Canada regards proportionality as the source of a court's power to intervene in proceedings. It allows the court to focus and direct proceedings in the most suitable and efficient direction, having regard to what is truly required to reach a fair and just conclusion.[lxi] In Ontario, proportionality was enshrined in the new *Rules*

of Civil Procedure that came into force on January 1, 2010[lxii]. Rules 1.04(1) and (1.1) state the following:

> 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> 1.04(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.[lxiii]

By making proportionality the overarching principle in the *Rules of Civil Procedure*, by placing it at the beginning, Ontario has intended proportionality to be used as an overall tool to interpret the entirety of the *Rules* and the court's practice. Proportionality is a principle that should touch every instance of court work in Ontario, as well as be the lens through which procedure, and procedural reform, is viewed.

Many judgments have made reference to the importance of proportionality[lxiv] and have discussed how proportionality is a foundational principle upon which all court practice and decisions must rest, even where proportionality is not specifically cited in any rule: "[…] applying rules of court that involve discretion 'includes…an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation'."[lxv]

However, the fundamental importance of proportionality goes beyond litigation. The principle affects the conduct and procedure of all civil matters, whether they are contentious or non-contentious, and whether they are dealt with in a courtroom or out.[lxvi] Justice Osborne, in his report on civil justice reform in Ontario, concurred that proportionality "has broad application to all civil proceedings."[lxvii] Proportionality has therefore been used and applied in

many ways: Justice Brown, for example, indicates that he has used it in giving direction on where an application, in a non-contentious estates matter, should be started.[lxviii]

Proportionality is therefore not a principle that should be limited to the actual courtroom. Justice Brown has indicated that it should reach the court staff as well, and help create what he has called a “culture of common sense”[lxix] in balancing the need for correctness and precision in preparation of court forms with the costs and delay incurred when corrections are ordered, as well as the substantial importance of the corrections requested.[lxx] He himself has used it to direct exceptions to the standard clerk practice of requiring formal corrections, complete with a completed corrections form, for each change to the probate application forms, where the error was insignificant or of no practical consequence to the substance of the forms.[lxxi]

Therefore, while the principle of proportionality in the *Rules of Civil Procedure* is not aimed at estates specifically, it has ramifications for how estate work is practiced by lawyers and self-represented individuals, as well as for how estates are administered in Ontario. Proportionality is used to examine the conduct of the parties, as well as their lawyers, in determining costs awards during estate litigation.[lxxii] It also affects solicitors, in demonstrating the need for them to manage their clients and the plans and strategies they suggest, so that legal service, too, is proportional to the complexity of the issues at play.[lxxiii] And it should affect procedure, so that the procedural requirements of estate administration do not outstrip the complexity, size, or legal importance of the estate itself, which may mean not using a court process at all.

C. Why Proportionality Is Important for Accessibility

Proportionality is a critical element of accessibility in the justice system. At a courtroom level, as we have seen, proportionality guides the process to ensure that it is representative of the resources required to adequately resolve an issue. Proportionality also guides the justice system as a whole, ensuring that a variety of processes and forums exist to best respond to the needs of the public. At a high, broad level, proportionality implies that the courtroom may not always be the best forum for resolving a dispute or issue. Court procedure costs the government, the court system, and the parties in both time and money. It costs individuals in terms of effort and stress, in terms of likely requiring legal assistance, and in terms of the difficulty of navigating the procedure.[lxxiv] *If accessibility is a key issue in affording the public with fair, just, timely and efficient mechanisms for resolving disputes, proportionality is the tool that allows such mechanisms to properly evolve*[lxxv].

The Supreme Court of Canada, in a recent judgment, made several statements regarding the importance of proportionality and the necessity of it in every aspect of the justice system:

> A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible – proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.
>
> […] There is, of course, always some tension between accessibility and the truth-seeking function [of a court proceeding] but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.[lxxvi]

Proportionality clearly has a key role to play in increasing accessibility, one of the chief goals of this project. It should therefore remain a principal focus in determining whether a simplified application procedure should be established for small estates.

D. Why Accessibility and Proportionality Matter in the Probate Application Procedure

The current probate application regime can lack accessibility where the value and/or complexity of the estate are not balanced with the procedure and mechanisms of the application to obtain the grant of probate.[lxxvii] Ontarians may face several barriers in accessing the current probate application procedure, which are discussed in more depth below. Cost and delay, complexity in the procedure, the outside perception of complexity in the procedure, and physical inaccessibility can also result in a lack of access to the probate application system; where these factors may be combined, the accessibility problem is compounded. Any of these barriers can demonstrate a lack of proportionality, where the value of the estate is not balanced with the barriers faced by the estate representative. Proportionality is therefore an important issue to consider for estates, and for estate representatives. It requires that all court systems and processes – probate included – should be equal to, or balanced with, the complexity of the issues at stake and the sums involved. As a result, proportionality should be considered in any probate application procedure, but especially so in smaller value estates.

Where the size of the estate is small, proportionality implies that it may be appropriate to have a more simplified probate application procedure. If the procedure on application is more complex, time-consuming, expensive, or burdensome for the estate representative than may be warranted by the value of the estate, the probate application system will not be

proportional. This is contrary to the recent developments in the *Rules of Civil Procedure*, and to growing importance of proportionality in the justice system generally. Furthermore, as a key element of accessibility, a probate application system that is not proportional will likely also be inaccessible for the public.

Developing a proportional probate application system requires a careful assessment of any downsides and risks associated with simplifying the application procedure. These will be considered more fully at the end of Part Two of this paper. Proportionality does not mean that systems should be opened and simplified to the point that they lose their protective purposes altogether. However, a proportional system suggests that the same quantity and level of protection measures may not be necessary in each circumstance.

Value can be used as one measure for determining the threshold for different processes. This has been used in other court processes, as will be seen in Part Three of this paper through an examination of Small Claims Court and Simplified Procedure. With value as the lens, small value estates may not require the same level of procedural protection as large value estates. This is because the level and value of the harm involved if a small value estates is mishandled is smaller, or of lesser quantum, than the level and value of harm if a large value estate is improperly dealt with. As this paper has discussed, the procedural protections in place in the current probate application system are designed to protect the estate from fraud or loss. If the value of the loss is smaller in a small estate, this implies that small value estates may not require as many procedural protections as larger value estates.[lxxviii]

Beyond the complexity of the process, proportionality and accessibility imply that the complexity of the individual components of that process should also be reviewed. The simple

creation of a simplified process – by reducing, for example, the number of forms required, or reducing the associated fees – does nothing to address the difficulty in each of the forms that remain required. If the forms are overly complex, unintelligible to non-lawyers, or if the information required to understand how to fill them out is not readily accessible and intelligible to the general public;[lxxix] if it is inefficient, overly time-consuming, or if it creates long delays in the administration of a small estate, then even a simplified process will remain inaccessible for the public.

Therefore, only some of the measures of increasing accessibility and proportionality can be achieved by simply creating a different stream for resolution of small value estates. Without simplifying the mechanisms involved in the process, parties that meet the lower-value threshold are still likely to require legal assistance, because the components of the simplified process – the forms that are required, the evidentiary rules, and the interpretation of the case law – will remain complex for the average non-lawyer individual.[lxxx] Therefore, a lack of proportionality and accessibility still exist, as the procedure required is not proportional to the value of the claim, and remains inaccessible for the public.

This suggests that increasing proportionality and accessibility in the probate application procedure will require a multi-pronged approach that addresses more than just the question of whether a simplified procedure should be created. It must also address how to make such a simplified procedure truly functional, effective, and accessible for individuals. To address that question of how, a closer examination of the barriers that people face in accessing the probate application procedure is needed.

E. What Barriers Do Ontarians Face in Accessing the Current Probate Application Procedure? (Or, Where are Proportionality and Accessibility Lacking in the Current Probate Application Procedure?)

There is no direct empirical research on barriers that Ontarians face in accessing the probate application system.[lxxxi] Rather, information in this paper was extrapolated from two types of sources: information about barriers individuals face in accessing the court system generally, and information about accessibility issues faced by populations outside Ontario in their respective probate system(s).

The barriers faced in accessing the probate application procedure can generally be aggregated into the following categories: costs and delay, complexity of the system, the perception of complexity in the system, and physical accessibility concerns.

1. Costs and Delay

Cost and delay[lxxxii], as well as complexity (addressed below), are the most frequently cited barriers to access to the court system for the average individual.[lxxxiii] Costs can include both the administrative cost of filing a probate application or paying the estate administrative tax, the cost of transport to physically access the court registry, as well as the cost of hiring legal assistance where required, or where complexity will not permit effective self-representation.[lxxxiv] Delays can often mean increased costs[lxxxv] as, for example, delay in obtaining the COA can mean delays in accessing the estate's funds, and therefore delay in an estate representative's ability to be reimbursed for expenses incurred out of the estate. Many estate representatives, especially those of lower income, may not be able to float money to the estate for those administrative tasks, especially if the delay in repayment stretches on too long.

Practically speaking, the application process may be too time-consuming and lengthy for most individuals to tackle without assistance, especially where it may take time away from paid employment. In my practical experience, the process of gathering information about the deceased's assets alone can involve inventorying a home, cataloguing paperwork and asset statements where they exist, seeking disclosure where they don't, and advertising publically for creditors and claimants of the estate.[lxxxvi] It can be several weeks or more before the deceased's financial picture is sufficiently complete to put a value on the estate. Tracking down beneficiaries, and providing them all with proper notice of the application, can be also be frustrating and time-consuming. The time necessary to complete these investigative steps, fill out the forms in the required manner, attend to the swearing or commissioning of affidavit evidence, apply at the court registry, and remedy any defects found by the Estates clerk, is typically more than a person has to give to this process. At the same time, however, the proposed estate representative faces pressure from beneficiaries, creditors, and the law[lxxxvii] to complete the process in a timely manner.

Therefore, for many individuals, navigating the process can be overwhelming and bewildering. Anecdotally, I asked two practitioners – one in Toronto[lxxxviii] and one outside Ottawa[lxxxix] – what they hear about the process from clients who hire them after attempting to file the application for probate themselves. While not a scientific survey by any means, both practitioners had the same response: "no one even tries." While this could be reflective of their clientele, it is telling that the application process seems to be regarded, by the public and the practitioners, as bewildering and overly time-consuming for individuals without legal training to manage alone.

However, the cost of hiring assistance may be prohibitive for many.[xc] The arguments here are not different from those concerning accessibility reforms that have taken place in other areas of the legal system over the years: the cost of legal services is too expensive for the vast majority of individuals, but the need for legal services remains critical, even necessary.[xci] This is compounded where the value of the estate is small and cannot bear the cost of legal assistance. Furthermore, to date in Ontario there is no Legal Aid or other publically-funded support mechanism for obtaining legal advice about probate matters, as estate matters are not part of the subject areas Legal Aid Ontario funds.[xcii] Therefore, for Ontarians requiring legal assistance to complete the probate application process, the only option appears to be private legal services, paid for – where allowable – out of the estate. For lower-income Ontarians or for small-value estates, this can often mean that legal assistance is not an option at all.

2. Complexity

Complexity is a highly interrelated issue to cost and delay and one of its primary drivers. The more complex the rules and procedures, the longer it takes for individuals to navigate them, and the more it costs in both time and money.[xciii] Complexity may mean that individuals are simply unable to navigate the system themselves, incurring cost; the cost of hiring legal assistance may be a substantive bar to access. Where individuals have no choice but to proceed self-represented, complexity leads to disempowerment, disillusionment, and can lead to procedural unfairness.[xciv]

In Ontario's probate application procedure, there are several elements to this complexity. First, there are many forms that may be required in a probate application in Ontario. As of this writing, there are twenty-two separate, fillable forms for an application with

a will listed on the Ontario Courts website for estate forms.[xcv] Certainly, not all of them apply in every circumstance. However, simply knowing which ones are applicable, required, or may become necessary later on may require some comfort with the procedure.

Second, navigating the order in which forms are required can be challenging.[xcvi] The application for probate is a multi-stage process that involves following a prescribed set of rules and steps in a particular order, often occurring at a time of emotional stress and upheaval. In my practical experience, it can be a bewildering process even for those with some familiarity with it; for those with no previous exposure to the system, it is easy to be overwhelmed. For example, advertising for creditors, serving notice on the beneficiaries and keeping track of when and how that is done, and calculating the amount of Estate Administration Tax owing are all elements of a successful probate application that may be new to estate representatives. Furthermore, each step is an absolute bar to proceeding: failure to properly complete any one of them produces an absolute inability to proceed with a probate application until it is done.

Third, the language on the forms can be intimidating for many.[xcvii] An understanding, for example, of how affidavits work or what evidence is permitted in an affidavit is not something that the public generally has; as affidavit evidence is the principal method of evidence in an application for probate, understanding how to provide all the relevant information can be challenging. Terms like “renunciation”, “service”, “notice”, even “estate trustee” have meanings within the probate process that may be new to Ontarians. The Application form[xcviii] for an individual applicant with a will asks, on the first page, for the “Address of fixed place of abode” instead of “residential address”. It sometimes refers to the deceased as a testator. It asks a series of questions that, if answered in the affirmative, require further detail in an

attached schedule. No information is provided as to why answering yes might require additional information, or what information should be provided. It also asks for information about those who may be entitled to apply, or entitled to a share of the estate, without fully explaining what persons may have an entitlement, or where to find that information. And it asks for information about entitlements to elect under the *Family Law Act*.

While these questions and terms may be familiar to the estates professional, they are often new and confusing to the public. Therefore, even a person willing and motivated to tackle the application process themselves, who is unhindered by barriers such as illiteracy, lack of computer literacy, lack of physical access to a court registry, or lack of knowledge about what is required, may be stymied by the language of the forms. Simplified, possibly plain-language, forms are a critical element of any successful simplified probate application procedure.

3. The Perception of Complexity

The public's perception of a system's complexity is almost as important as actual complexity itself. Individuals who perceive the court system to be imposing, difficult to navigate, or otherwise unfair are less likely to attempt self-representation, and more likely to be disappointed in the process.

This is especially so where racial, ethnic, gender, or other differences are not reflected in the courtroom or court registry experience.[xcix] Where the user of the system does not feel that the system reflects them, they are more likely to feel that the system is inaccessible to them. Disadvantaged populations, whether they be considered so because of economic status, social factors such as race, ethnicity, gender, or criminal history, disability or significant physical or mental health issues, are more likely to not only face barriers to the court system, but to feel

that barriers will exist before they even attempt access.[c] Overcoming that perception is an important aspect of increasing accessibility:[ci] even where a system is easy to navigate, if individuals do not perceive it to be so, they will not attempt to utilize it.

4. Physical Accessibility

A lack of accessibility can occur in other, more straightforward ways, such as where even the basic requirement of access to the court registry is lacking. Physical access to the court building remains an issue for many individuals. Many communities lack local access to a court registry, courthouse, or other administrative or legal agencies.[cii] Opening hours may be restrictive for those with daytime employment who may not be able to take time off work, or access a courthouse during a scheduled work break.[ciii] It is possible that the inability to file probate forms electronically or by mail may prohibit rural Ontarians, or those without the means to travel, from filing an application for probate.

Physical accessibility issues are compounded for those with physical disabilities, for those who are visually or auditory impaired, or who do not speak English or French in a fluent enough manner to understand and be understood.[civ] Many Ontarians may also face basic accessibility issues such as illiteracy or low or lack of computer literacy, making the procedure and its required forms difficult, or impossible, to locate, read, understand, or properly complete on their own. These issues may impact the deliverability of self-help legal instruction manuals and guides, as internet dissemination is typically one low-cost way of making these widely accessible. Therefore, any simplified process must concern itself with making information available in a wide variety of ways and languages.

One area that must not be forgotten in this project is northern, rural, or remote communities in Ontario. These communities face their own hardships and accessibility issues, which may not be present or as prevalent in southern or less remote communities. Northern and remote communities may often have a higher population of First Nations peoples, where access issues may be compounded by socio-economic and cultural factors.[cv] These can include lower rates of formal education, and higher rates of unemployment (or high rates of only seasonal employment), resulting in lower than average incomes for populations – of all ethnicities – in those communities.[cvi] Unemployment rates are higher than average in First Nations communities, as well as in northern, rural and remote communities,[cvii] making cost an even more critical element of accessibility. Furthermore, the physical presence of administrative or legal services is often lacking in remote communities. The closest bank branch, government office for ordering death certificates, hospital, courthouse or court registry, or even public computer terminal with reliable internet access, may be several hours drive away.[cviii] A lack of familiarity with the civil court system may exacerbate the accessibility issues[cix] in northern, remote, or rural communities. As the intention is to design a simplified probate application procedure that is accessible to all Ontarians, the particular issues of northern, remote, and rural communities should not be forgotten.

It is easy to see why, in the face of this complex task, some estate representatives may be tempted to skip the probate process altogether and simply leave the estate unadministered, or may be otherwise reluctant to take on their duties.[cx] This is especially true where it can be seen ahead of time that the estate itself is likely to be complex, the value of the estate is small,

and the reward – in terms of value personally received by the estate representative and/or the beneficiaries – is limited.

The barriers detailed above demonstrate a lack of proportionality between the desired result – a COA for a small value estate– and the process and mechanisms involved in obtaining one. The process is too complex, difficult, and time-consuming to be commensurate with the results and value that may be achieved through probate. As a result of this lack of proportionality, the probate application is fundamentally inaccessible for Ontarians dealing with a small-value estate. A simplified procedure may go a long way to increasing the proportionality and accessibility of the probate application procedure for small value estates.

F. Are There Risks to Increased Accessibility?

One challenge of increasing the accessibility of any legal regime is ensuring that the balance does not tip too far away from the protections that a rigourous application procedure can provide. Accessibility and procedural protection can be viewed as existing on opposite ends of a spectrum, with optimal proportionality between the two sitting roughly in the middle of that spectrum. Swing too far towards accessibility in creating a procedure open to everyone, and valuable procedural protections may be lost. Swing too far in the other direction, however, by increasing procedural protections too much, and accessibility to the system may be lost. A system that is proportionally balanced lies somewhere in between those two extremes; where the appropriate balance point will be depends on the issues, needs, and requirements of each particular system that seeks to strike that balance. The law exists to provide protection to the parties and to society as a whole, and our legal procedure has grown based on case law, established best practices, and need.

The protective functions of probate have been covered in the Consultation Paper, and briefly earlier in this paper. While, as we have seen, lack of accessibility and barriers to accessibility continue to exist, any probate application system that proposes to increase accessibility must also ensure that the protective, necessary functions of probate are not lost. That compromise, the proportionality, between accessibility and protection, is at the heart of any future reform.

The probate application procedure acts as the gatekeeper of access to, and control over, the estate. An application procedure cannot address any fraud or loss to the estate that occurs after probate has already been granted. This is because fraud and loss can occur even where the "correct", or most appropriate, estate representative is appointed. Regardless of value, the administration of estates can be complex enough to cause difficulty or loss even where the estate representative is honest and diligent and has the trust of the beneficiaries. Loss can occur through honest mistake, misunderstanding, or carelessness regardless of the estate representative appointed. It occurs even where estate representatives are properly and adequately informed of their duties and responsibilities. For situations involving an honest estate representative, simplifying the probate application procedure may not increase the risk of loss to the estate. This is because the loss takes place after probate is granted, and is not necessarily caused because of the person appointed as estate representative. Rather, these types of loss are caused by the nature of estate administration itself.

Furthermore, fraud can also occur even where the most appropriate or "correct" estate representative is appointed. Individuals do not always appoint honest and scrupulous estate representatives in their wills; in administrations where there is no will, there is no guarantee

that the person with the greatest legal entitlement to administer the estate is an honest or trustworthy individual. The simple act of being appointed the estate representative may not cure the representative of their intentions to act fraudulently once they are appointed. As well, properly appointed estate representatives may develop fraudulent intentions or purposes once they gain control over the estate assets, if circumstances in their own lives change, or where beneficiaries may be thought ill-informed or ill-equipped to monitor or care about the administration of the estate. Once individuals, properly appointed as estate representatives, gain access to sums of money that they alone control, without outside monitoring, it may be easier than we can comfortably admit to feel that no one would notice if they keep some for themselves. These may not truly be risks that can be addressed through any probate application process, because they exist long after the application is completed.

