"Hearings" in Writing: Towards a Doctrinally and Theoretically Defensible Practice

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The COVID-19 pandemic accelerated technological innovation in courts, leading to the rise of virtual hearings and the practice of resolving cases solely through written submissions. While written "hearings" can reduce time and expense, they raise significant questions regarding procedural fairness and whether they are permitted under existing legislation. This paper explores these competing interests by drawing on comparative practices and administrative law principles, analyzing how access to justice can both favor and caution against dispensing with oral hearings. Courts should be reluctant to dispense with oral hearings, particularly in first-instance decisions on the merits or when statutory language implies an oral default. Although, while skepticism is necessary, there are a variety of factors which Courts may consider when determining whether to dispense with an oral hearing, on a case-by-case basis.

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I. Introduction

The COVID-19 pandemic forced courts to innovate in a variety of ways. The rise of "Zoom courts," where hearings proceed electronically, has been studied extensively.[1] Many innovations regarding use of technology, particularly for interlocutory matters, remain as a means to facilitate access to justice. This is evidenced in virtual hearings which reduce time and expenses for lawyers and self-represented litigants.

Beyond that mentioned above, another practice arose in the pandemic and remains occasionally present post-pandemic: dispensing with oral hearings entirely and resolving cases solely on the basis of written submissions.[2] Though rarer, the phenomenon of written "hearings" has the potential to save time and expense for litigants and courts. In certain administrative law contexts this procedure is well established and accepted.[3] Though a question remains, does it come at too great an expense to procedural fairness in the civil litigation context? Further, is it permitted pursuant to legislation and regulations that govern court practices? These matters divide the courts and scholarship.[4]

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1 S.E. Chiodo, "Ontario Civil Justice Reform in the Wake of COVID-19: Inspired or Institutionalized?" (2021) 57:3 *Osgoode Hall Law Journal*; K. Puddister & T.A. Small, "Trial by Zoom? The Response to COVID-19 by Canada's Courts" (2020) 53:2 *Canadian Journal of Political Science*; S.A. Bandes & N. Feigenson, "Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom" (2020) 68:5 *Buffalo Law Review*.

2 *E.g.*, *4352238 Canada Inc v SNC-Lavalin Group Inc*, 2020 ONCA 303 [*4352238*].

3 See, *e.g.*, *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 CanLII 699, [1999] 2 SCR 817 (CanLII) (SCC) [*Baker*].

4 See, *e.g.*, *4352238*. This has been a particular problem in the realm of allegedly vexatious or abusive proceedings: See *e.g.*, *Heiser v Bowden Institution*, 2022 ABCA 300; D.J. Netolitzky, "After the Hammer: Six Years of *Meads v Meads*" (2019) 56:4 *Alberta Law Review*; G.J. Kennedy, "The Alberta Court of Appeal's Vexatious Litigant Order Trilogy: Preserving

This article explores the competing interests concerning whether a matter can proceed in writing by drawing on comparative practices across Canada while occasionally drawing insight from the United States and United Kingdom. While this article emphasizes dispensing with oral hearings and proceeding in writing, lessons from instances of virtual as opposed to in-person hearings will be drawn upon where appropriate. Part I analyzes first principles of procedural fairness including when oral hearings are required. The administrative law context informs most of the relevant case law and highlights what the common law has already held to be mandatory. The analysis in Part I will then move to the relationship between procedural rights in administrative law, criminal law, and civil litigation. Part II analyzes controversial civil (and, solely as a point of comparison, criminal) case law to better understand the *status quo*. Part III proceeds to consider how "access to justice" can be a double-edged sword, both favouring and cautioning against dispensing with an oral hearing depending on the circumstances. Finally, in Part IV, best practices are put forward.

Briefly, it is argued that courts should be reluctant to dispense with oral hearings in civil litigation. A court's reluctance is heightened at the first instance decision on the merits of a case. At times a hearing "in writing" should be prohibited as a matter of statutory interpretation and legislative sovereignty. This is not to suggest, however, that natural justice always mandates oral hearings. Seven indicia, more commonly in the form of standards than that of rules, are suggested, even though some particularly strong presumptions still remain. Access to justice and principles of

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Access to the Courts, Respecting Legislative Supremacy, and Hopefully Not to a Fault" (2021) 58:3 *Alberta Law Review* [Kennedy Vexatious]; J. Macfarlane, K. Trask & E. Chesney, *The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?* (The National Self-Represented Litigants Project, November 2015) [Macfarlane et al.].

procedural fairness can be in tension in this area, but they can also be complementary. This article suggests best practices to reconcile this tension.

II. Procedural Fairness and Oral Hearings

A. Generally

Oral hearings are often taken for granted in the civil litigation process. This is, to some extent, constitutionally (in the case of the United States) or statutorily (in the case of Canada) mandated when there are jury trials[5]—the logistical complications of a jury trial in writing would be extensive.

Despite protestations from litigants claiming that oral hearings are required for reasons of procedural fairness[6] (historically called "natural justice"), is this really the case? A return to first principles in the administrative law context is helpful as it provides the richest source of case law on the requirement of oral hearings.

It should also be acknowledged that significant scholarship[7] and case law[8] in the United States has concentrated on the difference between a "hearing" and a "trial". This is not surprising given certain aspects of the American constitution, though this concern is much less salient in Canada. In Canada, it is well-established that "hearings"—despite having the root word "to hear"—can occur in writing, so long as permitted by legislation.[9] A "hearing" appears to be the opportunity of a party to have its position "heard", though this can also mean metaphorically "heard" through writing. It is accordingly

5 *Juries Act*, RSO 1990, c J.3; U.S. CONST. amend. VI.

6 *Baker* at para 30.

7 See, *e.g.*, K.C. Davis, "The Requirement of a Trial-Type Hearing" (1956) 70:2 *Harvard Law Review*.

8 See, *e.g.*, *Williams v New York*, 337 US 341 (1949).

9 See Part II of this article.

an all-encompassing term that can include oral argument, written argument, a traditional trial, and likely, various other more informal steps. However, it is important that a party is able to put forward its position and be "heard".

Alec Samuels[10] has addressed the issue of the right to an oral hearing in quasi-judicial procedures in the United Kingdom, particularly within the context of public and administrative law. The House of Lords has emphasized the necessity for a fair procedure, with the right to an oral hearing dependent on various factors such as the nature of the issue, the legal and administrative context, public interest, and the presence of disputed facts. Samuels observed that these can provide some challenges, especially given the administrative state's need to be nimble. Concerns include logistical issues, potential delays, and the redundancy of reiterating facts already presented in written form.

An oral hearing, as part of natural justice, is an old concept in Anglo-Canadian common law. The case of *Pett v Greyhound Racing Association Ltd.*,[11] concerned a licensed trainer of greyhounds who was entitled to an interlocutory injunction restraining an inquiry into an allegation regarding his dog, pending his being represented by counsel at the inquiry and receiving an oral hearing. The decision raised questions about the entitlement to legal representation before domestic tribunals, as judges continue to expand the content of the principles of natural justice. The rules of the National Greyhound Racing Club, under which domestic proceedings were taken against Mr Pett, had no express provision for the requirement of an inquiry by track stewards. However, Lord Denning held that "in a case such as this... fairness may require an oral hearing."[12] Denning emphasized that the

10 A. Samuels, "A Right to an Oral Hearing in Quasi-Judicial Proceedings?" (2005) 64:3 *Cambridge Law Journal* [Samuels].

11 [1968] 2 WLR 1471 [*Pett*].

