

WORKING SMARTER BUT NOT HARDER IN CANADA:

THE DEVELOPMENT OF
A UNIFIED APPROACH
TO CASE MANAGEMENT IN
CIVIL LITIGATION



A Project Undertaken
by the Judiciary
Committee of the
American College of
Trial Lawyers



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WORKING SMARTER BUT NOT HARDER IN CANADA: THE DEVELOPMENT OF A UNIFIED APPROACH TO CASE MANAGEMENT IN CIVIL LITIGATION¹

I. Introduction

In Canada, lawyers and judges generally agree that the effective use of case management assists in reducing the cost and delay associated with our civil justice system. There is a wide disparity of views, however, as to the circumstances in which case management should be used and concerning the various approaches and techniques that can or should be implemented with a view to improving the results case management is intended to achieve.

In its recent decision in *Hryniak v. Mauldin*,² the Supreme Court of Canada noted that the civil justice system in Canada must be reformed in order to ensure timely and affordable access to justice. Writing for a unanimous Court, Justice Karakatsanis stated:

[1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

[2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.³

The fundamental problems of cost and delay that now plague the civil justice system in Canada were also recognized recently by the Chief Justice of Canada, Beverley McLachlin, when she stated succinctly that “[t]here is no justice without access to justice.”⁴

1 The principal authors of this Report are Kent E. Thomson and Kristin Jeffery. Mr. Thomson is a Fellow of the American College of Trial Lawyers in Toronto, Ontario. The Report was first undertaken during M. Thomson’s tenure as the Chair of the Judiciary Committee of the American College. Mr. Thomson is the Head of the Litigation Department of the Davies Ward Phillips & Vineberg LLP firm in Toronto, and Ms. Jeffery was an associate lawyer at that firm during the period that research concerning this Report was undertaken

2 *Hryniak v. Mauldin*, 2014 SCC 7 [“*Hryniak*”].

3 *Hryniak*, *supra* at 1-2.

4 The Right Honourable Beverley McLachlin, Chief Justice of Canada, “Access to Civil Justice,” (Access to Civil Justice Colloquium delivered at the Faculty of Law, University of Toronto, February 10, 2011), online at <<http://hosting.epresence.tv/MUNK/1/watch/219.aspx>>.

It is timely to take a fresh look at the important role case management can play in improving the efficiency and effectiveness of civil litigation in Canada. This case management project, undertaken by the Judiciary Committee of the American College of Trial Lawyers (the “ACTL”)⁵, aims to assist members of the bench and bar in responding to the Supreme Court’s call to arms.

II. **Background**

The Canadian case management project was undertaken with the aim of identifying techniques and approaches that have been implemented by judges in Canada who are recognized as being particularly adept at the use of case management to assist in the resolution of civil disputes. The hope of the Judiciary Committee is that through the identification of proven case management techniques, this project will assist in the development of a unified approach to the use of case management in the civil justice system in Canada.

The Canadian project follows in the footsteps of the “Innovating for Efficiency” project that was undertaken recently in the United States by the ACTL, working together with the Institute for the Advancement of the American Legal System (the “IAALS”).⁶ The central purpose of that project was to identify best practices in case management used in civil proceedings in the U.S. The results of the project were set out in a Report published in 2014, entitled “Working Smarter, Not Harder: How Excellent Judges Manage Cases” (hereinafter the “**Working Smarter Report**”).⁷

The Working Smarter Report recognized that while case management is widely accepted by members of the American bench and bar, it is not always easy for judges sitting in isolation to observe or learn from the case management techniques or approaches being utilized by their colleagues. As a result, it is difficult for judges to identify or implement the most effective case management techniques. The Working Smarter Report sought to assist in this regard by presenting a summary of the “best practices” currently engaged in by judges in the U.S. who are well-recognized for their achievements in the use of case management in civil proceedings. Approximately 30 trial judges from State and Federal Courts from diverse jurisdictions across the country were interviewed by Fellows of the ACTL, working in collaboration with representatives of the IAALS.

In the wake of the Working Smarter Report, the Judiciary Committee of the ACTL undertook a similar project in Canada (the “**Canadian Case Management Project**”). Fellows of the College interviewed members of the judiciary located throughout Canada who were identified as leaders in case management.⁸ This Report identifies areas of consensus among members of the Canadian judiciary as well as issues of significance on which opinions remain divided. As discussed below, perhaps the single most important issue that members of the judiciary differ on in Canada concerns

⁵ The American College of Trial Lawyers is an invitation only fellowship of leading trial lawyers in the United States and Canada, and is comprised of those who have demonstrated the highest standards of trial advocacy, ethical conduct, integrity, professionalism and collegiality. The College maintains and seeks to improve the standards of trial practice, professionalism, ethics and the administration of justice through education and public statements on important issues relating to its mission.

⁶ The Institute for the Advancement of the American Legal System is a national independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. The IAALS and ACTL first began working together in 2007 to explore aspects of the civil justice system that might have an impact on pre-trial cost and delay, including case management.

⁷ The Working Smarter Report was published by the ACTL and IAALS in January 2014, and can be found on the website of the ACTL at www.actl.com.

⁸ See Appendix A to this Report for a description of the Project Methodology.

the adoption of a long standing and well accepted foundational principle of case management in the United States, namely the use of a single judge to case manage civil proceedings prior to trial and then preside over those proceedings at trial (referred to hereafter as the “**One Judge Model**”).

This Report challenges those who may be reluctant to embrace the innovative use of case management techniques in civil litigation in Canada, and suggests that in order to respond in a meaningful and constructive way to the serious problems identified by the Supreme Court in *Hryniak*, members of the bench and bar should support a more expansive and flexible use of case management. Doing so may well result in reducing substantially the expense and delay associated with civil litigation while allowing justice to be dispensed fairly and reliably.

III. Problems with the Canadian Civil Justice System

It has long been recognized that excessive cost and delay are the primary impediments to meaningful and satisfactory access to the civil justice system. As the former Chief Justice of the Ontario Court of Appeal Warren Winkler observed almost a decade ago, in 2008, the civil justice system has become “too expensive and too slow”, with the result that for a large number of ordinary Canadians, access to justice “is growing more and more remote.”⁹

More recently, in his remarks at the Opening of the Courts in September 2014, the current Chief Justice of the Ontario Court of Appeal, George Strathy, stated:

Having been a lawyer and a judge in this province for over 40 years, it strikes me that we have built a legal system that has become increasingly burdened by its own procedures, reaching a point that we have begun to impede the very justice we are striving to protect. With the best of intentions we have designed elaborate rules and practices, engineered to ensure fairness and achieve just results. But perfection can be the enemy of the good, and our justice system has become so cumbersome and expensive that it is inaccessible to many of our own citizens.¹⁰

Justice David M. Brown of the Ontario Court of Appeal has been vocal in his criticisms of the civil justice system in Ontario, and has played a prominent role in asking that significant improvements be made.

In late February 2016, Justice Brown delivered a paper entitled “Commercial Litigation in the Next 10 Years: A Call for Reform” at a seminar hosted by the Hamilton Law Association. He stated:

What I call the “Fundamental Goal” of our public civil justice system is the fast, fair and cost-effective determinations of civil cases on their merits. As it currently operates, our public justice system is not

⁹ The Honourable Warren K. Winkler, Chief Justice of Ontario, “Access to Justice”, (Remarks delivered at the Canadian Club of London, April 30, 2008), online at <<http://www.ontariocourts.on.ca/coa/en/ps/speeches/accessjustice.htm>>.

¹⁰ Quoted by Justice David M. Brown, “Commercial Litigation In the Next 10 Years: A Call For Reform”, delivered at The 11th Annual Current Issues in Commercial Litigation Law Seminar of the Hamilton Law Association on February 24, 2016, at p. 8.

achieving the Fundamental Goal. In my view, all three players in the civil justice system [the Bench, the Bar and the Government] need to ditch the old way of doing things and adopt new practices. And we need to do so quickly. Time is not on our side ...

To stand by as civil courts continue to atrophy risks jeopardizing the health of our democracy, our economy, and our private law, at least in this judge's assessment. To avoid that risk, we must change our ways and work to re-invigorate our public civil courts.

These concerns are by no means limited to members of the judiciary. The *Rule of Law Index*, published in 2014 by the World Justice Project, ranked Canada 13th among the world's high-income countries on metrics measuring access to civil justice.¹¹ In 2015, Canada's ranking dropped to 18th.¹² Canada's ranking falls below the average for Western Europe and North America.¹³ According to the Project's methodology, this ranking measures "the accessibility and affordability of civil courts, including whether people are aware of remedies, can access and afford legal advice and representation, and can access the court system without incurring unreasonable fees, encountering unreasonable procedural hurdles, or experiencing physical or linguistic barriers."¹⁴

Similarly, in a 2013 Report by the Canadian Bar Association (the "CBA") entitled *Reaching Equal Justice: An Invitation to Envision and Act*, the CBA found that "people interviewed... consistently described the justice system as not to be trusted, only for people with money, arbitrary, difficult to navigate and inaccessible to ordinary people."¹⁵ The inevitable effect of excessive cost and delay is the erosion of public confidence in the efficacy and fairness of the civil justice system.¹⁶

The Supreme Court recognized in *Hryniak* that the risk of incurring excessive cost and delay leaves many litigants with no practical choice but to utilize alternatives to the civil justice system in resolving their disputes. Ultimately, this has the long term impact of impeding the development of the common law.¹⁷ As members of the public have increasingly sought out and utilized alternatives to a judicial system they no longer have access to or respect for, trials have diminished in frequency. Civil litigation has largely become what the Supreme Court once characterized as the "sport of kings".¹⁸

11 World Justice Project, "The World Justice Project Rule of Law Index 2014" (Washington: The World Justice Project, 2014) at 26 [*World Justice Project 2014*], online at <http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf>

12 World Justice Project, "The World Justice Project Rule of Law Index 2015" (Washington: The World Justice Project, 2015) at 30, online at <http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf>

13 *World Justice Project 2014*, *supra* at 78.

