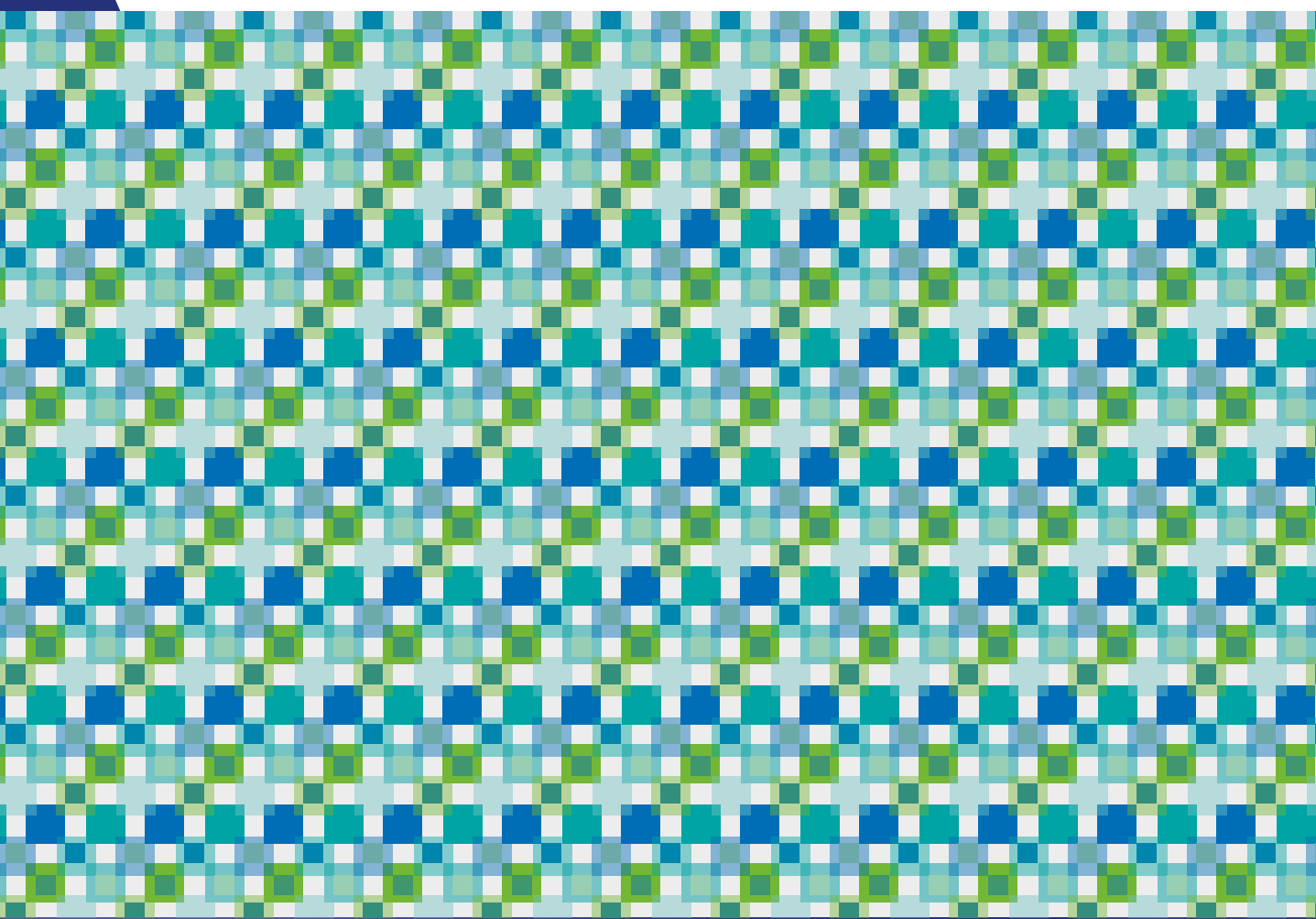
A Commonwealth Guide to Case Management

Identifying Opportunities, Challenges and Best Practice from Member Countries



The Commonwealth

A Commonwealth Guide to Case Management

Identifying Opportunities, Challenges and Best Practice from Member Countries

The Commonwealth

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Contents

Foreword

Access to justice is a basic principle of the rule of law and fundamental to upholding the values of our Commonwealth Charter, including human rights and democracy. Good case management is the backbone of an effective and efficient legal system, supporting citizens access to justice by ensuring that their voices are heard, and their rights are respected.

The Commonwealth provides a powerful platform for mutual support and collaborative action to help our countries improve case management systems by disseminating best practices and promoting principles of good case management, the use of technology, and efficient procedures.

The Office of Civil and Criminal Justice Reform, in partnership with the Civil Law Working Group, developed this *Guide* following a rigorous data collection process, wherein all stakeholders' experiences of technology in civil litigation during the COVID-19 pandemic was considered, and formed a pivotal aspect of the *Guide*. The members of the Working Group provided materials and information from their jurisdictions which are referenced in the *Guide*. It adds to the resources made available by the Commonwealth Secretariat, which also include templates, toolkits and model laws.

This is not a one-size-fits-all approach to addressing challenges in civil procedure, due to the diversity of civil procedure laws across the Commonwealth, as well as differences in resourcing capacity, technological capacity, and infrastructure.

The justice system is like a train in motion; it cannot be stopped and dismantled. Any change must be delivered while the journey is in progress. This is why justice transformation happens progressively, one piece at a time. This *Guide* is the latest contribution to the process of changing the wheels of justice for the betterment of the people across the Commonwealth.

The Right Hon. Patricia Scotland, KC
Secretary-General of the Commonwealth

Acknowledgments

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Acronyms and Abbreviations

ADR	alternative dispute resolution
AI	artificial intelligence
CanLII	Canadian Legal Information Institute
CAS	Courts Administration Service (Canada)
CLE	continuing legal education
CPR	Civil Procedure Rules
CRT	Civil Resolution Tribunal
CRMS	Court Registry Management System (Canada)
CSO	court services online
CVP	Cloud Video Platform (of the UK)
HMCTS	HM Courts and Tribunals Service (of the UK)
ODR	online dispute resolution
SCC	Supreme Court of Canada
VC	video conferencing

Introduction

Introduction

> *The confidence that citizens repose in the judicial system is in part dependent on their perception of how quickly cases are processed and the extent to which this process protects the individual's legal rights.*
>
> Hadiza S Sa'eed, Deputy Director, National Judicial Institute, Nigeria (Abuja, 2019)

Summary of objectives

The purpose of this *Commonwealth Guide to Case Management* ('the *Guide*') is to provide principled and practical guidance to the judiciary and to responsible policy-makers on justice modernisation[1] and case management. To borrow the words of Chan et al. (2021), case management 'has a broad interpretation, [referring] to the use of available procedural tools by the court to enhance efficiency and effectiveness in the management of the case at every phase of litigation'.[2] A somewhat narrower definition in the Canadian context specifies:

> *'Case management' involves early and ongoing, structured intervention by designated judges or delegated officers at various stages to ensure that individual cases move forward effectively within the court system, in the interests of all persons involved and of the broader administration of justice.*[3]

The objective of this *Guide* is to inform forward-looking best practices through a comparative analysis of member countries and to soberly align efficiency with the enduring constitutional values underlying the administration of justice.

Without a doubt, nimble, well-designed case management systems, alongside transformative technology, not only facilitate and support effective court proceedings, but also allow for the modernisation of justice.

Confidence in the administration of justice erodes when the cost of going to court in an adversarial setting outweighs the value of the underlying claim. Litigants are increasingly forced to represent themselves, as a cost-saving measure. Here enters the overarching value of proportionality as a defining feature of case management reform across Commonwealth member countries.

The immediate goal of proportionality is to attain an equilibrium between collective values (such as general access to the courts and protecting scarce public resources and judicial time) and the individual litigant's needs that are characteristic of the adversarial system.

This 'adversarial collaboration' constitutes a marked departure from the more traditional adversarial process at common law. Reforms described below at a high level of abstraction are characterised by a 'shift from party autonomy to Court management of proceedings' (Bell 2019) across the jurisdictions surveyed and beyond.[4]

The reforms' chief and common feature is rejecting 'rigid procedural formalism' (Zuckerman 2013) as an obstacle to meaningful justice, lest procedure 'stand in the way of doing justice on the merits'.[5]

Satisfying the overriding objective of proportionality in such reforms described below further involves inculcating the values of ethical – even collaborative – practice into the legal profession. This is broadly defined as 'a cooperative, interest-based approach to resolving their legal disputes', which is 'principled', 'problem-solving', 'integrative', 'cooperative' and 'mutual gains'.[6]

It stands to reason that by inching away from its overly zealous, technical, adversarial underpinnings, the legal profession may nurture a more ethical, **user-centred**, co-operative approach to the practice of law (training '**collaborative** attorneys' as an alternative or emerging practice) in certain contexts.[7]

Mindful of this context, the Guide will highlight prominent case management tools to potentially facilitate the inexpensive and efficient resolution of disputes by collating and distilling the experience of member countries at a high level of abstraction.

To this end, the following chapters will explore these related developments to impart high-level guidance and identify best practices that member countries can consider moving forward. More particularly, this Guide seeks to:

- explore comparative approaches to civil procedure rules on case management, e-filing, e-discovery and the use of technology, and identify best practices from their advantages or disadvantages (Chapters 2 and 3);

- identify common underlying philosophies of Commonwealth civil procedure laws, despite their diversity, and share best practices that could guide actors and enable just outcomes (Chapter 4);
- assist countries to address the burdens of paper-based systems by developing fit-for purpose case management systems, including electronic case management systems, where applicable;
- assist with examining case management systems to remove superfluous procedural steps and reduce the administrative burden on courts and litigants (Chapter 4);
- promote flexibility in case management systems to identify and respond to different case types and party characteristics (Chapters 4 and 5);
- provide suggestions to improve the workings and outcomes of court processes, and in so doing, assist with the just, efficient and timely disposition of cases (Chapter 5);
- generally inform member countries' strategic plans on strengthening their civil justice systems by researching the benefits and disadvantages of certain courtroom technologies, focusing on the impact on judges, lawyers and litigants (addressed throughout the guide);
- develop principles of the law of procedure and evidence for effective case management (addressed throughout the guide); and
- increase transparency by facilitating access to information, securing legal documents, and reducing opportunities for corruption within the system (addressed throughout the guide).