12 *Pett* at p 1476.

entitlement to an oral hearing was dependent on the nature of the inquiry. Alternatively, the entitlement to an oral hearing could have been the basis of a contractual agreement (or legitimate expectations) as Mr Pett was invited by the track stewards back to the track for an oral hearing. Because Mr Pett was entitled to an oral hearing, Lord Denning found that natural justice would require that person to be represented by counsel if they so choose.[13]

The seminal Canadian case of *Baker*[14] is particularly illustrative of the factors that are relevant in determining one's entitlement to an oral hearing. Entitlement to an oral hearing was a central issue in the case—a case that has since become Canada's leading case on procedural fairness in administrative law more generally. The appellant, Mavis Baker, illegally resided in Canada for many years, during which time she gave birth to four Canadian-born children who were Canadian citizens. When she was ordered deported (an order that was clearly *prima facie* lawful given her acknowledged illegal immigration status), she sought an exemption from deportation based on "humanitarian and compassionate considerations".[15] She was able to provide written submissions to the immigration bureaucracy with the assistance of a lawyer but her request for an oral hearing was denied.

Her case eventually came before the Supreme Court of Canada where several issues were raised, one of which was denial of the oral hearing. L'Heureux-Dubé J, writing for a unanimous Court (Iacobucci J's concurrence

13 *Pett* at p 1476.

14 *Baker*.

15 Permitted pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 at s 25(1).

was confined to another issue), held that five factors should be considered in assessing the content of participatory rights, including an oral hearing:

1) The nature of the decision: the more quasi-judicial it is, the more court-like procedures will be required, while the more discretionary, the less that will be required;
2) The nature of the statutory scheme: the more internal procedural protections (such as internal appeals) are prescribed, the less the common law will need to supplement;
3) The importance of the decision to the affected party: the more important to the party, the more procedural fairness will be owed;
4) Any legitimate expectations based on clear, unequivocal, and unqualified[16] statements by the decision-making body regarding procedure; and,
5) Choices made by the decision-maker itself, giving some space for the decision-maker to make decisions.[17]

In this case, L'Heureux-Dubé J agreed that the third factor warranted a great deal of procedural fairness given the importance of the issue to Ms Baker. However, the other factors pointed to the lower end, particularly because Ms Baker was seeking an indulgence as no one has the right to stay in Canada for humanitarian and compassionate reasons. Therefore, an oral hearing was not owed, especially as it was unclear what the oral hearing would add to the case. She did, however, win the case on the grounds that the administrative decision-maker's reasons gave rise to a reasonable apprehension of bias.

Having said that, there are times when an oral hearing has been held to be necessary. This arises in cases where credibility is at stake. Additionally, if

16 Discussed in more detail in *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 [*CUPE*].

17 *Baker* at paras 23-27.

life, liberty, or security of the person is imperilled per section 7 of the *Canadian Charter of Rights and Freedoms*[18], legislation and regulations will not be able to amend common law procedural fairness entitlements. The leading Canadian case in this regard is *Singh v Minister of Employment and Immigration*,[19] where Mr Singh and his co-litigants sought refugee status in Canada. Were they well-founded, the implications of their claims were such that they had a risk of persecution were they to be deported to India. The relevant legislation at the time did not give them a right to an oral hearing. A unanimous Supreme Court of Canada held that the principles of fundamental justice mandated an oral hearing in circumstances where credibility is at stake. While this common law principle can usually be amended by legislation, this was not the case here given constitutional and quasi-constitutional protections for life, liberty, and security of the person. Though the substance of the deprivations of life, liberty, and security of Mr Singh would take place in India, Canada's prospective deportation played a role in that, mandating a procedure that accords with the principles of fundamental justice.[20] Mandating an oral hearing when constitutional and credibility issues are at stake is also consistent with American precedent

18 See, *e.g.*: *R v Bennett*, 2017 NLCA 59 at para 16:

> [a] party's right to be heard when its interests are at stake is a principle of natural justice. If the party's security of the person is engaged, it can also be a principle of fundamental justice under section 7 of the *Charter* [...] In any event, the right to be heard is fundamental to the proper functioning of our justice system.

19 *Singh v Minister of Employment and Immigration*, 1985 CanLII 65, [1985] 1 SCR 177 (CanLII) (SCC) [*Singh*], addressing considerations under the *Canadian Charter of Rights and Freedoms*, being Part One of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] (constitutional) and the *Canadian Bill of Rights*, SC 1960, c 44 (a quasi-constitutional statute).

20 *Singh*.

which requires an oral hearing prior to the termination of one's benefits.[21] Though this procedure is not applicable in Canada given the lack of constitutional protection for property rights,[22] it illustrates the importance of oral hearings when constitutional interests and credibility are both under consideration.

B. Virtual (But Oral) Hearings

It is worth emphasizing that there are a host of other cases from the administrative law context where it is accepted that a hearing proceeding virtually complies with duties of procedural fairness.[23] Further, the ability to navigate such hearings are also viewed as a basic skill for lawyers and tribunals to possess.[24] They present a valuable point of comparison and contrast. Writing prior to the COVID-19 pandemic, Zimra Yetnikoff and Professor Lorne Sossin (as he then was) urged caution in this regard, asserting that the use of videoconferencing should be carefully evaluated against the standard of procedural fairness, especially in cases involving vulnerable individuals.[25] They emphasized the need for a delicate balance between cost-saving measures and the fairness of hearings, particularly when

21 *Goldberg v Kelly*, 397 US 254 (USSC, 1970).

22 A lack of constitutional protection for property rights is unusual among most Western liberal democracies: see D. Newman & L. Binion, "The Exclusion of Property Rights from the Charter: Correcting the Historical Record" (2015) 52:3 *Alberta Law Review* 543; P. Warchuk, *Beyond Patchwork Protection: Towards Comprehensive Property Rights in Canadian Law* (Macdonald-Laurier Institute, 27 November 2025).

23 *Appeal Commission for Alberta Workers' Compensation,* Decision 2021-0554, 2021 CanLII 120410 (ABWCAC); *Appeal Commission for Alberta Workers' Compensation,* Decision 2021-0538, 2021 CanLII 128573 (ABWCAC).

24 See, *Ontario v Regan*, 2020 ONLSTA 15.

25 L. Sossin & Z. Yetnikoff, "I Can See Clearly Now: Videoconference Hearings and the Legal Limit on How Tribunals Allocate Resources" (2007) 25 *Windsor Yearbook Access to Justice* [Sossin & Yetnikoff].

the use of videoconferencing may compromise the integrity of the judicial process. They raised critical questions about the legal sufficiency and constraints on tribunal funding and structure, urging a nuanced approach that considers the potential impact on fairness and reasonableness in tribunal decision-making.[26] Nonetheless, post-COVID, it is difficult to imagine the law in this area returning to the pre-COVID reservations regarding virtual hearings, especially as technology has improved and average persons have become more familiar with platforms such as Zoom.

It is also worth emphasizing that, even when credibility is central and an oral hearing is required, a virtual hearing is likely to suffice. This was still the case prior to the COVID-19 pandemic but given that there is now more experience with virtual hearings, one would expect them to be more widely accepted.[27] In *Klassen et al v Ember Resources Inc*,[28] the Alberta Land & Property Rights Tribunal held that an oral, albeit virtual, hearing provides adequate procedural safeguards to assess credibility. In *X (re)*, [29] the Immigration and Refugee Board reached a similar conclusion, largely on the basis that "Canadian Courts have determined that the requirements for procedural fairness are met and that a hearing by video-conference does not substantially differ from a hearing in person."[30] That said, the notion that a

26 Sossin & Yetnikoff.

27 *Arconti v Smith*, 2020 ONSC 2782 [*Arconti*]. *Arconti* has been cited over 70 times, including outside Ontario, such as by the Alberta Court of Appeal in *Mostafa Altalibi Professional Corporation v Lorne S Kamelchuk Professional Corporation*, 2022 ABCA 239 (at, in particular, paras 17-27) and the Federal Court in *Natco Pharma (Canada) Inc. v Canada (Health)*, 2020 FC 618 (at, in particular, paras 35-48).