However, one foreseeable risk that may occur if a simplified probate application procedure is implemented without addressing all of the prongs of increased accessibility is lack of education. The complexity of the current probate application process may have the unintentional function of alerting the applicant to the magnitude of the task being undertaken, and may provide opportunities for the estate representative to become educated on his or her duties. For example, having to attend personally on the court registry to apply may give estate representatives an opportunity to access self-help legal guides that are available in the registry, or even ask the court clerks for further information, or where to find further information. If a simplified application procedure does not make these educational opportunities present, or does not actively seek to increase awareness of the duties and responsibilities involved in administering an estate, a rise in loss to the estate through carelessness or inadvertence –

caused by a lack of understanding one's duties – may be seen. Therefore, a simplified probate application procedure should address this risk by ensuring that adequate, widely-publicized, and widely-available self-help information and guidance is available to those who use the simplified application procedure. This will not prevent honest mistake or carelessness, but will address the role that a simplified procedure may have in creating increased opportunities for that honest mistake or carelessness.

Loss to the estate, or outright fraud, can also occur because a dishonest or untrustworthy estate representative is chosen. This is a bigger risk that a simplified probate application procedure must address. If the mechanism is simplified, will it increase the possibility that a dishonest estate representative is appointed?

Attenuating this risk will involve careful examination of which parts of the process are being simplified, and how. For example, introducing plain-language forms would not likely limit the protective function of the forms; more likely, this would simply make the forms easier for more segments of the population to understand and complete properly. Likewise, introducing greater physical access to the court registry, or more and more widely accessible self-help guides, will not necessarily increase the availability of the system to untrustworthy applicants. The screening process inherent in the probate application would remain. A simplified application procedure simply seeks to address the method, or the mechanism, by which the COA is obtained. It does not necessarily suggest that the functions of the COA, nor the actual law and procedure of administering the estate once the COA has been granted, be changed or simplified. A simplified application procedure simply seeks to make it easier for Ontarians to access that administration. Therefore, the protective functions that the COA serves may not

necessarily be challenged or otherwise put at risk by merely simplifying the application procedure.

Risks involved in any of those proposed changes to the procedure would have to be addressed on the level of the individual proposal. For example, this paper will suggest in Part Five that changes be made to the method in which Notice to the beneficiaries of an estate is completed and served, by providing greater information in the Notice and by reducing the amount of paperwork involved for the estate representative in providing that Notice. However, it does not suggest eliminating the Notice altogether. Providing Notice to the beneficiaries may be one protective aspect of the probate application procedure that should not be eliminated in the name of accessibility or proportionality. This is because the protective functions it serves, in informing the beneficiaries of the estate and in encouraging them to monitor and be a check on the estate representative, outweigh the burden on the estate representative in having to serve that Notice. However, a simplified procedure can address the mechanism by which that Notice is given, without eliminating the protective function of the Notice. By eliminating a separate form for Notice, and, for example, streamlining the process by allowing estate representatives to notify the beneficiaries by serving them with a copy of the Application that is already required for probate, accessibility of the probate application is increased through a reduction in the time, delay, and potential efficiency cost to the estate representative. However, the beneficiaries still receive the required Notice in a timely manner, and the protective function is preserved.

Therefore, in general and depending on the individual proposal, streamlining the process of application may not increase the risk of fraud or mishandling of the estate assets,

because the protective functions of probate, and the application process' role as gatekeeper of estate administration, can be maintained even where the application procedure is simplified.

IV. PART THREE: EXAMINING PROPORTIONAL PROCEDURES

This section will examine five processes that have sought to strike a balance between accessibility and procedural rigour. It will then examine whether there is a difference between how adversarial processes and non-adversarial process have approached, or succeeded, at this balancing. Finally, it will seek to draw conclusions about what the examined processes can suggest for increasing accessibility in the probate application system by simplifying procedure.

A. Where Have Accessibility and Procedure Been Effectively Balanced?

Other processes and procedural reforms have sought to strike the balance between accessibility and protection. As access to the court system has become an issue of increasing focus in the last decades, a variety of processes have sought to achieve a proportional response to accessibility issues. What can these processes show us about what a simplified probate application procedure might need to consider or include? Is there a difference between adversarial processes that have struck this balance, and non-adversarial processes that have sought to do so?

This section will consider six processes: Small Claims Court, Simplified Procedure in Rule 76 of the *Rules of Civil Procedure*, the Social Justice Tribunals Ontario generally, the Landlord and Tenant Board specifically, the Land Titles Registry and Electronic Land Registration System, and the *Children's Law Reform Act*. Conclusions regarding what each of these processes can demonstrate for a simplified probate application procedure will be considered at the end of each section. Finally, this section will draw some conclusions about whether there is a

difference between how adversarial and non-adversarial processes have approached this balance, and what this may mean for a simplified probate application procedure.

1. Small Claims Court

Small claims courts have become one of the critical elements in increasing the accessibility of the court system for average individuals.[cxi] The rationale for small claims courts is to create a more informal, more streamlined court process,[cxii] limited by the dollar value of claims that can be made and by the procedural rules used, in order to increase the efficiency and speed of the civil litigation process.[cxiii] In Quebec, free assistance is provided by court staff to individuals who need help preparing for their hearings.[cxiv] Limited *pro bono* assistance from duty counsel is available at the Toronto Small Claims Court.[cxv]

Small claims courts tend to have nominal filing or other administrative fees, and self-representation is encouraged.[cxvi] Costs are further reduced in two ways: relative to the costs of traditional litigation, and relative to the means to the moving party and/or to the value of the claim.[cxvii] Both of these relative reductions increase accessibility. Delivery costs to the government are also reduced,[cxviii] as more cases can be heard in less time than in traditional civil litigation, sometimes with part-time judges, helping to reduce backlogs and increase efficiency, making small claims courts an effective cost-savings measure for government as well.[cxix] Evidentiary and procedural rules are relaxed, which also encourages self-representation.[cxx] Formalism is reduced, as is both complexity and the perception of complexity, so that individuals feel encouraged and capable to represent themselves in small claims courts.[cxxi] For example, the Small Claims Court forms in Ontario are “fill-in-the-blank” forms,[cxxii] which may be filed in court by mail.[cxxiii] The reduction of costs to access the court

system is even more important where the value of the dispute is low, as this increases proportionality and decreases the likelihood that fees and cost will be a barrier to adjudication of a claim.[cxxiv]

The limitation of cost awards to lawyers also helps increase the number of self-represented litigants,[cxxv] although in this sense people may self-represent not out of choice, but out of a lack of lawyers willing to represent parties in small claims court.[cxxvi] In Ontario, however, paralegals are now eligible to represent parties in Small Claims Court.[cxxvii] This clearly increases the cost for those who choose to hire a paralegal, and may have both a positive and negative result for accessibility: in may increase the sense of accessibility for those who are overwhelmed or unable, for whatever reason, to represent themselves in Small Claims Court, but may reduce accessibility or the perception of accessibility for those who cannot afford to hire a paralegal, but may face one as the opposing party's representative.[cxxviii]

A relaxation of the procedural rules is possible, in part, because of a greater quantity of self-help legal guides and resources available for Small Claims Court cases.[cxxix] A more involved, advisory role for court clerks and staff, and in some places, a more inquisitorial, managerial mentality from judges,[cxxx] may also assist with self-representation and help ensure that the process is properly directed.[cxxxi]

Ontario's Small Claims Court underwent civil justice reforms in 1998, 2006, and 2008, all undertaken to further increase accessibility.[cxxxii] Beginning January 1, 2010, the monetary limit of claims in Small Claims Court was raised from $10,000.00 to $25,000.00.[cxxxiii] However, small claims courts are limited in jurisdiction by more than just the monetary value of the claim. The

Small Claims Court cannot hear matters dealing with estate administration, family law, or real property, for example, limiting accessibility in these areas.[cxxxiv]

Research has indicated that rather than be used mostly by individuals, thereby increasing their access to the court system, small claims courts are most often used by business or business owners who use the court as a debt collection mechanism.[cxxxv] It is not clear, therefore, that Small Claims Court has fulfilled its mandate to increase accessibility for average individuals.[cxxxvi] Properly, it should be considered only one of several necessary avenues for increasing accessibility, and not a panacea for all things accessibility, as Small Claims Court has sometimes been presented.[cxxxvii]

Small claims courts still tend to be physically located within courthouses and are still designed like courts, with the same opening hours as courts. They therefore typically fail to address physical accessibility concerns.[cxxxviii]

It is questionable whether small claims courts have really increased access to the court system as widely as originally hoped. In one of the only major empirical study of small claims courts, which looked at Quebec, the population found to be using the Small Claims Court did not reflect the diversity of its geographical area, but rather continued to reflect the population demographic most often seen to use the civil justice system generally. That is, women, visible minorities, the young and the elderly, those of lower income or socio-economic status, immigrants, and those facing a language barrier were just as likely not to use the small claims court system as they were to not use a more superior court.[cxxxix] It must therefore be considered that a plaintiff's economic status may not be their only bar to accessing the court system; socio-economic, gender, racial, ethnic, or cultural factors may play an equal or greater

role in preventing or impeding individual access to the court system.[cxl] Focusing on cost alone, therefore, is not likely sufficient for increasing accessibility.

<u>What Can the Small Claims Court Show the Probate Application Procedure?</u>

For the probate application system, Small Claims Court demonstrates that imposing a simplified, streamlined, and more efficient procedure for claims under a certain monetary value can increase access for certain populations.[cxli] However, it also demonstrates that implementing such a procedure is not sufficient for increasing accessibility: self-help legal services, physical accessibility issues, and efforts to encourage access for all demographics must also be incorporated for any simplified small-value procedure is to be successful.

2. Simplified Procedure – Rule 76 of the Rules of Civil Procedure

Simplified procedure is contained in Rule 76 of the Ontario *Rules of Civil Procedure*. It is a stripped-down litigation procedure for cases with a claim valued at $100,000.00 or below, for either money, real property, or personal property,[cxlii] with proportionality being both the driving principle and at the very root of simplified procedure.[cxliii] Proceeding by simplified procedure under Rule 76 is mandatory for all civil claims falling under its monetary jurisdiction,[cxliv] although there are some mechanisms for moving into, or out of, simplified procedure as cases evolve and different procedures become warranted.[cxlv] However, there are serious penalties, including adverse cost awards, for lawyers who try to avoid the application of Rule 76 for cases that fall under its mandate.[cxlvi]

Simplified procedure was specifically introduced to address concerns about the ballooning costs and delays of civil litigation, which were seriously hampering access to the court system for individuals in Ontario,[cxlvii] and it was specifically designed to address those

concerns.[cxlviii] The idea of simplified procedure in Ontario took shape in the 1990s,[cxlix] and rule 76 was eventually permanently adopted into the *Rules of Civil Procedure.*[cl] Several other jurisdictions have also undergone simplification processes similar to Ontario's.[cli]

Indeed, simplification of rules of court generally has been seen as one of the primary methods of increasing access to the court system.[clii] Rules of procedure, while not necessarily substantive rules of law, can have a significant impact on accessibility to the court system, on a person's rights throughout a court process, and therefore on their ability to have those rights protected.[cliii] For example, procedural rules can sanction abuse of the process by parties, thereby protecting an individual's right to have a fair adjudication of their claim.[cliv]

Simplified procedures increase accessibility by managing or modifying elements of civil procedure to encourage efficient, expeditious trials,[clv] either through simplification of the existing rules, or granting judges greater discretion to manage the litigation process.[clvi] For example, Rule 76 limits examinations for discovery to only two hours,[clvii] eliminates cross-examinations on affidavit evidence,[clviii] examination in chief of one's own witnesses,[clix] encourages summary trial and/or summary judgment where possible,[clx] reduces the number and type of interlocutory motions counsel are entitled to make,[clxi] incorporates a trial management checklist and a schedule of possible witnesses into the affidavit of documents, from which the witness list cannot differ,[clxii] imposes cost consequences on lawyers who do not proceed in a timely or cost effective manner, and makes the appearance of all parties, with their counsel, mandatory at the pre-trial conference.[clxiii] All of these measures are designed to front-load the preparations lawyers must make,[clxiv] encourage settlement,[clxv] and encourage

the parties, as well as judges, to keep the primary issue(s) at the forefront of the trial, rather than get sidetracked by details that can engender higher costs and longer timelines.[clxvi]

Macdonald categorizes the typical methods used to encourage access to simplified procedures as

> 1) using costs rules to induce settlements; 2) aggregating disputes through relaxed joinder rules; 3) enacting wider rules to prevent re-litigation of the same point; 4) using more relaxed concepts of 'interest' and 'standing' to reduce parallel litigation; 5) reducing interlocutory procedures; 6) limiting discovery; 7) allowing for quick disposal of "stated cases"; 8) providing for summary trials; and 9) providing for summary judgments.[clxvii]

Simplified procedure rules are therefore designed to allow cases to use the best process for that individual case.[clxviii]

Simplified procedures may allow judges to encourage or adopt the use of processes outside the strict adjudication model, such as alternative dispute resolution or mediation techniques,[clxix] in order to encourage settlement.[clxx] While this is not universally applauded, evidence suggests that the increased flexibility given to judges to manage the litigation process in simplified procedures produces more out-of-court settlements, or at minimum shorter and less expensive trials.[clxxi]

It is a commonly repeated maxim that "procedure should be a servant of the law, and not its master."[clxxii] In time periods where formalism and strict compliance with rules of procedure has been the norm, adherence to such rules has often led to unfairness and stagnation in the development of the law and of people's rights.[clxxiii] By contrast, in time periods where formalism has waned, and where the merits of a case have been the drivers of procedure, rather than the other way around, the law has seen a greater development and increased focus on individual rights, fairness, and accessibility.[clxxiv] This is supported by

statements made by Justice Winkler: "[I]f a procedural code or provision is ornate and intricate, the chances are that it will be expensive and cumbersome to administer for both lawyers and courts and that it will thus detract from substantive justice.[clxxv]"

Grey *et al*. suggest that strict adherence to formal rules of procedure favours the wealthy and powerful in society. The wealthy are most able to hire unlimited legal assistance to represent them, to fill out numerous court forms in strict compliance with a detailed procedure, as well as navigate that procedure so as best to exploit the weaknesses or errors of the other party. Weaker parties may therefore feel pressured to negotiate differently or accept settlements that may be unfair because the cost of proceeding to trial is too high.[clxxvi] Therefore, full adjudication of the claim, and full protection of rights, remains inaccessible.[clxxvii] Wealthier parties are also able to obtain, and pay for, preventative legal advice, before claims are even made; they are therefore better able to manage and mitigate risk, as well as cost and delay.[clxxviii] Those who rely on publicly funded legal assistance are not able to obtain preventative advice in this manner, as publicly funded legal assistance generally requires that a claim already be filed.[clxxix] Furthermore, the wealthy and powerful are also most able to influence politics and, therefore, the legislative process, to further their own goals.[clxxx]

Research regarding how successful simplified procedure has been at increasing accessibility differs. While its institutional makeup ensures that proportionality is achieved in the procedure itself, it remains unclear (or perhaps simply a matter of divided opinion) whether simplified procedure has really resulted in greater access to the civil litigation system for average individuals. Early results reported by Joseph suggest that in its first few years, simplified procedure was meeting its goals.[clxxxi] Focus groups, comprised of members of the bar

and the judiciary, reported a high level of satisfaction with the new rule, including that it resulted in reduced costs to the client, speedier settlement or resolution of the claim, and less delay in getting to trial.[clxxxii] However, Macdonald's research suggests that it has not been average individuals who have benefitted from the rule, and increased access to the court system for individuals has not occurred. Rather, it is corporations that most seem to benefit from the simplified rules.[clxxxiii] Justice Winkler has stated that some of the reforms meant to simplify trials under simplified procedure achieve the result of making the pre-trial stages of litigation more expedient; however, the result was that when cases did proceed, the trials themselves tended to be disproportionately long, as counsel try to work out issues not fully investigated in the more limited pre-trial stages.[clxxxiv] They were still shorter than trials not conducted under simplified procedure, but much longer than warranted for claims of that reduced size. Therefore, the results were not proportional.[clxxxv]

Furthermore, Backhouse suggests that, similar to small claims court process, it remains privileged populations that are most able, and most willing, to engage these simplified processes, even though they are aimed increasing accessibility for all populations.[clxxxvi] This goal must be kept foremost in mind if any reforms are to achieve, in practice, increased accessibility for all.

What Can Simplified Procedures Show the Probate Application Procedure?

Macdonald suggests that if increasing access is the goal, it rationally follows that simplified processes should be aimed at the types of legal disputes and issues that the average citizen encounters regularly.[clxxxvii] As the vast majority of individuals are touched by estate administration at some point in their lives, the probate application process should be a primary

target for such a simplified procedure. Rule 76 in Ontario therefore has strong lessons for a simplified small value probate application procedure.

Rule 76 makes clear that simplifying the process, and encouraging flexibility in the application of procedural rules, can lead to more satisfactory resolutions, more efficiency, and therefore improved access.[clxxxviii] However, this increased flexibility must be accompanied by additional training and resources, for both court staff, judges, and the public,[clxxxix] in order to ensure that the flexibility is used effectively, and to its maximum potential; fairly, to achieve fair results for individuals, and to achieve those results in a fair manner; and consistently, so that it is available and accessible to all populations, in all parts of Ontario, in all cases where it is warranted.[cxc]

3. The Social Justice Tribunals Ontario (SJTO)

Administrative law exists at the intersection of society and the state, and is concerned with the regulating the state government's executive powers.[cxci] Each body of the executive, each arm or branch of government, exerts power and enacts decisions that affect society. Administrative law is the law of how they undertake and implement those executive decisions.[cxcii] As government has expanded, so too has the purview of administrative law. Administrative agencies may have several tools at their disposal to fulfill their mandates, and may provide an internal mechanism for review and redress of the decisions they make[cxciii]. Adjudicative methods, like tribunals or boards, are but one example of the ways in which administrative agencies may undertake that review mechanism.[cxciv]

In general, administrative boards and tribunals exist to provide a review mechanism for actions and decisions taken by government officials in their administrative, discretionary

capacity.[cxcv] Government officials have been delegated a great number of decision-making powers by legislatures, and administrative law is occupied with ensuring that the limits of those powers are not exceeded:[cxcvi]

> Most of administrative law involves the close scrutiny of the jurisdiction or authority of a particular governmental official to do a particular action which affects the rights or interests of another person, and this inevitably involves the application of rules of statutory construction to determine precisely what the legislative branch meant to enact.[cxcvii]

Many administrative boards and tribunals adjudicate in areas of law that have profound effects on the populations they serve. Many of these populations are particularly vulnerable, marginalized, or at-risk, such as the elderly, those with disabilities, and low-income populations from all racial and ethnic backgrounds.[cxcviii] To be effective, these boards and tribunals must also be accessible to the populations they serve.[cxcix]

Administrative boards and tribunals, especially those that work with the populations described above, may have rules and procedures that distinguish them from courts and make them a useful study for this project. Procedure from one tribunal to the next can be vastly different;[cc] however, they are typically designed to be a simple and straightforward as possible,[cci] encourage self-representation, and reduce both complexity and the appearance of complexity. They encourage efficiency in the decision-making process by, for example, not requiring excess forms or long timelines:[ccii] "[I]n general terms, [this meant] simplified forms, short time-frames, no formal discovery process, relatively informal hearings, simplified evidentiary rules and a more active and inquisitorial role played by adjudicators who have been granted broad discretionary powers."[cciii]

Generally, their procedures also have a great deal of flexibility in comparison to those of formal courts.[ccIV] This flexibility enables them to accomplish their decision-making functions while still treating the party or parties before them with fairness.[ccv] Their goals generally include limiting formality and technicality, so as to reduce both cost and delay:[ccvi] "[F]airness is the essential purpose of all procedural rules. Common sense should prevail over legal formalism."[ccvii] Tribunals also often have a great number of guidelines and manuals that are publicly available for users,[ccviii] to further increase accessibility.