Accordingly, by identifying both agile and effective practices recurring across member countries and common preoccupations that arise, the Guide serves to collectively tackle shared challenges as Commonwealth countries each revisit the framework and practices relevant to modern court administration in the transformative digital age.

Certainly, 'different courts have different problems'. Yet, they all 'share the same values and the importance of professional and independent judiciaries'. Consequently, courts benefit from 'gleaning successful practices from counterparts with shared values and experiences' (Id.).

Structure of the Guide

The Guide will proceed in five parts. Chapter 1 sets the stage with a contextual introduction. To cite former Canadian Chief Justice Beverley McLachlan:

> *The pandemic revealed the cracks in our justice system, forcing a reckoning with our approaches to serving the fundamental principles of justice and to ensuring that justice can be accessed by everyone. It showed us technology can be used in myriad ways to help deliver better justice. It showed us that a stodgy system is capable of innovation. We pivoted, we innovated. We came away with the confidence that despite the problems we face, we can innovate to make the justice system more accessible when this is all over. (McLachlin, 2021)*[8]

Simply put, ultimately this means ensuring that litigants' trust in the administration of justice is not overwhelmed or subverted by the arduous costs of navigating its procedural, technical complexity.

Chapter 2 proceeds to specifically address transformation through the digitisation of courts, ('justice technologies of the future') as part of the simplification of civil procedure and quest for better access to justice. Digitisation, as the jurisdictions surveyed recognise, is *inevitably intertwined with more efficacious case management in minimising cost and complexity*. The objective here is to evaluate the nature of civil justice's abrupt technological transformation (or shift towards online court processes on a global scale, particularly during COVID-19[9]) and to reflect on its impact on the law of evidence and procedure as it impacts on the future of case management.

As Uzelac et al. (2015) observe, digitisation, evidence and procedure are enmeshed in case management:

> *(...) the overwhelming penetration of new technologies into all spheres of public and private life has the capacity*

> *of dramatically changing the methods of the collection and presentation of evidence. The ubiquitous migration to paperless, online-based information systems is greatly changing the conventional landscape of civil courts, which were during many ages graphically presented as venues submerged in a sea of paper documents – and the biggest part thereof were the documents used as means of proof and those recording the results of evidence-taking. 'Digitalization' of civil procedure challenges the conventional principles and routines and may in the future bring much more than a mere conversion of dusty paper documents from court archives into electronic cyber-documents on court servers or cloud-based services.*[10]

This part summarily considers the benefits and drawbacks of 'paperless' case management, electronic filing of court documents, discovery and disclosure, more advanced digital tools (assistive technologies), tech-assisted or 'non-judicial justice' (Shetreet 2016) and their broader impact on access.[11]

Chapter 3 focuses specifically on the significant and increasingly preoccupying challenges to judicial independence occasioned by the unframed reliance on transformative technology. It highlights specifically, the concerns relating to private platforms and private case management or dispute resolution systems in the administration of justice.

Chapter 4 dwells specifically on case management systems, with emphasis on procedural law reform, including rules of evidence. It highlights tools and techniques endeavouring to facilitate and resolve court proceedings more efficiently. This chapter addresses common legal and policy questions with respect to the procedural rules governing case management. It also shares good practice from members' jurisdictions to develop principles of the law of evidence for effective case management.

The chapter focuses on substantive and procedural reforms aimed at achieving just outcomes and reducing costs across Commonwealth member countries. It similarly delves into evidence-related matters. The values underlying these reforms are proportionality and simplification, housing expedited procedures for high-volume, lower complexity disputes, limitations imposed on discovery and submission of evidence (including expert evidence), compulsory mediation or arbitration, encouragement of out-of-court settlement, and a

notable shift towards 'co-operative lawyering', particularly in the preliminary stages of the process.

Chapter 5 concludes with recommendations informing policy going forward. Accounting for the distinct needs, capacities and histories of the diverse jurisdictions and court systems in the Commonwealth, it provides high-level suggestions for good practice. Accordingly, and to foster efficacy and productivity, it emphasises more co-operative approaches to civil procedure and legal culture, and the submission of evidence, as well as a shift to a principled, less rigid approach to evidence and procedure.

Indeed, regarding evidence in particular, it stands to reason that digital migration leaves an inevitable and often indelible trail. This in turn enables more flexibility and simplicity (according to Legg, technology 'is an indelible contemporaneous record of communications between the parties'), particularly since audio visual trials during the COVID-19 pandemic did away with some of the court rituals and formalities.

In terms of caution, Chapter 6 underscores concerns relating to, inter alia: (a) a 'two-tiered' justice system if certain avenues are simplified and not others (per 'differential case management'); (b) the privatisation of justice or 'outsourcing'; and (c) the impact of active or facilitated case management ('managerial judges' in New Zealand parlance, infra.) on judicial independence and inclusiveness in digitisation.

The paramount objective of these reforms is to create a *litigant-centred* or *'user-centred'* environment that facilitates access to justice, empowers and informs litigants, and expects good faith co-operation between attorneys and the courts in efficacious case management.

Synopsis

However imperative in permitting justice to proceed during times of crisis, some of the solutions adopted precipitously were – and for the most part remain – substantially ad hoc, with complementary procedural and evidence reform still in flux and evolving in most if not all jurisdictions.

That said, the most prominent progressive case management solutions identified are: litigant-centred (or user-centred) justice; proportionality, simplification and flexible case

management. This is in addition to nurturing the duty of ethical co-operation expected of attorneys, enhanced judicial training, and the online 'funnel' for technologically mediated dispute resolution functions, ranging from providing basic legal information to foster litigant autonomy (helpful for cost-effectiveness), through to assisted online dispute resolution (ODR).[12]

Together these suggest a shared, robust approach to developing principles of the law of procedure and evidence for effective case management.

The chief practices gleaned from the Guide's comparative survey of several prominent member countries may roughly be enumerated as follows and are discussed more fulsomely in the chapters below:

- pursuing 'less paper,' as opposed to 'paperless';
- showing regard to access to justice and cybersecurity considerations;
- framing remote (i.e., online) procedures that are litigant-centric and accessible;
- adopting an 'inside-out' perspective that promotes access from the user's perspective;
- using technology (including artificial intelligence [AI]) for imparting legal information;
- familiarising would-be litigants with legal frameworks and potential avenues (the funnel model);
- developing in-house cyber infrastructure and cloud solutions;
- implementing cyber education and judicial training;
- facilitating good faith co-operation and ethics training for lawyers; and
- construing facilitated or differentiated case management approaches.

Chapter 1

General Considerations

Chapter 1
General Considerations

> *This movement is irreversible. Society is increasingly turning to digital processes, in all sectors of activity. To maintain or even improve the efficiency of courts in a post-pandemic context, the implementation of a reform focused on the use of technology will certainly be part of the solution… We must preserve at all costs (certain fundamental values) when transforming justice… These are the same values that will enable us to set the ethical and procedural guidelines essential to the emergence of a digital justice system that must truly serve the needs of the population in our democratic society. The task is important and requires a bold but essential vision.*
>
> Chief Justice Manon Savard (Québec Court of Appeal, QC, Canada)[13]

In the most recent comparative endeavour on modern case management, Chan et al. (2021)[14] offer the following macro definition: 'Case management has a broad interpretation. Case management refers to the use of available procedural tools by the court to enhance efficiency and effectiveness in the management of the case at every phase of litigation.'[15]

It therefore follows that improving party autonomy through technology-mediated facilitation and education lies at the heart of modernisation and constitutes an important best practice moving forward.[16] Digital technologies are briskly transforming communication on a global scale and altering 'how law is disseminated throughout and used by the…public'.[17]

In effect, the COVID-19 global crisis acted as a catalyst for precipitous digital migration, accelerating courts' technological transformation on a global and unprecedented scale. Issues lurking beneath the surface (such as harnessing technology to mitigate delays and inefficiencies in case management) abruptly surfaced with the pandemic. The pandemic abruptly upended traditional case management models, ushering in overnight public–private partnerships for rapid remote hearings and electronic submission of court documents and evidence as an antidote to 'yellowing paper'.[18] It similarly accelerated or indeed cemented a creeping shift to procedural simplification and one

from purely adversarial procedure, to an 'active' (or at least facilitated), co-operative iteration of case management, one that was reminiscent of civil law counterparts.

Whereas traditional adversarial systems (like those surveyed below) tended to relegate the judge to an essentially passive and reactive role, with the parties and their attorneys controlling proceedings,[19] the shift precipitated by COVID-19 has given the judge a far more active role in case management. Indeed, this shift is reminiscent of the inquisitorial system, 'in which judges use case management powers in order to shape the progression of a case', as (now Justice) Catherine Piché explains, outlining the Canadian province of Quebec's own transition in this respect.[20]

While Quebec is substantively a civil law jurisdiction,[21] its 'mixed' system – i.e., where 'civil law and common law coexist and commingle'[22] – meant that accompanying procedure was traditionally adversarial, just like in its sister provinces.[23] However, amendments to the province's Code of Civil Procedure (discussed further below) have carved out a far more 'hands on', active role for the judge in case management, with an eye towards guiding the parties and making the process faster and more efficient. Indeed, the goal of these amendments, as stated in the explanatory notes of the Act that proposed them, was to ensure an 'economical application of procedural rules, and the inculcation of a spirit of cooperation in the exercise of parties' rights'.[24]

From this perspective, it stands to reason that mixed jurisdiction, such as that of Québec, are of notable interest, considering this growing convergence between the adversarial and inquisitorial systems in their original, classic forms.[25]

These and other reforms (both formal and informal) are intended to serve the overarching objective of proportionality by simplifying procedure and enhancing co-operation, which supplants the overly adversarial culture historically in place.

This would result in satisfying proportionality between serving individual litigants and conserving limited resources and access to justice as a collective value for all.

1.1. Culture shift: rationing procedure rather than rationing access to justice' (Zuckerman 1995)

Like many of its counterparts across the Commonwealth, the Supreme Court of Canada (SCC) articulated the *legal culture shift* towards the proportionality principle in the Hyrniak case almost a decade ago (*FN Hyrniak v Mauldin*, 2014 SCC 7), thus ensuring that the procedure and rules of evidence applied to cases are commensurate with the scope and nature of issues raised.