28 *Klassen v Ember Resources Inc*, 2021 ABLPRT 505 at paras 19-24 [*Klassen*]; *Huang v Helm Property Management and Realty Ltd.*, 2021 AHRC 60.

29 *Thanaparatnam v Canada (Citizenship and Immigration)*, 2004 FC 349 [*Thanaparatnam*].

30 *Thanaparatnam* at para 26.

video hearing adequately meets the demands for procedural fairness was buttressed in *R v Dix*,[31] where Costigan J held—in the context of a criminal trial for murder, no less—that:

> In this case, reliability is safeguarded by the technological sophistication of the videoconference facility which allows the witness to be seen and questioned in a live broadcast and by the use of an oath recognized and enforceable in the jurisdiction in which the witness will be situated when she gives her evidence as well as by the use of the oath recognized by this Court. It is the very essence of the oath that it binds the witness's conscience, even in the absence of temporal sanctions.[32]

Obviously, the stakes here are higher than for the civil proceedings, which are of subject in this article. But Costigan J also addressed the ability of the Court to gauge the reaction of a witness in a virtual setting:

> The videoconference procedure…allows the witness to be brought electronically into the Court where the Court has the opportunity to hear and see the evidence as it is given and to control the evidentiary process while it is taking place. The witness is live before the Court and the Court is live before the witness.[33]

C. Administrative Law, Criminal Law, and Civil Litigation

How do we distinguish oral hearings, whether virtual or not, from written hearings? In *Mueller v Montana Alberta Tie Line*,[34] Miller J had to decide whether an oral hearing (as opposed to a written hearing) was required in the administrative law context. He looked to the five *Baker* factors to determine what common law procedural fairness requires. Citing Sara

31 *R v Dix*, 1998 ABQB 370 [*Dix*].

32 *Dix* at para 24.

33 *Dix* at para 17.

34 *Mueller v Montana Alberta Tie Ltd.*, 2011 ABQB 738 [*Mueller*].

Blake's *Administrative Law in Canada*,[35] he ultimately concluded that non-oral screening was not inherently procedurally unfair, particularly when a large volume of cases needs to be addressed. Of course, this is administrative law and not civil procedure, which makes an enormous degree of difference, given courts' unique constitutional role under s 96 of the *Constitution Act, 1867*.[36]

Even so, as the Supreme Court noted in *R v Nahanee*, administrative law's principles of procedural fairness extend beyond that context:

> [the] doctrine of common law procedural fairness was largely developed in administrative law cases, but the principles are also applicable to criminal cases […]. It is well established that the requirements for procedural fairness are context-specific […] Certain protections required in one context to ensure procedural fairness may not be required in another […]. In other words, "[w]hat is fair in a particular case will depend on the context of the case" (*Ruby v Canada (Solicitor General)* at para. 39).[37]

If administrative law principles can affect criminal procedure, they must logically be even more germane to civil litigation, which is the constitutional purview of the courts (like criminal law), but generally lacks constitutional procedural protections (like administrative law). Administrative law's informality can also not only be a boon for access to justice, but also a source of innovation that court systems can subsequently emulate.[38] At the same time, courts require a level of solemnity and formality that is important as a

35 S. Blake, *Administrative Law in Canada*, 4th ed (LexisNexis, 2006).

36 As such, administrators generally are not entitled to constitutional independence akin to judges: see, *e.g.*, *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 [*Ocean Port*].

37 *R v Nahanee*, 2022 SCC 37 [*Nahanee*].

38 See, *e.g.*, L. Sossin, "Designing Administrative Justice" (2017) 34:1 *Windsor Yearbook Access to Justice*.

public justice system.[39] One of the justifications for the publicly funded civil justice system is also that it ensures a forum for vulnerable parties to adjudicate claims with basic procedural fairness.[40] How do these principles intersect, with the state of the law to date, with respect to oral hearings in civil proceedings? That is the subject of the next section.

III. The *Status Quo* and Controversies to Date

A. The General Intersection of Procedural Fairness, Statutory Language, and the Entitlement to an Oral Hearing

Many procedural rules—for instance, those of the American federal courts[41] and the Ontario *Rules of Civil Procedure*—mandate, or at least imply, that hearings are to be oral[42]. As will be further referred to below, the history of controversies in this area illustrates the long history of oral hearings. Moreover, procedural statutes and regulations often refer to certain steps being permissible or mandated to be "heard" in writing.[43] The *expressio unius ext exclusio alterius* principle of statutory interpretation is germane in this

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39 See the decision of Lord Tenterden, CJ in *Garnett v Ferrand* (1827), 6 B & C 611 at 628 (KB):

> It will be, in many cases, impossible that a proceeding should be conducted with due order and solemnity, and with the effect that justice demands, if the presiding officer, whether he be Judge, coroner, justice, or sheriff, has not the control of the proceeding[.]

40 T.C.W. Farrow, *Civil Justice, Privatization, and Democracy* (University of Toronto Press, 2014) at pp 232-251.

41 *Federal Rules of Civil Procedure, SOR/98-106* at rr 38, 78; This has been cited in Canada in, *e.g.*, *Re Rose*, 1963 Carswell Ont 11 at para 8, [1964] 1 OR 299.

42 RRO 1990, Reg 194 [*Ontario Rules*].

43 *Ontario Rules* at rr 12.06(1.1.), 37.12.1(1), 37.12.1(4), 38.13(2), 61.03.1(1), 62.02(2).

regard: specification of particular exceptions to a general rule implies that those are the ***only*** exceptions to that general rule.[44] Applying this principle to this logically suggests, therefore, that these "hearings" in writing are exceptional—and the norm is thus for "hearings" to proceed orally. The default presumption of an oral hearing is demonstrated by the exceptional circumstances in which they have been denied. Even so, there is no absolute common law right to oral hearings in all circumstances. Statutes can certainly permit hearings in writing, even in courts. The determination of whether a litigant is entitled to an oral hearing depends on issues of procedural fairness (as discussed above in Part I), efficiency, the nature of the matter, and the nature of the statutory scheme.

The Ontario *Rules* contemplate "hearings" in writing for the following matters:

- Applications for leave to appeal (which are a screening mechanism to determine whether the order sought to be appealed has some merit, and/or if the good of finality should trump a possible error);[45]
- A motion on consent, unless the court orders otherwise (where presumably no prejudice is arising due to the matter proceeding in writing);[46]

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44 See, *e.g.*, P. Bryden et al., *Public Law: Cases, Commentary, and Analysis*, 5th ed (Emond Montgomery, 2025) at p 473-474. See also *Ontario Nurses' Association v Corporation of the County of Essex (Sun Parlour Home for Senior Citizens)*, 2020 CanLII 93596 (*ONLA*), for this principle's application in the administrative law context.

45 *Ontario Rules* at rr 12.06(1.1), 61.03.1(1), 62.02(2).

46 *Ontario Rules* at r 37.12.1(1).

- If a party wishes a motion to proceed in writing, though the responding party has a right to make oral submissions, meaning any prejudice would be to the moving party; [47] and,
- An application for a vexatious litigant order, where there is presumably concern that the responding party will abuse the process, but where the court still has discretion to order an oral hearing.[48]

As will be discussed further below, what unites all of these, apart from their statutory permissibility, is the fact that an oral hearing has occurred elsewhere in the process, or a party has a right to object to the dispensation with the oral hearing.