14 *World Justice Project 2014*, *supra* at 166.

15 The Canadian Bar Association, "Reaching Equal Justice Report: An Invitation to Envision and Act", (Canadian Bar Association, 2013) at 14, online at <http://www.cba.org/CBA/equaljustice/secure_pdf/EqualJusticeFinalReport-eng.pdf>; see also Roy McMurtry, Marion Boyd, John McCamus and Lorne Sossion, *Listening to Ontarians: A Report of the Ontario Civil Legal Needs Project* (Toronto: The Ontario Civil Needs Project Steering Committee, 2010) at 19, online at <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf>

16 Margaret A. Shone, "Into the Future: Civil Justice Reform in Canada 1996 to 2006 and Beyond" (December 2006) at 106 [*Shone*]. See also *Aon Risk Services Limited v. Australian National University* [2009] HCA 27 at 24. In that case, the Australian High Court stated "[u]ndue delay can undermine confidence in the rule of law."

17 *Hryniak*, *supra* at 24-26. Moreover, there has been a marked increase over the years in unrepresented litigants who resolve their disputes in the civil justice system, but cannot afford to retain counsel in doing so.

18 See the Decision of Justice Binnie of the Supreme Court of Canada in *Kerr v. Danier Leather Inc.*, 2007 SCC 44, at para. 63.

Much has already been written about the multiple causes for the excessive cost and delay now embedded in our civil justice system.¹⁹ Delay is attributable both to increasingly unsupportable demands on court time, but also to burdensome and largely unnecessary interlocutory wrangling in the pre-trial phase of cases. Needless and avoidable pre-trial motions, excessive demands for documentary and oral discovery, backlogs in booking court dates, scheduling conflicts and adjournments that are too easily obtained all factor into the frustrations experienced by litigants.²⁰ Cost and expense seem to have increased almost exponentially in recent years. Litigants have been forced to resolve their disputes without having their “day in court”, well before any member of the judiciary has assessed, let alone decided, the merits of their dispute.²¹

As noted above, criticisms stemming from the cost and delay inherent in our civil justice system are not new. Indeed Madam Justice Rosalie Silberman Abella of the Supreme Court of Canada has noted that similar concerns have beleaguered our civil justice system for more than a century. In a provocative paper that was delivered in 2003 at the First Colloquium of the Chief Justice of Ontario’s Advisory Committee on Professionalism, Justice Abella criticized members of the legal profession and judiciary for being wedded to historic practices and procedures that are no longer workable or appropriate. Too often, they involve being mired down in overly complex and unnecessary pre-trial disputes, rather than in the timely and efficient pursuit of justice. In her presentation, Justice Abella cited a speech delivered in 1906 by Nathan Roscoe Pound commenting on the public’s dissatisfaction with the administration of justice:

Uncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, [are] direct results of the organization of our courts and the backwardness of our procedure.²²

Justice Abella remarked that more than a century later, these same issues and concerns remain. She noted that although there have been substantial advances in almost every other profession and field of endeavour in the period since the early 1900 s, the civil justice system remains essentially untouched and unchanged.²³

These problems are not unique to Canada. In fact, excessive cost and delay have also had highly negative impacts on the civil justice systems of other countries. In a paper delivered in 2003 at an international conference in New Delhi concerning the use of Alternative Dispute Resolution, Fern Smith, a U.S. District Court Judge who served as the Director of the Federal Judicial Center in Washington D.C., expressed concerns about undue cost and delay caused by increased demands on the civil system in the U.S.:

19 The authors recognize that relatively high hourly rates of many lawyers also contribute to the cost associated with civil litigation. This aspect of the cost of access to the civil justice system, while worthy of discussion, is beyond the scope of this Report.

20 Doris Wilson, “Managing Litigation in Canada”, (News and Views Issue 5: Fall 2002, Canadian Forum on Civil Justice) at 1.

21 Report of the Canadian Bar Association, “Task Force on Systems of Civil Justice”, (Canadian Bar Association: August 1996) at 13 [Systems of Civil Justice].

22 Justice Rosalie Abella, “Justice and Literature” (Paper delivered at the First Colloquium of the Chief Justice of Ontario’s Advisory Committee on Professionalism, October 20, 2003) [Abella].

23 Abella, *ibid* at 4-8.

Judicial resources in the United States have not kept pace with the massive expansion of litigation. There are neither enough judges nor enough funds for the optimal operation of the courts. The result is court congestion and excessive delay in the resolution of civil cases. The delay results in increased costs to litigants. Widespread concern among all segments of the legal community as well as the public has led to the search for solutions designed to eliminate unnecessary expense and delay in civil litigation.²⁴

Similarly, Justice Forrest Miller of New Zealand stated the following, in a paper presented in 2011:

Of course, delay is a function not only of demand and court rules but also of legal culture. The legal profession contributes much to the speed and cost of outcomes. It does this not merely by making use of the rules of court but also through the local legal culture, by which we mean established expectations, practices and informal behavioural norms prevailing in any given area. Court systems adapt to a given pace, and rule changes may mean little unless legal culture changes with them. [citations omitted]²⁵

Whether extraordinary cost and delay associated with civil litigation can be attributed to increased demands placed on the judicial system, to the changing and more complex nature of the proceedings themselves, or to aspects of the legal culture more generally, the appropriate and effective use of case management can assist in addressing all of these important causes and issues.²⁶

IV. The “Case” for Case Management

The legal community has long looked to case management as a tool for combatting excessive cost and delay in civil litigation. Traditionally, litigants and their counsel have controlled the pace of civil litigation. Under the party-managed model, courts occupy a largely passive role, and have little or no independent stake in the pace or manner in which civil proceedings are conducted. Rather, courts resolve pre-trial disputes when the parties choose to litigate them and permit the parties to determine how and when matters proceed. By contrast, in jurisdictions with well-defined case management regimes, courts play an active role in supervising the conduct of civil proceedings with a view to ensuring that cases move along at an appropriate pace and in a suitable manner. Although case management has several forms and variants, common among them is active and ongoing supervision by a given judge, or team of judges and masters, from the commencement of a case to its ultimate disposition. Judges not only adjudicate the merits of legal disputes, but also meet with counsel in

24 Fern Smith, “Case Management”, (Paper presented at the International Conference on ADR and Case Management in New Delhi, India, May 3-4, 2003), at 2 [*Smith*].

25 Forrest Miller J., “Managing the High Court’s Civil Caseload: A Forum for Judges and the Profession”, 2011, at 10 [*Miller*].

26 The Working Smarter Report begins with the following quote from Judge David G. Campbell of Arizona: “Since Chief Justice Warren Burger convened the Williamsburg conference in 1971 to address serious problems of backlog and inefficiency in U.S. courts, study after study has confirmed that judicial case management is the answer. Cases resolve in less time, at lower cost, and often with better results when judges manage them actively.”

Chambers to supervise case preparation, set deadlines, resolve interlocutory issues and encourage consensual resolutions.²⁷

As discussed more fully below, in effective case management regimes interlocutory disputes are generally discouraged wherever possible. When they do, in fact, arise, they are generally disposed of quickly and informally in the absence of extensive briefing and oral argument. In person attendances are used where necessary or appropriate, but the business of the court is also conducted by email or through the use of telephone conferences.²⁸ Courts make clear that litigants no longer have the “right” to fight over every issue, or to occupy as much court time as they or their counsel might wish for. In circumstances where the One Judge Model is followed, and the same judge case manages a proceeding during the pre-trial phase and then presides over the matter at trial, rulings concerning the conduct of the trial are made well before the trial commences in an effort to ensure that the trial is conducted on a constrained and efficient basis. These sorts of pre-trial rulings can involve a host of different matters, including the use of affidavit evidence as a partial or complete substitute for evidence-in-chief at trial, the imposition of time limits at trial, the use of procedures to limit the field of debate between opposing experts and the use of technology to control or even eliminate the use of paper during trials.

Proponents of case management agree that its use saves time and expense in a number of respects, including by: (i) reducing the number, length and complexity of interlocutory disputes and motions; (ii) controlling the behaviour of the parties; (iii) ensuring that timelines and deadlines are imposed and adhered to; and (iv) allowing the case management judge to become familiar with the case, thereby increasing efficiency and consistency.²⁹

Experience in jurisdictions with developed case management regimes supports the conclusion that case management is an effective means of achieving timely and affordable access to justice.³⁰ Case management was introduced widely in the United Kingdom in 1999 following the issuance of Lord Henry Woolf’s Reports on Access to Justice (the “**Woolf Reports**”).³¹ As a general matter, a number of the reforms introduced in the U.K. following the release of the Woolf Reports were aimed at reducing the cost, delay and complexity of civil litigation by shifting responsibility for the management of litigation from the litigants and their counsel to the courts.

27 Different lawyers have different views concerning the appropriate level of involvement case management judges should have in civil cases. Some favour active involvement on an ongoing and proactive basis. Others favour a more passive approach. As discussed below, there is no “one size fits all approach” that must be applied by all case management judges in all cases. Rather, the proper approach may well vary from judge to judge and case to case.

28 While informality can be used to reduce the cost and delays associated with civil litigation, the Ontario Court of Appeal emphasized in its recent decision in *Akagi v. Synergy Group (2000) Inc.*, (2015) 125 O.R. (3d) 401, that care must be taken to ensure that informal procedures are not abused. That is particularly so where relief is sought on an *ex parte* basis, or against unrepresented third parties. The facts and circumstances of this case are extraordinary, and the concerns identified by the Court are unlikely to arise in many cases.

29 *Shone, supra* at 104; *Smith, supra* at 3-4; *Systems of Civil Justice Task Force, supra* at 35.

30 Importantly, effective case management requires sufficient administrative and judicial resources to ensure that members of the bench are not overburdened when undertaking a more active role in the administration and resolution of civil proceedings. Governments should take this need for additional resources seriously and act accordingly in their efforts to improve the efficiency and effectiveness of the civil judicial system. Implementing meaningful reforms in the area of case management without ensuring that adequate resources exist to accommodate and implement those reforms may well do more harm than good.