In *Hyrniak* (para. 28), the SCC instructively stated:

> *A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.*

More recently, as Rossner et al. (2021) observe in the Australian context, the proportionality principle 'militated most in favour of the shift to virtual hearings'.[26] As Legg and Higgins (2016) emphasise in the same vein:

> *Arguably the primary objectives of civil procedure are to assist courts to resolve legal disputes justly within a reasonable time and at proportionate cost… To emphasise the importance of minimising cost and delay, courts and legislatures in common law countries devised the innovative approach of adopting the concept of an overriding or overarching objective or purpose for their civil justice systems that requires attention to justice, cost and delay ('Purpose Requirement').*[27]

Digitisation can therefore serve to accelerate proceedings and include simplified evidence submission.

In effect, technological transformation (addressed in Chapters 2 and 3) is arguably inseparable from procedural reform in robust case management to structure courts' workflow. Further, technological transformation accords with one of the Guide's stated objectives: namely, to assist countries in addressing the burdens of paper-based systems by developing fit-for-purpose case management systems, including electronic case management systems, where applicable.

In addition to proportionality and simplification as overarching principles, the shift to more *collaborative lawyering* acts as an adjunct to this approach. Defined broadly as a 'cooperative, interest-based approach to resolving their legal disputes',[28] *collaborative lawyering* paves the way for evidence submission and pre-trial proceedings characterised by a greater degree of professional good faith and co-operative exchanges. This paradigm shift is nurtured and reinforced by enhanced ethics education at both the law school and judicial training levels.

As Singapore's Chief Justice opined with regards to the active case management model prevailing increasingly:

> *Judges today must not only be legal technocrats, but they also need the skills of a problem solver acclimatised to cross-cultural differences. In this environment, the need for ongoing training and education for judges has become an imperative.*

Accordingly, the judicial college serves as an 'innovation sandbox'. In his words, the college, testing out a novel practice that is not widespread, will:

> *develop the dimension of serving as an empirical judicial research laboratory with the aim of serving as a testbed for innovation in judicial studies and practices. The empirical research will allow new or existing practices in the courts to be tested and validated. We can experiment with new ideas and study the findings to identify areas for refinement and implementation.*[29]

Given the pertinence of these developments across Commonwealth member countries, '[t]here is no need for us each to separately invent our own wheels in our own countries… the willingness to share accumulated knowledge, wisdom, and experience with others are vital assets in our drive to maintain the effectiveness of our (judicial) training despite limited resources'.[30]

1.2. Shared values, diverse cultures

To reiterate then, the Guide serves as an opportunity for fruitful exchange, seeking to shape a broader, collaborative conversation. It sets forth the foundation for a shared vision on principles of effective case management and reflects on procedural reforms and technological transformation

going forward. By collating and distilling the experience of litigants, practitioners and judges prominent across several Commonwealth member countries, the Guide aims to examine the benefits and drawbacks of existing case management systems and practices in different Commonwealth contexts.[31] Recognising the distinct needs, capacities and histories of the various jurisdictions and court systems in the Commonwealth, this Guide will, as noted, provide suggestions of good practice and highlight the importance of training for various stakeholders within the justice system.

1.3. A word of caution: potential drawbacks identified

For our purposes, a comparative overview suggests that while active or at least facilitated case management aimed at reducing costs may oftentimes promise greater efficiency, it is not a panacea and, if imported precipitously or wholesale, may have the unintended effect of compromising the perception of impartiality and indeed, independence.

The challenge therefore lies in finding balance between a more active role for the judiciary in case management and addressing these concerns regarding excessive 'front-end loading'[32]; between safeguarding collective judicial resources and satisfying the imperatives of individual justice and party autonomy; and between equipping institutions with safe and effective cyber infrastructure and online dispute resolution (ODR) mechanisms when appropriate, while shoring up the public charter of courts and their duty to control records and preserve access to justice.

These concerns surfaced and are being addressed in several Commonwealth member countries, as this Guide (Chapter 5) explores in greater detail and in its final recommendations.

Chapter 2

Transformation Through Technology for Agile Case Management

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Traditionally, courts relied heavily on cumbersome paper-based procedures and all hearings were strictly held in-person. Yet digitisation and automated processes – including electronic filing and court records, paperless submission of evidence, e-discovery, and e-courts or remote hearings – can, when appropriate, reduce administrative burdens, enhance access to justice and promote nimble case management.[33]

That said, to adhere to time-honoured constitutional values (above all, judicial independence, both individual and institutional, as well as impartiality) and nurture the public confidence upon which the administration of justice rests, digitisation must be conscientiously framed, sustainable and inclusive. To that end, and as Commonwealth member countries have recognised, technological transformation demands forethought and percipience. Therefore, a contextual appreciation of whether the circumstances and cultural context lend themselves to digitisation is key.

2.1. Preliminary principles for digitisation: good practice examples

2.1.1. British Columbia, Canada – pioneers in digitisation

The British Columbia Civil Resolution Tribunal (CRT) makes for an edifying case study. Though an adjudicative body similar to many others, its structure is particularly innovative. As Sourdin and Zeleznikow (2020) accurately summarise (supra. note 29 at 8):

> *The [CRT] is an online dispute resolution tribunal that hears – inter alia – simple personal injury, employment, construction and property matters. Applicants apply online to have their dispute resolved by the CRT. The system then automatically classifies the dispute and provides applicants*

> *with the necessary documents to file their claim. Thereafter, parties can lodge submissions and evidence for the tribunal member to assess online. Indeed, if an oral hearing is required, it is conducted by Skype. While the CRT had been in operation before COVID-19, its inherently digital nature has allowed it to 'remain fully operational' since the outbreak.*

Indeed, British Columbia courts were true pioneers in digitising and simplifying high-volume, low-complexity cases. The system in place has generated high satisfaction and is regularly cited across Commonwealth member countries as a robust practice of note.[34] To borrow the words of Salter and Thompson (2016), who term the province's new Civil Resolution Tribunal (CRT) 'the first of its kind in the world':

> *[The CRT empowers] people to become active participants in solving problems. [It] employs agile, user-centred design principles to pioneer transformative change in the civil justice system [and] is presented as a case study for the proposed redesign of civil justice processes.*[35]

2.1.1.(a). An overview of CSO: court services online

Presciently recognising early on that virtual proceedings can serve the administration of justice efficiently and proportionately,[36] British Columbia always rendered court services available online via its entirely virtual CRT.[37] Indeed, CRT is mandatory for small claims under $5,000 and all strata property claims.[38] The tribunal expanded its activities to vehicle accidents and injury claims up to $50,000 before the pandemic.[39]

The CRT is a fully digital forum for processing and resolving disputes. It should be noted that traditional court documents are not used. Instead, claims, responses, evidence and arguments are submitted electronically. The CRT process includes a mandatory mediated online dispute-resolution stage, and many claims are successfully resolved without being adjudicated. CRT claims that are not resolved are adjudicated by tribunal members – typically based on a written record, although there is discretion to convene an oral hearing. Decisions are usually rendered within a period of three months and are made public on the open access website of the Canadian Legal Information Institute (CanLII). Decisions of the CRT are subject either to appeal *de novo* to the Provincial Court or to judicial review in the Provincial Superior Court.

Anecdotally, public indications are that the CRT process is working well, has made the justice system more accessible in cases where the parties would not typically retain counsel, and has reduced the workload of the provincial courts.[40]

As noted, feedback *vis-à-vis* the CRT has been overwhelmingly positive, as illustrated by the following anecdote:

> *September 18, 2021, Jessica Kalynn traveled from Vancouver to Dubai on an Air Canada flight. Her luggage arrived nearly halfway into her six-day business trip. Kalynn asked for $2,120.67 in compensation, and Air Canada gave $500.*
>
> *Kalynn decided to file a claim against Air Canada through the Civil Resolution Tribunal (CRT) in British Columbia. The hearing was held online, with Kalynn representing herself. On July 15, 2022, less than a year after the incident, the CRT ordered Air Canada to pay an additional $700 in compensation.*
>
> *The unusual part of the story isn't so much that Kalynn got Air Canada to pay for her delayed luggage. It's the speed and ease with which her case got resolved. Even then, at ten months, it took more than the average three months typical for CRT case resolution.*
>
> *It's a reminder, too, that use of technology has the potential to improve access to justice. But how many legal disputes can reliably be completed with that type of efficiency or low cost? And can it help ensure people have confidence in our legal system.*[41]

Importantly, the first stages of the CRT are informative and educational, in line with the 'funnel' concept described by the UK Master of the Rolls Lord Vos[42] for effective case management deploying technological solutions. Lord Vos, as further elaborated below, gave a speech in 2021 in which he announced his intension to commence a 'fundamental generational reform of the civil justice system', in which claims begin online using an integrated system and enter a 'digital court process' via a 'single transferrable data set' for England and Wales. This system is what the Master of Rolls labels a 'funnel'.[43]

Succinctly summarised, the first step features a solution explorer, allowing potential litigants to navigate options and educate themselves on potential pathways. In Lord Vos's words:

> *My vision for a 21st century civil justice system is, as many of you will already know, shaped like a funnel. It starts with any would-be claimant being able to go to a single well publicised website or app to be directed, after entering some basic information about their claim, to the appropriate pre-action or court portal in which their claim can be either resolved or progressed. Behind that point of entry, there will be a series of pre-action portals and ombuds sites which would aim to resolve industry specific problems for consumers and small businesses. The portals would, in an ideal world, encompass family claims and claims against the state as well as ordinary private law disputes.*[44]

2.1.1.(b). Best practice features identified: education as an integral part of access

British Columbia courts boast digitised procedural education to empower litigants. Litigants (particularly of the self-represented variety) who are aware of their legal options and armed with legal information as to avenues before them and chances for success, facilitate case management at an entry level and eventually assist with fluid case flow. Thus, for instance, an online navigation system for self-represented litigants alerting them to milestones means fewer missed deadlines and accelerated timelines; it can similarly help with filling out online forms. As per the British Columbia's *Court Digital Transformation Strategy – Future Directions*:

> *Online procedural guidance helps participants to navigate court processes and helps to find the right services (enabled by Artificial Intelligence and other technologies). This could include convenient one-stop online resources on civil proceedings for self-represented litigants and streamlined processes for inmates to access court documents and legal advice. It also includes navigation tools and mobile apps for court users taking into consideration the cultural diversity of the province.*[45]

2.1.1.(c). Best practice features identified: leadership and accountability

Leadership and accountability are essential features of a successful technological transformation in case management (see Recommendations, Chapter 5, infra.).