The importance of starting the analysis with the relevant legislation and regulations is also underscored in Alberta practice. For example, the Alberta *Rules of Court* explicitly state, "all appeals will be set down on the Civil Appeal Hearing List for an oral hearing."[49] However, the rule's opening clause states, "[u]nless otherwise directed,"[50] which implies that a judge has the authority to do otherwise and distinguishes this regime from Ontario's. The Alberta *Rules* also allow a single appeal judge to direct an appeal to be heard "without oral argument",[51] further distinguishing the regime from Ontario's.

To be sure, s 96 courts (such as the Alberta Court of King's Bench and the Ontario Superior Court of Justice) have inherent jurisdiction to control their own process. Meanwhile, statutory courts, such as provincial courts of

47 *Ontario Rules* at r 37.12.1(4).

48 *Ontario Rules* at r 38.13(2).

49 AR 124/2010 at r 14.32(1)(a) [*Alberta Rules*].

50 *Alberta Rules* at r 14.32(1).

51 *Alberta Rules* at s 14.32(2).

appeal, the Ontario Divisional Court,[52] the Tax Court, the Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada (which, although a statutory court, has constitutional status[53]), have implicit or penumbral powers to fulfill their judicial role.[54] This means that there may be residual power to order a hearing in writing even if not contemplated by statute. However, it is important to underscore that the exercise of inherent jurisdiction cannot conflict with statutory grants of authority, subject to constitutional challenge.[55]

In *Sgrignuoli v Sgrignuoli*,[56] the courts' inherent jurisdiction to dispense with oral argument came into tension with the Ontario *Rules*. The Ontario Divisional Court was faced with a motion to set aside an order and obtain a rehearing of a leave to appeal decision. Despite scheduling an oral hearing, McKelvey J only considered the leave motion in writing. He subsequently dismissed the motion with reasons provided. The Appellant argued that McKelvey J's decision to deny leave should be overturned as the Ontario *Rules* were violated by refusing the Appellant an oral hearing. To remedy the matter, the Appellant sought to set aside the order refusing leave to appeal two cost orders and to obtain a rehearing *orally*, or to direct the motion to a panel of the Divisional Court. Another issue was the jurisdiction to set aside

52 For an informative discussion, see *Isaac v Law Society of Ontario*, 2022 ONSC 3577; *Sgrignuoli v Sgrignuoli*, 2017 ONSC 651 at para 36 [S*grignuoli*]; *Lochner v Ontario Civilian Police Commission*, 2020 ONCA 720 at para 27; *R v 9746499 Ontario Inc*, 2001 SCC 81 at para 70.

53 *Reference re Supreme Court Act,* ss 5 and 6, 2014 SCC 21.

54 See *e.g.*, D. Stratas, "A Judiciary Cleaved: Superior Courts, Statutory Courts and the Illogic of Difference" (2017) 68 *University of New Brunswick Law Journal*.

55 See *e.g.*, I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems*; E. Campbell, *Rules of Court: A Study of Rule Making Powers and Procedures* (Law Book Company, 1985) at p 20–25.

56 *Sgrignuoli*.

the leave order and hear the appeal of the cost orders issued. The Court held that Rules 37 and 61.03 imply that leave motions to the Divisional Court should be heard through an oral hearing. However, there are exceptions to this general rule, as outlined in Rules 37.11(1)(e) and 37.12. Rule 37.12 allows motions to be heard in writing under specific circumstances, such as on consent, when unopposed, or without notice. Sutherland J held that:

> I do not imagine that the drafters of the *Civil Rules* intended to bestow greater procedural rights at the Divisional Court to appellants where the issue is only that of a final cost order than that of interlocutory orders for costs [...] This inconsistency of motion for leave to appeal of final orders on costs and interlocutory orders to the Divisional Court may require examination by the Civil Rules committee. It may be that appeals from final order where the only issue is that of costs and interlocutory orders should both be heard in writing.[57]

It is clear that Sutherland J struggled to balance reading the plain words of the Ontario *Rules* with the pragmatic implications of the strange division of jurisdiction and procedural rights between the Court of Appeal and the Divisional Court.[58] Ultimately, he directed the motion to a panel of the Divisional Court and reserved the costs to the panel.

Another instance where exigencies may have driven the dispensation with an oral hearing was *4352238*,[59] wherein Roberts JA held that the Court of Appeal of Ontario's inherent jurisdiction to manage its own process allowed it to mandate a written hearing early in the COVID-19 pandemic, notwithstanding the requirement that appeals be "heard". None of the

57 *Sgrignuoli* at paras 52–53.

58 See G.J. Kennedy, "Wither the Divisional Court? Looking at the Past, Analyzing the Present, and Querying the Future of Ontario's Intermediate Appellate Court" (2021) 53:1 *Ottawa Law Review*.

59 *4352238*.

aforementioned discrete exceptions for "hear[ings] in writing" were applicable to the case at hand. Her order was appealed, but that appeal was abandoned when the appellant abandoned the underlying appeal. Given the *expressio unius* principle of statutory interpretation, and the lack of constitutional stakes in the appeal, her decision could be critiqued from a statutory interpretation perspective. Even so, it illustrates that pragmatic considerations, particularly in the early days of the COVID-19 pandemic, may sometimes carry the day in these matters, especially with sophisticated commercial litigants.

It is more difficult to imagine this dispensing with an oral hearing being permitted before courts of first instance. Even here, however, written processes can be justified—particularly for cases that suffer from a manifest flaw. This is strikingly the case regarding Rule 2.1 of Ontario's *Rules of Civil Procedure*.[60] This rule permits a court to dispense with traditional procedure to dismiss a matter that is "on its face" frivolous, vexatious, or abusive. This Rule is quintessentially used in one of two situations:

a) where the deficiency in the pleading is obvious (such as frivolous complaints, exemplified in a lawsuit against a city after its lifeguard allegedly wrongly criticized the plaintiff for swimming too slowly in the fast lane of a pool[61]); or,

b) attempts to re-litigate matters already decided.[62]

The former category addresses instances where there is reason to believe the litigant will abuse the court process and even a motion to dismiss the matter will result in the "proposed cure" of a dispositive motion, "caus[ing] a fresh outbreak of the disease" that is abusive litigation tactics.[63] The latter

60 *Ontario Rules* at r 2.1.

61 *Asghar v Toronto (City)*, 2015 ONSC 4650.

62 *Simpson v The Chartered Professional Accountants of Ontario*, 2016 ONCA 806.

63 *Raji v Borden Ladner Gervais LLP*, 2015 ONSC 801 at para 8 [*Raji*].

category encompasses instances where a litigant has already had an oral hearing and is abusing the court system after failing to "move on". In other words, there are very acute, but very sound, reasons to dispense with the oral hearing in these circumstances. Moreover, litigants are still allowed to make written submissions as to why their proceedings should not be dismissed. It is important to observe that Rule 2.1 is an explicit rule designed for circumstances where the oral hearing is likely to be counterproductive (by giving a vexatious litigant a fresh opportunity to act vexatiously) in facilitating a just outcome; it is not a process that the courts have developed *sua sponte*.

Oral hearings are nonetheless mandatory when penal consequences are at stake. A public, oral trial is constitutionally guaranteed in the criminal context pursuant to s 11(d) of the *Canadian Charter of Rights and Freedoms*. As such, when quasi-criminal consequences are at stake in the civil or administrative context, an oral hearing will likely be required.[64] For instance, in *Jackson v Jackson*,[65] Chapel J held that contempt proceedings, given their quasi-criminal nature, require the same procedural protections as criminal proceedings:

> Having regard for the quasi-criminal nature of contempt, the alleged contemnor must be afforded the same protection and procedural safeguards as an accused in a criminal proceeding. These include the following:
>
> 1. The right to a hearing, including an oral hearing, if requested.
>
> 2. The right to make full answer and defence, including the right to counsel, to call evidence, and to cross-examine upon the other party's evidence.