31 In June 1995, Lord Woolf published an Interim Report on access to justice in the U.K. The Interim Report proposed a new system of case management by the courts to reduce costs and delay in civil litigation. The Final Report, published in July 1996, set out detailed proposals for the implementation of case management.

The experience with case management in the U.K. has been largely positive. A study undertaken by Professors John Peysner and Mary Seneviratne of Nottingham Law School, entitled *The Management of Civil Cases: the Courts and Post-Woolf Landscape*, found that the implementation of case management in the U.K. has not detracted from the ability of the civil justice system to ensure that cases are dealt with in a fair and balanced way:

The overriding objective of the [Civil Procedure Rules] is for ‘courts to deal with cases justly’. Justice requires rigor and accuracy in decision making, together with openness and transparency and a sense of fairness, but this must be balanced with the use of scarce and expensive resources both of the judicial system and individual litigants. Nowhere did we find any evidence that the case managed system simply trumps justice with the strictures of efficiency: in fact this balance is best exemplified in the fast track. On the contrary, the new case managed system focuses minds on the essential issues in a case.³²

Similarly, empirical studies undertaken in the United States reveal that when judges intervene at an early stage to assume judicial control over a case, and to impose dates for the completion by the parties of principal pre-trial steps, cases are disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.³³ Other U.S. studies have found that early judicial intervention serves to narrow the issues, helps to limit pre-trial discovery and to avoid or minimize interlocutory disputes, and ultimately leads to results that are more satisfactory to litigants.³⁴ The conclusions reached in these studies were echoed by the findings of the ACTL and IAALS in their Working Smarter Report.

There is, therefore, a broad consensus in a number of jurisdictions concerning the importance and effectiveness of case management in reducing the cost and delay associated with civil litigation. The only real debate in the U.S. concerns the best practices that can or should be utilized when case management is employed. It was precisely to address that issue that the ACTL and the IAALS undertook the Innovating for Efficiency project and published the Working Smarter Report in 2014.

V. The American Case Management Experience and the Working Smarter Report

A. The Working Smarter Report

³² John Peysner and Mary Seneviratne, “The Management of Civil Cases: The Courts and the Post Woolf Landscape” (London: Department of Constitutional Affairs, 2005), online at <http://www.dca.gov.uk/research/2005/9_2005_full.pdf> [Peysner and Seneviratne].

³³ Flanders, “Case Management and Court Management in United States District Courts 17”, (Federal Judicial Center, 1977). It should perhaps be noted that while the One Judge Model described herein is used widely in the U.S., jury trials are much more prevalent in civil cases in the U.S. than they are in Canada. Critics of the One Judge Model in Canada argue that while that Model may be appropriate in the U.S. where juries (rather than judges) are the “triers of fact” in many civil cases, it is inappropriate in Canada in circumstances where the role of the trial judge in civil non-jury cases is more significant. For the reasons explained below, in the majority of civil cases in Canada this concern appears to be misplaced. Experienced judges in Canada are perfectly capable of case managing civil cases and then presiding over those cases at trial fairly, properly and efficiently. Indeed, they have done so on numerous occasions, without complaint or concern. This is a regular feature, for instance, of the Commercial List of the Ontario Superior Court in Toronto which specializes in handling complex commercial disputes.

³⁴ The American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, Final Report (March 2009) at 19.

The Innovating for Efficiency project was undertaken in 2012 by a Task Force led by Richard P. Holme of the ACTL and Justice Rebecca Love Kourlis, the Executive Director of the IAALS. As described above, the project involved numerous interviews of trial court judges across the United States who were identified by Fellows of the ACTL as being particularly adept at case management. The results of these interviews were compiled and presented in the Working Smarter Report.³⁵

Five general themes emerged concerning the most effective techniques used by U.S. judges in case managing civil proceedings. They are:

1. *Assess a case and its challenges at the outset.* Use active and continuing judicial involvement when warranted to keep the parties and the case on track.
2. *Convene an initial case management conference early in the life of the case.* Discuss with the parties anticipated problems and issues, as well as deadlines for major case events.
3. *Reduce and streamline motions practice to the extent appropriate and possible.* Rule quickly on motions.
4. *Create a culture of collegiality and professionalism* by being explicit and up front with lawyers about the court's expectations, and then holding the participants to them.
5. *Explore settlement with the parties at an early stage* and periodically throughout the pretrial process, where such conversations might benefit the parties and move the case toward resolution.³⁶

As discussed below, similar themes emerged during our interviews of judges in Canada with particular expertise in case management. In considering the lessons that can be learned from the use of case management in the U.S., however, it is important to be practical and to recognize that in many circumstances judges in the U.S. may well have resources available to them that their counterparts in Canada do not. These include, among other things, access to or the use of additional clerks and staff as well as more advanced technology.

This concern pertaining to limited judicial resources has been recognized in several provinces, including Quebec. Under Article 157 of the Code of Civil Procedure of Quebec, special case management is only available when the Chief Justice or Chief Judge determines that it is warranted due to the nature or complexity of the proceedings. Special case management remains the exception rather than the rule in Quebec, other than in respect of class actions.

B. The Canadian Case Management Approach

Case management is a more recent feature of the Canadian civil justice system than in the U.S. In 1988, the Joint Committee on Court Reform (the "JCCR"), representing the Ontario

35 *Working Smarter, supra.*

36 *Working Smarter, supra* at 1-2. The Executive Summary of the Working Smarter Report is attached as Appendix B.

Branch of the CBA, the Law Society of Upper Canada and The Advocates' Society, among others, recognized the need for active case management to address the dual problems of cost and delay.³⁷ Interestingly, this early Canadian analysis of case management explored the issue of whether the case management judge should also be the trial judge. Ultimately, however, the JCCR left that important issue open noting only that this was a "serious issue that must be considered for Ontario".³⁸ Thirty years later this issue remains unresolved not only in Ontario, but also elsewhere in Canada. Although there have been a number of studies concerning case management undertaken in the period since the Report of the JCCR was published, there has been a distinct lack of robust discussion and analysis concerning the potential use in Canada of the One Judge Model.

Although case management has been used with increasing prevalence in Canada in the period since 1988, it has not yet reached the same widespread level of acceptance as is found throughout the United States. Instead, different members of the bench and bar in Canada have differing views concerning the role case management can or should play in the civil justice system.

VI. The Canadian Case Management Project

The Canadian Case Management Project followed approximately the same methodology that was used in the U.S. by the ACTL and IAALS in the preparation of the Working Smarter Report: experienced members of the judiciary in various provinces were interviewed concerning their perspectives on the use of case management, including about particularly effective approaches or techniques that have been utilized in different courts. With the assistance of Fellows of the ACTL, twenty judicial leaders in the field of case management were identified and interviewe³⁹

While the judges interviewed did not all share the same views concerning every aspect of case management, they agreed without exception that the effective use of case management in appropriate cases serves as a useful tool in combatting excessive cost and delay. The most important and contentious issue on which members of the judiciary disagreed concerns the use of the One Judge Model. Some judges questioned whether it would be beneficial, or even acceptable, to delegate to a single judge the task of case managing a civil proceeding during the pre-trial phase and then presiding over that proceeding at trial. Notably, this issue was not discussed in the Working Smarter Report, presumably because of the long-standing and widespread acceptance of this practice in the American judicial system.

A. Areas of Consensus From the Canadian Case Management Project

The Canadian interviews demonstrated that case management is viewed favourably

37 The Joint Committee on Court Reform, "Report to the Attorney General of Ontario" (The Law Society of Upper Canada, 1988) at 10 [*JCCR Report*].

38 *JCCR Report, supra*, at 19.

39 Special thanks are owed to Justice N. Smith and Prothonotary R. Lafreniere of British Columbia, Justice N. Gabrielson, Justice D. Ball and Justice T. Zarzeczny of Saskatchewan, Chief Justice G. Joyal and Associate Chief Justice Perlmutter of Manitoba, Associate Chief Justice Marrocco, Justice Newbould, Justice Brown and Master MacLeod of Ontario, Justice Lynch, Justice MacDonald, Justice Gass, Justice Cormier, Justice Legere Sers, Justice Wood and Justice Murphy of Nova Scotia, Justice Campbell of Prince Edward Island, and Justice LeBlanc and Justice Stack of Newfoundland and Labrador for participating in this study. Thanks also goes to Justice Millar of the New Zealand High Court for his insights on case management in New Zealand. The Fellows of the ACTL who assisted in the preparation of this Report are listed in Appendix A.

and offers a number of recognized benefits, particularly when used in larger or more complex matters. Further, Canadian judges generally supported and endorsed the various themes described in the Working Smarter Report.

Ultimately, six major themes emerged during interviews of members of the judiciary in Canada concerning the most effective approaches that can be taken when case management is utilized. They are described below.

(i) ***Theme One - Identify Early Critical Facts, Evidentiary Problems or Legal Issues the Case Will Ultimately Turn On***

Members of the Canadian judiciary expressed the opinion that an investment of judicial time early on in a matter to identify critical facts, evidentiary problems or legal issues the case will ultimately turn on can be highly beneficial, and normally saves time in managing a case as it proceeds. This is particularly so where the same judge (or master) is used to case manage the proceeding throughout the pre-trial phase of the case. In this regard, it was generally accepted that continuity using a single case management judge (or master) is highly beneficial, if not indispensable, to efficient and effective case management. Among other things, using the same judge (or master) to case manage a proceeding throughout the pre-trial phase of a case: (i) eliminates the need for different judicial officers to learn the case on multiple occasions; (ii) reduces the risk of inconsistent approaches and results; and (iii) creates a strong disincentive for the parties (or their counsel) to behave badly, including by bringing or precipitating needless interlocutory motions, making disproportionate and excessive discovery demands and failing or refusing to conduct proceedings on a constructive, collaborative and courteous basis.