As technology – and the legal requirements framing it – evolve, regular auditing and responsible governance are of the essence, as recognised in British Columbia:

> *The Court Technology Board – consisting of senior officials from the three levels of [British Columbia] Courts and the Ministry of Attorney General – is responsible for measuring impacts, as well as for delivering on the court digital strategy. The pace, scope and delivery of the court digital strategy hinges on funding and resources made available to the Court Technology Board.*
>
> *The Board is accountable for the success of the identified actions of the strategy and will be supported by various project teams, as well as a stakeholder advisory committee. We anticipate the stakeholder committee will be representative of the various court user groups and will be identified over the next year through an outreach process.*[46]

2.1.1.(d). Protecting litigant data in a networked environment

Alive to the delicate nature of digital litigant data in the networked environment (ranging from e-filing to AI [artificial intelligence, broadly speaking] use, as underscored in greater detail below), the British Columbia provincial court released a policy on access and privacy, setting forth criteria to address concerns. Mindful of the aforementioned risks as a deterrent from access to justice, the policy sets out narrow or 'least restrictive means' restrictions on certain forms of access, related to the underlying purpose.[47]

2.1.2. The United Kingdom – towards 'radical simplification': a funnel metaphor

In a likeminded effort to modernise courts and enhance judicial flexibility in line with the United Kingdom Government White Paper ('Transforming Our Justice System' 2016), the Courts and Tribunals Bill (2018) sought to advance a paperless system, including but not limited to online document sharing (initiatives in that vein had begun far earlier). As Sorajbi (2021) observed:

> *The HMCTS [HM Courts & Tribunals Service] reform programme has sought to digitize the civil court process.*

> *It has done so to, variously, reduce the cost and time of civil proceedings to individual litigants, i.e., to improve the practice and procedure of the courts, and to enable individuals to litigate effectively without legal assistance. It is intended, and continues to intend, to achieve this by reducing the number of physical court buildings and administrative staff and by replacing paper-based procedures with digitized procedures and hearings. It is a reform process that is to render English civil justice 'digital by design and by default'. Its long-term aim is the introduction of a wholly online, digital, civil process, akin to that in use in the Civil Resolution Tribunal in British Columbia, Canada, for claims that would otherwise proceed in the County Court. As such it is, particularly, intended to incorporate negotiation and mediation into the intended digital civil process, with few claims having to be determined by a judge on their substantive merits. Underpinning the drive for digitization was the assumption that it would render the delivery of civil justice, and its provision by the State, quicker, cheaper and more convenient for both the State and litigants.*[48]

The initial reform project phase was completed in April 2023 and was to be complemented by Digital Justice System (DJS) Court Rules and a few amendments at time of writing.[49] The driving force animating these reforms is *procedural simplification*, which in turn lies at the heart of improved access to justice. This is because cumbersomeness and delay 'too often defeats justice' (Lord Dyson 2015)[50]. Diminishing the need for in-person courtroom presence (or shifting online when feasible) is an important and prominent cost-saving measure.

At this juncture, it is important to note that case management typically focuses on the progression of individual cases before the courts, while case *flow* management refers to the processes by which cases generally move before the courts from beginning to end. Procedural simplification can improve case flow management, while not being intrinsic to it.

Thus, for instance, an accompanying Practice Directive (153rd Practice Directive)[51] furnishes important precisions regarding service by email,[52] where it was held that a party who provides more than one email address for service, cannot be served electronically. Similarly of interest, the new Judicial Review and Courts Act (2022) provides for an online procedural rules

committee to be established, thereby allowing for greater leadership and accountability, not unlike the preceding British Columbia example. Significant as a best practice, the role of this agile body will be to generate online procedure and practice rules adapted to digital practice. Smart systems and continued mediated interventions to suggest imaginative ways of resolving disputes at every stage lie at the core of this approach.

This as a best practice is seen as fostering the greater agility and flexibility required in the fast-moving digital context.

2.1.2.(a). Publicly backed ODR (online dispute resolution)

Redirecting several high-volume, low-intensity disputes to ODR is intended to turn around a 'Behemoth' justice system that ordinary people cannot be expected to comprehend, let alone navigate in their time of need (to paraphrase Lord Vos). Indeed, an illustration of good practice is what the Master of the Rolls Lord Vos recently referred to as 'the online funnel' (or 'digestible pieces'). In his words:

> *It starts with any would-be claimant being able to go to a single well publicized website or app to be directed, after entering some basic information about their claim, to the appropriate pre-action or court portal in which their claim can either be resolved or progressed….*

This funnel involves a series of online questions aimed at identifying the main issues arising; formal pleadings are superfluous in most instances, thus eventually leading to a 'no pleadings as default'.

Accordingly, for civil courts, the United Kingdom instituted a small claims online system (money claims online) and a probate procedure.[53] The disclosure pilot, which allows judges to determine the extent to which disclosure is needed in each case, is a significant step forward for curtailing paralysing and overwhelming delay tactics. Further, with an eye towards advancing flexible working practices and a collaborative approach, HM Courts and Tribunals Service features an e-filing service used by legal professionals or self-represented litigants to submit and manage cases. Given the complexity of navigating the legal system more generally, a citizens' helpline is also available, thus echoing the Canadian perspective that legal information and aid must go hand in hand with digitisation to prevent alienation.

2.1.2.(b). Compulsory response to online claims

> *Distinctive of the United Kingdom system, as of September 2022, it became mandatory for defence solicitors to use the damage claims online portal to respond to online damage claims.*
>
> Law Society (2022)[54]

Not only is mediation regarded as mandatory (Mandatory Mediation – the Digital Solution 2022)[55], but 'smart process' might go as far as proposing tailored solutions early in the process to repeatedly prompt resolution. Indeed, Practice Directive 5b provides helpful guidance regarding the electronic submission of documents (Practice Directive 510 supplements Civil Procedure Rules [CPR] 5.5 and 7.12).

2.1.3. Trinidad and Tobago

The judiciary of Trinidad and Tobago introduced the e-filing of probate applications during the pandemic in 2020. In May 2021, as part of *the establishment of an e-probate registry*, e-filing was introduced to facilitate the electronic submission of documents and to provide a more efficient method of receiving and processing applications.[56]

The digitisation at the Petty Civil Courts has also enabled the adoption of e-services such as: (a) virtual and teleconference court hearings; (b) Petty Civil Court e-filing and electronic fillable filing forms; and (c) improved electronic communication between the courts and their customers.[57]

The judiciary of Trinidad and Tobago engaged in stakeholder consultations during the period December 2020 to March 2021 on the establishment of a Small Claims Court.[58] Indeed, the project titled 'Let's Talk Small Claims' (2021)[59] involves virtual dialogue sessions conducted in an inquisitorial style (in line with the trends signalled above). The themes covered include access to court, alternative dispute resolution and enforcement, with the overarching goals of 'improved access for the informed litigant', informed court staff and an informed public. Key stakeholder groups were engaged to this end and a public forum was held.

2.1.4. The Indian experience

During the COVID-19 pandemic, the Indian judiciary, led by its Supreme Court, embraced the digitisation of court records, e-filing of cases and virtual hearings, including live streaming of court proceedings.

2.1.4.(a). Succinct historical overview

Digitisation of public services more generally began in the 1990s but was later enshrined in the Information and Technology Act of 2000.

E-courts, for their part, had already been launched as early as 2006 as part of the Indian National E-Governance Plan (NEGP). As early adopters of technology, Indian courts had begun hearing family law cases by video conferencing by 2017. Live streaming of cases was also in place in India at that early time, including but not limited to live streaming of a case of national import.[60]

2.1.4.(b). Transformative technology

The more recent phase of the e-courts project seeks to integrate more advanced technologies such as AI and machine learning, examined by the Supreme Court's Artificial Intelligence Committee. The committee's establishment aligns with other member countries' practices, identified as the best practice of mindfully adopting technology and internal oversight (see, for example, the British Columbia and UK examples discussed above).

Broadly, it is important to note that there is no universally accepted definition of 'artificial intelligence'. As University of Waterloo Professor Maura Grossman, among many others, reiterates in this regard:

> *There is no universally accepted definition of 'artificial intelligence'. We adopt a working definition that artificial intelligence refers to the capability of machines to mimic aspects of human intelligence, such as problem solving, reasoning, discovering meaning, generalizing, predicting, or learning from past experience. Of the different types of AI [artificial intelligence], machine learning is probably the most prominent and most familiar.*[61]

Communication between courts is integral to mitigating delays in case management. Technology can assist here, as the Indian courts have, for instance, found that 'summoning records from the lower courts to the appellate courts is one of the major factors that cause delays in cases'.[62] It is edifying to note that courts in Australia (particularly in the state of Victoria) have – like their Indian counterparts – identified more seamless communication between courts as a significant efficiency marker that digitisation can help address.

In harmony with the analysis above regarding the need to address cybersecurity concerns when digitising (Chapter 2), Indian courts have identified cybersecurity as a chief priority in the e-courts initiative. Moreover, in accord with the 'less paper not paperless' best practice identified in this Guide (below), Indian courts, like their Canadian counterparts (see Canadian Federal Courts example above), have opted for virtual hearings in certain cases; virtual hearings cannot be a substitute for physical court hearings in all cases.[63]

Similarly, the Indian courts' practices (generally speaking, at a high level of abstraction, given their great internal diversity), cohere (from the tone set by the Supreme Court) with those identified in this Guide as best practices. Namely, framing the technology (both at the stage of procurement and implementation) and perhaps most importantly, a marked emphasis on judicial training. Thus, for instance, Syed (2022) observes that justice 'will also require external regulation by the legislature through statute, rules, regulation and by the judiciary through judicial review and constitutional standards'.

2.1.4.(c). Budgeting for count infrastructure

In actively embracing virtual proceedings, Indian courts are beginning to address the important question that all courts must in the digital age. That is, namely, and as mentioned in the United Kingdom example above, determining whether a court needs to be a physical 'place' or merely a service, or perhaps both depending on context and complexity (see: Bhardwaj 2013).[64] Asking whether a physical courtroom setting is actually needed is a different but increasingly important and cost-effective way of construing 'differential proceedings'.

2.1.4.(d). Multilingualism

Understanding proceedings in one's language of comfort is a significant component of accessibility, which technology can help facilitate.

On 26 November 2019, the President of India, Shri Ram Nath Kovin, unveiled an application called 'Supreme Court Vidhik Anuvaad Software', which is capable of translating English judicial records into nine vernacular languages and vice versa. The Official Multilingual Mobile Application of the Supreme Court of India will also be released to provide accurate real-time access to case status, review screens, judgements to lawyers and litigants, daily orders, etc. Much technical advancement has been made across the judiciary, such as capturing testimony by video conferencing, but a significant changes to virtual courts have arisen because of the COVID-19 pandemic.[65]

2.1.5. Lessons from across the Commonwealth: When to digitise? 'Less paper' not 'paperless'

Notwithstanding the convenience of digitisation and the temptation for widespread automation as a cost- and time-saving measure, experience and practice in several Commonwealth member countries suggests that 'less paper' rather than 'paperless' (that is to say, maintaining some paper documents) is preferable.[66]

Although not exhaustive, the principal rationales against blanket or wholesale digitisation of court documents are: cybersecurity and its relationship to judicial independence.