64 Samuels; *John Howard Society of Saskatchewan v Saskatchewan (Attorney General)*, 2025 SCC 6.

65 *Jackson v Jackson*, 2016 ONSC 3466 at para 55 [*Jackson*]; *Antoine v Antoine*, 2024 ONSC 1397 at para 38.

> 3. The right not to be compellable as a witness in the hearing.[66]

This is also the case for administrative decisions with quasi-criminal consequences. For instance, in *Bilodeau-Massé v Canada (Attorney General)*,[67] Martineau J held that the principles of fundamental justice require that an offender, who was at risk of having a long-term sentence order being suspended (which would have severe consequences to his liberty), have the opportunity to appear in person before the board that will make such a decision.[68]

These cases build on uncontroversial cases from the criminal law context, which hold that oral hearings are required as a matter of constitutional law, prior to decisions being made that would jeopardize the accused's liberty. This goes beyond the trial itself and extends to special hearings that affect a sentence, such as dangerous offender hearings,[69] and incidents where the collateral consequences of a sentence on immigration status were not factored into what appeared to be a *pro forma* sentencing hearing.[70] This does not prohibit, post-sentencing, the possibility of a judge reaching out to counsel if the judge is considering factors and even penalties beyond what was discussed at the sentencing hearing—but only after there has been a sentencing hearing and the parties are given a reasonable amount of time to respond in writing.[71]

These are all interesting cases because they appear, like the aforementioned *R v Nahanee*, to apply principles from the administrative law context to the civil and/or criminal context. It is worth noting, however, that

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66 *Jackson* at para 55.

67 *Bilodeau-Massé v Canada (Attorney General),* 2017 FC 604 [*Bilodeau*].

68 *Bilodeau* at para 8.

69 *R v McDonald*, 2018 ONCA 369.

70 *R v Mills*, 2024 ONCA 204.

71 *Nahanee* at para 46.

these common law principles of fairness can be modified by statute—subject to constitutional constraints.

When liberty is at stake, the common law may not amend the procedural principles of fundamental justice, as guaranteed by s 7 of the *Charter*.[72] In the civil litigation context, however, it is possible to amend such principles and courts must respect legislative choice in this regard, unless the legislative choice offends the constitution. Such a constitutional issue is unlikely, given that particular procedural rights in the civil litigation process are unlikely to be subject to constitutional protection.[73]

B. Virtual But Oral Hearings

It should be emphasized that the previous subsection addressed the entitlement to any type of oral hearing. This is to be distinguished from virtual hearings, which are almost always permitted outside certain criminal contexts (and even there, elements of remote hearings can be permissible[74]). As always, statutory authorization for a proceeding virtually is important. In British Columbia, for instance, the governing statute holds that parties are to be examined within the province,[75] but an exception can be made "where it is just and convenient"[76] for persons residing outside of the province. This has been interpreted generously bearing in mind the interests of the witnesses, although the presumption remains that examinations are to take place in person in the province.[77]

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72 *Singh*.

73 *Poorkid Investments Inc v Ontario (Solicitor General)*, 2023 ONCA 172.

74 *R v Benjaminson*, 2020 SKPC 26 at paras 26-28; *R v Burns*, 2020 SKQB 228 at paras 16-17; *R v Turner*, 2002 BCSC 1135.

75 *Supreme Court Civil Rules*, BC Reg 168/2009 at r 7-2(11).

76 *Scott v Fresh Tracks (Canada) Inc.*, 2023 BCSC 1724 at para 28 [*Scott v Fresh Tracks*].

77 *Huang v Silvercorp Metals Inc.*, 2016 BCSC 778 [*Huang*].

Remote examinations became even more common upon the advent of the COVID-19 pandemic.[78] For instance, in *Arconti v Smith*,[79] COVID-19-related public health restrictions at the time precluded an in-person hearing, meaning the examination of witnesses would need to take place virtually or be delayed. The plaintiffs objected to a video examination, asserting that they:

a. needed to be physically present with counsel to assist with documents and facts during the examination;

b. it is more difficult to assess a witness's demeanour remotely;

c. the lack of physical presence in a neutral setting deprived the occasion of solemnity and a morally persuasive environment; and,

d. the plaintiffs did not trust the defendants to not engage in sleight of hand to abuse the process.

Myers J rejected these arguments and was quite blunt in doing so. He held:

> In my view, the simplest answer to this issue is, "It's 2020". We no longer record evidence using quill and ink. In fact, we apparently do not even teach children cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than person attendance. We should not be going back.[80]

78 *Scott v Fresh Tracks*; *Lo v Lo*, 1991 BCSC 3005; *Le Soleil Hotel & Suites Ltd. v Le Soleil Management Inc.*, 2007 BCSC 2049; *Huang*; *Baldface Mountain Lodge Limited Partnership v Swan Engineering*, 2013 BCSC 2198 at para 15.

79 *Arconti*.

80 *Arconti* at para 19; *Mostafa Altalibi Professional Corporation v Lorne S Kamelchuk Professional Corporation*, 2022 ABCA 239 at paras 17-27; *Natco Pharma (Canada) Inc v Canada (Health)*, 2020 FC 618 at paras 35-48.

He also expressly rejected the notion that there were "due process concerns" inherent in the context of a video hearing:

> I respectfully do not find the presence of any "due process concerns" inherent in the format of a video hearing. All parties have the same opportunity to participate and to be heard. All parties have the same ability to put all of the relevant evidence before the court and to challenge the evidence adduced by the other side. The only possible "unfairness" is a lack of comfort by one counsel that he or she will be at their best in presenting evidence and making arguments using technology.[81]

Myers J, who has had a particularly large impact in the development of Rule 2.1,[82] further held that comfort with such technology is part of a lawyer's basic competence. This may mean that dispensing with an in-person hearing is permissible. When can the oral hearing be entirely dispensed with, allowing matters to proceed in writing? That will be addressed in Part IV, but first it is important to consider the concept of access to justice.

IV. Access to Justice

"Access to justice" is a concept everyone expresses support for in the abstract, only for its meaning in particular cases to become contentious. [83] Traditionally, this has been conceived of as access to lawyers and court resolution processes. Under this procedural (in Canada, sometimes called the

81 *Arconti* at para 32.

82 G.J. Kennedy, "Rule 2.1 of Ontario's Rules of Civil Procedure: Responding to Vexatious Litigation While Advancing Access to Justice?" (2018) 35 *Windsor Yearbook of Access to Justice* at p 243 [Kennedy 2018].

83 T.C.W. Farrow, "A New Wave of Access to Justice Reform in Canada" in A. Dodek & A. Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) [Farrow 2016].

"First Wave" [84]) conception of access to justice, there is an implicit presumption that, should access to the justice system be fostered, access to justice will have been achieved. Therefore, somewhat unsurprisingly, this conception of access to justice emphasizes how lawyers practice law.[85] More germane for present purposes, however, this conception of access to justice also takes aim at court procedure: if only access to the court system can be facilitated through simpler procedure, access to justice will have been achieved. Accordingly, this conception of access to justice tends to emphasize both the delay and costs of civil litigation and seeks to minimize both.[86]

This procedural conception of access to justice can be critiqued for being too myopic, and not considering alternatives to litigation that can achieve more satisfactory results. [87] This conception is also fairly agnostic about outcomes, which Trevor Farrow's work demonstrates litigants value enormously. [88] Related to the concern about outcomes, this procedural conception of access to justice can also be critiqued for downplaying the extent to which procedure is required to achieve a just result—which is, after all, what procedure serves to facilitate.[89]

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84 R.A. Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in J. Bass, W.A. Bogart & F.H. Zemans, eds, *Access to Justice for a New Century – The Way Forward* (Law Society of Upper Canada, 2005).