An upfront investment of time by the judge (or master) chosen to case manage a civil proceeding serves to inform each of the later steps in the proceeding, and assists in ensuring that the procedures utilized in particular cases remain proportionate to the dispute in question. As Justice D.P. Ball of the Saskatchewan Court of Queen's Bench stated, this technique ensures:

that the case does not get bogged down on disputes that will not be relevant. This assessment will then inform case management decisions arising from disputes with respect to, for example, the scope of discovery, expert opinion evidence, the scheduling of motions, the pretrial settlement conference and trial.

In addition, understanding the issues that the case may give rise to allows the case manager to anticipate issues before they arise, and to deal with them when they are raised on a timely and efficient basis.

As a general matter, expertise in a particular area of the law will enhance a judge's understanding of issues that arise in that area. For that reason, assigning judges to case manage cases in areas they have particular expertise in may improve the efficiency and effectiveness of their efforts. This is one of the underlying tenets of the Commercial List in Toronto, and of Family Courts in various provinces.

(ii) ***Theme Two – Render Timely Decisions on Substantive Issues***

There was also widespread agreement that case management judges who are tasked with deciding interlocutory motions and other disputes should attempt to render decisions as quickly as possible to allow the parties to continue with their preparation of the case. Shorter and faster decisions concerning interlocutory disputes are generally preferable to lengthier decisions that take longer to research and write. One of the questions posed to the judges who were interviewed was whether in some circumstances delaying the release of a decision might have the beneficial effect of facilitating or promoting settlements. The response from members of the judiciary was that rendering timely decisions, rather than frustrating the parties with delay, was the preferred approach.

Justice T.C. Zarzeczny of the Saskatchewan Court of Queen’s Bench noted that while it is his practice to decide interlocutory disputes in a timely matter, in some instances he will ask counsel if they want him to delay the release of particular decisions in order to allow them to pursue their own resolutions. In these instances, where counsel express such a desire, he will generally delay the release of his decisions to facilitate such discussions.

Members of the judiciary practicing in family courts stated that they sometimes find it best to defer making decisions on certain issues near the outset of a matter, for the purpose of giving the parties time to “cool off” and let more reasonable heads prevail. On this note, family law judges noted that litigants often begin the process by making more unreasonable demands than they do as the process unfolds, time passes and emotions abate.

(iii) ***Theme Three – Fix Trial Dates Early in the Process***

Members of the judiciary generally agreed that it is frequently beneficial to fix a firm trial date at a relatively early stage of the proceedings, and then work back from the fixed trial date in imposing a realistic schedule concerning various steps that must be completed prior to trial. Importantly, they also agreed that deviations from the fixed trial date should only be granted in exceptional circumstances. The establishment of a fixed trial date generally disciplines the approach of the parties and their counsel taken during the pre-trial phase of a case, causes them to act more efficiently and reasonably, and helps to avoid unnecessary interlocutory motions and delays.

In his paper delivered to the Hamilton Bar Association referred to above, Justice Brown of the Ontario Court of Appeal recommended the adoption of a “Front End Assignment of Trial Dates System”:

We need to move the assignment of trial dates from the back-end of a civil proceeding to its front end. We need to develop a case management process which sees trial dates assigned to cases upon the close or deemed close of pleadings; with trial dates, once assigned, carved in stone.

The Advocates’ Society is an association comprised of thousands of litigation counsel throughout Canada. In June 2015, the Society published a thoughtful paper, entitled “Best Practices For Civil Trials”, following the formation in 2014 of a Task Force comprised of civil

litigators and judges that examined ways to “ensure the fair and timely resolution of civil disputes through our court system”. One of the issues dealt within this paper is “Best Practices For Case Management”. The paper states the following, concerning the fixing of trial dates

The trial date, and the length of trial, should be fixed as early as possible. Fixing a trial date early in the process is helpful in focusing the parties on what is required to get the case ready for trial. A fixed trial date may eliminate or reduce disproportionate discovery requests, unnecessary motions and other problems that tend to increase costs and delay the progress of cases. Fixing a trial date also provides a degree of certainty and predictability to the parties as to when their dispute will be finally resolved, which is a major concern for litigants. Fixing the length of trial at an early stage will assist the parties in narrowing the issues and focusing the litigation on the essentials of the dispute.⁴⁰

Justice N.G. Gabrielson of the Saskatchewan Court of Queen’s Bench noted that reserving trial dates is especially important in cases requiring lengthy trials, as it can become difficult to book large blocks of court space and judicial time when trial dates are not set well in advance. Fixed date trials that can only be moved in extraordinary circumstances generally force parties to operate more collaboratively and sensibly in the period prior to trial.

On this point, several members of the judiciary cautioned that in at least some cases, setting trial dates too early in the process based on inadequate information or assessment can also be detrimental. If the parties have not had sufficient time or lack sufficient information to determine on a realistic basis how long a trial will take, or how much time they will require to prepare for trial, setting trial dates can become an exercise in frustration that inevitably leads to requests for adjournments. For this reason, some participants in this Project expressed the view that trial dates in case managed proceedings should generally be fixed at the stage of documentary production rather than at the close of pleadings.

Case management judges who fix trial dates early in the process should insist that the parties act thoughtfully, sensibly and on an informed basis in providing realistic estimates for the time required to prepare for and conduct trials. Parties who fail to do so should be met with meaningful consequences.

(iv) ***Theme Four – Encourage an Atmosphere of Collegiality and Cooperation***

Throughout each of the interviews, the judges and masters we interviewed recognized, and indeed emphasized, the importance of ensuring a collegial and cooperative environment in the conduct of civil litigation. In their experience, a lack of cooperation and civility is corrosive, and almost invariably results in wasted expense and unnecessary delay. Judges who manage civil proceedings can and should make their expectations in this regard known at the outset

40 The Advocates’ Society, “Best Practices for Civil Trials”, June 2015.

of their involvement, and treat with disfavour those who fail or refuse to conduct themselves properly. Judges should also recognize in this regard that their conduct in case managing proceedings is scrutinized carefully by litigants and their counsel. Judges frequently “set the tone” for proceedings they case manage. One judge noted that it is more difficult for a discourteous judge to insist that counsel act with courtesy and respect. Another noted that he makes every effort to treat counsel who appear before him in the same manner that he wanted and expected to be treated when he appeared before the courts as counsel. In this way, he is able to maintain a collegial and constructive atmosphere that enhances efficiency and effectiveness.

Although the judges that were interviewed described an expectation of cooperative behaviour from counsel, several stated that their challenge lies in addressing discourteous or uncooperative conduct when it arises. They stated that they have only limited tools available to them in that regard, and rarely use awards of costs for this purpose. Instead, they do so through direct discussions with counsel, by writing Reasons that express their displeasure (that can then be read by other members of the bench and bar), or by insisting that the lawyer’s client attend at court for case management or other sessions or hearings.⁴¹

(v) ***Theme Five - Utilize Informal Procedures***

Although some jurisdictions in Canada still tend to require that formal motion materials be filed whenever substantive matters or interlocutory disputes are being decided in the pre-trial phases of cases, there is an increasing and positive trend towards the use of informal procedures to case manage civil proceedings.

Justice Brown addressed the problems associated with needless interlocutory motions in a recent paper delivered at the Annual Meeting of the Carlton County Law Association in November 2014:⁴²

Interlocutory motions are killing our civil justice system; they stand as one of the major obstacles to securing access to civil justice. Procedural rights accorded by our Rules of Civil Procedure with the laudable goal of securing a fair hearing have morphed into a system-killing creature worthy of a painting akin to Francisco Goya’s *Saturn Devouring his Son*, which depicted the Greek myth of the Titan Cronus, or Saturn, who ate his children upon their birth fearing that he would be overthrown by them. So, too, civil motions now risk devouring the civil justice system by causing unacceptable delays and increased costs, for litigants.

41 In Ontario, Judicial Complaint Protocols were introduced in 2009 that provide procedures for Ontario judges and justices of the peace to refer incidents of lawyer or paralegal misconduct to the Law Society of Upper Canada for disciplinary purposes. Recognizing that judges may well be reluctant to initiate a formal investigative or disciplinary process against counsel who appear before them, the Judicial Complaint Protocols also allow judges and justices of the peace to request that lawyers receive mentoring from a panel of senior members of the bar. See “Judicial and Tribunal Complaints”, The Law Society of Upper Canada, online: <http://www.lsuc.on.ca/with.aspx?id=642>.

42 “A 5-Point Action Plan to Get the Civil Justice System Moving Back in the Direction of Achieving its Fundamental Goal – the Fair, Timely and Cost Effective Determinations of Civil Cases on “Their Merits”, November 21, 2014.

The use of informal procedures to resolve interlocutory disputes or issues can be highly beneficial in reducing the expense and delays associated with civil litigation. These procedures range from judges making themselves available to discuss matters by phone, to meeting with counsel in Chambers at the beginning or end of judicial days, to insisting that no formal motions concerning interlocutory disputes be filed until the matters in question have been discussed first with the case management judge on an informal basis. Formal contested motions are treated as an exceptional procedure of last resort, and are only permitted where absolutely necessary. When they are brought, they are generally decided quickly using brief written endorsements rather than lengthy judicial decisions.

Master Calum MacLeod, an experienced Case Management Master in Ottawa, indicated that he has a practice of informing parties that he is available for “real time motions” on very short notice to determine disputes concerning matters such as documentary production, the conduct of examinations or refusals to answer questions posed at discovery or during cross-examinations. His experience has been that by making himself readily available to parties, disputes of this nature occur less frequently and are resolved much more quickly when they do, in fact, arise. In a similar vein, Master MacLeod stated that making himself readily available for case conferences often reduces the need to actually hold them.

Prothonotary Roger Lafreniere of the Federal Court of Canada in British Columbia echoed these sentiments. He noted that case management has been a central fixture in the Federal Court for many years, since the introduction of Part 9 of the Federal Court Rules in 1998. Essentially all complex actions in the Federal Court are specially managed from their inception, including class actions, representative actions and aboriginal governance cases. Moreover, a case management judge is appointed in the Federal Court in any action where a requisition for a pre-trial conference has not been filed within a year of commencement of the proceeding. Prothonotary Lafreniere also noted that the informal handling of interlocutory issues or disputes has reduced substantially the volume of pre-trial motions in the Federal Court.