Broadly speaking, then, these tribunals have sought to achieve a proportional balance between accessibility and protection by retaining the adjudicative and decision-making functions of a court, but requiring the minimum of formal procedural requirements in order to enable those functions to continue.[ccix] By requiring only that minimum, and eliminating formal requirements that do not strictly serve that adjudicative function, tribunals have increased accessibility through simplicity in the remaining process, as well as in the procedural mechanisms that are retained.[ccx]

Accessibility, efficiency, and effectiveness were some of the drivers behind the creation of The Social Justice Tribunals Ontario (SJTO), a new administrative super-cluster that came into effect on January 19, 2011. It is an umbrella organization that brings together seven previously stand-alone tribunals under one roof, with a mandate to share resources, rules and procedures.[ccxi] The SJTO includes the Child and Family Services Review Board, the Custody Review Board, the Human Rights Tribunal of Ontario, the Landlord and Tenant Board, the Ontario Special Education Tribunals (both English and French), and the Social Benefits Tribunal; these tribunals were clustered together because they deal with similar issues or a similar

intersection of social injustice issues and, frequently, common users.[ccxii] While each tribunal continues to hear cases independently and make independent decisions, the resources, rules, and procedure are now commonly centered.[ccxiii] This is part of a more general movement in Ontario to cluster tribunals with related mandates, thereby encouraging them to work together on shared issues.[ccxiv]

The goals behind the creation of the SJTO were to increase efficiency of process, share resources, reduce cost, and increase accessibility for shared client populations, all without losing effectiveness or procedural fairness and rigour in the decision-making process.[ccxv] The creation of the super-cluster has not necessarily resulted in a further reduction of procedural rigour. Rather, it has brought together different boards and tribunals that had each balanced accessibility and procedural rigour on its own, but may have developed different – or worse, duplicate – structures, rules, and procedures, resulting in inefficiency and inaccessibility for common clients.[ccxvi] Therefore, the decision to cluster the tribunals together under one umbrella came out of a desire to further increase accessibility and efficiency, further streamline the process for clients, as well as reduce fragmentation and redundancy.[ccxvii] Many clients of one board or tribunal may also be clients of another – for example, the Landlord-Tenant Board and the Social Benefits Tribunal.[ccxviii] As each deals with similar areas of law, and operates on similar principles, efficiency could be achieved by providing for common procedures and shared resources,[ccxix] by allowing for staff cross-appointments with a minimum of re-training required, increasing opportunities for professional development and shared resources, and by creating a more seamless client experience. Clients are no longer required to learn, observe, or apply a different set of rules to each tribunal or board they encounter.[ccxx]

The SJTO has taken this process even further by establishing a common set of rules of procedure, called the Common Rules.[ccxxi] These Common Rules mandate that the member tribunals, and each individual member of a tribunal, adopt, in every case, whatever method or procedure will enable it to most quickly and efficiently decide the issues while also ensuring that the parties before it have the opportunity to know the issues and to be heard.[ccxxii] For example, Rule A3 of the Common Rules of Procedure states:

A3 INTERPRETATION

A3.1 The rules and procedures of the tribunal shall be liberally and purposively interpreted and applied to:

(a) promote the fair, just and expeditious resolution of disputes,

(b) allow parties to participate effectively in the process, whether or not they have a representative,

(c) ensure that procedures, orders and directions are proportionate to the importance and complexity of the issues in the proceeding.

A3.2 Rules and procedures are not to be interpreted in a technical manner.[ccxxiii]

The SJTO Common Rules therefore place proportionality, efficiency and expediency at the heart of the process.

To achieve such flexibility in procedure, the Common Rules allow for a variety of novel procedures and mechanisms, and place a great deal of discretion in terms of methodology and process in the hands of the decision-making members. Among others, the Common Rules allow a tribunal member to waive or vary any rule as needed;[ccxxiv] to add or remove parties, or join or sever applications;[ccxxv] to amend any application at any time during a proceeding on notice to the respondent;[ccxxvi] to extend or shorten certain time limits;[ccxxvii] to control the hearing's own process;[ccxxviii] and to compel or admit evidence.[ccxxix] The Common Rules also grant members

investigative powers, which can be extremely useful: for example, the ability to make on-site visits during a landlord-tenant dispute.[ccxxx] These are powers far beyond those granted to judges in a typical court proceeding.

The procedural flexibility of the SJTO demonstrates that increasing accessibility need not come at the expense of rigour. Rather, creativity and flexibility in how and where that rigour is imposed can increase accessibility while still maintaining the protection inherent in robust procedures.

The lessons that this project can take from the SJTO will be considered below, in conjunction with those from the Landlord and Tenant Board.

4. The Landlord and Tenant Board

The Landlord and Tenant Board is a relevant example to this project, as prior to the Board's initial creation, landlord and tenant issues were dealt with through the court system. The current Landlord and Tenant Board administers the *Residential Tenancies Act*, 2007; its predecessor, and the original administrative tribunal for landlord and tenant issues in Ontario, was the Ontario Rental Housing Tribunal, which was created by the enactment of the *Tenant Protection Act* in 1997 (the "*TPA*").[ccxxxi] The Tribunal was created to remove landlord and tenant issues from the purview of the Superior Court and, ostensibly, to create a more fair and accessible system for both tenants and landlord to resolve disputes.

Prior to the enactment of the *TPA*, rental housing issues were governed by multiple statutes and judicial processes. It was a multi-faceted system that was difficult and unwieldy for individuals to navigate. For example, rent control issues went to an administrative tribunal run

by the Ministry of Housing, but eviction proceedings and other, non-rent related matters involved an application to Superior Court.[ccxxxii]

In the 1980s and early 1990s, criticism began mounting that, among other issues, the Superior Court was not likely the best avenue for resolving landlord-tenant issues or disputes.[ccxxxiii] Courts are very formal places that have an intimidating atmosphere and the procedure was disadvantageous to unsophisticated parties, as well as parties without legal representation – often, although not exclusively, tenants.[ccxxxiv] The court, by its very nature, created an adversarial environment that discouraged settlement and cooperation.[ccxxxv] The result was a contentious landlord and tenant dispute resolution process, as well as a swamping of court resources.[ccxxxvi] As well, the process itself was criticized as being too slow and time-consuming, as landlord-tenant issues shared the same court calendar as all other matters, and a significant court backlog existed during that time.[ccxxxvii]

In 1997, following the resolution at the Supreme Court of Canada of a constitutional question regarding the jurisdiction to decide landlord and tenant issues,[ccxxxviii] the *TPA* was enacted. It created the Ontario Rental Housing Tribunal to be an "independent, quasi-judicial tribunal[ccxxxix]" to be the administrative decision-making body in all landlord-tenant disputes.[ccxl]

The *TPA* and Ontario Rental Housing Tribunal regime came under almost immediate criticism.[ccxli] Some of these concerns were procedural in nature and demonstrate the difficulty of reaching a suitable compromise between accessibility and procedural protection. One relevant example is the so-called "default eviction process" and the criticism that surrounded it.

The default eviction process allowed landlords to obtain an eviction order by default in only five calendar days, not business days, after service of a Notice of Hearing upon the tenant.

If the tenant failed to file the required Dispute within those five calendar days, the hearing was cancelled and an eviction order issued based on the documentary information and evidence filed by the landlord.[ccxlii] However, service could be affected by regular mail, and service by registered mail was not required. In practice, this often meant that tenants, especially those in rural or northern areas, or those in large apartment complexes where mail was easily misplaced or misdelivered, had not even received the Notice of Hearing before an eviction notice was obtained.[ccxliii] Data showed that approximately 50 percent of the applications to the Tribunal were dealt with through this default process.[ccxliv] Clearly, this resulted in significant procedural unfairness, with parties not knowing the case to meet or having the opportunity to state their own case before the decision-maker.[ccxlv] Therefore, while it was efficient and less time-consuming than the previous court regime, as well as an easier and more accessible mechanism for some of the parties – namely, the landlords – to achieve a desired result, it lacked the procedural protection for all parties and failed to strike an appropriate balance between accessibility and procedural protection.[ccxlvi] The ease of the default procedure was also disproportionate to the result: eviction for the tenant from their home.

Reform consultations regarding the *TPA* began in 2004, and in 2006 the *Residential Tenancies Act* ("*RTA*") was enacted. It replaced the Ontario Rental Housing Tribunal with the Landlord and Tenant Board.[ccxlvii] The *RTA* eliminated the default procedure described above. Now, eviction proceedings require a hearing in front of the Landlord and Tenant Board.[ccxlviii] The required notice periods are based on the reason the landlord puts forth for eviction, but the Board itself also notifies the tenant.[ccxlix] Generally, for issues such as non-payment of rent, the notice period is seven days; for damage-related issues, it is twenty days.[ccl] Furthermore, it

has been shown that the increase in protective measures under the *RTA* did not significantly impact the functionality of the Board, which remains able to deal as efficiently with its caseload under the *RTA* as it was under the *TPA*.

The default eviction process that existed under the *TPA* can be viewed as a form of simplified procedure, in the sense that some of the requirements for landlords to evict tenants that existed under the Superior Court regime were eliminated under the *TPA* in order to increase accessibility to the system, as well as efficiency. The creation of the Tribunal under the *TPA* was designed to eliminate backlog, encourage expediency, and increase accessibility. A simplified eviction procedure was one element of that process.

However, it can be argued that this simplified eviction procedure was flawed in two ways relevant to this project. First, it provided increased accessibility for only one category of affected party, namely landlords. Second, it swung too far towards accessibility on the accessibility/protection spectrum, and increased accessibility for landlords to the point of eroding necessary procedural protections. As a result, it created unfairness, and lacked proportionality.

The simplified eviction procedure lacked proportionality because the ease with which eviction orders could be obtained by landlords was not proportional to the seriousness of the orders that could be made, nor to the effect of those orders on tenants: eviction from their homes. In striving for efficiency, the default eviction process had eliminated too many of the protective functions that a more rigorous proceduce can provide. Eiminating the requirement for a hearing, for example, having short notice periods, and relaxing the acceptable methods of service meant that the procedure was not rigorous enough to protect tenants from unfairness.

The Landlord and Tenant Board's changes in procedures and policies regarding tenants remind us that proportionality, and simplified procedures as a means of achieving that proportionality, require an effective and appropriate balance on both sides of the accessibility/protection spectrum: for simplified procedures to be proportional, they must be accessible to all parties on the one hand, but must still offer adequate procedural protection for those parties on the other.

The Board under the *RTA* shows a more effective example of this balancing than was seen under the *TPA.* The *RTA* has rebalanced the eviction process by adding in greater protective mechanisms for tenants, and has also increased accessibility for tenants without necessarily losing efficiency in the process. Therefore, both accessibility and procedural protections are increased. The result is a more balanced and therefore more proportional system.

What Can the SJTO and the Landlord and Tenant Board Show A Simplified Probate Procedure?

The administrative processes and clustering model of the SJTO, and the Landlord and Tenant Board specifically, demonstrate several key propositions for this project. First, they demonstrate clearly that increased flexibility and discretion in decision-making and rule application can increase accessibility and efficiency, provided that they are managed effectively so as not to lead to bias and injustice. This flexibility does not necessarily reduce procedural rigour, but rather allows the rules to be more effectively applied, having regard to the individual circumstances of each case.

Second, the Landlord and Tenant Board more specifically reminds us that balancing accessibility and procedural protection can sometimes require a balance on either ends of the

spectrum. Any simplified procedure, used as a mechanism to increase accessibility, must not relax procedural protections too greatly. This project must continue to be mindful of the risks highlighted in Part Two, Section F of this paper, as well as any additional risks that may arise out of individual proposals for simplifying the probate application procedure.

Nevertheless, these examples do demonstrate that an effective, accessible, and sufficiently protective balance is possible. The Landlord and Tenant Board under the *RTA* has effectively rebalanced the eviction process so as to increase the proportionality between procedure and the serious effects of eviction orders. It has increased accessibility for all parties through the administrative tribunal model, but has also added in sufficient procedural protections. As a result, a greater balance is achieved. As well, the SJTO and the Common Rules give us some further examples of how accessibility can be increased, while maintaining a robust decision-making process.

Lastly, these two bodies demonstrate that we should be creative in our approach to reform. This creativity is one path towards increasing accessibility while maintaining robust procedural protection. For example, the court may not always the best mechanism for processing claims of a certain nature. The creation of a unique tribunal process for dealing with landlord and tenant issues resulted in reforms and an increase in accessibility for both landlords and tenants. Furthermore, the Landlord and Tenant Board is a more proportional system, in that the accessibility of the system is balanced with the procedural protections needed in light of the serious consequences of the orders that the Board can make, such as eviction.

It is possible that the adjudicative, adversarial model that uses the court as the decision-making body for the administrative task of granting a COA in non-contested cases may not, in

fact, be the only or best method of making decisions about when, and to whom, a COA is granted. This possibility bears further consideration. The Common Rules demonstrate that flexibility and creativity can result in increased accessibility, without altogether sacrificing procedural protection. These Common Rules still allow the SJTO member tribunals to be effective and protective decision-makers, while increasing user accessibility. This encourages us to consider whether a non-court model could be an efficient, effective, accessible, but nevertheless still rigorous model for the probate application procedure.

If moving to a non-court model for probate applications is not feasible or otherwise desired, the SJTO encourages us to consider whether a more flexible procedure might allow the increase in accessibility that this project seeks. It demonstrates one example where creating a flexible procedure has increased accessibility but has not necessarily resulted in a loss of procedural protection. These models suggests that some of the ways in which administrative tribunals, such as the Landlord and Tenant Board, have exempted themselves from the traditional court process, and the tribunal rules procedures that have resulted, can be useful examples for a simplified probate application procedure.

5. The Land Titles Registry and Electronic Land Registration System

At first blush, it may not seem that the Land Titles Registry system in Ontario could have much to say about a simplified probate application procedure. However, if we step back from the court model and look at what functions the probate application system is truly serving, we can see that in some ways, it operates like a registry system already. Therefore, the advent of the Land Titles Registry and Ontario's Electronic Land Registry System (E-LRS) may have much to show us about a possible way forward for the probate application process.

The premise of any land titles or land registration system is that owners of land or other real property must register their ownership of such property before they can enforce any of the rights associated with that ownership. This enables conflicting claims to be resolved on a first-registered, first-priority basis, and true ownership to be ascertained in any dispute over real property or real property rights.

The Land Titles system in Ontario is a successor system to the land Registry system, and currently operates parallel to that system for certain parcels of land. Ontario began with a Registry system. Each township had a Register book, in which each Crown grant of land was entered. Any easements or reservations to the Crown on that land were also entered into the Registry book.[ccli] Every time the parcel of land was subsequently transferred, the Registry book and original Crown grant were checked to ensure that the correct rights and entitlements to the land were also being transferred.[cclii] That transfer and the new owner, as well as details of any new documents affecting title or ownership of that property, were entered into the Registry page for that title, in chronological order by date of registration.[ccliii] Documents were checked for form, including signature and description requirements, but not for substance or legal effect.[ccliv]

In 1885, Ontario passed the *Land Titles Act*, introducing the Land Titles system to the province. Any land registered after 1885 was entered into the land titles system. As a result, most of Ontario is now under the Land Titles system, and only small pockets of historically settled areas remain under the Registry system.[cclv]

Modern land titles systems like Ontario's are a form of Torrens system, a type of registry system based on the International Ship's Registry. An individual registers their ownership and is

granted a certificate of title, or ownership, of that property. Land parcels are described on the title based on plans registered in the system.[cclvi] The title must display any current, active interests in that property, such as encumbrances, liens, or easements.[cclvii] Defunct or inactive interests, such as discharged liens or encumbrances, are deleted off the title. This updated record is meant to mirror, on the actual certificate of title, all current active interests and documents registered against the property that are within the system.[cclviii]

The entire system, and each transaction within that system, is guaranteed by the province's Land Titles Assurance Fund,[cclix] an insurance fund that protects interested parties from damages caused by lost, false,[cclx] or missing registrations, or by errors on the certificate of title (such as missing encumbrances or discharges) that deprive them of land or their rightful interest in the real property.[cclxi] Eligibility for claims to the Land Titles Assurance Fund generally include: "fraud, in certain circumstances; errors or omissions by the land registration system; errors in recording land that is bought under the *Land Titles Act*; errors in recording a registered document in the automated land registration system".[cclxii] The Fund can provide compensation for: "financial losses resulting from a real estate fraud or error; reasonable legal costs related to the claim; other reasonable costs related to the claim".[cclxiii]

The move from a Registry system to a Land Titles system in Ontario was, in itself, a move to increase efficiency. It eliminated the need for an in-depth search of the Registry,[cclxiv] and provided greater certainty by reducing the possibility that something would be missed within the midst of the large Registry books. Since the 1970s, Ontario has been engaged in a project to convert all the previous Registry land into the Land Titles system and digitize all the existing paper records, including maps.[cclxv]

In more recent years, the move towards greater efficiency in the Land Titles system has resulted in the creation of an electronic land titles database, called the Electronic Land Registration System ("E-LRS"). Using digitized data, E-LRS is an online title searching and electronic document registration system that allows paperless registration of documents from a remote location.[cclxvi] Thus, it is no longer a requirement to go down to the Land Titles Office to register documents or transfers, or to search titles.

E-LRS was in part created by necessity, as the pace and sheer volume of land transfers in Ontario by the 1990s was simply too big and too time-consuming for office staff to manage without error. As the backlog grew, any delay in the registration of documents meant that interests in land could be affected after a title search was done, but before the registration of the transfer, making the process for lawyers cumbersome. The time and delay involved in transferring land because of this backlog was being passed on to clients, and costs were rising to unsustainable levels. Government resources were also being taxed and strained, as even finding sufficient space to house all the documents and titles was becoming an issue. Furthermore, the fact that the system was so decentralized was also becoming problematic, as different offices may enforce government policies and procedures in different ways, resulting in a lack of continuity and creating frustration. The delay, uncertainty, and cost were threatening the entire system.[cclxvii]

As a result, the goals of E-LRS were to modernize the land titles system in Ontario and make it automatic, simple, and standard across the province. This was to be done by computerizing all the information, thus enabling automated document production and registration, and online title searching. This would also create one centralized online system,

accessible from anywhere, with all the information about a given parcel of land in the province. This would reduce the costs of conveyancing for the lawyer and therefore the client, and save government resources on space, staff, and disputes.[cclxviii]

There were, of course, risks to moving to an electronic system like E-LRS. Many of these risks remain today. Fraud, in terms of mortgage or title fraud, remains a significant concern and serious issue.[cclxix] In an electronic system, the risk of identity fraud, fraudulent powers of attorney, and/or cheque fraud increases, and these are the most common sources of serious issues within E-LRS.[cclxx]

Ontario has tried to tackle the risks of fraud in several ways. First, Ontario has tightened the requirements around client identification. Clients are required to provide a greater number of specified types of identification before any transaction can proceed. Second, Ontario now requires two independent lawyers on each transaction, one representing the vendor, and one representing the purchaser. This acts as an additional check on both client identification and a separate check for signs of fraud.[cclxxi]

Third, Ontario has restricted access to E-LRS by requiring users to register in order to gain access. By law in Ontario, only lawyers can give legal opinions about the viability and marketability of a title to land. Therefore, access to E-LRS has been restricted, as only lawyers, conveyancers, and real estate professionals can be registered. This restricted access further reduces the risk of fraud and/or misuse, whether intentional or not, of the system.

Lastly, as we have seen, the Land Titles Assurance Fraud provides a safeguard against loss from fraud. While the Assurance Fund may not prevent fraud from occurring, it does

address the risk of loss from that fraud by allowing compensation not only for losses stemming from administrative error, but for losses stemming from real estate fraud as well.

For the Land Titles system, then, a reduction in procedural rigour through the adoption of E-LRS has meant an increased risk. However, the increased risk is warranted by the gains made in the system as a whole. Furthermore, the measures described above show that the increased risk can be managed. As a result, E-LRS has managed to increase accessibility by making the Land Titles system less expensive, more effective, and more efficient for both users and the general public, while still keeping in place the procedural protections required.

What Can the Land Titles Registry and E-LRS Show a Simplified Probate Application Procedure?

E-LRS, and the Land Titles system generally, essentially act as a repository for required documentation and a centralized database for the searching of that documentation. They do not examine the substance or legality of documents. Legal opinions about the nature of the titles and documents registered are still left to legal professionals. In some ways, the registration of probate application documents with the Court is quite similar, in that the Clerks accept the documents for registration, but merely check them for form and for completeness. The legal opinion about the substantive completeness of the documents is left to the judge who reviews the application.