85 M.M. Leering, "Enhancing the Legal Profession's Capacity for Innovation: The Promise of Reflective Practice and Action Research for Increasing Access to Justice" (2017) 34:1 *Windsor Yearbook of Access to Justice* at p 220.

86 Farrow 2016.

87 J. Macfarlane & M. Keet, "Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program" (2005) 42:3 *Alberta Law Review* at p 677.

88 T.C.W. Farrow, "What is Access to Justice?" (2014) 51:3 *Osgoode Hall Law Journal* at p 957.

89 O.G. Chase, J. Smith & A. Lee, *Civil Litigation in Comparative Context*, 2d ed (West Academic Publishing, 2017) at p 387 [Chase et al.].

While it is possible to be focussed excessively on more efficient procedures to the detriment of other essential factors, minimal financial cost and speed remain, other things being equal, essential components of a just system.[90] This is reflected in the ancient maxim "justice delayed is justice denied". Moreover, if the public justice system is so expensive that it cannot be accessed, the common law will end up underdeveloped. As Louis Kaplow has put the matter starkly: "how [are we] to assess the truthfulness of a legal system that rarely errs but is prohibitively costly to employ?"[91] As such, we should critically examine the extent to which a more extensive process furthers just results, and the collateral consequences of seeking ultimately unattainable perfect procedural justice.[92]

How do oral hearings match up against these conceptions of access to justice? The short answer is "it depends". There is no question that an oral hearing—certainly, a traditional trial—delays matters and costs significant financial resources. Accordingly, if oral hearings can be dispensed with, that would logically further access to justice. This concern about delays and costs is amplified if there is reason to believe that a problematic litigant will "highjack" the oral hearing and turn it into a circus.[93] But even more generally, there are times where a decision is required urgently, or giving

90 Farrow 2016.

91 L. Kaplow, "Information and the Aim for Adjudication: Truth or Consequences?" (2013) 67:2 *Stanford Law Review* at pp 1365-1366.

92 *Revane v Homersham*, 2006 BCCA 8 at para 17, cited by the dissenting reasons of LeBel and Abella JJ in *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19; L. Sirota, "How Much Justice Can You Afford?" Double Aspect (23 April 2020) https://doubleaspect.blog/2020/04/23/how-much-justice-can-you-afford/.

93 *Raji* at para 8.

everyone an oral hearing is impractical. In such circumstances, written hearings must suffice.[94]

Having said that, even under a narrow procedural definition of access to justice, there are costs to dispensing with oral hearings. Judges may have questions for lawyers that will remain unanswered should the proceeding be entirely in writing. This is because even if questions are sent in writing by the judge, follow-up may be required. Litigants will further need to expand their written arguments, meaning judges need to spend more time preparing and lawyers need to spend more time writing, which may ultimately be more expensive for litigants.

Moreover, from a substantive access to justice perspective, there is a logical reason oral hearings exist: to allow lawyers to explain their argument before a captive audience and discern where potential problems may be. For self-represented litigants, this concern may be heightened. Such litigants may lack the sophistication to explain their case in writing and will rely upon the oral hearing to ensure the judge understands their position.[95] To be fair, however, some self-represented litigants may excel at writing and be unnerved by the court atmosphere.[96]

Ultimately, access to justice ***can*** favour dispensing with oral hearings. At the same time, there are access to justice costs, to say nothing about procedural fairness concerns, when matters proceed in writing. How can these considerations be balanced? That is the subject of the next subsection.

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94 *Fish v National Steel Car Ltd.*, 2012 HRTO 358, where expedited hearings are conducted via written submissions. But even *Baker* illustrates that practical considerations play a role in oral hearings not always being required.

95 *Kirby v Hope Place Centres*, 2013 ONCA 459 [*Kirby*]; Macfarlane et al.

96 A. Schmitz, "Measuring 'Access to Justice' in the Rush to Digitize" (2020) 88:6 *Fordham Law Review* at p 2385.

V. Towards a Theoretically and Doctrinally Sound Approach

What lessons should we draw from first principles and the *status quo* related to the dispensing with oral hearings? This article suggests seven factors should be considered. Generally, they are to be weighed, in a manner like the *Baker* factors, to determine whether procedural fairness requires an oral hearing. However, some warrant particularly strong consideration.

A. The Need to Comply with Governing Statutes and Regulations

As observed before,[97] courts in Canada have been reluctant to hold that a superior court's inherent jurisdiction (and, by analogy, penumbral powers of statutory courts) is displaced by legislation. In *R v Caron*, Binnie J noted that the breadth of the inherent jurisdiction of the Court is nearly limitless and is essential to ensure a court can fulfil its duties as a court.[98] Simultaneously, however, the breadth of this power means that courts should exercise inherent jurisdiction sparingly and with caution, cognizant of their proper and modest, albeit essential, role in the constitutional order. [99] Notwithstanding this, Binnie J held that a court's inherent jurisdiction will only be ousted "if the action contemplated through inherent jurisdiction would conflict with the statute."[100]

This, of course, begs the question of what "conflict" means here. Dickson J (as he then was) held in *Baxter Student Housing Ltd. v College Housing Co-operative Ltd.* that "the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating

97 Kennedy Vexatious at p 742, which this section is in large part based upon.

98 *R v Caron*, 2011 SCC 5 at para 30 [*Caron*].

99 *Caron* at para 32.

100 Kennedy Vexatious at p 747.

the unambiguous expression of the legislative will."[101] Even so, *Caron*, the decision of Bastarache J in *Canada (Human Rights Commission) v Canadian Liberty Net*,[102] and the scholarship of Professor Thomas Cromwell[103] (as he then was) all underscore that "explicit" or "clear" language is required to oust inherent jurisdiction. As Slatter JA held in *Jonnson v Lymer*,[104] courts should only rely on inherent jurisdiction in areas where the legislature has legislated if: a) the proposed exercise of the jurisdiction is compatible with the underlying statutes and regulations; and b) there is no other way to achieve a just result.

How does this intersect with the availability of oral hearings? Insofar as statutes and regulations mandate (or at least heavily imply considering the principles of statutory interpretation) that hearings are to be oral, this must be respected, at least in the absence of parties' consent to proceed entirely in writing. Interpretative provisions such as Rule 1.04 of the *Rules of Civil Procedure*, which emphasize the overarching importance of justness and proportionality in interpreting the rules, cannot override the more specific mandating of oral hearings.[105] Exceptions such as Rule 2.1 of Ontario's *Rules of Civil Procedure* are ***legislated*** exceptions addressing discrete problems. As noted before, relying on legislated rules and statutes is appropriate in terms

101 *Baxter Student Housing Ltd. v College Housing Co-operative Ltd.* (1975), [1976] 2 SCR 475 at p 480 (SCC).

102 *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at para 32 (SCC).

103 T.A. Cromwell, "Aspects of Constitutional Judicial Review in Canada" (1995) 46:5 *South Carolina Law Review* at p 1031.

104 *Jonsson v Lymer*, 2020 ABCA 167 [*Lymer*].