Associate Chief Justice Frank Marrocco of the Ontario Superior Court similarly spoke about the benefits associated with resolving interlocutory disputes and issues informally and expeditiously. Justice Marrocco stated that in the pre-trial phase of a case he likes to develop a constructive and informal atmosphere in which counsel can contact him directly by email in a non-argumentative fashion about issues as they arise with the hope they can be resolved informally without the need for formal motions. He does so by inviting counsel to meet with him in Chambers without filing motion materials, factums or briefs of authorities, and asking counsel to explain briefly their perspective on the issue in question. To the extent possible, he then “decides” the matter at issue, and generally does so on the spot, with a relatively brief endorsement but without writing comprehensive Reasons. In this way, contested motions are generally avoided, and treated very much as the exception rather than the rule.

Justice Frank Newbould of the Ontario Superior Court is particularly adept at using case management to move “real time” commercial matters along efficiently and effectively. He noted the importance of cooperation, professionalism and the use by the parties, their counsel and the court of a constructive approach to resolving issues when they arise. He generally discusses with counsel contentious issues before interlocutory motions are brought, and has an enviable record of

resolving interlocutory disputes without formal motions. Justice Newbould has used the One Judge Model on a number of occasions, and is well known for insisting that counsel conduct themselves sensibly and fairly. He strongly disfavours conduct that falls below the requisite mark.

The use of informal procedures is an increasingly important attribute of effective case management and, alone, goes a considerable distance toward avoiding unnecessary expense and delay while promoting an atmosphere of civility.⁴³

(vi) ***Theme Six – Case Management is Not One Size Fits All***

The theme that was expressed most consistently by almost all members of the judiciary throughout Canada was the importance of using flexible case management procedures that can be adapted to suit the needs of particular cases. Case management is not required in all cases, and there is no “one size fits all” approach that must be followed in every case where case management is utilized. Case management cannot be approached as a set of rules that judges must apply in every case. Even the best practices described above will not always be appropriate in every case where case management is utilized. Members of the judiciary emphasized that each case is different and may require different levels of support and direction. What might work well in one case may not work well in another. In this regard, Justice MacDonald of the Family Division of the Nova Scotia Supreme Court noted that members of the bench and bar need to ensure they do not fall victim to the misapprehension that procedure is as important as substance. Slavish adherence to procedure is not the objective of case management. Rather, the fair, effective and efficient resolution of disputes is the goal

B. Other Views Emerging from the Canadian Case Management Project

Several judges cautioned against the use of case management to enable members of the judiciary to micro-manage cases, stating that over management can be as harmful as inadequate management. Proportionality was cited repeatedly as a key principle that should be used in devising and implementing case management procedures, and the lens through which virtually all pre-trial procedures should be viewed.

Despite the recognized benefits associated with case management, a number of judges expressed the view that there remains “reluctance” and “misunderstanding” on the part of at least some members of the judiciary concerning the use of case management, which is impeding its widespread adoption and use. Although many judges have a keen interest in the use of case management and are prepared to experiment with innovative approaches and techniques, others have little or no interest in doing so. Their reservations appear to stem from concerns about wasting scarce judicial resources on the use of procedures they have little experience with or enthusiasm for.

Multiple judges noted with regret that the worldwide technological revolution that has changed profoundly the way in which people live and work in Canada has had much less of an impact on

⁴³ Interestingly, in January 2015, the Rules of Practice for the New York Supreme Court Commercial Division were revised to allow more informal procedures to be utilized in an attempt to resolve discovery related disputes. The Rule amendment allows attorneys to exchange letters with the court following which a telephone conference will be scheduled to attempt to resolve the dispute, rather than resorting to a formal motion. See Rule 14 of the Rules of Practice, Section 202.70, Rules of the Commercial Division of the Supreme Court, online at <<http://www.nycourts.gov/rules/trialcourts/202.shtml#70>>.

the administration of justice in most judicial systems and court houses. Regrettably, technological advances that are readily available to lawyers and their clients in preparing cases have generally not been made available to judges who are responsible for managing and deciding those cases. There can be little doubt that efficient and effective case management would benefit from providing members of the judiciary with “real time” and readily available access to current information concerning cases they are responsible for. Electronic filings are easier to access and work with than paper filings in number of important respects.

In this regard, Justice Brown noted in his recent paper to the Hamilton Bar Association that the “outdated legacy case information systems” used by the Ontario courts “are severely impeding the delivery of justice”. This is so for at least two reasons. First, those information systems do not provide the tools that judges and court administrators need to manage and schedule judicial time in an effective and efficient fashion. Second, they lack the capability to support electronic filings and document management. As a result, litigants and others cannot file or access documents remotely or electronically, and instead are forced to work with paper documents at substantial increased expense. Justice Brown concluded that the Ontario courts “lag dangerously behind American courts in the state of their court technology systems”, by as many as 20 years. This is so even though the necessary technology is readily available:

Simply put, we don’t have a “Things” problem; the technology Things are all there. We have a “Culture” problem.

In this province, we remain stuck in a culture that fears improving court technologies... We must change that culture. We need to throw open our windows on how the rest of the world is using IT in their courts, let the light shine in, dispel the ghosts of the past, and have the Bench, Bar and provincial government move ahead to modernize our court technology systems.

One can only hope that governments in various regions of Canada will take seriously the important goal of ensuring timely and affordable access to justice, and will take the necessary steps to provide members of the judiciary with the necessary technology (and other support) required to ensure that that goal can and will be realized.

Although a broad consensus emerged among members of the judiciary concerning each of the case management techniques listed above, varying opinions emerged on a number of related topics. For example, some judges were in favour of conducting regular case conferences to discuss the merits of pending disputes for the purpose of moving matters forward, complying with timetables and causing parties and their counsel to focus on potential settlements at relatively early stages of cases. Other judges refrain from commenting on the merits of disputes, and instead only utilize case conferences to identify and resolve interlocutory disputes or procedural issues when they are asked to do so by the parties or their counsel.

C. Canadian Case Management Rules

These divergent views concerning the proper use of case management may, in part,

be the result of varying approaches to case management reflected in the applicable Rules of Court of various provinces and territories.

For example, in Manitoba, unless the case falls under Rule 20A (governing expedited actions) case management is only available where both parties consent to its use.⁴⁴ This, in turn, informs the role judges in Manitoba feel they can or should play in a case managed case. Chief Justice Glenn Joyal and Associate Chief Justice Shane Perlmutter of the Manitoba Court of Queen's Bench noted that the consensual nature of case management in Manitoba often acts as a restraint on judicial activism.

Interestingly, extensive amendments to the Manitoba Queen's Bench Rules are in the process of being formulated. Those amendments are expected to be in force in late 2016 or early 2017. The amendments will represent a substantial change to the pre-trial conference procedures currently in force in Manitoba. The proposed new rules relating to pre-trial conference procedures will allow any party to a civil action to arrange for the scheduling of a pre-trial conference at any time after the close of pleadings. The guiding principle under the proposed new rules will be proportionality. Pre-trial conference judges will have much of the same authority and most of the powers and responsibilities as "case management judges" in other jurisdictions. A separate set of even more extensive "case management" rules will apply in complex commercial cases.

In Quebec, prior to amendments to the *Code of Civil Procedure* that were implemented in January 2016, case management was the exception, rather than the rule. Cases were case managed only when the Chief Judge or Justice determined that case management was warranted due to the nature or complexity of the proceedings, or in cases where peremptory time limits were extended.⁴⁵ This was referred to as "special case management".⁴⁶

The January 1, 2016 amendments to the *Code of Civil Procedure* expanded the role of case management, and introduced case management conferences that can be convened by the court at its own initiative or at the request of the parties.⁴⁷ Nevertheless, special case management remains largely restricted, and is available only where the Chief Justice or Judge orders it.⁴⁸

By contrast, the very hallmark of the Commercial List of the Ontario Superior Court in Toronto is case management. The Commercial List is comprised of a small number of senior judges with particular expertise in commercial matters. All judges in the Commercial List are responsible for case managing complex civil disputes, and are singularly effective at moving "real time" matters forward efficiently and effectively. In doing so, they utilize many of the case management techniques identified in this Report and in the Working Smarter Report of the ACTL and the IAALS.⁴⁹ As one might expect, judges we interviewed who preside in the Commercial List tended to be more activist and progressive than at least some judges in other jurisdictions.

44 Rule 20A governs expedited actions. Expedited actions are those involving claims of less than \$100,000; however, Rule 20A may apply to actions involving claims exceeding \$100,000 where ordered by the court, or with consent of the parties. See Rule 20A(6).

45 Quebec, *Code of Civil Procedure*, CQLR c-25,01, at Article 151.11.

46 *Ibid.*

47 Quebec, *Code of Civil Procedure*, CQLR c C-25.01, at Articles 153-156 and 158-160.

48 Quebec, *Code of Civil Procedure*, CQLR c C-25.01, at Article 157.

49 Consolidated Practice Direction Concerning the Commercial List, Part XIII, R. 34, online at <<http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/commercial/>> [*Commercial List Practice Direction*].