With this similarity in mind, the Land Titles system and E-LRS can show us one path forward for a simplified probate application procedure. Technology is often discussed as one answer to accessibility issues.[cclxxii] The probate system often also has concerns about efficiency of the application procedure, physical access to the registry, the standardization of information and policy across the province, costs to the system, the government, and the client, and

variations in document production by clients or lawyers that slow down the application procedure even further. Within Toronto, although not necessarily outside of Toronto, issues with backlog at the registry and delay in obtaining the COA following application are also sometimes seen. These mirror, in many ways, the concerns that existed in the Land Titles system, which prompted the move to E-LRS. This suggest that increased use of technology may be one path towards increasing accessibility and efficiency while maintaining procedural protection. As we have seen above, technology can reduce costs and delays, and increase access to the court system for those in rural or remote communities that do not have physical access to a court registry.[cclxxiii]

It is important to recall that increasing efficiency in this manner is not necessarily the goal of this project; rather, increased accessibility is sought. Technology can certainly increase efficiency in the system, and can address the concerns above. It can also address some issues of accessibility, such as physical accessibility, for some populations. However, technology can also create a barrier for other populations, as not everyone is sufficiently literate or technologically literate to access and successfully use such a system to its full potential. Therefore, any recommendations regarding the use of technology as a means to simplify the probate application procedure must take this potential barrier into account.

The move to an electronic registry system could have significant benefit for the probate application procedure, keeping in mind the potential barrier that it may create. Ontario would not be the first jurisdiction to adopt such a system for small value probate applications, lending credence to the idea. This will be discussed in more depth in Part Five, Section G, below.

6. The Children's Law Reform Act

The Office of the Children's Lawyer, a branch of Ontario's Ministry of the Attorney General, is the representative for minor children in civil law matters, including estate and trust matters.[cclxxiv] Where a child under 18 is a beneficiary, or otherwise entitled to money or property from an estate, the Office of the Children's Lawyer requires notification of an application for a COA, just the same as any other beneficiary or person entitled to any portion of the estate.[cclxxv] The Children's Lawyer will then involve itself in the sale of any property in the estate where the property is sold for distribution to the beneficiaries.[cclxxvi] Furthermore, for estate entitlements over $10,000.00, the estate representative cannot pay the money to the minor child directly, nor to their parent or guardian to be held in trust for the child, unless stipulated by will. Section 47(1) of the *Children's Law Reform Act*, R.S.O. 1990, Chapter C.12, (the "*CLRA"*) requires estate entitlements over $10,000.00 to be paid into court and held for the benefit of the child until the child reaches the age of majority.

However, where the estate entitlement is less than $10,000.00, s.51 of the *CLRA* specifies that the entire amount of the entitlement may be paid to the child's parent or other lawful guardian, for safekeeping for that child.

Therefore, the *CLRA* is a further example of the balance between procedural protection and accessibility, and furthermore is an example of using monetary value as the threshold mechanism for determining the procedure to apply. By allowing for a different, more straightforward procedure for smaller value entitlements, the *CLRA* has increased accessibility of the procedure, and reduced the delay associated with increased procedural requirements. However, it has done so by sacrificing some of the procedural protection provided by paying

the entitlement into court: namely, that the money may be mishandled or lost by the parent or guardian.

Despite this risk, the two-tier system in the *CLRS* appears to be a fair compromise when one balances the amounts involved on the one hand, and the extra requirements and procedures an estate representative must undertake when paying money into court on the other hand.

What Can the Children's Law Reform Act Show a Simplified Probate Application Procedure?

The *CLRA* is another successful model of using monetary value as the threshold for determining procedure. Furthermore, it creates a precedent in the estates context for using low monetary value as the driver for a simplified procedure or for the application of relaxed rules. While this relaxation of procedure and rules may invite risk due to the reduction of procedural protections, both the risk and the procedure may presumably be considered to be proportional to the values at stake.

7. Other Processes Not Considered Here

There are other processes that have balanced accessibility and procedural rigour, and which have used monetary limits as the threshold for accessing a different procedure. Two further examples in the commercial realm were found[cclxxvii]. Both processes use monetary value as the threshold for determining which procedure is to be used. However, as they are substantively very different from the probate application process, and therefore not relevant to this project, they will not be examined in this paper.

B. Is There a Difference Between Adversarial and Non-Adversarial Processes?

The increasingly managerial role given to judges in simplified civil litigation procedures and small claims courts,[cclxxviii] as well as their more investigative role and greater discretion to manage the adjudicative process that characterize administrative tribunals, are both somewhat removed from the traditional, adversarial model of justice upon which our current court system is founded.[cclxxix] As Roderick Macdonald explains, in a survey of access to justice in Canada, the adversarial system:

> presupposes a fixed evidentiary record, and the existence of precise legal rules that antedate the dispute. It leaves the management of the process in the hands of the disputing parties, on the assumption that settlement of the dispute is more important that development of the law, and that the judge's primary role is not to produce justice, but to resolve the dispute between the parties. Together, these propositions suggest not only that judges should not manage civil litigation, but that the parties themselves should decide both the shape of the dispute and the procedural mechanisms for handling it. Of course, it is precisely these built-in structural features of adversarial adjudication that are in view when it is suggested that the process can be improved to enhance access to justice.[cclxxx]

We have seen above that increased flexibility, and increased accessibility, are hallmarks of the procedures examined here, such as the SJTO, the Landlord and Tenant Board, and, to some extent, E-LRS. Even Small Claims Court and Simplified Procedure have relaxed some of the procedural rules of the court system, and therefore to some extent moved away from the model of traditional litigation. The fact that these models have all moved, in varying degrees, away from the adversarial model in order to increase accessibility says something significant about the adversarial model's ability to render justice accessible to all.

Furthermore, the non-court models contemplated in the SJTO, Land Titles Registry and E-LRS, as well as the move away from traditional litigation in the Landlord and Tenant Board,

demonstrate that a non-court model can further increase flexibility, and therefore accessibility. Non-court models can retain an adjudicative, even adversarial nature,[cclxxxi] but are better able to respond to the individual needs of users and situations. They are better able to be creative in addressing accessibility and proportionality, because they are not hampered by needing to emulate, in some way, the traditional court model. These non-court models suggest multiple ways to increase accessibility in the probate application system.

It can be argued that models such as the SJTO and the Landlord and Tenant Board, which have incorporated a move from traditional litigation to a more administrative model, may reflect more of a difference in degree, rather than a difference in nature altogether. That is, they remain adjudicative decision-making bodies, and still serve many of the same functions of a traditional court. The changes made through the administrative law context, such as increased flexibility and discretion in decision-making, are changes to the ways in which the adjudicator can do his or her job, but are not fundamental changes to the role or function of the adjudicator. Certainly, the changes made to create Small Claims Court or the Simplified Procedure under Rule 76 are also changes of degree, not nature. This begs the question whether a wholesale change to a non-court model is truly necessary for the probate application procedure. Or, can sufficient changes in degree be made within the court system already in place to accommodate additional flexibility in order to increase accessibility?

The probate application procedure, where uncontested, is non-adversarial. Nevertheless, the ways in which simplified adversarial procedures and administrative tribunals have moved away from the fully adversarial litigation model can suggest some mechanisms for increasing accessibility in the current probate application system. Increased discretion for court

staff, or an increased mandate and training to assist self-represented individuals with non-substantive issues, an increased role for judges to manage probate applications where the estate already appears likely to be contentious, and increased, accessible self-help legal guides could be helpful in addressing the accessibility issues relating to cost, delay, complexity, the perception of complexity, as well as physical accessibility.[cclxxxii] As well, a relaxed procedure, increased informality,[cclxxxiii] and the discretion to modify procedure where rigour is not required in individual cases would increase efficiency and expediency in the probate application procedure.

Concrete suggestions for increasing accessibility and proportionality in the probate application procedure will be considered in more detail in Part Five of this paper.

V. PART FOUR: CONTRASTING THE PROBATE SYSTEM WITH CONTINUING POWERS OF ATTORNEY FOR PROPERTY

One useful comparison when contemplating a simplified probate application procedure for small value estates is the procedure regarding Continuing Powers of Attorney for Property ("POA"), which are statutorily provided for, and governed by, the *Substitute Decisions Act*, S.O. 1992, c.30 (the "*SDA*"). As we have seen, one of the rationales for the procedural rigour of the probate application is to protect the estate from fraud, financial mishandling, or abuse by the estate representative. However, as a legal system, we have provided much less procedural protection over the POA regime, and the application requirements for a POA are minimal to non-existent.

Attorneys for incapable grantors, exercising their authority under a POA, and estate representatives may seem to have similar powers, duties, and responsibilities. However, as will

be seen, this is not necessarily so. It can be argued that the fiduciary duties owed by an attorney to an incapable grantor extend beyond those owed by an estate representative to the estate or the beneficiaries.[cclxxxiv] Owing to the nature of their relationship to the grantor, and to the extreme vulnerability of the grantor in such a situation, attorneys should be held to the highest possible standards.[cclxxxv] Yet, in Ontario, the procedural rigour required of attorneys is minimal, especially in comparison to that required of estate representatives. Does this suggest anything for a simplified probate application procedure for small value estates?

A. Functions and Features of the Continuing Power of Attorney for Property

A POA is a legal document in which someone (the "grantor") appoints an individual or individuals (the "attorney"), to manage the grantor's finances and property on the grantor's behalf during any subsequent incapacity of the grantor. Attorneys are responsible for managing and making decisions regarding all of the grantor's property and financial affairs.[cclxxxvi]

Attorneys have discretionary powers over almost any aspect of the grantor's finances and property,[cclxxxvii] except that they cannot make, revoke, or otherwise alter testamentary dispositions made by the grantor.[cclxxxviii] Up to that point, however, and subject to any contrary terms in the document and their fiduciary obligations, they have extremely wide discretionary powers regarding the finances and property of the grantor. This includes the power to make discretionary gifts out of the grantor's estate while the grantor is living.[cclxxxix]

Attorneys under a POA are fiduciaries.[ccxc] They are required to undertake their duties and responsibilities with the utmost care, honestly and in good faith, standing in the place of the grantor and in the grantor's best interests, having regard to all the circumstances.[ccxci] The attorney's fiduciary obligations are owed to the grantor, and only to the grantor. Part of an

attorney's duty to the grantor is not to disclose personal or confidential information about the grantor or his or her finances to anyone other than the grantor, unless so authorized.[ccxcii] This includes family members or other close relations. An attorney does not have fiduciary obligations to other interested persons or family members of the grantor, although the *SDA* encourages the attorney to include family members in the decision-making,[ccxciii] and case law suggests there may be a subordinate duty to consider family members' interests in the estate.[ccxciv] However, the overarching duty is always to the grantor and to make decisions in the grantor's best interests,[ccxcv] and it is presumed that the grantor has chosen the attorney who will best manage the fiduciary obligations that the attorney owes to the grantor.[ccxcvi]

Outside of those within the legal and estate planning community, it is my experience that the average individual is less aware of what a POA is or why it is necessary[ccxcvii]. As a result, they tend to feel that a POA can be an afterthought in estate planning. However, the decisions made by an attorney under a POA can have serious, life-altering impacts on a grantor, not just on their finances.[ccxcviii] These decisions are made and carried out while the grantor is alive; as a result, the decisions can have enormous impacts on the grantor's quality of life and well-being. Once the grantor is incapable, and the attorney begins to act, the grantor is entirely vulnerable and completely dependent on the attorney to make responsible decisions.[ccxcix] Sadly, quality of life, quality of care, and comfort can vary significantly depending on the assets at one's disposal.[ccc]

Furthermore, in the context of the elderly, it may be unlikely that a grantor will recover from their incapacity and regain control over his or her own affairs[ccci]. As a result, an attorney's decisions can have significant consequences that last for the remainder of the grantor's

lifetime.[cccii] The vulnerability and total dependency of a grantor put the attorney in a higher position of trust, and of control over the grantor, than the estate representative has over the estate or the beneficiaries.[ccciii] This can make a POA a more important document in any estate plan than a will, and also make it more critical that POAs are thoughtfully and carefully granted.

Given that an attorney's decisions have much farther-reaching impacts than those of an estate representative,[ccciv] the choice of attorney is, in my opinion, as or more important than the choice of estate representative. This is especially so because the oversight mechanisms in the POA regime are less rigourous than those of estate representatives. This lack of rigour is present in four ways.

First, grantors can execute POAs without legal advice or legal assistance provided they are executed in accordance with the formalities laid out in the legislation, as they can for holograph wills. There is no mandatory form, and no mandatory information required for either the grantor or the attorney.[cccv] While, arguably, this increases accessibility of the document to those who may not be able to access legal advice or assistance, it also limits the opportunities for grantor and attorney education about the document, its parameters, and the duties that the attorney must undertake. As we have seen, the consequences of a poorly thought-out homemade POA can be more severe than the consequences of a poorly thought-out holograph will. While information and guidance about POAs are publicly available, it is dependent on either the grantor or the attorney choosing to avail themselves of it.[cccvi] It also limits the opportunities for grantors to discuss and receive advice from a neutral party about who best to name as their attorney, in light of their personal circumstances. While legal advice is not required, it is my (perhaps biased) opinion that some measure of informed guidance and

protection is lost when proper legal advice is not obtained. It may increase the risk that a grantor names an attorney who is ill-suited to the role out of a lack of understanding, and that the POA may be used improperly.

Second, in Ontario, grantors are not required to notify attorneys of their appointment at the time the appointment is made, nor do attorneys have to agree in advance to assume the role and responsibilities of being an attorney. It is possible, therefore, for an attorney to suddenly be informed of their appointment and asked to act immediately, without necessarily understanding their legal duties or obligations, or the parameters of their powers, as discussed above.[cccvii] The fact that appointments are made in private certainly increases the privacy of the document and may encourage the creation of a POA in those who may not wish their private affairs to become public. However, the privacy of appointments also increases the risk that any misuse or abuse remains hidden, and increases the opportunities for coercion or undue influence. It is possible for no one else to know that a POA has been granted, and/or for concerned family and friends not to know who has been appointed as attorney.

Third, there is no application to become officially appointed as the attorney once the grantor becomes incapable, as there is for the estate representative to be officially appointed by the court through the probate process. There is therefore no mechanism for vetting the validity of the POA, or for ensuring that the execution formalities have been properly followed and that the grantor had the requisite capacity to make such a document. There is no process or institution that acts as a gatekeeper, and ensures that the attorney is the person intended by the grantor to act, or that the attorney is aware of the entirety of the grantor's financial and property affairs. The system is entirely reliant on outside third parties to raise concerns and

rebut the presumption of validity if they become concerned. Critically, however, this may only take place once the attorney is already using the POA. In that case, misuse, abuse, or fraud, and the attendant financial loss, may have already taken place.

Fourth, there is no public or third-party oversight of an attorney's actions, nor any passing of accounts unless ordered by the court. Attorneys are required to keep records,[cccviii] and required to keep the grantor informed of the decisions they make, the reasons, and the financial picture or accounting of the grantor's estate. However, incapable grantors may be unable to participate meaningfully in this process, to monitor or question the attorney's decisions, and may be incapable of alerting anyone else to a suspicion that something is amiss. They may not even know that the attorney is behaving improperly or fraudulently.[cccix]

Section 42 of the *SDA* does permit those with automatic standing, and those who are able to obtain leave, to obtain a court order forcing the attorney to begin an application to pass accounts.[cccx] Case law suggests that a grantor's child would likely qualify for leave of the court; other, more remote family members would have a higher threshold to prove why they should qualify for such leave.[cccxi] However, this is a complex, time-consuming, and likely expensive process. It is likely that, should an individual wish to pursue this process, they would require legal advice. The difficulty in obtaining such an order may reflect concerns over privacy, as discussed above. It may also exist in part to discourage frivolous applications. Indeed, where the court deems that the application was unnecessary, or that the attorney is not, in fact, acting improperly, the applicant may be ordered to pay costs.[cccxii] In situations where it is needed, however, it is still a difficult, time-consuming, and potentially extremely expensive proposition to obtain such an order.[cccxiii]

This lack of oversight, coupled with the lack of procedural requirements regarding the naming of the attorney, give the impression that the POA regime lacks procedural rigour and protective measures, especially in contrast with the probate system, considered below. However, the duties and functions of the attorney are wide-ranging; the consequences of an attorney's mishandling of the grantor's estate can be catastrophic. Without oversight and procedural protection, the POA regime may be open to misuse, abuse, and fraud. The risk of fraud is considered in Section C.

B. Contrasting the Functions and Features of an Attorney With Those of an Estate Representative

This paper has already considered the functions and features of both the probate application and of the estate representative. This section will not recap those functions and features, but rather highlight some areas where they differ from the functions and features of the POA.

Attorneys, have we have seen, have discretionary powers to make gifts out of the grantor's estate, although they cannot alter testamentary dispositions made while the grantor had capacity. Subject to any debt or tax liabilities of the estate, however, estate representatives are generally bound by the terms of the will and the testamentary dispositions made by the deceased. Depending on the terms of the will, there is much less room for estate representatives to make discretionary decisions. The discretion granted to attorneys is therefore more wide-ranging than any that may be given to estate representatives.[cccxiv]

An estate representative's duties are owed to the beneficiaries, not to the deceased. This is a fundamental difference from the attorney's duty, which is owed solely to the grantor. The estate representative is a trustee for the estate, and is safeguarding that estate for the

benefit of those entitled to receive it. The fiduciary duty is owed to the beneficiaries, not the deceased. Estate representatives also face different, and perhaps lesser, privacy concerns than attorneys, although estate representatives do have privacy concerns vis-à-vis third parties. While attorneys are not permitted to disclose information about the grantor or the grantor's estate to anyone other than the grantor, except in limited circumstances described above, estate representatives are required to keep beneficiaries informed about the financial affairs of the estate.

The procedure for the appointment of an estate representative has also been covered elsewhere in this paper. The simple difference is that estate representatives do have procedural requirements to be appointed, as part of an application system in which the procedure is designed to serve protective functions for the estate and the beneficiaries. In a POA, there are no such procedural requirements. Anyone can be named, and no one need apply; rather, they are appointed by the grantor, at the grantor's choosing. There is no notification to other interested parties of the attorney's appointment, nor do they need to approve the appointment. Attorneys are not required to swear an oath of good faith, as estate representatives must on application, nor be informed of the content of their duties.[cccxv] As we have seen, there are no procedural safeguards in place to ensure, for example, that the POA was not made fraudulently, that is it the grantor's last true POA and has not been revoked, that it is properly witnessed, that the attorney has proper regard for, and accounting of, all of the grantor's assets and property, or that the attorney understands their duties and responsibilities in acting as attorney.[cccxvi] All of these safeguards are present in the estate representative's application for probate. While some of this can be explained by the difference in fiduciary duty

and by privacy concerns, the difference is stark enough that those two reasons alone may not be sufficient to explain the vast difference in procedural requirement.

This lack of procedural protection is compounded when one considers the difference in the effects of misuse, abuse, or fraud in a POA versus those in an estate. As we have seen, the consequences of the attorney's handling of the grantor's finances and property can be more severe than those of an estate representative's handling of the estate. Although the estate representative has duties to the estate and to the beneficiaries not to waste assets or otherwise mishandle the estate, their decisions do not have potentially life-altering consequences for the testator.

C. Contrasting the Risk of Misuse and Fraud in the Two Regimes

We have examined already in this paper the risk of fraud in estates, and in the application to be estate representative. POAs, however, also carry with them a risk of misuse and fraud[cccxvii] that is equal to, or perhaps greater, than that in the probate regime.

POAs can be used to perpetuate financial abuse in a number of ways:[cccxviii] for example, misuse by a well-intentioned attorney who does not understan the limits or ramifications of their decision-making powers, coercion or undue influence, forgery, fraudulently obtained POAs, predatory relationships, unauthorized asset sales or investments, misappropriation or depletion of assets, unauthorized restrictions on personal liberty through certain financial decisions,[cccxix] and misusing the POA for personal gain[cccxx] or to commit, among others, title or mortgage fraud.[cccxxi]

Misuse, abuse and fraud can be perpetuated whether the POA is valid and validly granted or not.[cccxxii] As we have seen, there is no application in the POA system that can serve

as a safeguard against the risks of fraud, or serve a gatekeeping function to the grantor's assets the way the probate application serves for estates. Nevertheless, having an application procedure would not prevent those who are validly appointed from misusing the POA, just as there remains a risk of fraud or misuse in estates once even after probate is granted. Therefore, an application or appointment procedure that take place if the grantor does become incapacitated, similar to the procedural requirements for the probate application, would only go some way towards combating potential fraud.