2.2. Cybersecurity

As the COVID-19 pandemic and other global events have made abundantly clear, cybersecurity is no longer a limited issue to be contained – but a shared security concern. AI (including but by no means limited to assisted decision-making and bots such as ChatGPT) now appears tempting for cutting processes (for example, case management) and conveniently liberating professions and the courts from time-consuming, menial and repetitive tasks.

Triage is helpful in determining which documents are to be filed or posted online or digitised (and at what time in the process),

as is regular cyber training for judges and court personnel.[67] Indeed, nurturing internal expertise (rather than outsourcing) and appointing an in-house court cybersecurity expert both constitute sound practices for both resilience and independence.

As part of the state's essential infrastructure, courts must be mindful of both general and geopolitical cybersecurity considerations.[68] Cybercriminality is borderless. During lockdowns, cybercriminals exploited the abrupt digitisation that took place and the ad hoc practice of workers bringing home devices, which exacerbated vulnerabilities.[69]

2.2.1. A Canadian example and report

In Canada, the Federal Court of Appeals, for instance, requires paper documents for sensitive matters.[70] Due to constantly mutating cybersecurity risks, Canadian courts must increasingly sort or triage between documents that may securely go 'paperless' in the short term and those that must remain in traditional form – as outlined in the Canadian Bar Association's (CBA's) *Task Force Report on Issues Arising from COVID-19*.[71]

2.2.2. The court's duty to control its records

Conscientious triage similarly reconciles with courts' duty to control the documents they generate, a duty potentially undermined by the volatile nature of e-records.

2.3. The open-court principle, litigant privacy and electronic court records

Not unlike many other actors in society, the courts, eager to show that they are not lagging behind, have, with good reason, tended to embrace technology – whose promise of simplicity and efficiency is difficult to ignore. However, in so doing, and in a sincere effort to promote and expand access, they, again like many others, have overlooked some of the perils inherent in the sudden or urgent need to resort to complex innovative tools during pandemic-related restrictions to in-person access.

This is particularly true with respect to electronic or online court documents, which tend to raise significant issues that are only now beginning to gain attention. Specifically, these issues

include the inadvertent disclosure of personal information in ways unanticipated by existing rules and the resulting affront to the very access to justice that digital files were meant to promote.[72]

Information of this nature has always been public — with excellent reason. The distinction between the past and present circumstance lies in the new conception of 'accessibility'. Namely, there is now an audience of incalculable numbers with indiscriminate access to bits and pieces of sensitive, personal information in an unprecedented fashion.

Not surprisingly perhaps, new technology can and has produced some very unfortunate by-products, ranging from identity theft to participants in the justice system receiving threatening messages from parties entirely removed from the case (Eltis 2016, supra. note 64). In addition to the embarrassment it can generate, free-for-all admission to court records online significantly facilitates witness–litigant bullying and may even nourish an intimidation industry. This is certainly not to suggest that litigants could not be embarrassed, or that witnesses could not be 'reached' prior to the internet age; it is merely that these pre-existing difficulties are exponentially worsened by the indiscriminate posting of court records online, due to the nature of the networked environment.

Therefore, blanket e-filing and e-disclosure, although aimed at enhancing accessibility, can have the opposite effect online. That is, it can inadvertently deter participation in the justice system. Institutions therefore need to find 'legal tools to reach roughly the same balance of interests in the internet that we have developed for the rest of our world'.[73] The internet begs a sober rethinking of how we define access to court information in the internet age, and of the current balance struck between this important value and access to justice.

2.3.1. Narrowly tailored e-disclosure

The principle of purposiveness requires that personal information only be used for purposes that are directly related to the data processing in question. It is forbidden to stray from the initial purpose or process this personal data in a manner incompatible with the said purpose.

Accordingly, electronic publication of court decisions allows for widespread dissemination, thereby creating the temptation to access such personal information for reasons removed from the initial purpose of posting. Most significantly, digitising often occasions a loss of judicial control over court materials. That is to say, once unleashed online — however inadvertently — most of these files cannot be edited, effectively redacted or recalled. This is often despite the court's wishes and best efforts to do so. That in turn might do violence to the judge's duty to control court documents and indeed, protect litigants before them.

Additionally, whereas judges take pains to draft court documents in restrained and respectful language, lawyers – not to mention self-represented litigants — are hardly as careful in phrasing their statements of claim and motions. With electronic records and e-filing, these often-inflammatory declarations can be propagated online for all to see. As noted, even if later 'withdrawn', the damage caused is potentially irreparable.

Imposing reasonable delays (rather than publishing decisions online when rendered) will afford litigants, their representation, and of course the courts themselves, the time that they need to adjust to technological change and to soberly evaluate, challenge and correct the information that goes online. Or, at the very least, it will allow them time to manage the risk of inadvertently shaming litigants. An internet of infinite memory not only engenders the prospect of permanent harm to participants in the justice system, as previously indicated, but also risks bringing the courts into disrepute for publishing the impugned content.

The by-products of such loss of control reverberated with Canadian litigants in the Globe 24 saga in Canada,[74] (as in Google Spain in the EU),[75] and in countless incidents catalogued elsewhere. These cases illustrate the perils of permitting uninhibited access to court documents in the digital form (including both documents and hearings).[76] Indeed, in the 'data economy' (or what Zuboff and others now refer to as the 'surveillance economy'),[77] courts are invited to recognise the changing value of personal information and their new role as publishers of data. This requires vigilance in guarding this 'treasure trove', lest access be deterred – as recognised in the Supreme Court of Canada's landmark decision in *AB v Bragg*.[78]

Cognisant of the nuance that the digital age brings to privacy harm, the Supreme Court of Canada, in *AB v Bragg*,[79] allowed an adolescent to proceed anonymously with a request that an internet service provider release the identity of the creator of a fake Facebook account that included various explicit and disturbing sexual references. Understanding that a vulnerable litigant would not go to court for fear of stigmatisation, the Supreme Court recognised intangible privacy harms and used these as a basis for allowing the adolescent to proceed anonymously in her legal action.

The Supreme Court of Canada further recognised not only the teenager's privacy interests, but also the collective value of access to justice as grounds for curtailing the open court principle. Doing so was, in the SCC's words, necessary to protect vulnerable litigants from 'objectively discernible harm',[80] for 'absent a grant of anonymity, a bullied child may not pursue responsive legal action'.[81]

2.3.2. A step forward

As previously noted, Canada's landmark decision in *AB v Bragg* [82] is a constructive starting point for attaining balance between traditional notions of open courts and other values, including but not limited to access to justice (and privacy construed as an ally thereof) and confidence in the justice system, in the context of the digital age.[83]

In *Bragg*, the Supreme Court of Canada unleashed a cultural shift that recognises that in the 'Digital Age' (in contrast to its brick-and-mortar counterpart), providing indiscriminate and often decontextualised access to litigant (and justice participant) information based on the open courts principle, as it was interpreted before, thrusts courts into an unfamiliar role – that of publisher (rather than custodian) of sensitive data. That in turn affects not only privacy but, surprisingly, access to justice. In other words, publishing court documents online wholesale unexpectedly, surely undermines rather than encourages access to and confidence in justice by deterring litigants from claiming their rights for fear of public shaming and revictimisation.

2.4. Securing simplified online justice – selected examples from the Commonwealth

Generally, jurisdictions including but not limited to Canadian provinces, the UK and Australia have taken a similar view of online or virtual courts as meeting the imperatives of procedural propriety.[84]

2.4.1. Limiting the details unleashed digitally to the minimum necessary, contextually and proportionally

In their more recent court practices, Canada, Australia and other Commonwealth jurisdictions have carved out exceptions to electronic courts records for sensitive matters, including but not limited to minors in cyberbullying cases, health-related matters, family matters and trade secrets. These exceptions continue to be submitted in paper form or in the alternative identified.[85]

In terms of respecting the court's role of de facto data publisher in the digital age, the Federal Court of Canada, for its part, now allows for a party to request an exemption from online posting, even if the record does not fall into a confidentiality order but may be otherwise understood as such.[86] This more flexible and progressive policy reflects an increasing understanding – if not consensus – that, in the digital age, unbridled access to sensitive personal information from court documents can have the above-mentioned unintended side effect of deterring access to justice.

Needless to say, and now more than ever, unrestrained or unverified posting exposes participants in the justice system to identity theft, mass scraping of data, leaks, hacks, ransomware and distortions of court-generated data. These risks bring justice into disrepute, especially when unsecured court documents are distorted or tampered with.[87]

2.4.2. 'Keeping the wheels of justice turning': enshrining 'sensible improvements' in Australia

As Townend (2021) has noted in the United Kingdom context, 'the COVID-19 period should be used as a catalyst for

improving and standardizing access, in ways that best serve the interests of efficient, fair, and open justice'.[88]

Perez Ragone (2018) observes:

> *The number of courts and their geographical distribution have important effects on the quality of justice and case management. The introduction of IT and artificial intelligence creates a virtual space for the hearing of cases. Specialisation helps to reduce costs. Costs reductions may be achieved through closing underused courts and shifting cases to nearby courts. Finally, several small courts could be brought together within one main court to reduce costs and overhead in general. Although such reorganisations may result in longer travel time for parties and thus in a deterioration of geographical access to justice, IT may help to solve this problem since the physical presence of the parties and witnesses is becoming less important. Video conferencing is becoming the norm in large jurisdictions. In other jurisdictions, however, it is believed that parties and witnesses should be physically present in specific types of cases. The combination of IT and physical court rooms may be the solution for these jurisdictions.* [89]

Reflecting and operationalising the courts' role as custodians of digital data, the state of Victoria government's *Law Reform Committee Report into the use of Technology in Law (Australia)* underlines three main practical issues in relation to the security of electronically submitted documentation:

> *First, the need to verify the identity of persons purporting to electronically to sign or submit a document; second, ensuring that the document sent electronically has not been modified in transit; and third, preventing the unauthorised access to documents either in transmission or storage.*[90]

In terms of digitisation (generally) and cybersecurity questions (specifically), an important best practice is legal framing of ad hoc practices. This has been enshrined in legislation enacted in Victoria, Australia. The *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021*[91] made changes to several pieces of legislation that cover how legal documents must be signed and witnessed in Victoria.[92] According with the triage approach discussed above, the legislation frames courts' decisions about whether a given case is best heard via audio link (as during the pandemic) or better lends itself to an in-person

hearing. The legislation also frames questions such as e-signing and remote testimony, in addition to addressing the important issue of access for vulnerable litigants.