105 For discussion on conceiving of legislative purpose as an excessively abstract level, see, M. Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59:4 *Alberta Law Review* at p 919.

of predictability, democratic legitimacy, and judicial humility.[106] When parties reasonably view a statute or procedural rules as entitling them to an oral hearing, courts should not rely on their inherent jurisdiction to contradict that. This is particularly the case in procedural law, where parties may have prepared written arguments or their pleadings assuming an oral hearing will follow.[107] Accordingly, a decision such as *4352238* is troubling, as it dispensed with even a virtual oral hearing after parties relied upon there subsequently being an oral hearing in writing their factum. Dispensing with an oral hearing in such circumstances would also not accord with legitimate expectations, which hold that parties may rely upon explicit representations of procedure to be followed.[108]

Ultimately, therefore, explicit prescriptions or heavy implications that hearings are to be oral, if found in governing statutes or procedural rules, must be respected by courts. Courts cannot dispense with oral hearings in such circumstances, and certainly not if the expectation of an oral hearing has been reasonably relied upon.

B. First Instance Decisions on the Merits

The second general category where oral hearings should (almost) always be mandated is first-instance hearings on the merits. By "first-instance hearing on the merits", I intend to encompass not just a trial but also a summary judgment motion or motion to determine a legal question that could dispose of an action. This should be close to an absolute rule, with very discrete exceptions. A trial was historically viewed as the epitome of a just process,

106 G.J. Kennedy, "The Rules-Standards Debate and Summary Procedures: A Case for More Rules" (2022) 47:1 *Journal of Legal Philosophy* at p 24 [Kennedy 2022].

107 Kennedy 2022.

108 *CUPE*.

with the denial of a trial being the quintessential procedural injustice.[109] While we have moved away from the paradigm of a trial being the only way to have fair resolution of a case on the merits,[110] there remains something essential about a party feeling ***heard***,[111] which is logically buttressed when matters take place orally. To deny even a first-instance oral hearing appears to offend very deep common law perceptions of fairness. While administrative law precedents show an oral hearing is not necessary to have a fair process, a court is a qualitatively different entity than an administrative body. While both are adjudicative, the former is constitutionally guaranteed and provides a unique and essential role in a constitutional democracy.[112] The fact that certain processes in criminal law or American civil jury trials must ***constitutionally*** be heard orally is a caution against dispensing with an oral process entirely.

Two caveats should nonetheless be added to this. First, many oral hearings need not look like a traditional trial. A summary judgment motion[113] and a motion to determine a legal issue[114] are both expeditious ways to have an oral

109 J. Walker, "Summary Judgment Has its Day in Court" (2012) 37:2 *Queen's Law Journal* at pp 697, 701 [Walker]; *Irving Ungerman v Ltd. Galanis (CA)*, 1991 CanLII 7275 (ON CA) at paras 550-551.

110 *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*].

111 E.A. Lind & T.R. Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988) at pp 76-81; E.A. Lind, et al, *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* (The Rand Corporation, 1989) at pp 78-80; J.V. Roberts & L.J. Stalans, *Public Opinion, Crime, and Criminal Justice* (Westview, 2000).

112 *Crevier v A.G. (Québec) et al.*, 1981 CanLII 30 (SCC), [1981] 2 SCR 220.

113 *Hryniak*; Walker; B. MacKenzie, "Effecting a Culture Shift: An Empirical Review of Ontario's Summary Judgment Reforms" (2017) 54:4 *Osgoode Hall Law Journal* at p 1275 [MacKenzie].

114 *Atlantic Lottery Corp. v Babstock*, 2020 SCC 19 [*Babstock*]; G.J. Kennedy, "Nevsun, Atlantic Lottery, and the Implications of 2020 Supreme Court of

hearing on the merits, even if not through the means of a traditional trial. Nothing in this article should suggest that these mechanisms ought not to be employed robustly if appropriate—both can be very beneficial in facilitating access to justice.[115]

Second, there are exceptional circumstances, as illustrated by Rule 2.1 in Ontario, where there is good reason to suspect that if a litigant is given an oral hearing, the litigant may abuse the process of the court. This is often because the claim is facially absurd or abusive and ought not to be given "another moment of court time."[116] Though this is rare, and courts should be zealous not to "water down" the standards in this regard, such instances do occur. If done with sufficient procedural safeguards in writing, dispensing with the oral hearing can be necessary to preserve the integrity of the court process. Another quintessential reason that a proceeding is abusive is when it is an attempt to relitigate a matter already decided. While courts should be careful to be certain that this is indeed what is occurring before dispensing with an oral hearing,[117] the fact is that such individuals have already had oral hearings and there is no need to provide another one.

By and large, however, a first instance hearing on the merits should almost always receive an oral hearing.

C. Interlocutory Matters

The first instance hearing on the merits can and should be contrasted with interlocutory matters. Interlocutory matters, by definition do not finally

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Canada Motion to Strike Decisions on Access to Justice and the Rule of Law" (2021) 72 *University of New Brunswick Law Journal* at p 82 [Kennedy 2021].

115 *Hryniak*; Walker; MacKenzie; *Babstock*; Kennedy 2021.

116 *Sarac v Wilstar Management Ltd.*, 2021 ONSC 7776 at para 25.

117 A real danger that can be seen in, *e.g.*, *Khan v Krylov & Company LLP*, 2017 ONCA 625 at para 14.

resolve an action.[118] To be sure, there are matters that are very close to a determination on the merits. For instance, a determination on jurisdiction or *forum non conveniens* may, as a practical matter, decide a case.[119] Similarly, a motion to strike out part of a claim may finally resolve that matter. Limitations determinations can similarly be dispositive of a claim or defence.[120]

At the same time, other interlocutory matters address issues of discovery, technical rules of pleadings, and whether an expert's report complies with procedural requirements.[121] These matters are far removed from a case's merits and, for example, Ontario permits motions concerning such matters to be brought in writing if there is consent.[122]

It is ultimately posited that the further an interlocutory matter is from the merits of a case, the more sanguine a court can be about dispensing with an oral hearing. This is truly a "standard" and not a rule, to be considered in conjunction with other factors raised in Part IV. But it recognizes that, as noted in *Baker*, "what is at stake" and how much of a legal "right" it is, are relevant to determinations of appropriate procedure.

D. Appeals

Appeals are another area where the necessity for an oral appeal is not as clear particularly when, as is almost always the case, there is no new evidence on

118 G.J. Kennedy, "Civil Appeals in Ontario: How the Interlocutory/Final Distinction Became So Complicated and the Case for a Simple Solution?" (2020) 45:2 *Queen's Law Journal* at p 243 [Kennedy Appeals].

119 *MJ Jones Inc. v Kingsway General Insurance Co.*, 2003 CanLII 37356 (ON CA).

120 *Charlebois v Les Enterprises Normand Ravary Ltee.*, 2006 CanLII 8873 (ON CA).

121 Kennedy Appeals.

122 *Ontario Rules* at r 33.08.

appeal.[123] On appeals, there has already been a determination on the merits, almost certainly after an oral hearing.[124] In many civil law jurisdictions such as Italy, there is a triage process to determine whether a matter appealed from warrants more than a cursory review of written submissions.[125] In many common law jurisdictions, leave processes before an appeal is permissible are common.[126] This is not surprising. As Daniel Jutras has noted, appeals are not an intrinsic good or a corollary of decision-making but rather have discrete purposes, such as the correction of legal error.[127] It may not be necessary to have an oral hearing to comprehensively address whether there has been a legal error in the court below.

To be sure, there are times where an appeal is very complicated and helping the judges understand the issues in the case is greatly aided by an oral process. There are other circumstances, quintessentially at apex courts, where the judges may want to ask questions of the litigants with back-and-forth banter being possible.[128] However, this will often not be necessary as a matter of procedural fairness to identify legal errors. This is not an invitation to dispense with legal requirements for an oral appeal.[129] But, when rule-crafters and/or judges are deciding whether dispensing with an oral hearing

123 *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759.