However, the fact that there is no application process and no procedural oversight may encourage those with predatory or fraudulent intentions to coerce or unduly influence a grantor to name them as the attorney, knowing that once named, they can have complete control over the finances and property, and exercise this control in secret.[cccxxiii] The lack of protection may also encourage attorneys to be unscrupulous in situations where, if oversight existed, they may be more circumspect. It may encourage laziness or a laissez-faire attitude in attorneys who may be even be well-intentioned, but become careless while they know that no one is monitoring their actions.[cccxxiv] As well, the lack of continual oversight in the POA regime, as compared to that required from estate representatives, means that fraud and abuse may continue undiscovered for much longer under a POA than in an estate; the only person to whom the attorney owes a duty of disclosure may not be capable of understanding the attorney's actions, or of raising the alarm if they suspect something is amiss. In addition, the more restrictive mechanisms for concerned parties to force an attorney to account, or to attempt to force removal of an attorney, may also mean that abuse, fraud, or mishandling of the asset are less likely to come to the attention of concerned parties,[cccxxv] are less easy to

remedy, and may therefore be more likely to continue, unfettered.[cccxxvi] Lastly, as discussed, the consequences of financial mismanagement, fraud, or abuse under the POA regime are potentially more significant than those in an estate.

The result of these factors may be that POAs present a strong possibility for misuse, abuse, and fraud. The prevalence of financial misuse, abuse, or fraud under POAs is understudied, but generally thought to be high;[cccxxvii] it has become a much-discussed topic in both law and public policy in recent years. In my own professional experience, and among practitioners I have spoken with, the ease with which POAs can be used improperly is of utmost concern, and abuse of POAs is felt to be more probable, and more problematic, than abuse in the context of estate administration.

Importantly for this project, abuse of POAs is seen not only where the value of the grantor's finances and property are high, but equally where the value is small, perhaps consisting of misappropriation of Old Age Security payments or other monthly benefits.[cccxxviii] The effect of this can, of course, be devastating where the grantor has no other significant assets.

D. What Can the Differences Between the POA Regime and the Probate Regime Tell Us?

We have seen that one of the primary rationales of the probate application regime has been to protect estates from fraud. We have also seen that the POA regime has, comparatively, been left more open to misuse, abuse, and fraud by lacking procedural rigour. As a result, it is felt that the incidence of misuse or abuse of POAs may be high. This contrast begs the question of why we have designed a system of procedure that is so concerned with protection from fraud and financial abuse in the estate, but not as similarly concerned with providing

procedural protection for POAs. As the population ages and more people adopt POAs to be used during their incapacity, is it not possible that by the time the adult dies and the estate representative applies for probate, the deceased's estate will have already been mishandled or even depleted by an attorney acting for the grantor before death?

The evidence of the prevalence of misuse, abuse, and fraud under POAs may suggest two things. First, it may suggest that our concern regarding fraud is misplaced when we focus on estate administration, and not on POAs. Our focus on fraud in the estate may be somewhat disproportionate to the actual incidence of fraud in that system. By the same token, our lack of procedural protections in the POA system may also be disproportionate to the higher incidence of fraud taken place within that system.

It follows from this that, if we look at the POA system and the probate system existing along a continuum for the older adult (in that probate follows after the death of the grantor of a POA), the timing of the procedural safeguards may also be misplaced. More evidence is needed to show that misuse or fraud of the probate system is sufficiently prevalent to warrant the rigourous protections that the system has put in place to guard against it. However, in looking for this evidence, we must be careful not to mistake the prevalent reporting (in the media or in the case law) of the mishandling of estates as compared to that of POAs as empirical proof of an actual higher incidence of misuse or fraud. As we have seen, abuse of POAs is more likely to occur in secret, and legal redress is more difficult and expensive to obtain as compared with that under estate administration. It is therefore possible that the reported cases of mishandling of estate assets represent a majority of cases that exist, while the reported cases of abuse under POAs represent only a fraction of those that exist.[cccxxix] If it is

true that fraud is more commonly occurring under POAs than under estate administrations, it may mean that the timing of procedural protections should occur at the POA stage, and not exclusively at the probate application stage.

However, this leads to the second point raised by the prevalence of fraud in the POA system. If we accept that fraud is a greater possibility under the POA system than under the estate administration system, and we also know that the probate application presents a safeguard against fraud, while the POA system has no such safeguard, a chicken-and-egg problem emerges. That is, is fraud less likely under estate administrations because of the nature of the law in that area – for instance, that the fiduciary duty owed to the beneficiaries provides greater potential for oversight – or is it because the safeguards in place in the probate application serve their function well, and actually reduce the incidence or likelihood of fraud? Does the lack of procedural protection under POAs contribute to the higher incidence or likelihood of fraud, or is it incidental to the nature of the document?

This suggests that any simplification of the probate application procedure for small value estates should proceed with caution. This is especially true because, as we have seen, fraud in the POA system is not limited to only large value estates, but small value ones as well. It may be wise to extrapolate that the same could be true in the probate regime. Without more empirical evidence, it may not be possible to attribute the greater incidence of fraud in the POA system to the lack of procedural safeguards in place. However, knowing that both are true, even if we do not know if there is a causal relationship between them, encourages caution whenever we contemplate altering the probate process in such a way that may lessen or even remove some of the procedural protections it offers.

This paper does not suggest that the probate application process move to the POA model of minimal to no procedural protections; while, in some ways, this would increase accessibility of the probate system, in my personal view it could also render the probate system more easy to exploit and misuse. Where changes are contemplated, therefore, it may be wise to consider those that streamline or simplify the mechanisms of the probate application, without stripping away those features of the system that provide procedural protection. This is the balancing that is at the heart of this project. Some suggestions for how to achieve this balance are considered below, in Part Five of this paper.

VI. PART FIVE: SUGGESTIONS FOR CHANGE

We have seen through this discussion that the functions of probate should, where at all possible, be maintained. Therefore, to increase accessibility in to the probate application system, without weakening the rigours of the application, we must consider altering or simplifying the procedure by which estate representatives apply for probate.

We have seen that where procedure is easy to understand, easy to access, and its mechanisms easy to navigate, a highly proportional system can develop. Such a system would make it easier for Ontarians to access the probate system without draining the value of small estates. A simplified process can reduce the amount of legal advice needed to navigate it, therefore reducing costs.[cccxxx] There are several elements involved in creating a simplified process such as this.

The conclusions presented earlier in this paper suggest a multi-pronged approach to increasing accessibility in the probate system while maintaining its procedural protections: one, simplifying the procedure itself; two, simplifying the forms and their delivery; three, increasing

the amount of flexibility in the system; four, increasing physical accessibility; five, providing more legal self-help services and materials; six, moving to a non-court model; and finally seven, creation of an electronic document generator and registration system. Many of these suggestions are interrelated, as they can impact accessibility in deeper ways when they are layered upon each other. Taken together, they produce a probate application system for small value estates that is proportional to the value of the estate, accessible for all Ontarians, yet procedurally rigorous and still able to maintain the protective functions of the current probate application.

A. Streamlining and Simplifying the Procedure

Streamlining the procedure itself would increase accessibility by making it less complex, and also making it appear to be less complex. It would address issues of cost created by needing legal assistance, and would address issues of delay engendered by procedural confusion. It would also make self-help legal services more effective. It may require, however, that increased flexibility be built into the system, so that it can remain responsive to individual circumstances.

One idea to consider is whether or not there are parts of the procedure that can either be eliminated altogether, or eliminated as a mandatory requirement in all applications. For example, do all probate applications in Ontario need to include an Affidavit of Execution? Or, can the basic information regarding formalities of execution that are contained in the Affidavit be incorporated into the Application? This would leave the request for a more formal Affidavit to the discretion of the judge reviewing the application. Surely, there are some cases where a separate document would not be required, or where there is no suspicion that the will was

executed incorrectly. In those circumstances, removing the mandatory requirement of an Affidavit of Execution would increase accessibility of the system. Retaining the flexibility, however, means that in any suspicious or unclear circumstance, the judge can require the estate representative to provide the Affidavit of Execution.

Altering or eliminating the Affidavit of Execution may increase the risk of fraud where, for example, it becomes easier to probate a will that is either not validly executed, or is not the true last will of the deceased. However, the example of jurisdictions where no Affidavit of Execution is required may be instructive here. Further information would be required to know if empirically or anecdotally, the lack of Affidavit increases the risk of fraudulent applications. It is possible that eliminating the Affidavit altogether, including eliminating the requirement that the information in the Affidavit be required in any form, would increase the risk of fraud, as the procedural protection of the extra affidavit – sworn by someone who is not the applicant – is lost. It may also increase the risk of inadvertent mistake where, for example, the lack of a requirement means the applicant is not alerted to formality of execution as an issue to consider. However, if the information contained in the Affidavit of Execution was incorporated into the Application, this may mitigate some of the increased risk. While the safeguard of the additional affidavit would still be lost, the applicant would still be forced to turn their mind to the issue of execution formalities and provide information regarding execution in the Application. Again, the judge could retain the flexibility and discretion to order an Affidavit of Execution where he or she felt it was necessary in light of the circumstances. As a result, incorporating the information contained in the Affidavit of Execution into the Application could

be one method of streamlining the procedure to increase accessibility while presenting a manageable risk of fraud.

As the procedure develops, other ways in which the procedure itself can be simplified may suggest themselves. Simplification of the forms themselves, discussed below, may also encourage simplification of the process.

B. Simplification of the Forms and their Delivery

A major avenue for simplifying the probate application process lies in the simplification of the mechanisms of that application – the forms themselves – in order to make them more easily understood. Re-writing the forms in plain language, perhaps modeled on the Small Claims Court forms, would be a relatively simple reform to undertake, but would make a marked difference in an individual's ability to access the system. It would make the system less complex, and also appear less complex, and would increase the efficacy of self-help legal guides. It would also help alleviate some physical access concerns, for those with low literacy or with lesser fluency in English and French.

The Notice of Application[cccxxxi] can be problematic and/or cause significant misunderstanding and distress for estate representatives, in several ways. First, from a practical perspective, it is an additional form that the estate representative must correctly complete and then serve on the proper parties. The applicant must then complete the required affidavit swearing they gave proper notice. It is critical to remember that the average Ontarian has little or no experience with court forms or affidavits. In my practical experience, and in the experience of the practitioners I spoke with,[cccxxxii] preparing the Notice, deciphering who exactly should receive that Notice, understanding and completing the prescribed method of service,

correctly preparing an Affidavit, and having it properly sworn, is a daunting task for most people and one of the biggest barriers to accessing the probate system. Therefore, altering or simplifying the Notice can increase access to the probate system by allowing a greater number of Ontarians to understand the requirements and potentially undertake the application process themselves, or with minimal assistance.

Second, the Notice provides incomplete information to the beneficiary about the size and content of their entitlement. In Ontario, beneficiaries may receive the entire will or the portion relevant to their specific entitlement. However, the Notice does not provide them any information about the actual size of the estate, the relative value of their share, nor any information about the assets contained in the estate. Furthermore, and perhaps most importantly, it does not provide any information about the debts or other liabilities of the estate. While the beneficiary is not strictly entitled to this information, not providing it can engender suspicion on the part of the beneficiary and create problems for the estate representative later on.

Without further information, the beneficiary may feel that the estate representative is hiding information. The beneficiary may be more likely to develop possibly unfounded suspicions that the estate representative is being unnecessarily slow in distributing the estate, or mishandling the estate assets. They may begin to request more records, and more frequently, causing further delay in administration. Receiving more information about the size and composition of the estate at the beginning of the process may help alleviate some of the concerns a beneficiary develops purely out of being uninformed.

Furthermore, in my practical experience, many beneficiaries have a significant misunderstanding of the complexity and process involved in administering an estate. They may be more accommodating of the time it takes to receive their distribution, even in an estate with no significant delays, if they understand the estate representative's responsibility to ascertain and pay the estate's debts and taxes before proceeding to beneficiary distributions. Debts and taxes can be significant drains on the value of an estate that are invisible to beneficiaries who only receive a will, or portion of a will. This leads to misunderstandings regarding the net value of the estate. Having no information about the value of the estate, or the liabilities that may be attached to it, beneficiaries may falsely guess how much they are likely to receive as an inheritance.[cccxxxiii]

Some beneficiaries may therefore be less anxious about the timing of the distribution to them if they understand, from the beginning, that their entitlement may be of small value.[cccxxxiv] Providing further information up front may avoid the scenario that the beneficiary finally receives their inheritance, at a much later time and in a smaller amount than they may have imagined on receipt of the Notice, and without further information from the estate representative. Confused, having mentally (or actually) already spent their inheritance, they begin to feel suspicious and angry about how the estate was managed. Their only recourse is then to enforce a passing of accounts by the estate representative, a very costly and time consuming process.

Therefore, providing the beneficiary with different and more detailed information up front could result in a simpler probate process in two ways: simplifying the actual application process that the estate representative faced, through the reduction or elimination of a separate

Notice form, and by potentially reducing the amount of friction between estate representatives and beneficiaries, a frequent cause of stress and legal battles. It is telling that in Manitoba, the only jurisdiction that does not require any notice to beneficiaries, at least one practitioner considers it best practice to provide this type of detailed information to the beneficiaries anyway[cccxxxv].

As a result, one recommendation to consider is eliminating the current form of the Notice of Application and the Affidavit of Service of Notice, and serving beneficiaries with a copy of the Application instead. This recommendation can be adopted by the project as one element of a simplified probate application procedure for small value estates; however, it is not intrinsic to the value of the estate and could be a useful general recommendation for the probate application process generally. Its value for the small estates project is in its ability to increase accessibility to the probate process for those who may administer a small estate that is not able to bear the cost of outside or professional assistance with the probate application process.

While the Notice serves an important function that should not be eliminated, the current form of the Notice of Application is overly cumbersome on the estate representative. Furthermore, the procedure for serving the Notice could be streamlined as part of an overall simplification of the application procedure. The functional protections of these forms could be retained, and service could be streamlined, by serving the actual Application, complete with a copy of the will, on the beneficiaries instead.[cccxxxvi]

Changes could be made to the Application to include the names, locations and ages of each beneficiary. A simple covering page for the Application could be created, to be included by

the estate representative on service to each beneficiary. This covering page could include tick boxes identifying why the beneficiary is receiving the Application, and providing them with some plain language instruction about their rights and the next steps in the process. Furthermore, it could include a statement to the effect that the estate representative must first pay the debts and taxes of the deceased, before calculating the distribution. This kind of statement is included in the Notice forms in both Nova Scotia and Alberta.[cccxxxvii] A simple, plain language form such as this would increase the estate representative's access to the probate system by making it easier for them to complete themselves, by simplifying and streamlining the procedure, thereby reducing both complexity and the appearance of complexity. It would also potentially increase the ease with which they administer the estate, by reducing the acrimony that can arise between beneficiaries and estate representatives due to lack of information or misunderstanding about the process involved. Furthermore, self-help legal services and guides could be used to provide greater, easier to understand information about who must be served.

It is my opinion that eliminating the current Notice form and replacing it with service of the Application on the beneficiaries may not, in itself, increase the risk of fraud in the probate application system. This is because the protective aspects that are created by serving the beneficiaries with information regarding the estate and the application still exist in this suggestion. They are merely achieved through a different mechanism – notification using a different form.

One important element to examine, however, would be the timing of such service. Ontario currently requires that service be affected before the application can be submitted.

This allows beneficiaries and those interested in the estate time to file an objection or otherwise raise any issue with the application or with the applicant him- or herself. Currently, Nova Scotia is the only jurisdiction where notice of an application is served after probate has already been granted. As a result of this, some of the protective function may be lost, as it may be more difficult for concerned beneficiaries to alter a grant that has already been given; furthermore, the grant may have already been used improperly or fraudulently by the time any objection is raised. Therefore, even if the change is made to allow for service of the Application, instead of a separate Notice, it may be most prudent for the current timing of this service to be maintained.

At the same time, this may present a procedural difficulty. In order for the applicant to know that the Application they are serving on the beneficiaries is complete, accurate, and acceptable to the court, they will need to have it vetted or somehow otherwise approved by the court registry prior to serving it on the beneficiaries. Otherwise, they may prepare an Application and serve it on the beneficiaries, only to be told by the clerk upon application that the Application is deficient in some manner. The process must then start again, with a properly completed Application. This may effectively negate any administrative efficiencies created by serving the Application on the beneficiaries, instead of a Notice form.

This difficulty could be solved in a number of ways. One, the timing of the service could be changed to follow the Nova Scotia model. This would ensure that the Application that is served on the beneficiaries is already approved by the court. However, as considered above, this suggestion may open the application procedure to too many risks of fraud.

Two, the possibility that the applicant need to redo, and re-serve the Application, could simply be accepted as a feature of the system and dealt with on an individual basis. While it may create difficulties for some applicants, it may still be deemed to be a more efficient system than requiring a separate Notice form. Furthermore, the risk of double Applications may be mitigated by increased access to more, and better quality, legal self-help services and materials, which may increase the likelihood that the Application is correctly prepared on the first attempt.

Three, the application could be filed in two stages. In the first stage, the Application and all other supporting documents could be prepared and filed with the court. The Registry would hold them on file, and stamped copies would be returned to the applicant for service on the beneficiaries. Once service is complete, proof of service could then be provided to the court, rendering the application file “complete”. It is only at this stage that the judge would review the file and grant probate. This could alleviate the concern that the Application as served is deficient in some way, because it would be pre-vetted and filed with the court before service. However, this could decrease accessibility in the sense that it would require two trips to the Registry.

One final way to address this procedural difficulty would be through the creation of an electronic document generator, which is discussed in much more depth in section G below. An electronic document generator could be used to create an Application that meets the formality requirements of the probate application, and is produced in a ready-to-serve format for the applicant to send to the beneficiaries. Once done, the entire application, including proof of service, would be brought to the Registry for filing. This is the model that is used in the New

York State Small Estate Affidavit Procedure, also discussed below in section G. While this suggestion may eliminate the need for two trips to the Registry, it would not address situations where substantive deficiencies may be found with the Application upon filing which require correction. For example, if the user of the document generator misunderstands the instructions, they may serve an Application on the beneficiaries that will still require correction.

To some extent, however, it may not be possible to address and prevent every circumstance of formal or substantial non-compliance with the application requirements. The best that any application procedure can hope for is to create a system that is easy to use, understand, and access for the vast majority of the population and that also does not increase the risk of misuse, abuse, or fraud within that system. Certainly in the current system, corrections and re-filing do occur. As has been discussed, it is not uncommon for applicants to misunderstand the Notice of Application and prepare, or serve, it incorrectly. Therefore, while eliminating the separate Notice and requiring service of the completed Application instead may create a procedural difficulty, four potential solutions to that difficulty have been presented, demonstrating that it may be possible to overcome the difficulty and retain the benefits of this suggestion, outlined above.

C. Encouraging Discretion and Flexibility

Where the value of the estate is small and the financial risk of fraud or mismanagement is minimal, the encouragement of flexibility, discretion, and a relaxation of the formality and precision required in the forms should be explored as a further avenue to increasing accessibility. Estates clerks see estates forms every day and have an immense body of knowledge and familiarity regarding what information is or ought to be included, or what is

missing. However, they are not able to provide legal advice or assistance, yet are frequently faced with self-represented applicants who do not know how to proceed. The requirement to prepare things in a uniquely prescribed manner can be frustrating for individuals who do not have sufficient information about what that prescribed manner truly is.

Discretion and flexibility allow administrative officials to choose whether or not to do a certain act that is within their power to do, based on their assessment of all the circumstances.[cccxxxviii] Indeed, discretion, flexibility, and reduced formalism are the primary lessons from administrative tribunals and the SJTO. They increase accessibility, efficiency and the speed of dispute resolution, while limiting the amount of formality.[cccxxxix]

Encouraging discretion at the clerk level – giving them an increased mandate to use the knowledge they already possess, or else pass it to the judge – could be one method to increase accessibility by reducing formalism. Increasing discretion, however, must be accompanied by an overall increase in flexibility in the system; otherwise, it only creates more delay as the clerks accept more defects, only to have those defects returned by the judge. In practice, then, separating substance from form may be difficult. Where information is not present, the clerks may not feel able to accept the application; however, that information may be missing for a substantial, legal reason meant for a judge's discretion.