An electronically signed will was tested before the Supreme Court of Victoria in *Re Curtis*.[93] Here, it can be argued, the court adopted a less rigid construction of procedural imperatives in the digital age, admitting a will into probate notwithstanding procedural deficiencies.

2.4.3. The risk of link rot: a particular concern for Commonwealth countries

The risk of untraceable, 'vanished' or migrated sources — often referred to as 'link rot' — is worrisome in a judicial context. It is especially problematic in the common law world, where caselaw is predicated upon prior decisions. [94]

The use of dubious or ephemeral sources by judges in drafting what is normally binding precedent not surprisingly amplifies the dangers not only to the parties, but also to future litigants, courts and the justice system. In other words, 'the authority underlying the case law itself becomes authority, which makes it important for those researching the law to see why a court ruled as it did. If the authority upon which a court relies disappears, then a component of a court's decision disappears as well.'[95]

Until permalink and other initiatives aimed at confidently preserving sources take root, maintaining some paper records in certain cases is accordingly of primary importance.

2.5. Accessibility and digital disadvantage

As previously noted, encouraging self-represented litigants, those living with disabilities, older adults and marginalised communities to access the courts necessitates both inclusive digitisation as well as the preservation of paper records and in-person appearance. Best practices should account for the needs of self-represented litigants and, as far as possible, clear the barriers that impede their access and those of people living with functional limitations.[96]

As Hagrittai has pointed out, transformative technologies meant to extend access may 'perpetuate the exclusion of vulnerable and marginalised individuals and groups from the justice system'. In pursuing greater cost-effectiveness and eliminating procedural redundancies, courts must be alive to the preponderance of 'digital disadvantage', a common concern in an age of increased remote delivery of justice, in order not to erode trust, especially in these siloed, turbulent times. For in the end, as Wallace and Laster remind us:

> *The legitimate exercise of power by the courts is universally accepted as a central tenet of the rule of law and thus a vital component of both democratic theory and practice. Litigants who have confidence in their courts are well disposed to obey the law and to respect the decisions of courts. Conversely, a lack of trust in courts can lead to various forms of lawlessness, including failure to report crime or unwillingness to participate in legal proceedings and, in extreme cases, can even prompt citizens to take matters into their own hands … [in] his kind of complete disillusionment with key institutions is what Valerie Braithwaite terms 'dismissive defiance'.*[97]

Chapter 3

Maintaining and Shoring Up Judicial Independence in Times of Technological Transformation

Chapter 3
Maintaining and Shoring Up Judicial Independence in Times of Technological Transformation

With the privatisation of court services on the rise, it is imperative to flag this phenomenon's impact on judicial independence. To borrow the words of Niva Elkin Koren, justice seems mediated by 'an invisible hand' – that of foreign-based private platforms, cloud-based services, and case management technology services and consultancies.[98]

In effect, the procurement of data-driven technologies, as Rashida Richardson cautions, 'present(s) new challenges and legal concerns that were not contemplated when most relevant procurement laws and policies were enacted'. This is even more the case for court technology. Assessing the social and institutional impact of technologies procured – generally but even more so in the context of courts – is therefore of the essence.[99]

Thus, for instance, a UK report[100] on the heels of COVID-19 made practical recommendations for the procurement process (for the public sector generally). That is, the need to:

1. consider the consequences of technology via DPIA (data protection impact assessments);
2. incentivise responsible innovation and explainability;
3. review vendor contracts for cyber incident response plans and regular auditing of cybersecurity practices; and
4. measure the impacts of technology.[101]

More specifically and for the purposes of courts, in integrating expedient off the shelf solutions such as the use of private platforms, private case management systems, video conferencing systems and ODR mechanisms, courts must heed Alon Harel's general caution: 'Law is not merely an instrument to render a correct decision. Legal procedures and institutions matter intrinsically to democracy' (*Why Law Matters*). [102] Plainly put, justice cannot 'move fast and break things' or run on

'auto-pilot'. Nor can courts as institutions merely mimic 'e-bay' dispute resolution (or as some call it, 'uber-justice') – however tempting – primarily due to the risk of sacrificing institutional independence, or the appearance thereof.[103]

Moreover, 'on demand justice' must not be conflated with substantive justice from a public confidence perspective. Justice must not only be efficient, but also be perceived as upholding substantive rights.[104]

The ecosystem in which courts operate has shifted remarkably — a transition sharpened abruptly by the pandemic, as justice precipitously migrated to private platforms and private technology.[105] Private technology can indeed be leveraged in an endeavour to improve services and offer effective administration of justice via digitised courts. But such procurement must be done in a manner mindful of courts' role as public institutions and the constitutional values underlying their operation. Shared technology infrastructure (be it with the executive branch or private companies) can mean loss of control over court networks and assets, particularly since the emergency has receded and with it the rationale justifying otherwise unorthodox temporary measures. As Judith Townend wrote:

> *Restrictions imposed during the COVID-19 pandemic in England and Wales accelerated the use of digital technology for remote hearings. Inevitably, a period of trial and error followed, with a hybrid and emergency set of rules for media and public access to hearings. ...this tumultuous period has highlighted the potential for improved accountability of the justice process, but also unresolved issues around the practical management of public access to courts.*[106]

One potential solution of note is encouraging collaboration between sister courts themselves, rather than resorting to and relying on private assistance. For instance, the Canadian province of Ontario has collaborated with the Canadian province of British Colombia to use and adapt the latter's technology.

3.1. Looking forward

As the Canadian Bar Association's Taskforce Report, supra. on this point aptly notes, 'there is no turning back'.[107] Transformative technologies are providing new and important

tools for the nimble administration of justice and offer an opportunity to revisit dated paradigms and procedures. Virtual proceedings continue to help 'administer more accessible justice by allowing participants to be "present" in court without traveling, which is particularly helpful for demographics such as older adults, and parents with young children'.[108]

The COVID-19 crisis precipitated and spurred judicial digitisation 'on a scale and at a pace that our court system would never have contemplated just a few months ago'.[109] This visibly culminated in several supreme courts worldwide conducting proceedings on Zoom, Teams, WebEx and the like.[110]

This de facto 'marriage of convenience' between private platforms and case management systems, on the one hand, and courts, on the other, may best be characterised as an unstructured partnership prematurely born out of necessity. For instance, Zoom – simply described as 'a multi-faceted cloud communications platform for video, voice, content sharing, and chat'[111] – faced several class action lawsuits for alleged privacy violations, a mere few months into the lockdowns (now settled). Most often, these platforms are headquartered and led in jurisdictions outside the courts whose sensitive documents they house. Further, many store these 'treasure troves' of data (including but not limited to those of courts) onto the cloud of a few American companies, primarily Amazon Cloud and Microsoft.[112]

While certainly not a panacea, risks can be mitigated to a certain extent by issuing guidance on preferred settings for courts, as was done in the Canadian context by the Office of the Commissioner for Federal Judicial Affairs' Action Committee on Court Operations in Response to COVID-19 guidance on virtual platform settings.[113] Guidance on options for virtual access included, by way of a non-exhaustive illustration: providing shared or personalised links through advance registration or distribution lists and pre-screened admittance when feasible; admitting participants individually; and requiring identification when appropriate and done in respect of privacy concerns. Disabling certain sharing or interactive features is also a prominent practice.[114]

3.2. Artificial intelligence (AI), assisted justice and predictive analytics

While beyond the scope of this endeavour to address in any detail, predictive analytics are similarly seeping into the justice system. This may be understood as part of a global trend of outsourcing justice and the privatisation of its administration. This is visible not only in the use of (or indeed dependence on) platforms but in incentivising ODR and its mechanisms as discussed below. In fact, it is worth reiterating that the rules of procedure only exist to protect these very values and the perception of their reaffirmation.

Mindful of this gargantuan change, the following posits that judicial independence must now be understood in the context of platform-dependent modern communications in the digital realm. Remote or online justice (including electronic records) – which previously struck most as incredulous and unfeasible – is now commonplace in justice systems across a multitude of jurisdictions.[115]

Whereas innovation tailored to ease the disquieting backlog that haunts courts is best greeted with openness, if not enthusiasm, recognising the necessity of digitising, this chapter endeavours to underscore the perils to judicial independence inherent to unbridled or *ad hoc* dependence on foreign commercial platforms. While these concerns were largely obscured by both the urgency and convenience of hastily transitioning online during the persisting pandemic, the long-term impact of this partnership is ripe for sober scrutiny. Thus, underscoring the risk of compromising the foundational principle of judicial independence in the age of default platform infrastructure, mechanisms tailored to ensure that intermediary partnerships are adequately framed, rather than *ad hoc*, are of the essence.