124 Section IV.B at pp 25-26.

125 F. Fiecconi, *The Role of Courts of Appeal in a Changing World: The Experience of the Court of Appeal of Milan in Civil Proceedings*, (Diretto Penale Contemporaeo, 2015) at p 4.

126 *Ontario Rules* at rr 12.06(1.1), 61.03.1(1), 62.02(2).

127 D. Jutras, "The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?" (2006) 32:1 *Manitoba Law Journal* at p 65.

128 Which have a fundamentally jurisprudential function: R. J. Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at pp 45, 50-51, 95-96.

129 *4352238* at paras 2-8.

is permissible and/or prudent, the comparative lack of importance of an oral hearing on appeal is another non-determinative factor to be considered.

E. Would the Oral Hearing Cause Expense and/or Delay?

As noted above, "access to justice" can be a double-edged sword when deciding whether to dispense with an oral hearing. Throughout this, Noel Semple's observation that "access" and "justice" are complementary is important to remember.[130] Reducing costs and delay, which can be done through dispensing with an oral hearing, can be in the best interests of the justice system. Very often, however, an oral hearing is not a source of delay or expense. It can allow the judge to better understand the issues and come to a decision more promptly. Assuming a matter is interlocutory, the oral hearing can allow the judge to engage in formal or informal case management, bringing the matter forward to trial in a more expeditious fashion,[131] which is more challenging when proceeding in writing.

At other times, this is much less likely to be the case. Interlocutory motions on peripheral matters may not benefit from any of the foregoing. If the written hearing is used as a triage step, having it proceed in writing is likely to keep costs down. In other words, delay and expense considerations on the way to a just resolution on the merits are fact-specific and should be considered alongside other considerations.

F. Is the Case of Broader Public Importance?

The open court principle encourages that justice be done in public. As Kasirer J noted for a unanimous Supreme Court in *Sherman Estate v*

130 N. Semple, "Better Access to Better Justice: The Potential of Procedural Reform" (2022) 100:2 *Canadian Bar Review*.

131 C. Piché, "Judging Fairness in Class Action Settlements" (2010) 28:1 *Windsor Yearbook of Access to Justice* at pp 116-117; G.J. Kennedy, "The Federal Courts' Advantage in Civil Procedure" (2024) 102 *Canadian Bar Review* at pp 125-126.

Donovan, "the open court principle […] is a central feature of liberal democracy".[132] Hearings in writing, to be sure, are not secret—evidence, pleadings, and decisions can all be publicly accessed. Even so, there is a tension between hearings in writing and the public's ability to access the courts through media who attended the proceedings. The interests served by the open court principle will usually not be significantly affected by hearings in writing because of the ability to access the court file, and the fact that it is rare for civil cases to be of public interest. However, in exceptional cases where the matter is of public interest such that the media or researchers may be interested in attending, the desirability of an oral hearing is greater, in line with Samuels's analysis.[133]

G. Self-Represented Litigants

Finally, it is worth adding a warning, albeit not an absolute prohibition, against dispensing with oral hearings when a self-represented litigant is a party. The National Self-Represented Litigant Project has noted that self-represented parties are likely to benefit from the opportunity to explain their case in court, rather than participating in processes largely in writing.[134] This finding is supported by the work of Jona Goldschmidt and Loreta Stalans, who note the importance of judicial involvement in cases involving self-represented litigants.[135] Lauwers JA further noted as much in *Kirby v Hope Springs*, where he observed that those who suffer from mental health problems, and are disproportionately likely to find themselves self-represented, find it particularly difficult to follow court processes and require

132 *Sherman Estate v Donovan*, 2021 SCC 25 at para 1.

133 Samuels.

134 Macfarlane et al. at p 15.

135 J. Goldschmidt & L. Stalans, "Lawyers' Perceptions of the Fairness of Judicial Assistance to Self-Represented Litigants" (2012) 30:1 *Windsor Yearbook of Access to Justice* at p 157 [Goldschmidt & Stalans].

judicial indulgences unless the responding party is actually prejudiced.[136] James Stone has made similar observations in the American context.[137] In this vein, a set of standard questions about their case and the issues raised may be helpful, to ensure the self-represented litigant has been asked essential questions. Standardization of questions, though challenging given the breadth of subject matter disputes that civil claims address, also prevents the judge from being seen as the self-represented litigant's advocate.[138]

Care must also be taken to avoid equating vexatious litigants, whose litigation is particularly likely to be appropriate to dismiss without an oral hearing, with self-represented litigants. Despite the temptation to conflate the two categories, these are very different phenomena, as Slatter JA emphasized in *Lymer*.[139] Watson JA similarly observed in *Nkusi v Patricia C Tiffen Professional Corporation* that "the vast majority of self-represented people are not vexatious litigants, nor do they foment or pursue abusive litigation."[140] This is not a *carte blanche*. While the vast majority of self-represented litigants are not pursuing vexatious litigation, the overwhelming majority of vexatious litigation is brought by self-represented litigants, perhaps due to ethical prohibitions on lawyers bringing frivolous litigation.[141] If there is legitimate reason to fear that a self-represented litigant will abuse the process of the court, or nothing would be added

136 *Kirby* at para 8; Lauwers JA was dissenting in the case, but the majority did not dispute this point.

137 James Stone makes this observation in the high stakes prison litigation context in, "The Prison Discovery Crisis" (2025) 134 *Yale Law Journal* at pp 2819-2820.

138 Canada, Canadian Judicial Council, *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) at p 2.

139 *Lymer* at para 14.

140 *Nkusi v Patricia C. Tiffen Professional Corporation*, 2023 ABCA 272 at para 14.

141 Law Society of Alberta, *Code of Conduct* (23 September 2025) at r 5.1-1.

through an oral hearing, an oral hearing should not be mandated. Even so, concerns about the perception of fairness in these circumstances are greater should a matter proceed entirely in writing. Moreover, the self-represented litigant may uniquely benefit from the opportunity to present their case in person. So, this is a caution in favour of having oral hearings when self-represented litigants are present.

VI. Conclusion

Oral hearings are quintessentially part of the common law process. They can further both "procedural justice" in the sense of feeling heard,[142] and can also facilitate reaching the "accurate" result.[143] But are they always required? And what do the concepts of procedural fairness and access to justice have to say about this? This article concludes that, in the main, the reasons for oral hearings are well-founded. They can reduce the burden on the judge by allowing them to concentrate on issues that are most important and, even more importantly, enhance the perception of fairness. Judges should be very reluctant to dispense with oral hearings on their own initiative, and they should be forbidden from doing so if procedural rules and/or governing legislation mandate oral hearings, as is often the case.

Having said that, it is also suggested that oral hearings are not always required to have a fair process and there are circumstances where matters should proceed in writing, complying with procedural fairness and furthering access to justice. This article considers several variations in this regard. Though the overarching consideration can boil down to this: barring constitutional interests being at stake, the further a particular step in litigation moves away from an initial first-instance decision on the merits, the more willing rule-crafters—and, more exceptionally, judges—should be

142 Goldschmidt & Stalans at pp 157-159.

143 Chase et al. at p 387.

to dispense with the requirement of an oral hearing. In other words, there is good reason to be skeptical of requests to dispense with oral hearings and judges should demonstrate the virtue of humility in this regard, as Binnie J indicated was necessary in *Caron*. But requests should occasionally be granted. This article, it is hoped, brings together some considerations in this regard.