Context is already important in probate applications. For example, based on my own practical experience, the rule requiring that estate representative listed in the will, but not applying for probate, provide a signed Renunciation to the applicant is one such area where flexibility and discretion are important. If this rule were to be enforced universally regardless of circumstance, it would be impossible to obtain a COA in any estate where one of the listed

estate representatives was alive, but incapacitated or otherwise physically or mentally unable to swear a Renunciation form. This can often occur where a parent dies and their spouse is listed as the estate representative, but the spouse is incapacitated and unable to apply. In that circumstance, the second choice estate representative must apply, and may need to rely on the discretion of the clerk to accept an application where the reasons for no Renunciation is present, but the reasons for that are properly evidenced. Thus, discretion and flexibility are already critical elements in the probate application process. Increasing that discretion, where its goals, purpose, and limits are clearly defined, and where the factors and circumstances to be considered are enumerated,[cccxl] could be a very useful tool for probate applications in Ontario generally. Furthermore, that discretion may be an even more critical element in a small estates procedure, as it allows for a proportional balance between the size of the estate and the procedural rigours involved.

However, increasing discretion and flexibility must be balanced against the risk of fraud. It is possible that increasing flexibility may make it easier for fraudulent applicants to, for example, work their way around procedural requirements that would act to protect the estate from fraud. Using the example above, increased flexibility may make it easier for an unscrupulous applicant to convince the clerk that no Renunciation is needed in a particular instance, even where the applicant is not the first-named estate representative in the will, and even where the applicant is intending to use the COA for fraudulent purposes. If it were to emerge later than the first-named estate representative was capable of applying, and was intending to apply, and had never renounced or intended to renounce their right to apply, it is possible that increased flexibility may have been the tool that allowed a fraudulent applicant to

gain access to the estate. Therefore, increasing flexibility and discretion is a suggestion that would have to be very carefully managed in order to ensure that it does not increase the risk of misuse, abuse, or fraud of the probate application system.

Thus, the following questions must be asked: is there a way to increase flexibility in the system, and give clerks a greater mandate to provide more information, without crossing the line into legal advice? Is there a way to do this without increasing the risk of fraud, or can any increased risk of fraud be mitigated in other ways? Is there a way to increase flexibility by giving the clerks the discretion to accept more forms with defects, thereby allowing the reviewing judge to be the arbiter of what is or is not acceptable? Or, should another method of providing this guidance to estate representatives be considered, if it would indeed cross the line into legal advice? Are there different or new fraud checks that should be introduced into such a system? Suggestions along this path should be sought and thoroughly reviewed, as increasing flexibility may have a very big impact on the accessibility of the probate application procedure.

D. Increasing Physical Accessibility

Methods to increase physical accessibility should be considered in any simplified probate application procedure, whether they be through actual accessibility of the buildings themselves, through technological advances such as e-filing or electronic registration, through automated document production (discussed below), through longer or different opening hours, or through having more Registry offices, outside of courthouses in more accessible locations such as shopping malls or community centres, and in more communities.[cccxli] This would also help address accessibility issues in northern, rural, and remote communities. These accessibility issues may be particularly compounded in small value estates, to the extent that small value

estates are more prevalent within lower-income communities, as well as those that face more particularized barriers such as language, citizenship status, socio-cultural factors, or employment status. Although physical accessibility issues will not be unique to these populations, their effects may be heightened within these communities. As a result, increasing physical accessibility may result in a higher proportional increase of accessibility among these communities than elsewhere.

Increasing physical accessibility may not impact the risk of fraud in the probate application procedure. It would not alter the actual procedure that exists, and it may not impact the efficacy of the gate-keeping function that the registry, and the application procedure itself, plays in addressing the risk of fraudulent applicants or applications. One possible issue could be that if additional registry offices are opened, or if they are given longer opening hours, more staff may need to be hired and trained. This may increase the likelihood that errors are made at the staff level or that red-flags for fraud are missed. However, this risk can be mitigated and managed by proper and continuous training. Increasing the number of clerks should not necessarily impact the level of professionalism and expertise present among the clerks currently, although care would have to be taken not to expand too quickly or without proper care and training.

The Small Claims Court model demonstrates that even where simplified procedures with low monetary thresholds exist, physical access to those procedures can remain an issue. Services to increase accessibility for those with disabilities and language barriers should also be implemented. For example, having plain language self-help legal guides, instructions and manuals in print, online, by audio, and in a multitude of languages, would make them more

accessible to more diverse populations. This is discussed in more depth below, but is an important component of increasing accessibility.

Much effort must also be put into ensuring that the system increases accessibility for all segments of the population, regardless of value, so that it achieves the goals it sets out for itself.

E. Providing More, and Better, Legal Self-Help Services and Materials

The Small Claims Court model demonstrates that the ability and ease with which people can represent themselves in a court process is a necessary, but not sufficient, requirement for increasing accessibility.[cccxlii] That is, it is one important tool of increasing accessibility, but should be only one of many avenues that stakeholders pursue.[cccxliii] Simply reducing the complexity of the process is not sufficient. To be successful, any simplified procedure must be accompanied by significant legal self-help services and educational tools, in order to also reduce the perception of complexity, so that individuals feel empowered to utilize the mechanisms available to them.[cccxliv] It must also make efforts to reduce the cost of legal representation in order to make the system more accessible in those situations where legal advice is necessary.[cccxlv]

The Small Claims Court self-help legal manuals and guides present one model to follow. As discussed above, for a system to be accessible, it is critical that this information be accessible in a multitude of languages and formats. Plain language forms, discussed in Section B, would make these self-help services more applicable. Another model to consider may be the income tax preparation guides prepared by the Canada Revenue Agency every year. These guides are mass-produced, readily available in locations such as post offices and pharmacies, and designed

to help individuals with no tax background and uncomplicated taxes complete, prepare, and file their income tax forms themselves.

Providing increased and better self-help guides and materials is not a suggestion that should be unique to small value estates, but it may be more applicable to small value estates. As discussed, small value estates may be least able to bear the cost of needing legal assistance to prepare the application; as a result, estate representatives for small value estates may be more likely to seek out, access, or use self-help legal guides and materials. They also may use self-help guides to narrow the focus for any legal advice or assistance sought, and to help reduce the perception of complexity within the application system. To any extent that small value estates may be correlated with socio-economic factors such as language barriers, cultural barriers, or educational barriers to accessing the application system, self-help services and materials may be more relevant to small value estates by helping to reduce complexity, the perception of complexity, as well as the inaccessibility of the probate application system for these populations.

Increasing the availability and quality of self-help legal guides many not impact procedural protection; if it does, the increased risk may be manageable through other components of the application process. It is possible that demystifying the process for the public may increase the ease with which unscrupulous individuals access the system, although it is by no means certain that this would be the case. Again using the Canada Revenue Agency's tax preparation guides as an example, it is not clear if or how the wide availability of these guides could have increased the level of tax fraud in the system. They simply guide individuals on what to include in each line of the applicable tax form. Probate application guides and self-

help materials could operate in the same manner for the probate application forms. These guides may actually reduce the risk of inadvertent or accidental mishandling of the estate by increasing the amount of education and guidance estate representatives read and receive regarding their duties as estate representative.

However, even if an increased risk of fraud is created by increasing the availability and content self-help guides and services, the existence of these guides would not not prevent the other procedural protections in the estate application process from functioning normally. They would not alter the actual application system, merely assist individuals in understanding and navigating that system. Therefore, even if increased legal self-help services and materials do increase the risk of misuse, abuse, or fraud of the probate application, this may be a risk that can be mitigated through the checks for fraud that exist elsewhere in the probate application system. Furthermore, the risk may be considered worthwhile if the overall result is increased accessibility and education for the vast majority of scrupulous, well-intentioned estate representatives.

One method of providing such increased self-help services is the electronic document generator, discussed below in Section G.

F. Moving to a Non-Court Model

The SJTO's flexibility, and the experience of the Landlord and Tenant Board, shows us that we should be creative in seeking to tackle the issues of accessibility and proportionality and not be afraid to think outside the realm of what is done or what has always been done in contemplating a simplified probate application procedure. The flexibility of the Common Rules of the SJTO, for example, serve a very particular, purposeful function. They serve the goals of

efficiency in decision-making, savings of government resources by reducing court backlogs through creation and use of tribunals, as well as streamlining of the procedures of the tribunals themselves. Most importantly, the rules increase the public's access to critical dispute resolution and decision review in a fair and impartial manner regarding services and programs that touch fundamental aspects of the individual's life and well-being.

Taken together, increasing discretion and flexibility and reducing formalism, as discussed above, as well as moving towards an electronic system, as discussed below, could move the probate application procedure quite a ways outside the traditional court model. Based upon my research and in my opinion, moving a small value estate probate application procedure to a non-court model could have much to recommend it. Increasing flexibility and discretion while reducing formalism could be especially useful in a small-value estate application procedure, much the way reduced formalism and increased flexibility has functioned well in the model of small claims courts. Values under a certain threshold may lend themselves to reduced formalism and increased flexibility because they increase the ability for applicants to self-help or self-represent, while reducing the likelihood that legal assistance may be required in precisely those estates that are least able to bear the cost. It is therefore possible that moving the small value estate probate application procedure towards a non-court model could help incorporate the flexibility, efficiency, efficacy, and accessibility of those models and of the Small Claims Court studied in this paper. In general, then, I do believe that the idea of moving to a non-court model bears serious consideration.

However, in practice, there are many unanswered questions regarding such a move. How would a non-court model deal with cases that become contentious? One suggestion may

be for a non-court model that deals strictly with probate applications. Once probate is granted, anything else that must be done with the estate would proceed, as currently, in the court system. This would not be substantially different than the system currently in place, except in the creation of a body or mechanism outside the courthouse and court registry for reviewing and approving probate applications. However, how would such a model deal with grants of probate that need to be reviewed, revoked, or altered in some way – would those reviews proceed in the non-court model, or in the court system? This model may mimic administrative law practices. In this suggestion, the granting of probate in a small value, non-contentious estate would be seen as an administrative decision. Internal mechanisms could be implemented to provide review of those decisions; the court could act as an external review where all internal mechanisms have been exhausted or where the file moves outside the purview of internal administration.

As the rate and incidence of estate litigation continues to increase, it is not likely possible to move estates outside of the litigation world altogether. One could argue that a non-court, administrative-type model could incorporate mandatory alternative dispute resolution and/or case management, such as exists in the Simplified Procedure. This could reduce the number of cases that end up in litigation. Nevertheless, a mechanism to easily transfer files from the non-court model to the traditional court system would likely still need to be implemented, regardless of the value of the estate. It simply isn't possible, at the time of the application, to know if a probate matter or estate is going to become complex or contentious later on. You can never know, at the outset, all of the issues that may arise, those that may be easily dealt with, or those that may become unexpectedly complex. Furthermore, as in the

wider court system, some files are simply not going to resolve through alternative dispute resolution, either because the issues cannot be fully negotiated, or the parties are intractable. As a result, any model for moving estates outside the realm of the court will need to grapple with contentious dispute resolution in some way.

This begs the question, how would this transfer process operate in practice? If the rules, forms, and procedures are substantially different in the non-court model, how would this work for clients and files that must be transferred back to the court? Much care would have to be taken to ensure that the transfer process does not unfairly disadvantage self-represented parties, who may enter the non-court model without legal assistance because they believe they can use it to avoid litigation, only to end up in court without having ever received proper advice. It is possible that the two processes would encourage parties to push for litigation at an earlier stage, because they do not want to "waste time" in the non-court model, only to require legal assistance in the end anyway.

It is possible also that a non-court model, with a transfer mechanism, would create more complexity than it solves, and/or increase the perception of complexity among the general population. Practitioners, too, would have to buy-in to the system, in order to become adequately well-versed in working within the non-court model, as well as transferring files to traditional court. The example of Simplified Procedure may be instructive here, as it includes a transfer mechanism in and out of the small value process, even though the Simplified Procedure itself is still a court process; furthermore, as examined in this paper, not all practitioners have embraced the Simplified Procedure. Practitioner buy-in could have significant ramifications for the success of any such non-court model for small value estates.

Clearly, there is much to be discussed in any move to a non-court model for probate applications, regardless of the size of the estate. Furthermore, as discussed earlier in Part Two, Section B of this paper, the difference in degree, rather than in wholesale nature, revealed by the move towards increased flexibility and discretion in the non-court models examined in this paper suggest that in some ways, moving to a non-court model may not be necessary. It may be possible to achieve and create a simplified application procedure for small value estates that is flexible, accessible, and proportional without the fundamental changes involved in a move to a completely non-court model. As well, making sufficient changes in the current model this would address the procedural difficulties contemplated above.

In my opinion, a non-court model for a simplified small value probate application procedure is an interesting idea that merits further exploration and study. However, it would be a bold action that may not be altogether necessary if sufficient change can be accomplished in the current system. Any such move would have to be carefully planned and implemented in order to ensure that it does not create more problems than it solves.

G. Creation of an Electronic Document Generator and Registration System

One option that can and should be considered is creating an electronic registry for small value probate applications in Ontario. There is precedent for this outside the probate context, as some courts in Canada have already moved to allow e-searching and even e-filing of court documents, for at least some matters.[cccxlvi] The automation of document production is a particularly intriguing aspect of such a system that could, in my opinion, greatly increase accessibility to the probate application procedure for members of the public. Individuals could be guided electronically through inputting the information required in a probate application.

Such a system could then generate, at the end of the process, documents and affidavits ready to be signed and sworn. This would greatly increase the ability of individuals with small value estates to complete the application process themselves, thus reducing cost, complexity, and delay, and increasing accessibility.

Furthermore, an online or electronic registration system for probate would reduce government costs in terms of staff and resources by reducing the number of probate applications that the Clerks must deal with themselves, thus freeing them to concentrate on estates that do not fall below the small value threshold.[cccxlvii] It could increase the efficiency behind the application procedure by enabling automatic, real time registration of documents. It could also help lead to standardization in terms of the application of policies, rules and procedures across the province. For example, it could help ensure that there isn't flexibility about a rule or document in one county, but not in other counties. It may also lead to a standardization of wait times across the province, so that, for example, probate applications in Toronto are not excessively delayed, while on the same day they may be quickly processed in Kingston or Thunder Bay or Niagara.

It could, depending on the system, eliminate the need to file the application in the county of the deceased's last residence. This would enable the probate application procedure to be accessed from anywhere in the province, thereby further increasing accessibility. It could also help address concerns of physical accessibility, although it would potentially increase concerns regarding computer and internet access and literacy concerns, as well as confidentiality. However, as the internet-savvy generation continues to age, and as computer

and internet access reach ever more remote corners of the province, the applicability of this concern would decrease.

Such a system would likely still require a judge's review and approval of the documents before the Certificate of Appointment is granted. However, the process of the application itself could be automated, so that clients are guided through the creation of the documents, provided with finished documents that can be printed and signed/notarized, perhaps provided with the opportunity to then upload and electronically file those documents with the electronic registration system (or file them in person if so desired), and provided with a court file or application reference number, as they would be in person. An intelligently designed electronic system would prevent individuals from proceeding to the next screen, or the next step in the process, if the preceding step or screen is not satisfactorily filled out.[cccxlviii] The system could calculate the application fees or estate administration tax, provide for online or credit card payment of such fees, and provide an automatic receipt. The information could then be printed or sent electronically to the Registry, and then on to the judge. Once the COA is signed, it could be mailed (or in future, electronically delivered) to the estate representative.

With an electronic system, especially one that is intelligently designed, the risks of fraud could be mitigated. One significant advantage regarding fraud that E-LRS may have over the probate system is that land is not an asset that can be moved out of province or hidden away.[cccxlix] As a result, the risk of fraudulent listing of assets appears higher in a proposed electronic probate application system. However, that risk is not substantially increased in an electronic probate application system from a paper-based system, as there is no check of assets done by the Estates Desk staff. It remains, in the current system, for the judge, or the

beneficiaries, to raise issues such as asset fraud. Therefore, an electronic probate application system that simply guides users towards the creation of pre-approved documents ready for registration does not appear to substantially increase the risk of asset fraud. Furthermore, the risk of fraudulent dealings concerning assets remains in the current probate system, as the risk typically occurs after the COA is granted, and not at the application stage.

Another possible risk is increased identity fraud on the part of the estate representative. Again, however, this is a risk that would not be significantly increased from the current system. In the current probate application procedure, there is no scrutiny of the identity of the person applying as the estate representatives at the court office; individuals who appear with completed documents to file a probate application are not required to show any identification. The application does require affidavits that must be sworn in front of a Notary Public or Commissioner of Oaths who should, of course, be verifying the identity of the affiant/applicant. Nevertheless, in the current system, the only verification of the identity of the estate representative applicant is at the stage of swearing the affidavits. One possible solution would be to restrict the electronic system to the production of documents alone, and leave the actual registration of documents to the Clerks (rather than enable online or electronic registration). Proof of identity could then be required and provided on registration, or provided through a sworn statement of identity from the Notary or Commissioner of Oaths that witnesses the swearing of the required Affidavits. However, an electronic system that generates completed documents and affidavits ready to be taken to be sworn, even if that electronic system then permitted you to upload and file those sworn affidavits electronically, would not result in the

loss of any scrutiny or checks on the estate representative's identity in comparison to the system that currently exists.

Taken together, an electronic probate application document creation and registration system such as this could present a seamless application procedure for many small-value estate representatives. Where problems arise, the Clerks would remain available to answer questions, or the estate representative may need to proceed towards obtaining legal advice. However, for many estate representatives, some guidance on proper completion of the documentation may be all they need to enable them to complete the probate application procedure themselves. Therefore, the electronic system is an idea that bears serious consideration as Ontario moves forward towards consideration of how to implement a simplified probate application procedure for small estates.

Should Ontario choose to adopt such a system for small value probate applications, it would not be the first one in existence, which bodes well for the idea. An excellent model for an online, electronic small estates document creation program exists in the New York State Small Estate Affidavit Procedure ("SEAP"), as described in the Consultation Paper.[cccl] The SEAP has a free, user-friendly, online plain language guide that produces a completed Affidavit ready for filing, as well as instructions for how to file. For the purposes of this paper, I accessed the SEAP online Affidavit service, using made-up information about a fictional deceased, in order to see how the program worked. I did not complete the process to its very end, as I did not want to generate real documents. I ended the program at the last step before I reached the "Congratulations" that the program was prompting me towards.

The program prompts the user to enter the required information in a particular order, and does not allow the user to proceed to the next screen without fully completing the required information. It allows users to create an account that will save their inputted information, so that they may return and complete the affidavit process at a later date. It prompts the user about additional forms or paperwork that may be required, such as the original will, or a Renunciation. It has pop-up text bubbles that explain any terminology used (such as "distributee" – a person who is entitled to receive something from the estate – or "non-marital child"), as well as answering commonly asked questions. It requires the user to read and agree to by a separate click box, each of the estate representative's duties.[cccli] Interestingly, it prompts the user to input names and addresses of all the beneficiaries listed in a will, as well as any other distributees. This apparently allows the court to generate the notices that are sent to beneficiaries. Clearly, then, in New York's SEAP, it is not the estate representative who prepares and sends the notices to beneficiaries, but the court staff.[ccclii]

The New York SEAP is certainly a model that points towards the possibility of an electronic or online document creation, and possibly registration, system. The fact of its success in New York bodes well for possible adoption in Ontario. Therefore, the creation of such an online system is one important solution for increasing accessibility in the probate application procedure for small estates, while maintaining a proportional balance with the required procedural rigour.

H. Using the Suggestions for Change Together

The suggestions for change discussed above could each be implemented individually in order to improve accessibility. However, many of them can also work together as part of the

multi-pronged approach needed to effectively address concerns over accessibility while maintaining procedural protection. For example, increasing physical accessibility and providing more, and better, legal self-help materials are overarching suggestions that would increase accessibility to the probate application procedure by themselves, even if nothing else was done. However, using them in conjunction with other suggestions ensures that accessibility is tackled in a multi-dimensional way. Ignoring physical accessibility issues, for example, regardless of what else is done, could still result in a system that is inaccessible for portions of the population. Therefore, the options in this paper are suggested so that they may be used together, as part of an overall simplification process of the procedure, using a multi-pronged approach to increasing accessibility while maintaining procedural protection.