3.2.1. Examples (UK)

As Townend notes in the UK context:

> *The rapid development of online hearings was primarily managed by the judiciary and practitioners working together to find a solution, rather than being centrally planned and managed by HMCTS.*[116, 117]

In fact, in the UK, attempts were made to create and make available in-house VC systems, but their popularity paled compared to commercial counterparts (Teams, Zoom …) in the absence of guidelines mandating their use: '[T]he preferred platform being developed, known as Cloud Video Platform (CVP), was not yet ready. (It has since been rolled out extensively, but that has taken more than a year to achieve and is still not complete.)[118]

Instead, there was what one judge described as a 'smorgasbord' of different approaches adopted by judges or by law firms and advocates using their own app accounts. In April 2020, Mr Justice Macdonald, in what was by then already the third edition of guidance entitled *The Remote Access Family Court*, explained that:

> *[I]t is simply not going to be possible at this point, pending the introduction of CVP, to arrive at a common agreement as to a single 'off the shelf' software platform to be used in the interim in all cases. In the circumstances, this paper proposes that … the court and parties choose from a 'suite' or 'smorgasbord' of IT platforms, subject always to the cardinal requirement that at the outset of each case the judge and parties consider and settle on the platform that is to be used in that case.*
>
> *The civil courts provided an example of this 'free-for-all' approach in what was reportedly the first fully virtual High Court trial, in* National Bank of Kazakhstan v Bank of New York Mellon *[2020] EWHC 916 (Comm) before Mr Justice Teare. The case was listed with links to several sessions on YouTube, which were for a short time available for 'catchup' viewing by anyone with a link. As is now common, both judge and counsel appeared on screen from their own living rooms or studies. The recording appeared to have been arranged by one or more of the solicitors' firms in the case and was not published on the official YouTube channel used by the judiciary for its somewhat experimental live streaming of Court of Appeal cases dating back to before the pandemic. Although this unofficially posted video content was later removed, a daily transcript of the hearing remained on the solicitors' website.*

3.2.2. Examples (Trinidad and Tobago)

In Trinidad and Tobago, the Civil Proceedings Rules 1998 introduced the concept of case management in civil matters. These new rules took effect in 2005.[119] The challenges and achievements of case management by the judiciary of Trinidad and Tobago are set out in detail in its *2020/2021 Annual Report*.[120]

More specifically, the judiciary of Trinidad and Tobago introduced CaseLines – a purpose-built, cloud-based collaborative evidence management system that can gather multimedia evidence. By compiling documentary evidence, CaseLines provides a single, secure environment in which to manage all types of evidence. It uses the highest levels of security and produces a fully traceable audit trail to prevent mislaid or corrupted evidence.[121]

3.2.3. Why is this important? Judicial independence as a 'pivotal principle of civil procedure'

As previously asserted, the effectiveness and legitimacy of the judiciary is largely rooted in its independence. In fact, 'judicial independence is a major and pivotal principle of civil procedure' (Ragone citing Seibert-Fohr 2012, 5–20; Burbank and Friedman 2002, passim; Bovend'Eert 2016).[122]

Not surprisingly, the public is more likely to trust the judiciary if it renders decisions 'impartially and disinterestedly, shielded from inappropriate external influences and political pressures'.[123] In consequence, judges should be insulated from politicisation and improper influence – even when such influence is only indirect, such as via dependence on foreign commercial cyber infrastructure for VC, cloud storage or court management systems.[124]

Furthermore, administrative independence (and its perception) appears most jeopardised under the circumstances discussed here. Ad hoc, unframed dependence on platforms like Zoom, Microsoft Teams and Amazon Cloud – not to mention ChatGPT – imperils the very foundation of these principles by potentially introducing the apprehension of external pressures (or the perception thereof).[125]

So too, a significant component of judicial independence is transparency, accountability and control. As Professor CW Farrow observed in a different context: 'From the early days of the Magna Carta, all the way up to the current judgments of the Supreme Court of Canada, it is key to Canada's functioning democracy that we are ruled by laws, not humans. That is a core element of our democratic system.'[126] For our purposes then, reliance and — even more so — over-reliance on private platforms and the like threatens to supplant laws and institutions with foreign commercial intermediaries and the opaque algorithms that they mysteriously deploy for profit.

In this delicate context, it stands to reason that seemingly innocuous dependence on commercial actors (automated case management system process or ODR, for example) risks bringing individual justices and the courts themselves into disrepute.[127] The conundrum, briefly summarised, is as follows. As many courts, to our collective chagrin, are under-resourced, keeping up with Silicon Valley —or at the very least entrusting private platforms with supporting digital justice — is understandably tempting. This is all the more the case as these pre-existing difficulties and inadequacies have been compounded by an unforeseen and protracted pandemic.[128]

As former Canadian Chief Justice Beverley McLachlin stated long before the pandemic, access to justice is a question of democracy.[129] Although seemingly obvious, it is worth repeating in context. Private alternatives may have their place in the above-highlighted triage but, due to the carefully nurtured imperatives of cherished constitutional values, they cannot supersede or supplant the public system and courts' institutional authority. Nor can inordinate dependence upon them be permitted or allowed to compromise judicial independence.

3.2.4. A specific word on ODR in this context

Finally, and more specifically respecting ODR, the aftermath of the pandemic 'is likely to accelerate the introduction of e-negotiation, e-mediation and e-ENE [early neutral evaluation] into civil procedure'. As such, 'an aspect of the HMCTS reform programme that was meant, initially at least, to apply to low value consumer claims could … become the presumptive resolution track for a wide range of civil claims, leaving adjudication very much as the procedural option of

last resort'.[130] Although Rabb writes in the UK context, this, as has been previously indicated, is true across Commonwealth member countries (and beyond).

Judith Resnick (2015) cautioned:

> *The foundation of the authority of judges is that their power to impose judgment comes from the structure of adjudication, its constraints, and its public character. If the task of adjudication is replaced with that of shepherding parties toward private conciliation, the independence of judges becomes a goal without a purpose or a constraint. The result is the decline of adjudication's potential to serve and to support democracies.*[131]

In the context of ODR, Shetreet confirms:

> *A new approach must be introduced to ensure fairness in online justice, following the model of impartiality and decisional independence that is now accepted for administrative adjudicators.*[132]

3.2.4.(a). Illustration: The Canadian Federal Courts CRMS

In line with the above-suggested practices distilled from member state experiences, the federal courts of Canada are moving to implement a new digitised Court Registry Management System (CRMS), which is still in the early approval and development stages. It is described as:[133]

> *a multi-year effort to incrementally modernise all courtrooms in support of virtual hearings and trials. Each modernised courtroom will be equipped with fully integrated IT infrastructure, including video conferencing, digital screens, computer workstations, internet connectivity, and digital audio recording systems. Other initiatives will include enhancements to e-filing capabilities, increased electronic document sharing with parties through SharePoint, and expansion of the e-trial toolkit. CAS [the Courts Administration Service] will also increase the capability to manage electronic hearings with large volumes of electronic documents. In parallel, the multi-year project to implement a new CRMS and a broader digital strategy to accelerate the organization's ability to deliver digital solutions incrementally will be advanced.*

The drawback is a risk to the value of judicial independence, as outlined by Konina (2020) confirming the aforementioned:

> *The CRMS embraces many functions that contribute to the courts' daily operations: case management, access to case records and documents, transmission and service of court records, transfer of cases and documents among courts, scheduling of cases and court- rooms, etc. Traditionally, these services have been provided by courts' registries. However, integrated systems offer an opportunity to automate most processes, thereby improving operating efficiencies and reducing procedural delays.*
>
> *Despite the significant benefits of digitization and automation of courts' operations, the implementation of a CRMS solution poses significant risks to judicial independence. Particularly, this article scrutinizes how CRMS may undermine the security of judicial information and how automation of procedures may adversely affect the procedural independence of the judiciary.*[134]

Her recommendation to minimise these risks – namely, that 'the CAS create a specialized standard-setting committee that will monitor the CRMS implementation process'[135] – echoes emerging suggestions put forth.

3.3. Summary of chapter

While this Guide strongly advocates modernising the justice system by technological means, the issues raised in this chapter require our prompt attention. The first is that digitised justice systems (whether in the sense of virtual hearings or commercial case management apparatuses) depend on private platforms, and so there is a risk that judicial interactions will become mediated by commercial actors. This can be problematic when viewed through the lens of judicial independence. An additional and related preoccupation highlighted in Chapter Five, below, is that the courts substitute 'poor man's justice' for access to fair procedural justice in the name of efficiency. In other words, this means steering a normal person's claim away from the public (physical) courts to commercial ODR systems or, increasingly, AI.

More broadly, this is a conversation about proactively nurturing and maintaining people's trust in our judicial institutions as we pursue cost saving and efficiency.

Chapter 4

Case Management Systems, Procedural Reform (Including Evidence): Common Practices

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While it is beyond the scope of this Guide to delve into the details of the particular jurisdictions explored given their individual internal depth and complexity, at a high level of abstraction, the following practices recur in case management procedural reforms across the Commonwealth:

1. Active or facilitated case management for tackling costs and delays (in line with the overarching principle of proportionality and with simplification).
2. The advent of the 'co-operative model' of practice. This imposes obligations upon attorneys to co-operate in good faith, particularly at the pre-trial stages and in terms of evidence gathering.
3. Simplified evidence submission.
4. Procedural differentiation based on claim value.
5. Encouraging party autonomy (via an online 'funnel', mediation, even ODR).

4.1. Summary

The chief objective of procedural and evidence reforms across the diverse jurisdictions surveyed in the foregoing is to ameliorate access to justice, or in Semple's words '**better access to better justice**' (Semple 2021).[136] This entails a renewed focus on good faith, if not co-operation, between attorneys and party autonomy (antithetical to the traditional adversarial view of procedure).

Mindful of that overriding endpoint and the overarching principle of proportionality, the most prominent common features of reforms derived from comparative analysis across Commonwealth member countries (with particular emphasis on those set forth) include a significant shift in culture and mindset. This shift is from purely adversarial procedure and

evidence gathering to a more collaborative iteration; from the judge sitting back passively, to shepherding (or at the very least, taking an assertive lead in facilitating) the process; and with special emphasis on pre-trial procedures and simplifying evidence submission (especially in high-volume, less 'complex' cases, ideally directed or funnelled to mediation or ODR).

Not surprisingly and as previously suggested, this change necessarily involves several 'trade-offs' (discussed in Chapter 5), sparked throughout Commonwealth member state jurisdictions by an undisputed recognition that justice and indeed judicial time 'has become a scarce resource since the number of cases handled per judge has grown dramatically'.[137] Yet even prior to 2019, the *Innovating Justice Report* found that two-thirds of the world's population lacked 'meaningful access to justice'.[138]

There are significant societal – and personal – reverberations from increasingly unaddressed legal needs, which are certainly not limited to the most vulnerable would-be litigants (in the context of housing, domestic violence and employment, to name a few). Further, inadequate access to meaningful, reasonably affordable and timely legal recourse exerts a disturbing toll on democratic legitimacy and has a negative impact on trust in the administration of justice, which is perceived by many as prohibitive or beyond reach.