In British Columbia, case management occurs on a case-by-case basis pursuant to a Practice Direction adopted by the Supreme Court of British Columbia in 2010.⁵⁰ This represents a change from an earlier rule that required all civil actions with an estimated trial length of 20 days or more to be case managed. The 2010 B.C. Practice Direction brought the B.C. practice in line with the practice in Toronto, which had also undergone a similar change. Rule 77, which was rolled out incrementally in Ontario between 1997 and 2003 in Ottawa, Windsor and Toronto, contemplated the automatic assignment of a case management team to every case.⁵¹ The mandatory nature of Rule 77, combined with unforgiving and unrealistic timelines and a disproportionately large number of cases in the Toronto region, resulted in an abundance of motions, adjournments and overworked case management staff.⁵² As a result, on January 1, 2010, Rule 77 was amended to apply only to those cases that have a demonstrated need for case management.⁵³

Although there is a clear lack of uniformity in case management practices across Canada, there are at least three key similarities in approaches that emerge from a review of the case management rules in various jurisdictions. *First*, a majority of provinces have Rules that expressly embrace and enforce the principle of proportionality.⁵⁴ *Second*, except in limited circumstances, case management is not required in all cases, but instead may be requested by counsel or recommended by judges at their discretion.⁵⁵ *Third*, the Rules of a number of provinces presume that the case management judge will not be the trial judge.⁵⁶ We address below the vexing issue of whether that presumption should now be reconsidered, under the heading The One Judge Model.

D. The Importance of Proportionality

Despite the variance in Rules governing the use of case management in various jurisdictions, there is clearly a trend throughout Canada towards an increasing focus on the use of proportionality as a governing principle. Legislatures, Rules Committees and Law Reform Commissions have recognized that one of the central goals of case management should be to ensure that civil litigation is conducted on a proportionate basis at every stage. Recent changes in provincial Rules of Civil Procedure reflect this development.

50 *Court Rules Act*, Supreme Court Civil Rules, B.C. Reg. 168/2009, at Part 5 [*BC Court Rules*].

51 The Honourable Warren Winkler (then Chief Justice), Evaluation of Civil Case Management in the Toronto Region, “A Report on the Implementation of the Toronto Practice Direction and Rule 78”, (February 2008) at 6-7, 11 [*Report on Rule 78*].

52 *Report on Rule 78*, *supra* at 13-14.

53 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 at Rule 77 [*Ontario Rules of Civil Procedure*]. The amendment of Rule 77 which came into force on January 1, 2010 also marked Rule 78’s revocation. Rule 78 applied to cases in the Toronto region between December 31, 2004 and January 1, 2010 and made case management in the Toronto region more flexible. Case management was no longer universal, but rather applied only to those cases that truly required court intervention.

54 See for example *BC Court Rules*, *supra* at Rule 1-3(2); *Alberta Rules of Court*, A.R. 124/2010 at Rule 1.2(4); Saskatchewan Queen’s Bench Rules, Sask. Gaz. December 27, 2013, 2684 at Part 1, 4; Manitoba Court of Queen’s Bench Rules, Man. Reg. 553/88 at Rule 20A(5), *Ontario Rules of Civil Procedure*, *supra* at Rules 1.04(1) and (1.1); Quebec *Code of Civil Procedure*, CQLR c C-25.01 at Article 18; New Brunswick, *Rules of Court*, N.B. Reg. 82-73 at Rule 1.02.1

55 See for example *BC Court Rules*, *supra* at Rule 5-1; *Ontario Rules of Civil Procedure*, *supra* at Rule 77; *Nova Scotia Civil Procedure Rules*, November 19, 2008 at Rule 26.

56 *Alberta Rules of Court*, A.R. 124/2010 at Rule 4.15; Saskatchewan, *Queen’s Bench Rules*, Sask. Gaz., December 27, 2013, 2684 at Part 4, 4-7(2); *Ontario Rules of Civil Procedure*, *supra* at Rule 37.15(2).

By way of example, on January 1, 2010, amendments to the Ontario *Rules of Civil Procedure* came into force that specifically introduced proportionality through Rule 1.04(1.1)⁵⁷ This Rule states:

(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.⁵⁸

Rule 1.04(1.1) goes further than the organizing principle that had previously been recognized for many years in Rule 1.04, which requires that Ontario's Rules be construed "to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits".⁵⁹

On July 1, 2010, a new set of Rules governing civil procedure came into force in British Columbia. The principle of proportionality was recognized explicitly in Rule 1-3(2),⁶⁰ and Part 5 of the Rules introduced a new case planning regime.⁶¹

In 1996, Manitoba introduced Rule 20A, which allowed expedited actions in cases up to a certain monetary limit.⁶² After years of public consultations, amendments to Rule 20A came into force on April 1, 2012. One of the key changes introduced by these amendments was Rule 20A(5), which introduced proportionality to the case management regime.⁶³

These recent changes to the various Rules of Court emphasizing and requiring proportionality, coupled with the Supreme Court of Canada's demand in *Hryniak* that the Canadian legal community adopt a culture shift in the conduct of civil litigation, render it appropriate to reassess the presumption that as a general matter the case management judge should not act as the trial judge. As stated above, the American experience is quite different, and illustrates the numerous advantages associated with the One Judge Model.

VII. The One Judge Model

A. The Underlying Assumption of Case Management in the American Judicial System

One of the fundamental assumptions underlying the Working Smarter Report of the ACTL and the IAALS – and indeed, the case management regime used generally in the U.S. – is that a single judge takes "ownership" of a given case from the time of its filing to its ultimate disposition at the trial level.

The One Judge Model utilized in the American civil justice system is a legacy of

57 *Courts of Justice Act*, O. Reg. 438/08.

58 *Courts of Justice Act*, O. Reg. 438/08, at 2 Rule 1.04(1.1).

59 *Ontario Civil Procedure Rules*, *supra* at Rule 1.04(1).

60 *BC Court Rules*, *supra*.

61 *BC Court Rules*, *supra* at Part 5.

62 Man. Reg. 229/96.

63 Queen's Bench Statutory Rules Committee, "Notice Court of Queen's Bench of Manitoba Re: Amendment to Court of Queen's Bench Rules", December 22, 2011, online at <<http://www.manitobacourts.mb.ca/court-of-queens-bench/procedure-rules-and-forms/notices-and-practice-directions>> Man. Reg. 215/2011.

amendments made to the American Federal *Rules of Civil Procedure*, almost 80 years ago, in 1938.⁶⁴ For decades, the prevailing attitude in the U.S. has been that judicial continuity and familiarity with a given case is fundamental to the efficient and proper administration of justice. For this reason, the One Judge Model has been utilized widely in the U.S. and remains firmly in place today. The *Civil Caseflow Management Guidelines* – the product of a comprehensive study launched by the IAALS aimed at mitigating excessive cost and delay – prescribes that a single judge preside over a case from start to finish because

[t]he use of a single judge assigned to a case from beginning to end provides the parties in the litigation with a sense of continuity. With respect to discovery issues and disputes, the same judge who handles the pretrial and trial matters is in a better position to resolve discovery matters because of his or her familiarity with the issues, the parties, the history of the case, and the relationship between the parties. For cases that go to trial, the judge who handled all pretrial and discovery matters in a case is in a better position to try the case, based on a familiarity with the issues, the parties, and the history of the case.⁶⁵

This approach is generally well-received by various participants in the civil justice system in the U.S. A recent Litigation Survey conducted by the American Bar Association concluded that approximately 85% of respondents supported the notion of having a single judge oversee a case from start to finish.⁶⁶

In the U.K. there is also support for the idea of having a single judge oversee a case from start to finish at the trial level. Professors John Peysner and Mary Seneviratne of Nottingham Law School recently undertook a qualitative study involving interviews of a wide range of practitioners, judges and court officers. The results of this study were presented in their research paper entitled “The Management of Civil Cases: the Courts and Post-Woolf Landscape”.⁶⁷ The study specifically raised the question of whether utilizing the same judge as the case management judge and trial judge would make case management more efficient and effective. The responses indicated that there was agreement in principle that having the same judge act as the case management judge and trial judge would improve the efficiency and effectiveness of the civil justice system. Reservations were expressed, however, about whether and how such a system would work from an administrative perspective.⁶⁸

64 Gensler, Steven, “Judicial Case Management: Caught in the Crossfire”, (2010) 60 Duke LJ 669 at 689. Since 1938, Rule 1 of the Federal Rules of Civil Procedure has required that the Rules be construed to “secure a just, speedy and inexpensive determination of every action and proceeding”. Further amendments to these Rules were effected in 1983 and again in 1993 that strengthen the role of the court in administering cases prior to trial so as to improve efficiency and reduce cost and delay.

65 The Institute for the Advancement of the American Legal System, “21st Century Civil Justice System: A Roadmap for Reform Civil Caseflow Management Guidelines” (IAALS, 2009) at 8-9, online at <http://iaals.du.edu/sites/default/files/documents/publication_civil_caseflow_management_guidelines2009.pdf>

66 The American Bar Association Section of Litigation Member Survey, “Detailed Report” (The American Bar Association, 2009) at 11.

67 Peysner and Seneviratne, *supra*.

68 *Ibid* at 48.

B. Efficiencies Associated With the One Judge Model

In June 2006, the Attorney General of Ontario assigned the Honourable Coulter Osborne with the formidable task of reviewing the civil justice system in Ontario and making recommendations that, if adopted, would improve access to justice for Ontarians. In 2007, the preliminary results of this review were presented in Mr. Osborne's "Summary of Findings and Recommendations" (hereinafter the "**Osborne Report**").⁶⁹ One of the issues addressed in the Osborne Report was the benefit associated with case management conducted throughout the pre-trial phase of a proceeding by a single judge:

Litigation management by a single judge or master for those cases that require it, as permitted under rule 37.15, has several benefits. It saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue. I was advised that this has been the experience of many lawyers who appear regularly before Master R. Beaudoin who, until recently, was the sole case management master dealing with case managed cases in Ottawa.⁷⁰

It is hard to see any principled reason why these same benefits would not be realized to even greater effect if the same judge that case manages a civil proceeding during the pre-trial phase of the case also presides over the same proceeding at trial. In fact, judges in Canada who have had the experience of acting as both the case management and trial judge in the same case confirmed exactly that.

These judges noted that in circumstances where they had acted as the case management judge and trial judge in the same case, they were able to ensure the consistent progression of the case through to trial. They emphasized that the case proceeded more efficiently at trial as they were already familiar with the issues in the case by the time the trial started, as well as the parties and their counsel. They were able to make rulings more easily prior to trial that affected the conduct of the trial, for the purpose of ensuring that the trial proceeded efficiently, fairly and on a timely basis. Moreover, their presence throughout the matter had the important beneficial effect of deterring parties (or their counsel) who might otherwise have been inclined to misbehave in the period prior to trial from doing so.