For example, an electronic document generator, coupled with greater legal self-help services, could create an easy-to-use, plain language interface to guide individuals through the creation of their application documents. The document generator could assist in streamlining the procedure by, for example, creating an Application that is designed to be served on the beneficiaries, rather than also creating separate Notice forms that are to be served. The document generator could generate a list, based on the information provided and for the applicant's own benefit, of those who must be served with a copy of the Application. It could also include instructions about the next steps: notarizing or commissioning the affidavits, and then filing them at the court registry. This could increase accessibility for applicants by reducing complexity, reducing the perception of complexity, and reducing cost.

Once the affidavits are notarized or commissioned, longer or different opening hours at the court registry, or registry-only offices that are opened outside of court houses in more

accessible locations, could also increase accessibility. Once at the registry office, increased flexibility or discretion in the application system could help reduce delay, thereby even further increasing accessibility.

Furthermore, if these suggestions are found to impact procedural protection, this impact may be manageable through other parts of the process. For example, increasing or altering the opening hours of the registry, or opening registry-only offices in more accessible locations that would allow for filing of documents without attending at the courthouse, would not impact the procedural protections of the application itself. They simply render it less difficult for the actual application to be filed. Likewise,

As a result, while each individual suggestion for change could increase accessibility on its own, the suggestions can also be interwoven and work together to create a more balanced, accessible probate application procedure for small value estates that nevertheless maintains appropriate procedural safeguards and protections.

VII. CONCLUSION

This paper has examined the functions of the current probate process, and described why they are important to maintaining the procedural protections that the current probate process provides. It has also examined the principles of accessibility and proportionality, and discussed why they are important in a probate application system. Looking at the barriers that the public may face in accessing the probate system has demonstrated that the current probate application procedure is not proportional where the value of the estate is small, and is therefore likely to be inaccessible. As a result, a simplification of the probate application procedure is recommended.

This paper has also examined several key processes in which accessibility and procedural protection have been balanced. It looked at Small Claims Court, Rule 76 of the *Rules of Civil Procedure*, the Social Justice Tribunals Ontario, the Landlord and Tenant Board, the Land Titles Registry and Electronic Land Registry System, and the *Children's Law Reform Act* in an effort to discover how each of these processes have achieved the balance between accessibility and procedural protection. Several lessons for a simplified probate procedure were identified. This paper has also compared the probate application process with the regime for attorneys under a Continuing Power of Attorney for Property. This comparison gave further evidence that the current probate application procedure may not be proportional to the value, risks, and powers involved in small estate administration.

Finally, this paper has made several recommendations regarding simplification of the current probate application process. It is hoped that these can be implemented together to create a simplified probate application for small value estates. As discussed, such a simplified procedure would greatly increase the public's ability to access the probate application system, by reducing cost and delay, complexity, the appearance of complexity, and physical inaccessibility. It would do so while still maintaining the procedural rigour and protective functions provided by the probate application process. While undertaking reform is always a daunting task, moving towards a simplified procedure would move Ontario forward by ensuring that proportional procedural systems are accessible to all Ontarians.

ENDNOTES

[i] Rodney Hull , Q.C., and Ian M. Hull, *Macdonnell, Sheard and Hull on Probate Practice*, 4th ed., (Toronto: Carswell, 1996), 1-2.
[ii] Hull, note 1, 1-2.
[iii] Ontario Law Reform Commission, *Report on Administration of Estates of Deceased Persons* (Toronto: 1991), 7.
[iv] Ontario Law Reform Commission, note 3*,* 7.
[v] Hull, note 1, 2.
[vi] Ontario Law Reform Commission, note 3, 9-10.
[vii] Ontario Law Reform Commission , note 3, 10.
[viii] Hull, note 1, 2.
[ix] Law Commission of Ontario, *Simplified Procedure for Small Estates in Ontario Consultation Paper* (Toronto: September 2014), 7-8.
[x] See, for example, Leopold Amighetti Q.C. and Darrell Wickstrom, "Claims Against the Estate for Debts", in Carmen S. Theriault, ed., *Widdifield on Executors and Trustees*, 6th ed. (Toronto: Carswell, 2002-), 3-1 - 3-4.
[xi] Wendy Templeton, *Wills, Trust and Estate Administration: Step Diploma for Canada*, 1st ed. (Toronto: Society of Trust and Estate Practitioners, 2010), 8-4.
[xii] Templeton, note 11, 8-7.
[xiii] Templeton, note 11, 8-6
[xiv] Templeton, note 11, 8-4.
[xv] Templeton, note 11, 8-5.
[xvi] Templeton, note 11, 8-5.
[xvii] Templeton, note 11, 8-5.
[xviii] The main exception to this is Quebec, which is not covered by this discussion as it does not follow a common-law system.
[xix] Ontario Superior Court of Justice Form 74.8
[xx] *Rules of Civil Procedure*, O.Reg. 170/14.
[xxi] *Rules of Civil Procedure*, note 20, 74.04(1)(c)
[xxii] In my practical experience in the Yukon, however, a judge may request further information on this point if, after review of the file, he or she deems it necessary.
[xxiii] I confirmed this in a phone call with John Delaney, Barrister and Solicitor specializing in wills and estate administration with Tradition Law LLP in Winnipeg, Manitoba, on 20 November 2014. The only form in Manitoba that must be sent to beneficiaries is that which lists the tariffs that lawyers may charge for acting for the estate representative. He did not have any insight into why Manitoba does not require notice to be sent to all the beneficiaries, and was surprised to learn that this is a requirement in the other common law jurisdictions across the country. John told me that, when acting for an estate representative, he personally has a practice of sending a copy of the will and a letter to residuary beneficiaries advising them of the death, of roughly what they may be entitled to, and whether or not he anticipates, at that preliminary stage, any issues of abatement. He includes a caution that the entitlement is subject to the debts and tax liabilities being resolved, and therefore the final amount may be quite different. However, there is no statutory requirement to send any kind of notice whatsoever in Manitoba; John does it as a best practice, because he feels it assists the estate representative later on if the beneficiaries have some awareness of the process and their potential entitlement. He may alter the content of the notice if the estate representative objects, for example, if the estate representative does not wish all the beneficiaries to have a copy of the will and therefore know what all the other beneficiaries are entitled to.
[xxiv] Nova Scotia *Probate Court Practice, Procedure and Forms Regulations*, S.N.S. 2000, c.31, O.I.C. 2001-450, s.44(1).
[xxv] Nova Scotia *Probate Regulations*, note 24, s.44(2).
[xxvi] Yukon Supreme Court, Form 73.
[xxvii] Supreme Court of Prince Edward Island, Form 65X.
[xxviii] Ontario Superior Court of Justice, Form 74.4.

[xxix] Yukon Form 73, note 26.
[xxx] Alberta Surrogate Court Form NC 19.
[xxxi] Nova Scotia Probate Court Form 24.
[xxxii] Ontario Form 74.4, note 28.
[xxxiii] Ontario Form 74.4, note 28.
[xxxiv] See, for example, Yukon Supreme Court Form 72.
[xxxv] Saskatchewan Probate Court Statement of Property.
[xxxvi] Yukon Form 72, note 34.
[xxxvii] Manitoba Court of Queen's Bench Form 74B.
[xxxviii] Similar to that in Ontario's Form 74.4, note 28. Nova Scotia Probate Court Form 8.
[xxxix] *Probate Act*, S.N.S. 2000, c.31, s.57(1), and Nova Scotia Probate Court Regulations, note 24, s.45.
[xl] I confirmed this in an email conversation with Bianca C. Krueger, Barrister and Solicitor specializing in estate administration at Cox & Palmer, Halifax, Nova Scotia, 13 November 2014.
[xli] Ontario Superior Court of Justice Form 74.11.
[xlii] In Ontario, Consent to Applicant's Appointment as Estate Trustee with a Will is Form 74.12, and Consent to Applicant's Appointment as Estate Trustee without a Will is Form 74.19.
[xliii] In Ontario, this is double the amount of the estate: *Estates Act*, R.S.O. 1990, Chapter E.21, s.37(1), unless reduced by the judge under s.37(2)
[xliv] see Ontario Ministry of the Attorney General, "Frequently Asked Questions About Estates: What Is a Bond?" online: http://www.attorneygeneral.jus.gov.on.ca/english/estates/estates-FAQ.asp#s7 (last accessed 12 December 2014).
[xlv] In Ontario, this is ss.35-43 of the *Estates Act*, note 43, and Rule 74.11 of the *Rules of Civil Procedure.*
[xlvi] Templeton, note 11, 8-19.
[xlvii] Templeton, note 11, 8-18.
[xlviii] Templeton, note 11, 8-19.
[xlix] Roderick A. Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, W.A. Bogart and Frederick H. Zemans, eds., *Access to Justice for a New Century – The Way Forward* (Toronto: Law Society of Upper Canada, 2005), 19.
[l] Shelley McGill, "Small Claims Court Identity Crisis: A Review of Recent Reform Measures", (2010) 49 Can. Bus. L.J. 213, 214, 217.
[li] Seana C. McGuire and Roderick A. Macdonald, "Small Claims Courts Cant" (1996) 34 Osgoode Hall L.J. 509, 510.
[lii] McGill, note 50, 215-216.
[liii] Macdonald, note 49, 19.
[liv] Jane Bailey, "Digitization of Court Processes in Canada" Cyberjustice Laboratory Working Paper No.2 (23 October 2012), 3, online: http://www.cyberjustice.ca/wordpress/wp-content/uploads/webuploads/WP002_CanadaDigitizationOfCourtProcesses20121023.pdf (last accessed: 18 November 2014).
[lv] Macdonald, note 49, 35.
[lvi] Macdonald, note 49, 20.
[lvii] Macdonald, note 49, 20-21.
[lviii] Bailey, note 54, 3.
[lix] Mr. Justice David M. Brown, "A View From the Bench", in Melanie A. Yach, ed., *Key Developments in Estates and Trusts Law In Ontario*, 2010 edition (Aurora: Canada Law Book, 2010), 1.
[lx] Justice Brown, note 59, 1.
[lxi] Carole J. Brown and Steven Kennedy, "Changing the Rules of the Game: Rewinding the First Ten Months of the New Rules of Civil Procedure" (2010-2011) 37 Advoc. Q. 443, 462-463.
[lxii] *Rules of Civil Procedure*, note 20.
[lxiii] *Courts of Justice Act*, R.R.O. 1990, Regulation 194.
[lxiv] See, for example, the discussion in C. Brown, note 61, 463-464.

[lxv] *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, para.53, as quoted in *Hryniak v. Mauldin*, [2014] 1. S.C.R. 87, 2014 SCC 7, para. 31. The Supreme Court of Canada in *Hryniak*, above, used this quote to explain the proportionality principle and how it is to be applied by courts.
[lxvi] Susan A. Easterbrook, "Costs in Estate Litigation" in Melanie A. Yach, ed., *Key Developments in Estates and Trusts Law In Ontario*, 2010 edition (Aurora: Canada Law Book, 2010), 155.
[lxvii] The Honourable Coulter A. Osborne, Q.C., "Summary of Findings & Recommendations", *Civil Justice Reform Project* (November 2007), 134, online: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf (last accessed 22 November 2014).
[lxviii] As discussed in Justice Brown, note 59, 5.
[lxix] Justice Brown, note 59, 7.
[lxx] Justice Brown, note 59, 7.
[lxxi] Justice Brown, note 59, 7.
[lxxii] Easterbrook, note 66, 161.
[lxxiii] Easterbrook, note 66, 159.
[lxxiv] On cost as an issue and how it can arise, see Gerald L. Gall, "Efficient Court Management", in The Canadian Institute for the Administration of Justice, *Expeditious Justice: Papers of the Canadian Institute for the Administration of Justice* (Toronto: Carswell, 1979), 108.
[lxxv] Emphasis added.
[lxxvi] *Hryniak v. Mauldin*, note 65, paras. 28-30.
[lxxvii] This topic has already been examined in the LCO's Consultation Paper for this project: see Law Commission of Ontario, note 9, 20-21, 25-27.
[lxxviii] Straight quantum of value, however, may not accurately reflect the proportional value of the loss to the individual beneficiary.
[lxxix] see McGill, note 50, 234-235, for criticisms of the Ontario Small Claims Court in this regard.
[lxxx] McGill, note 50, 234.
[lxxxi] I expect that the public consultation process undertaken as part of this project may provide rich source material for this discussion.
[lxxxii] Gall, note 74, 108-109.
[lxxxiii] Macdonald, note 49, 27.
[lxxxiv] Macdonald, note 49, 27-28.
[lxxxv] Macdonald, note 49, 28.
[lxxxvi] See, on this topic in California, Charles P. Kindregan, "The California Crawl: Reforming Probate Administration in California", (1979) 19 Santa Clara L. R. 1., 5.
[lxxxvii] See, for example, the doctrine of the executor's year, or the duty not to waste assets, which may be impacted if the estate representatives delays in dealing with them: James F. Kennedy, "Bequests and Beneficiaries", in Carmen S. Theriault, ed., *Widdifield on Executors and Trustees*, 6th ed. (Toronto: Carswell, 2002-), 5-1, 5-6; Elena Hoffstein, "Resignation, Removal and Appointment of Trustees" in Carmen S. Theriault, ed., *Widdifield on Executors and Trustees*, 6th ed. (Toronto: Carswell, 2002-), 15-17.
[lxxxviii] Telephone conversation with Wendy D. Templeton, Barrister and Solicitor specializing in Estate, Trust and Tax Planning, 27 October 2014.
[lxxxix] In-person conversation with Donna Neff, Barrister and Solicitor, Neff Law Office, LSUC Certified Specialist in Estate and Trust Law, 5 November 2014.
[xc] See, on this topic, British Columbia Law Institute Succession Law Reform Project, *Interim Report on Summary Administration of Small Estates* (Vancouver: December 2005), 7-8.
[xci] Gall, note 74, 108.
[xcii] Legal Aid Ontario, "Are you looking to settle a will, an estate matter, or an inheritance?" on the Legal Aid Ontario website, online: http://www.legalaid.on.ca/en/getting/type_civil.asp (last accessed 4 November 2014). There may, however, be other pro-bono legal services available that will provide advice on estate application matters. The presence of such a service at the 393 University Avenue court in Toronto was suggested to me by Heather Hogan, Barrister and Solicitor at Whaley Estate Litigation, in a telephone call on 24 November 2014, although it is not clear from the Pro Bono Law Ontario website that this is a service that they actually offer.

[xciii] Macdonald, note 49, 28.
[xciv] Macdonald, note 49, 28.
[xcv] http://www.ontariocourtforms.on.ca/english/civil/pre-formatted-fillable-estates-forms (last accessed 14 November 2014).
[xcvi] I heard this comment many times from clients in practice, and heard it repeated by all the Ontario practitioners I spoke to: Wendy Templeton, note 88, Donna Neff, note 89, and Heather Hogan, note 92.
[xcvii] Again, this is based on my experience as a practitioner.
[xcviii] Ontario Form 74.4, note 28. The following is based on my own reading of the Form, attempting to place myself in the position of someone with no previous familiarity with the process.
[xcix] Constance Backhouse, "What Is Access to Justice?" in *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 121-122.
[c] Macdonald, note 49, 29-30.
[ci] Backhouse, note 99, 122.
[cii] Macdonald, note 49, 27.
[ciii] Macdonald, note 49, 27.
[civ] Macdonald, note 49, 27.
[cv] Chief Judge Heino Lilles, Territorial Court of the Yukon, "Some Problems in the Administration of Justice in Remote and Isolated Communities", presentation to the C.I.A.J. Conference, October 11-14, 1989, 7.
[cvi] Lilles, note 105, 6.
[cvii] Lilles, note 105, 8.
[cviii] Lilles, note 105, 8.
[cix] Lilles, note 105, 23-24. It is unclear to me how much First Nations communities in Ontario are affected by accessibility to the probate application system, since the estates of First Nations citizens still covered by the rubric of the *Indian Act* are administered under that Act by Aboriginal Affairs and Northern Development Canada. Only First Nations which are not covered by the *Indian Act*, or which have settlement or self-government agreements that exempt the estates of their citizens from being administered by the *Indian Act*, would have any interaction with the civil probate system in Ontario. A comprehensive study of the First Nations in Ontario and their estate administration scheme(s) is far outside the scope of this paper, though it remains an interesting topic for further exploration. I mention First Nations communities here only to highlight that, where applicable, First Nations communities do face increased and particularized barriers to accessing the probate application system that must not be forgotten in the development of any simplified probate application system. This is especially so as economic conditions, cultural values and norms regarding money and death, as well as familial or beneficiary distribution schemes, may dictate that, where a community or First Nation participates in the civil probate application scheme, the number of small value estates within a First Nations community is likely to be higher than average.
[cx] This is a question I heard several times from clients, the named or entitled estate representatives of particularly small value estates, once the magnitude and complexity of the job was explained to them. A feeling of moral obligation to the deceased was often cited to me as the other factor influencing the estate representative to act in light of the fact that the amount of money that may, after debts and taxes were dealt with, be available to beneficiaries was minimal or non-existent compared to the time and stress needed to get to the stage of distribution.
[cxi] McGuire, note 51, 3
[cxii] McGill, note 50, 216.
[cxiii] Macdonald, note 49, 58.
[cxiv] Macdonald, note 49, 58.
[cxv] Ministry of Attorney General, "Before Making a Claim in Small Claims Court" website, online http://www.attorneygeneral.jus.gov.on.ca/english/courts/scc/b4aClaim.asp, (last accessed 22 November 2014).
[cxvi] Macdonald, note 49, 59.
[cxvii] McGill, note 50, 220.
[cxviii] McGuire, note 51, 510-512.
[cxix] McGill, note 50, 226.
[cxx] McGill, note 50, 218.

[cxxi] Macdonald, note 49, 59.
[cxxii] Ontario Ministry of the Attorney General, "What is Small Claims Court?" (2014), 2, online: http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/What_is_Small_Claims_Court_EN.pdf, (last accessed 22 November 2014).
[cxxiii] Ontario Ministry of the Attorney General, "What is Small Claims Court?", note 122, 6.
[cxxiv] McGill, note 50, 218.
[cxxv] McGill, note 50, 230-231. Ontario eliminated the cap on counsel fees in 2006, reducing the effectiveness of this self-representation mechanism.
[cxxvi] Macdonald, note 49, 61.
[cxxvii] Ontario Ministry of the Attorney General, "Small Claims Court: Increase in Monetary Limit from $10,000 to $25,000" (December 09, 2010), 1, online: http://www.attorneygeneral.jus.gov.on.ca/english/courts/scc/Guide_to_transferring_a_claim_from_SCJ_to_SCC-EN.pdf (last accessed: 22 November 2014).
[cxxviii] Macdonald, note 49, 61; McGill, note 50, 231.
[cxxix] For example, see the Ontario Ministry of the Attorney General's Small Claims Court website generally, which has several informational and instructional guides available: http://www.attorneygeneral.jus.gov.on.ca/english/courts/scc/ (last accessed 24 November 2014).
[cxxx] McGill, note 50, 224.
[cxxxi] Macdonald, note 49, 59-60.
[cxxxii] McGill, note 50, 223.
[cxxxiii] Ontario Ministry of Attorney General, "Small Claims Court – Increase", note 127, 1.
[cxxxiv] Macdonald, note 49, 60.
[cxxxv] McGuire, note 51, 515; McGill, note 50, 228-229.
[cxxxvi] McGill, note 50, 214, 217.
[cxxxvii] McGill, note 50, 214, 216.
[cxxxviii] Macdonald, note 49, 58.
[cxxxix] Macdonald, note 49, 61-62.
[cxl] McGill, note 50, 220.
[cxli] McGill, note 50, 219.
[cxlii] Ontario Ministry of the Attorney General, "What's New? Changes to the Rules of Civil Procedure", website online: http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes_to_rules_of_civil_procedure.asp (last accessed: 22 November 2014); Ontario Ministry of the Attorney General, *Fact Sheet: Simplified Procedure under Rule 76 of the Rules of Civil Procedure* (January 1, 2010), online: http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/fact_sheet_simplified_procedure_76.pdf (last accessed: 22 November, 2014).
[cxliii] Lesly Joseph, "Rule 76 – Costs, Benefits and Implications for Access to Justice" (2008) 34 Advoc. Q. 88, 89.
[cxliv] Joseph, note 143, 92.
[cxlv] Joseph, note 143, 92-93.
[cxlvi] Joseph, note 143, 97-98.
[cxlvii] Joseph, note 143, 88.
[cxlviii] Joseph, note 143, 90.
[cxlix] Joseph, note 143, 88.
[cl] Joseph, note 143, 88-90; C. Brown, note 61, 461.
[cli] Julius H. Grey, Genevieve Coutlée and Marie-Eve Sylvestre, "Access to the Justice and the New Code of Civil Procedure" (2004) 38 R.J.T. 711, 715.
[clii] Grey, note 151, 713.
[cliii] Grey, note 151, 714-715.
[cliv] Grey, note 151, 715.
[clv] Macdonald, note 49, 64.
[clvi] Macdonald, note 49, 64-65.

[clvii] C. Brown, note 61, 461. Examinations for discovery were originally prohibited under the simplified procedure, but were added back in this limited capacity when the rule was overhauled in 2010, to help facilitate parties' full knowledge of the case before trial, as a means to encourage settlement. Joseph, note 143, 93, 99; C. Brown, note 61, 461.
[clviii] Joseph, note 143, 93.
[clix] Joseph, note 143, 93.
[clx] Joseph, note 143, 94-95.
[clxi] Joseph, note 143, 94.
[clxii] Joseph, note 143, 94.
[clxiii] Joseph, note 143, 95.
[clxiv] Joseph, note 143, 94.
[clxv] Joseph, note 143, 95.
[clxvi] Joseph, note 143, 91.
[clxvii] Macdonald, note 49, 65.
[clxviii] Catherine Piché, "Judging Fairness in Class Action Settlements", (2010) 28 Windsor Y.B. Access Just.111, 115.
[clxix] Piche, note 168, 115.
[clxx] Macdonald, note 49, 68.
[clxxi] Macdonald, note 49, 67.
[clxxii] Justice Warren K. Winkler, "Civil Justice Reform – The Toronto Experience" from *The Warren Winkler Lectures on Civil Justice Reform* (2007-2008) 39:1 Ottawa L.R. 99, 112.
[clxxiii] Grey, note 151, 716-718.
[clxxiv] Grey, note 151, 718-719.
[clxxv] Winkler, note 172, 112.
[clxxvi] Grey, note 151, 722-723.
[clxxvii] Winkler, note 172, 112.
[clxxviii] Grey, note 151, 722-723.
[clxxix] Grey, note 151, 735-736.
[clxxx] Grey, note 151, 724-727.
[clxxxi] Joseph, note 143, 90.
[clxxxii] Joseph, note 143, 90.
[clxxxiii] Macdonald, note 49, 66.
[clxxxiv] Winkler, note 157, 106.
[clxxxv] Winkler, note 157, 106.
[clxxxvi] Backhouse, note 99, 121-122.
[clxxxvii] Macdonald, note 49, 66.
[clxxxviii] Macdonald, note 49, 67.
[clxxxix] Macdonald, note 49, 68.
[cxc] For criticisms of the Connecticut model in this regard, see Margaret E. St. John, "The Connecticut Probate Court System Reform: A Step in the Right Direction" (2011) 24 Quinnipiac Prob. L. J. 290, 299.
[cxci] David J. Mullan, *Administrative Law: Cases, Text and Materials* 5th ed. (Toronto: Emond Montgomery, 2003), 3; David W. Elliott, "Scope and History of the Administrative Process", in David W. Elliott, ed., *Administrative Law and Process*, Revised 3rd ed. (Concord: Captus Press Inc., 2003), 10.
[cxcii] Elliott, note 191, 10.
[cxciii] Mullan, note 191, 20.
[cxciv] Mullan, note 191, 20-23.
[cxcv] David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law* 6th ed. (Toronto: Thomson Reuters Carswell, 2014), 3.
[cxcvi] Jones, note 195, 3.
[cxcvii] Jones, note 195, 6.
[cxcviii] Lesli Bisgould, "Twists and Turns and Seventeen Volumes of Evidence, or How Procedural Developments Might Have Influenced Substantive Human Rights Law," (2012) 9 J.L. & Equal. 5, 10.

[cxcix] Bisgould, note 198, 11-12.
[cc] Sara Blake, *Administrative Law In Canada*, 5th ed., (Markham: LexisNexis Canada Inc., 2011), 5.
[cci] Lorne Sossin, "Access to Administrative Justice and Other Worries" *Papers from the Future of Adminstrative Justice Symposium* (January 2008), 10, online: http://www.law.utoronto.ca/documents/conferences/adminjustice08_Sossin.pdf (last accessed 17 November 2014).
[ccii] Sossin, note 201, 8.
[cciii] Richard A. Feldman, *Residential Tenancies*, 10th ed. (Toronto: Thomson Reuters Carswell, 2014), 45.
[cciv] Lorne Sossin and Jamie Baxter, "Ontario's Administrative Tribunal Clusters: A Glass Half-Full or Half-Empty for Administrative Justice?" (February 2012) Osgoode Hall Digital Commons, *All Papers*, Paper 28, 11, online: http://digitalcommons.osgoode.yorku.ca/all_papers/28, (last accessed 18 November 2014).
[ccv] Blake, note 200, 5.
[ccvi] Blake, note 200, 5.
[ccvii] *Saleh v Canada* (Minister of Employment and Immigration), [1989] F.C.J. No 1015, para 23 (F.C.T.D.).
[ccviii] Sossin, note 201, 8.
[ccix] Sossin and Baxter, note 204, 9.
[ccx] Sossin, note 201, 8-13.
[ccxi] Social Justice Tribunals Ontario, "Executive Chair's Message" online: http://www.sjto.gov.on.ca/english/ChairsMsg/index.htm (last accessed: 17 November 2014).
[ccxii] Sossin and Baxter, note 204, 20.
[ccxiii] Sossin and Baxter, note 204, 26-27.
[ccxiv] Sossin and Baxter, note 204, 4.
[ccxv] Sossin and Baxter, note 204, 7.
[ccxvi] Sossin and Baxter, note 204, 12.
[ccxvii] Sossin and Baxter, note 204, 5.
[ccxviii] Sossin and Baxter, note 204, 11.
[ccxix] Sossin and Baxter, note 204, 8, 11.
[ccxx] Sossin and Baxter, note 204, 8, 11.
[ccxxi] Social Justice Tribunals Ontario, *Common Rules*, online: http://www.sjto.gov.on.ca/english/Resources/Commonrules/index.htm (last accessed: 18 November 2014).
[ccxxii] See, for example, Rule A4.2, which states: "The tribunal may vary or waive the application of any rule or procedure, on its own initiative or on the request of a party, except where to do so is prohibited by legislation or a specific rule." SJTO Common Rules, note 222, rule A4.2.
[ccxxiii] SJTO Common Rules, note 222, Rule A3.
[ccxxiv] Feldman, note 203, 46.
[ccxxv] Feldman, note 203, 47.
[ccxxvi] Feldman, note 203, 48.
[ccxxvii] Feldman, note 203, 49.
[ccxxviii] Feldman, note 203, 50.
[ccxxix] Feldman, note 203, 52.
[ccxxx] Feldman, note 203, 59-65.
[ccxxxi] Mary Truemner, "A Closer Look at Seemingly Pro-Tenant Provisions in the *Residential Tenancies Act*", (2009) 22 J.L. & Soc. Pol'y 27, 27-28.
[ccxxxii] Feldman, note 203, 1-2.
[ccxxxiii] Feldman, note 203, 2.
[ccxxxiv] Feldman, note 203, 2.
[ccxxxv] Feldman, note 203, 2.
[ccxxxvi] Feldman, note 203, 2.
[ccxxxvii] Feldman, note 203, 2.

[ccxxxviii] Feldman, note 203, 2. This was *Reference Re: Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186, which determined that it was not solely federally appointed judges who had jurisdiction to decide landlord-tenant issues.
[ccxxxix] Feldman, note 203, 3.
[ccxl] Feldman, note 203, 3.
[ccxli] Feldman, note 203, 4. Some topics of this criticism, such as how the *TPA* and the Tribunal dealt with rent control and so-called "vacancy decontrol", are not relevant to our discussion and have been omitted here, although they were significant causes of the push for reform of the *TPA* regime. See, for further reference, Truemner, note 231, 27-28.
[ccxlii] Feldman, note 203, 5.
[ccxliii] Truemner, note 231, 29.
[ccxliv] Feldman, note 203, 5; Truemner, note 231, 28.
[ccxlv] Truemner, note 231, 29.
[ccxlvi] Truemner, note 231, 29.
[ccxlvii] Feldman, note 203, 5.
[ccxlviii] Truemner, note 231, 29.
[ccxlix] Truemner, note 231, 30.
[ccl] Landlord and Tenant Board, "Reasons a Landlord Can Apply to Evict a Tenant", *Instructions for Landlords: How to Serve the Application and Notice of Hearing* (January 2007), online http://www.ltb.gov.on.ca/en/Key_Information/STEL02_111601.html (last accessed: 15 November 2014).
[ccli] Marguerite E. Moore, *Title Searching & Conveyancing in Ontario*, 6th ed. (Markham: LexisNexis Canada Inc., 2010), 10.
[cclii] Brian Bucknall, "Real Estate Fraud and Systems of Title Registration: The Paradox of Certainty" (2008) 47 Can. Bus. L.J. 1, 9.
[ccliii] Moore, note 251, 18.
[ccliv] Moore, note 251, 18.
[cclv] Moore, note 251, 18.
[cclvi] Moore, note 251, 19.
[cclvii] Bucknall, note 252, 10-11.
[cclviii] Moore, note 251, 16.
[cclix] Moore, note 251, 19.
[cclx] Bucknall, note 252, 13.
[cclxi] Bucknall, note 252, 42-43.
[cclxii] Service Ontario, "Compensation for loss from the Land Titles Assurance Fund" (July 10, 2014) online: https://www.ontario.ca/home-and-community/compensation-loss-land-titles-assurance-fund (last accessed 15 December 2014).
[cclxiii] Service Ontario, "Compensation", note 262.
[cclxiv] Moore, note 251, 16.
[cclxv] Moore, note 251, 16.
[cclxvi] Moore, note 251, 21.
[cclxvii] Moore, note 251, 19-20.
[cclxviii] Moore, note 251, 19-20.
[cclxix] Bucknall, note 252, 4-6.
[cclxx] Moore, note 251, 24.
[cclxxi] Moore, note 251, 24.
[cclxxii] Macdonald, note 49, 56.
[cclxxiii] Bailey, note 54, 3.
[cclxxiv] Ministry of the Attorney General, Office of the Children's Lawyer (October 27, 2014), online http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/default.asp (last accessed: 23 November 2014).
[cclxxv] *Rules of Civil Procedure*, note 20, rules 74.04(4) and 74.05(3).

[cclxxvi] Ministry of the Attorney General, Office of the Children's Lawyer, "Frequently Asked Questions", (October 27, 2014) online:
http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/faq/civil_litigation_estates_and_trusts.asp (last accessed: 23 November 2014).
[cclxxvii] The first is the *Companies' Creditors Arrangement Act*, which allows a financial restructuring process different than that outlined in the *Bankruptcy and Insolvency Act* where the total debts of a company exceed $5,000,000.00. The second is National Instrument 45-106, proposed for incorporation by the Ontario Securities Commission, which has already been incorporated in other jurisdictions. It proposes an exemption from the requirement to become a reporting issuer and issue prospectuses to potential investors if private investors that meet a net income test are used.
[cclxxviii] Piche, note 168, 116.
[cclxxix] Macdonald, note 49, 65.
[cclxxx] Macdonald, note 49, 65.
[cclxxxi] Hearings at the Landlord and Tenant Board are still adversarial in nature, even if they take place outside the court system.
[cclxxxii] St. John, note 190, 295.
[cclxxxiii] McGill, note 50, 219.
[cclxxxiv] C.D. Freedman, "Misfeasance, Nonfeasance, and the Self-Interested Attorney", (2011) 30 Est. Tr. & Pensions J. 303, 303.
[cclxxxv] Freedman, note 284, 325.
[cclxxxvi] Freedman, note 284, 319-320.
[cclxxxvii] Law Commission of Ontario, *Legal Capacity, Decision-making and Guardianship: Discussion Paper* (Toronto: May 2014), 165.
[cclxxxviii] Kimberly A. Whaley and Helena Likwornik, "Powers of Attorney and Financial Abuse" (2007-2008) 27 Est. Tr. & Pensions J. 379, 386.
[cclxxxix] Freedman, note 284, 319; Whaley and Likwornik, note 272, 387.
[ccxc] Freedman, note 284, 318; *SDA* s.32(1).
[ccxci] Freedman, note 284, 319-320, 326.
[ccxcii] Whaley and Likwornik, note 288, 390.
[ccxciii] Whaley and Likwornik, note 288, 387.
[ccxciv] Whaley and Likwornik, note 288, 390.
[ccxcv] Telephone call with Heather Hogan, note 92.
[ccxcvi] Whaley and Likwornik, note 288, 387 – in practice, however, we see that this is not always the case.
[ccxcvii] This may well be because POAs are a more recent legal invention than wills, and therefore people have less experience hearing about, or dealing with, POAs. However, it still speaks to a lack of education generally regarding POAs – including, unfortunately, among both grantors and attorneys themselves.
[ccxcviii] LCO Discussion Paper, note 287, 142.
[ccxcix] Whaley and Likwornik, note 288, 383.
[ccc] Freedman, note 284, 336.
[ccci] LCO Discussion Paper, note 287, 165.
[cccii] LCO Discussion Paper, note 287, 165.
[ccciii] Whaley and Likwornik, note 288, 381-383.
[ccciv] Freedman, note 284, 326, 329.
[cccv] LCO Discussion Paper, note 287, 174.
[cccvi] LCO Discussion Paper, note 287, 173.
[cccvii] In the Yukon, attorneys are required to sign a certificate acknowledging that they have been named and understand the duties of an attorney, and agreeing to undertake those duties, before the document is validly completed. I remain surprised that no such requirement exists in Ontario. Yukon *Enduring Power of Attorney Act*, R.S.Y. 2002, c.73, s.3(1)(c).
[cccviii] Whaley and Likwornik, note 288, 388.
[cccix] LCO Discussion Paper, note 287, 166.

[cccx] The list of persons included in the legislation who have automatic standing includes the attorney, the grantor, the grantor's guardian of the person or attorney for personal care; a dependant of the grantor or incapable person; the Public Guardian and Trustee; the Children's Lawyer; a judgment creditor of the grantor or incapable person; any other person, with leave of the court. *Substitute Decisions Act*, S.O. 1992, c.30, s.42.
[cccxi] Telephone call with Heather Hogan, note 92.
[cccxii] Whaley and Likwornik, note 288, 393-395.
[cccxiii] In-person meeting with Donna Neff, note 89.
[cccxiv] Freedman, note 284, 325.
[cccxv] As estate representatives may be or become informed, either by the content of the application or through the process of completing the application, although estate representatives are not strictly required to obtain this information as part of the application process.
[cccxvi] Whaley and Likwornik, note 288, 381.
[cccxvii] LCO Discussion Paper, note 287, 197-198.
[cccxviii] Whaley and Likwornik, note 288, 380.
[cccxix] LCO Discussion Paper, note 287, 204.
[cccxx] LCO Discussion Paper, note 287, 200.
[cccxxi] Whaley and Likwornik, note 288, 400.
[cccxxii] Whaley and Likwornik, note 288, 401.
[cccxxiii] LCO Discussion Paper, note 287, 204-205.
[cccxxiv] LCO Discussion Paper, note 287, 200-201.
[cccxxv] LCO Discussion Paper, note 287, 205.
[cccxxvi] LCO Discussion Paper, note 287, 170.
[cccxxvii] LCO Discussion Paper, note 287, 201-202.
[cccxxviii] LCO Discussion Paper, note 287, 204.
[cccxxix] It is also, of course, possible that the reverse is true, and that fraud is more prevalent under estate administrations than under POAs. More empirical evidence is needed before any definitive claim could be made. However, as discussed, the general feeling among practitioners seems to be that POAs are more widely misused or abused than estate administrations, and that mishandling of an estate is easier to catch.
[cccxxx] Where complex issues exist, however, legal advice may still be necessary. Even if the system itself is accessible, the world of estates will likely always include complex issues that cannot be solved without legal advice, whether the estate is large or small. As stated regarding POAs, it is my opinion that good, specific legal advice can be invaluable, even when the procedure is easy or the issues non-complex. It provides an opportunity for the estate representative to receive information, education, and tailored advice that simply cannot be provided by a guidebook or website. Furthermore, it offers pro-active advice on how to prevent issues from beginning or from becoming bigger. However, as a practitioner, I admit my bias in this regard.
[cccxxxi] For an Application With a Will, this is Ontario Superior Court of Justice Form 74.7; on intestacy it is Form 74.17.
[cccxxxii] Telephone call with Wendy Templeton, note 88, and in-person meeting with Donna Neff, note 89.
[cccxxxiii] This can be especially so when they are residuary beneficiaries, and therefore only know they are entitled to a share of the estate. However, having no knowledge of the size of the estate, they are incapable of understanding the relative value of their share. Human nature being what it is, they may imagine large numbers where only small numbers exist.
[cccxxxiv] Certainly, what constitutes small value may be relative to the circumstances of each beneficiary. Nevertheless, there is a vast difference between $1,000.00 and $10,000.00 or more.
[cccxxxv] Telephone conversation with John Delaney, note 23.
[cccxxxvi] Friction would be further reduced if Ontario adopted a model, similar to the Northern territories, of providing a net value of the estate, rather than simply the gross value, so that there is no misunderstanding of what value beneficiaries are sharing in. It remains doubtful, however, that the government would ever move towards calculating the Estate Administration Tax on the net value of the estate. Nevertheless, that would not prevent the form from requiring both values to be listed for the benefit of interested and entitled parties. Alternatively, Ontario could move towards the model of Nova Scotia, which requires a more comprehensive

inventory of the estate after the grant is obtained. The inventory could then be served on the beneficiaries, to provide a more complete accounting of the estate up front. This, however, creates additional paperwork, rather than reducing paperwork.

[cccxxxvii] The Alberta statement reads: "Once the court issues the grant, the personal representative(s) will collect in the property, pay the debts, and complete the administration of the estate and anything else required of the personal representative(s). Then they will be in a position to account to you before distributing any estate left after payment of all debts and expenses. By issuing the grant, the court is not approving the figures submitted in the application for a grant of probate. It is the responsibility of the beneficiary(ies) to supervise the actions of the personal representative(s)." Alberta Form NC19, note 30.

[cccxxxviii] Jones, note 195, 99.

[cccxxxix] Blake, note 200, 3.

[cccxl] Jones, note 195, 100.

[cccxli] For example, see the discussion of Connecticut's vast network of probate court offices, which essentially serve as "community courts", which, prior to reforms, created an easy to access system for citizens: St. John, note 190, 293-294.

[cccxlii] Grey, note 151, 713.

[cccxliii] McGill, note 50, 216-220.

[cccxliv] McGill, note 50, 221.

[cccxlv] Grey, note 151, 713-714.

[cccxlvi] Federal Court; Tax Court; BC, Alberta, and Newfoundland Provincial Courts; BC, Alberta, Saskatchewan and Newfoundland Courts of Appeal. Bailey, note 54, 5.

[cccxlvii] Macdonald, note 49, 55.

[cccxlviii] Much in the same way that you cannot purchase something online without accurately completing your billing or shipping address.

[cccxlix] Bucknall, note 252, 4.

[cccl] Law Commission of Ontario, note 9, 52-53.

[cccli] Such as opening an estate bank account, paying any debts in the order listed in the law, and distributing any assets left over to the distributees.

[ccclii] This is an interesting aspect of the New York model that may, in and of itself, greatly increase access to the probate application procedure by reducing a common source of frustration and confusion for estate representatives, as well as cost and delay. However, it does beg the question of how the process is managed by court staff and whether it absorbs an unsustainable amount of staff time and resources. Those questions could not be answered within the online program.