In this regard, Associate Chief Justice Marrocco of the Ontario Superior Court noted that the One Judge Model "eliminates a lot of nonsense". This is so because when parties (or their counsel) know that the case management judge will also be their trial judge, they will generally be less inclined to "spend their chips" before the judge who will decide the merits of their dispute, including by taking unnecessarily contentious positions, bringing interlocutory motions that could and should have been avoided, and more generally, engaging in tactical game-playing. Parties (or

⁶⁹ The Honourable Coulter Osborne, Civil Justice Reform Project, "Summary of Findings & Recommendations" (November 2007), online at <www.attorneygeneral.jus.gov.on.ca/English/about/pubs/cjrp> [*Osborne Report 2007*]. Mr. Osborne was a Justice of the Ontario Court of Appeal for many years.

⁷⁰ *Osborne Report 2007, supra* at 88.

their counsel) who might be prepared to tolerate the risk of alienating a case management judge who disappears from a matter prior to trial are unlikely to incur the same risk of offending their trial judge.

Justice Brown made a similar point in advocating the adoption of the One Judge Model in his paper delivered to the Hamilton Bar Association, referred to above:

Court customers are also calling for changes in how judicial time is assigned. They are asking for the adoption of a system similar to the judicial “docket system” of case management used by the United States District Courts. Under a “docket system”, a case is assigned to one judge to manage from the day it enters the court system until its ultimate adjudication on the merits. The docket system seeks to eliminate the “musical chairs” problem we currently see with civil cases, including family cases, where many differing judges touch a case before it is decided. By assigning one judge to a case for its lifetime, pre-hearing disputes will be minimized, and no doubt prospects for an early settlement would increase.

Other judges also expressed the view that trial judges who have no involvement in a matter prior to trial may have difficulty fully understanding why a case management judge made particular rulings along the way during the pre-trial phase of the case. The subtle day-to-day understanding that comes with living with a matter as it progresses may be lost if the role of the case management judge comes to an end prior to trial.

Further, it was noted by one judge that the important job of assessing credibility at trial can be rendered more difficult when judges have no interaction with the parties prior to trial. It should perhaps be noted that the judge who expressed this opinion was a judge sitting in the family division. Family cases, by their nature, generally involve more direct interaction with the parties prior to trial. The resolution of those cases may be more dependent on assessments of the credibility of the parties and less on the credibility of third party witnesses called to testify at trial.

The One Judge Model has the added benefit of providing a stronger incentive for judges to invest time and effort in the matter in the pre-trial phase of the case. As noted above, increased time spent with the matter at the outset may ensure that the case proceeds more efficiently and effectively.

Fundamentally, the time has come to recognize that litigants no longer have the “right”, and should not expect, to have their cases decided at trial by pristine judges who have had no involvement whatsoever with the matter in question prior to trial. Proceeding in such a fashion is certainly not necessary, and in many cases may well not be appropriate. That sort of judicial model should now be recognized for what it is – namely an outmoded luxury that the system of civil justice can no longer afford.

In order for the One Judge Model to work properly, the case management judge must preserve the important distinction between “case management conferences” and “settlement conferences”. Case management conferences can involve anything from setting timelines and

deadlines to deciding contested interlocutory matters or motions. Settlement conferences, on the other hand, are conducted for the specific purpose of discussing the strengths and weaknesses of each party's case as well as their willingness to compromise their positions in an effort to find common ground. The judge in the One Judge Model must be careful to ensure that the dividing line between case management discussions and settlement discussions is respected.

C. Concerns with the One Judge Model

Perhaps not surprisingly, some of the judges we interviewed expressed misgivings about the One Judge Model. The concern cited most frequently was that of bias: both in terms of the case management judge being at risk of actually becoming biased in the period prior to trial, but also in terms of the perception of bias that litigants might develop during the pre-trial phase of a case.

Several judges expressed the concern that they would feel more constrained and less able to be frank with the parties in their capacity as case management judges if they knew they were also responsible for presiding over a matter at trial because litigants might develop concerns about their willingness or ability to act fairly and dispassionately in deciding the matter on the merits.

These judges highlighted the distinction identified above, namely that in the U.S. far more civil disputes of varying shapes, sizes and descriptions are decided before juries than in Canada. As a result, questions of a judge becoming biased, or litigants forming a perception of bias, are of greater concern in Canada. These judges recognized the age old principle that justice must not only be done, but also must be seen to be done.

It is perhaps significant that none of the judges who expressed these concerns about the One Judge Model had actually used that Model. By contrast, other judges who favour the use of this Model have done so. These include, among others, Associate Chief Justice Marrocco and Justice Newbould of the Ontario Superior Court.

Justice Newbould's response to the concern of actual or perceived bias was sensible and straightforward. He indicated that the One Judge Model should work on a presumptive basis. Cases that are designated for case management should proceed on the expectation that as a general matter, the same judge will normally act as the case management judge and trial judge. However, that presumption would be displaced in particular cases wherever necessary. In any case where a case management judge feels that in view of matters that may have arisen prior to trial she cannot or should not sit as the trial judge, the matter would be assigned at the judge's request to a different judge for trial. The same thing would happen in cases where litigants express legitimate concerns based on matters that may have occurred prior to trial during the case management process.

The practical reality is that concerns of this nature are unlikely to arise in the vast majority of cases.

Concerns of actual or perceived bias are important, but should not result in the wholesale rejection of an innovative judicial model that carries with it the significant and much needed benefits referred to above. As the Supreme Court of Canada noted in *R. v. Teskey* in 2007, and the Ontario Court of Appeal also noted very recently in *Stuart Budd & Sons Limited v. IFS Vehicle*

Distributors ULC,⁷¹ judges in Canada benefit from a “presumption in integrity”, which acknowledges that they are bound by their oaths and will carry out their duties in accordance with their legal responsibilities. This presumption is well-earned, and should be respected unless it is displaced in extraordinary cases. Judges in Canada are appointed, rather than elected. Virtually without exception, they are responsible and respected jurists and take their judicial oaths very seriously. As the Supreme Court made clear in *Hryniak*, meaningful and innovative reforms are essential if the goal of ensuring timely and affordable access to justice is to be achieved. The adoption in Canada of the One Judge Model, on the basis described above, might well assist in achieving this important objective.

D. Acceptance of the One Judge Model in Canada

Although there was divided support among members of the judiciary for the One Judge Model, the Supreme Court of Canada recently signalled its acceptance of such a practice, albeit in a different context. In *Hryniak*, the Supreme Court paid careful attention to the discussion of case management in the Osborne Report and held that judges who hear and dismiss summary judgment motions should generally preside over those cases at trial:

Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as a trial judge. I agree with the Osborne Report that the involvement of a single judicial officer throughou

saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue. [citation omitted]⁷²

As stated above, although there are many reasons to embrace the One Judge Model, resistance remains among some members of the bench and bar towards implementing such a significant change, even on a presumptive basis. Hesitancy in the legal community to embrace change has arisen on many occasions over the years, however, during debates concerning the use of case management. As was noted by U.S. District Judge Smith:

Acceptance of case management into a national legal culture is not always accomplished easily. Many view it as a threat to long accepted legal and cultural norms; however, during the past four decades, many American judges believe that their efficiency has been significantly increased through the use of active judicial management of cases. Judges, lawyers and litigants now give testimonial to case management effectiveness, although significant opposition existed during the earlier years of implementation. Does that mean the U.S. courts are without problems – of course not. But it does

71 2007 SCC 25 and 2016 ONCA 60, respectively.

72 *Hryniak*, *supra* at para. 78 citing the Osborne Report at 88.

mean that the downward spiral of logjam has been reversed in great part. It also means that we are less afraid of new systems, new methods and new processes to assist us in the delivery of prompt and fair resolution of civil disputes.

...

It has taken approximately four decades, but I believe that the processes just discussed have substantially reduced the excessive litigation cost and undue delay in the resolution of civil cases in the federal trial courts in the United States. Ninety-five percent of our civil cases are generally resolved without trial. Although some are disposed of by dismissal or summary judgment, most cases are resolved by voluntary settlement. Effective case management tailored to each particular case enables the parties to evaluate their positions sooner, thereby reaching settlement sooner and less expensively.⁷³

Despite the general reluctance of the legal community to embrace change, a shift toward the adoption of the One Judge Model may well be taking hold in Canada. This is evidenced not only by the Supreme Court's decision in *Hryniak*, but also by changes in the Rules of Court that have now been implemented in several jurisdictions in Canada. Currently, four territories or provinces have enacted Rules that specifically permit the case management judge to preside at trial without requiring the consent of the parties.

The first Canadian jurisdiction to adopt this approach was the Northwest Territories, in the *Rules of the Supreme Court of the Northwest Territories*, which came into force on April 1, 1996. Rule 290 of these Rules provides that "the judge who presides at a conference or who otherwise has responsibility for case management in respect of an action or proceeding is not seized of the action or proceeding and the trial may be heard by that judge or any other judge." (emphasis added).⁷⁴ This stands in stark contrast to the majority of jurisdictions in Canada which either offer no concrete guidance on the issue or have enacted rules explicitly prohibiting the case management judge from presiding at the trial "except with the written consent of all parties".⁷⁵

Newfoundland was the next jurisdiction to allow the case management judge to act as the trial judge with the introduction of case management in Rule 18A. This Rule came into force on January 1, 2006.⁷⁶

In the original formulation of Rule 18A, the case management judge was not allowed to preside at trial:

18A.09. (1) The case management judge and, where the alternate case management judge has been actively involved in the matter, the alternate

73 *Smith, supra* at 7. Also cited in B.C. Justice Review Task Force, "Proposed Rules of Civil Procedure of British Columbia Supreme Court, September 2008 at 21.

74 *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. R-010-96, s. 290.

75 See for example *Alberta Rules of Court*, A.R. 124/2010 at Rule 4.15; Saskatchewan, Queen's Bench Rules, Sask. Gaz., December 27, 2013, 2684 at Part 4, 4-7(2); Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 at Rule 37.15(2).

76 *Newfoundland and Labrador Regulation* 84/05.

case management judge, shall not sit on the trial of any proceeding that has been subject to the case management order.⁷⁷

However, on the eve of Rule 18A coming into force, this provision was amended to allow case management judges to preside at trial:

18A.09. (1) A judge who acts as a case management judge or alternate case management judge may preside at the trial of the proceeding. (emphasis added).⁷⁸

The Yukon followed the Northwest Territories and Newfoundland in implementing rule changes that specifically permit case management judges to preside at trial in the absence of the consent of the parties. In the Yukon, the *Rules of Court* came into effect on September 15, 2008.⁷⁹ The Yukon Rules specifically provide in Rule 36(7) that “the case management judge may preside at the trial or hearing” (emphasis added).⁸⁰

The Practice Direction of the Commercial List in Toronto provides that the case management judge is to hear all substantive components of the proceeding. Although the Practice Direction is silent on the issue of the case management judge sitting as the trial judge, any number of judges of the Commercial List have done so. The experience to date has been highly positive.

Article 157 of the 2016 Quebec *Code of Civil Procedure*, dealing with “special case management”, provides that case management judges will dispose of all pre-trial motions or applications, will hear pre-trial conferences and may also preside over hearings and render judgments on the merits.⁸¹

Similarly, class proceedings legislation in a number of provinces allow judges who preside over certification motions or applications to preside over subsequent common issues trials, without the consent of the parties. The class proceedings legislation in British Columbia, Saskatchewan, Nova Scotia, New Brunswick and Newfoundland and Labrador all fall into this category.⁸² Only Ontario, Alberta and Manitoba require the consent of the parties to allow the judge who hears a certification application to preside at the trial of certified common issues.

E. Measurement

If the changes recommended in this Paper are implemented, consideration should be given to the collection of data and information that will permit a rigorous and objective assessment to be made of the impact these changes have had on the administration of justice in affected

77 *Ibid.*, at 18A.09.

78 Newfoundland and Labrador, *Rules of the Supreme Court*, 1986, S.N.L. 1986, c. 42, Sch. D. at Rule 18A.09.

79 R. S. Veale, J., *Introduction*, online at <<http://www.yukoncourts.ca/courts/supreme/ykrulesforms.html>>.

80 *Rules of Court*, Yuk. Reg. O.I.C. 2009/65, s. 36(7).

81 Quebec, *Code of Civil Procedure*, CQLR c C-25.01, at Article 157.

82 British Columbia, *Class Proceedings Act*, RSBC 1996, c 50, Saskatchewan, *The Class Actions Act*, SS 2001, c. C-12.01, Nova Scotia, *Class Proceedings Act*, SNS 2007, c 28, New Brunswick, *Class Proceedings Act*, RSNB 2011, c 125, Newfoundland & Labrador, *Class Actions Act*, SNL 2001, c C-18.1.

Note that Prince Edward Island, the Yukon, Nunavut and the Northwest Territories do not currently have class proceedings legislation.

jurisdictions. Anecdotal information is certainly helpful, but hard data is generally more useful and reliable and may prove to be invaluable in efforts that may be undertaken in the future to improve the efficiency and effectiveness of the civil justice system throughout Canada.

VIII. **Conclusion**

In *Hryniak*, the Supreme Court of Canada challenged the Canadian legal community to adopt innovative approaches with a view to reducing the cost and delay associated with the civil justice system, so as to ensure timely and affordable access to justice. The use of innovative and flexible case management approaches and techniques in appropriate cases will assist in achieving these important goals.

Leading Canadian judges and masters who are recognized as being particularly adept at the use of case management to move matters forward efficiently and effectively have shared with the Judiciary Committee of the ACTL the benefit of their wisdom and experiences. This Report summarizes their views, raises proposed changes for consideration and is intended to serve as a building block in the development by members of the bench and bar in Canada of a unified approach to the use of case management in civil litigation.

APPENDIX A

The Canadian Case Management Project was led by Kent Thomson of the Davies, Ward firm in Toronto, with the assistance of a number of Canadian Fellows of the ACTL, including Geoff Cowper, Tom Curry, Peter Doody, Blair Graham, Olivier Kott, Gord Kuski and Terrence O’Sullivan (the “**Canadian Task Force**”). Justice Jim Williams lent valuable assistance in putting the Canadian Task Force in contact with members of the judiciary in Eastern Canada.

This Report is based on a review of past studies of case management in Canada, the experience with case management in the United States, the United Kingdom, New Zealand and elsewhere, and on interviews conducted by members of the Canadian Task Force of judges and masters throughout Canada. This Appendix describes the process that was followed in conducting these interviews.

The Canadian Task Force identified members of the judiciary who are recognized as particularly skilled users of case management. The Canadian Task Force then conducted interviews with these judicial leaders. The Canadian Task Force decided to use the Working Smarter Report prepared in the U.S. by the ACTL and IAALS as the starting point for these interviews. The Working Smarter Report was distributed to each of the judicial leaders interviewed to help facilitate discussions during these interviews.

The interview guide used in the U.S. in preparing the Working Smarter Report was adapted and used by the Canadian Task Force as the basis for conducting interviews of members of the Canadian judiciary. At a high level, these interviews focussed on four key issues:

1. How is Case Management used, if at all, in your jurisdiction?
2. Does Case Management assist in improving the efficiency of, and reducing the delays, costs and expenses associated with civil litigation?
3. What techniques can be used to make Case Management more effective in civil cases?
4. Are there pitfalls associated with Case Management that should be avoided?

Interviewers were also free to ask other questions they considered appropriate.

The logistical challenges involved with conducting interviews across various jurisdictions in Canada meant that it was not feasible to have all interviews conducted by one interviewer. Instead, different interviews were conducted by different members of the Canadian Task Force. Also, unlike in the U.S., Fellows of the ACTL in Canada did not have the benefit of the IAALS (or its Canadian equivalent) in conducting interviews in Canada or in compiling this Report. The interviewers took notes of the interviews they conducted, and these were sent to Kent Thomson to compile and review.

This Report was finalized and issued by the ACTL after it was reviewed by: (i) the various Fellows of the ACTL who participated in the interview process referred to above; (ii) members of the judiciary who were interviewed in Canada; (iii) members of the Judiciary Committee of the ACTL; and (iv) members of the Executive of the ACTL, including its Board of Regents.

APPENDIX B

Working Smarter Not Harder Executive Summary

In 2012, the American College of Trial Lawyers (“ACTL”) Task Force on Discovery and Civil Justice, the ACTL Judiciary Committee, ACTL Jury Committee, ACTL Special Problems in the Administration of Justice Committee, and IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, undertook a study on practices and methods for pretrial management of civil cases that might reduce cost and delays for litigants while saving judicial time and resources. This report is based on personal interviews with approximately 30 state and federal trial court judges, from diverse jurisdictions across the country, who were identified as being outstanding case managers and whose civil case management experience can serve as a model for others.

Five general themes emerged from the interviews, with numerous specific practices and techniques discussed further in the report.

Assess a case and its challenges at the outset. Use active and continuing judicial involvement when warranted to keep the parties and the case on track. There was strong consensus among the judges interviewed that becoming involved at the earliest stage of a case is critical. Some judges review cases as soon as they are assigned. Others hold off until the time of the initial case management or Rule 16 conference. Virtually all interviewed judges, however, agreed that a small expenditure of time at the very beginning of a case saves significantly more time as the case progresses.

Convene an initial case management conference early in the life of the case. Discuss with the parties anticipated problems and issues, as well as deadlines for major case events. Initial conferences provide a valuable opportunity for judges to get a feel for the relative complexity of the case and the relationships among the parties and their counsel. By spending time in advance familiarizing themselves with the pleadings, judges can establish priorities for discovery. By obtaining input from counsel about the realistic timing for trial and for various pretrial events—such as amendment of pleadings, joinder of additional parties, discovery cutoffs, and expert disclosures—judges can establish a firm trial date and work backwards to set necessary pretrial deadlines that will assist in moving the case forward expeditiously. By limiting continuances to serious and unanticipated circumstances, judges can work toward meaningful and timely resolution in processing the case.

Reduce and streamline motions practice to the extent appropriate and possible. Rule quickly on motions. The judges emphasized that motions practice drives cost and delay in the civil pretrial process. Many judges aim to resolve motions, especially discovery disputes, informally. This obviates the need for written submissions and focuses on oral presentations. The judges interviewed also overwhelmingly believe that prompt rulings on motions, including those announced from the bench, can dramatically expedite progress in cases, reduce litigants’ expenses, save judicial time and resources, and enhance ultimate resolution.

Create a culture of collegiality and professionalism by being explicit and up front with lawyers about the court’s expectations, and then holding the participants to them. Interviewed judges universally recognized the importance of collegiality and professionalism among counsel. Most judges interviewed make their expectations of civility explicit during the initial discussions with counsel in the pretrial process.

Explore settlement with the parties at an early stage and periodically throughout the pretrial process, where such conversations might benefit the parties and move the case toward resolution. Keeping the subject of settlement on the table expedites resolution, and periodically opening the topic for discussion

may give lawyers the cover needed, with clients and opposing counsel, to avoid the appearance of negotiating from a position of weakness.

The collective experience of these judges suggests several techniques that—used individually or together—can expedite resolution of cases with lower cost to litigants and courts. The ACTL and IAALS offer this report to share successful practices, and hope the report will spark further use of these and other practices to better serve litigants, lawyers, and the court.

This report is primarily designed to provide civil trial court judges with proven techniques used by outstanding judges for more efficient pretrial case management. Nonetheless, trial lawyers may also choose to encourage adoption of these recommendations for use in cases they are handling, in order to decrease the delays and costs of today's litigation.