Enhancing access to justice therefore requires making more effective use of 'scarce' resources (foremost judicial time), a lynchpin of public confidence in a time of changing public expectations. Indeed, the common thread underlying these reforms is the principle of proportionality requires that 'decisions affecting process should be made with consideration for the impact they have on the rest of the system'.[139]

Accordingly, in a recent treatise on this point, Peter Chan describes active case management as: 'handling procedures in a manner consistent with cost-effectiveness'. It follows, as Cabral (2018)[140] highlights, that:

> *to reduce costs, management activity is commonly associated with the formal loosening of procedures. Reducing formalities and adding flexibility to the proceedings would enable the prevention of nullities of procedural legal acts, thus making it feasible for the judicial procedure to better serve the purposes of effective dispute resolution, solving the litigated substantive*

> *legal issues. A more flexible procedure would contribute to adaptability and would be more suitable to provide effective relief.*

What is more, and as Ragone (2018)[141] recounts:

> *The role of the judge was gradually changed, not as a passive spectator of the activities of the parties, but as a proactive participant who sought to direct the realization of the public purposes of the process.*

Simply put:

> *case management has three main functions: to encourage the parties to pursue mediation, where this is practicable; secondly, to prevent the case from progressing too slowly and inefficiently; finally, to ensure that judicial resources are allocated proportionately, as required by 'the Overriding Objective' in CPR Part 1 (reformulated in 2013 to highlight the need for cases to be dealt with justly and 'at proportionate cost').*

4.2. Shortening first instance proceedings

First instance proceedings form the bulk of civil litigation. Whether or not the parties eventually reach the trial stage, first instance proceedings are usually the most costly and time consuming, given the need to conduct fact finding. Shortening first instance proceedings, both in terms of streamlining the pre-trial procedure and simplifying trial, is critically important if courts are to make the civil process more efficient.

4.2.1. Distilling common features from Commonwealth jurisdictions: examples of the 'culture shift' to individual and collective proportionality

As noted above, reform of the procedures framing civil litigation in Commonwealth member countries is defined by a 'less adversarial' system or a system that is slowly becoming more inquisitorial. In other words, a survey of Commonwealth jurisdictions reveals a 'distinct shift from party autonomy to

the court management of proceedings' (Bell 2019)[142]. The purpose of this change in approach is to ensure that the time and cost allotted to cases before the courts are proportional to their complexity and to the litigants' objective needs in the circumstances. Indeed, it is manifest from comparative inquiry across Commonwealth member countries that effective use of judicial time through good faith co-operation and differential case management guided by proportionality are integral to procedural reforms aimed at promoting (better) access to justice.

Echoing the Nigerian perspective at the start of this Guide, which proposes shifting away from paper to digital, Justice Bell too observes that Australia, New Zealand and Canada, among others, have all elevated the 'consideration of proportionality in case management decision-making' and enshrined it in procedural advances, with an eye towards 'reducing the high costs and delays of civil litigation.'[143]

Hence, a holistic and contextual approach to case management can be said to surface as a best practice throughout many Commonwealth member countries, recognising not only the procedural rights of the parties, but the public interest in the efficient use of court resources more generally, alongside the rights of other and all litigants in the justice system.

As noted, a recurring theme drawn from caselaw across the Commonwealth jurisdictions surveyed (Canada, UK, Australia…) is that *context* is key and that it may be 'no longer acceptable for a party to be permitted to raise any arguable claim or defence at any stage in proceedings on payment of cost previously stated'. In *Hryniak v Mauldin*[144], the Supreme Court (of Canada) addressed the need for a 'culture shift' in civil litigation that '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'. While the Canadian civil justice system is 'premised upon the value that the process of adjudication must be fair and just ... [t]he proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.'[145]

In Australia, the Victorian law reform commission also confirmed that, 'the concept of proportionality reflects an inherent tension between ideas of utility and those of autonomy, where proportionality may be seen to be an "effectiveness"

measure at the sake of individual justice'.[146] More generally, as early as 1995, the Court of Appeal of New South Wales 'acknowledged that the capacity to do justice for other litigants in a timely way is a relevant consideration in the administration of civil justice' (cited by *Bell Byron v Southern Star Group Pty Ltd* (1995) 123 FLR 352 at 352–354 per Kirby P; *Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd* (1996) 40 NSWLR 543 at 553–554 per Clarke JA, 601–605 per Powell JA.[147]

Although a complete analysis of the diverse Australian federal system (each state having its own independent system) is clearly beyond the scope of this endeavour, the following glimpse into the jurisdiction's practices nevertheless yields instructive guidance.

Historically, the British Woolf reforms have been an inspiration in Australia.[148] The greatest impact has been a generalised shift away from traditional judicial 'detachment' and unbridled party autonomy to increased judicial supervision in case management or 'managerial judging' ('the process by which a judge actively uses the court's powers to facilitate the swift disposition of cases' (see, for example, Victorian Law Reform Commission, *Civil Justice Review, Final Report 2008*).

Judges have broad case management powers. These managerial principles are enshrined in a number of legal instruments, such as the Civil Procedure Act in New South Wales 2005, which states: 'The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolutions of the ***real issues in the proceedings***' (emphasis added).

This 'overarching purpose' has been adopted in other states (Victoria, Western Australia, Queensland, South Australia, the Australian Capital Territory, and the Northern Territory), as well as by the Federal Court, via the Federal Court of Australia Act (as amended). Furthermore, as Tania Sourdin observed as early as 2013, differential dispute management or the multi-door model response system is an important feature of overall reforms, as is expedited discovery (which is viewed as a significant cause of delays, particularly in low-value matters).

4.2.2. Collaborative lawyering and non-adversarial approaches to practice

The onus for preventing unnecessary delays and complications has also shifted to the attorneys, being enshrined in their professional duties. This onus includes an obligation to decline unmeritorious cases subject to penalties of professional misconduct. Under the Federal Rules, lawyers may be disciplined for causing costs to be improperly incurred (Federal Court of Australia Act, s 43).

Commentators have lauded the removal of financial incentive to sustain conflict, especially in family matters. In other words, an overly adversarial approach to case management incentivises protracted conflict, whereas active or facilitated case management encourages more efficacious resolution. This approach resonates with that set out by Canadian jurist Suzane Chiodi (2023) in a recent piece titled 'Don't Just Change the Rules, Change the Game', which reiterates the need for shifting towards a less adversarial legal culture.[149] The focus, the article argues, should be on changing the legal and professional culture rather than focusing solely on the rules themselves.

Expedited proceedings or 'fast tracking' is yet another tool at the courts' disposal. This includes various reforms to the expert evidence process (controls and limits on use of expert evidence) and pre-trial exchange of witness statements (putting other parties on notice as to the evidence they plan on calling).

4.2.2.(a). UK: The principle of procedural proportionality

Thus, while it is again and as previously noted beyond the ambit of this Guide to engage in a thorough historical survey of UK procedural reforms, a few salient practices emerge.

In the original *Access to Justice Report* of 1995 Lord Woolf sought to mitigate the overly onerous effects and impact of the adversarial approach on the justice system and instead 'offer appropriate procedures at a reasonable cost' for greater speed, responsiveness, intelligibility and effectiveness.[150] Proportionality therefore became a fundamental tenet – the cornerstone – of procedural law reforms, known as an 'overriding objective'.[151] Its distributive goal was to ensure users did not appropriate more than their 'fair share' of judicial resources, therefore depriving others of their own day in court.

Likewise, many jurisdictions opted for a more 'global' or contextual appreciation of the allocation of court resources being justified by the needs of a particular case. This in turn led to procedures that differentiated according to the parties' level of sophistication, the matter's complexity and the overall circumstances. These important factors are to be accounted for in determining the extent of judicial resources to be attributed to a particular case, with consideration of the justice system as a whole. This approach reflects Lord Jackson's embrace of proportionality as a facilitator of access to justice (2009), emphasising that expenses 'reflect the nature and complexity' of cases 'to promote access to justice at reasonable cost'.[152]

With the advent of technology, modern case management further calls for striking a balance between harnessing commercial advances towards the nimble administration of justice (such as deploying commercial platforms for case management such as Ninex), while maintaining courts' cherished independence and the justice system's public character.

Proportionality is defined by John Sorabji[153] as:

> *a recognition that justice has both individual and collective dimensions deal with cases justly and at proportionate cost.*

As Lord Dyson MR described it, the CPR's overriding objective required that no individual claim should receive more than its fair share of the court's time and resources. The reason for this was that the proper administration of justice goes beyond the immediate parties to litigation. It requires the court to consider the needs of all litigants, all court-users. This idea finds expression in the 'overriding objective'.

Furthermore, co-operation between lawyers is integral to keeping costs reasonable. By 'co-operation' it means the 'expectation is that the parties will endeavour to agree on the level of disclosure that is reasonably necessary and on the most cost-effective means of providing it' (Bell citing Woolf reforms Civil Procedure Rules 1998 (UK) r 31.5(2)–(8).

4.2.2.(b). Quebec: an ongoing culture shift in lawyering and judging

Québec (in addition to British Columbia and Ontario) is emblematic of the tectonic shifts in both mindset and practice.

To borrow the words of Professor Piché (as she then was), these jurisdictions have:

> *Recognized the need to address the great costs and delays incurred in the justice systems and introduced the requirement of proportional procedures into their laws and palliate access to justice issues.*

Québec, however, is distinctive both in terms of proportionality and judicial settlement conferences, as outlined in Professor (now Justice) Jean-François Roberge's instructive research.[154] As (now Justice) Piché edifyingly points out with regard to proportionality:

> *Québécoise proportionality is unique in Canada – and perhaps even around the world. First, it requires both parties and judges, in first instance and on appeal, to promote proportionality. They will have to act – or adjudicate – in view of simplifying or accelerating court procedures and hearings, or otherwise reducing court delays.*[155]

Judges themselves are also responsible for ensuring that the recourses and procedures in place are proportionate to the nature of the litigation. Under this model, judges will be expected to intervene to rectify a situation where procedures are too onerous in the circumstances to speed up the process. For instance, Article 27 of the Code of Civil Procedure (Quebec) allows the Chief Justice of Québec and the Minister of Justice jointly to make changes to procedure in case of emergency[156] and Art. 158 of said Code allows notably the court, on its own initiative or on request, to take measures to simplify or expedite the proceeding.[157] Judges are permitted to restrict the number of pleadings and documents, shorten or extend the time limits prescribed by the Code, or prescribe their own deadlines. While they must use their powers proportionately, judges are permitted to find their management decisions on considerations of procedural proportionality.

As Piché (2011) further explains:

> *Québec proportionality is unique because it applies largely in time, at all stages of the action, from service of process at the introductory motion to trial on the merits. Parties and their lawyers are required to be able to justify each decision, strategy and choice in the management of their file. They must always consider the following considerations: will the*

> *procedures I have chosen to allow my case to be ready for a court hearing after the Code-prescribed 180-days delay for inscription of the case for trial? Are judicial and extrajudicial costs high? What kinds of recourses, procedures and interests are at stake? Are the substantive law and evidence more complex than usual? What are this procedure's principal objectives and uses? How will the chosen procedures advance the case? Third, Quebec proportionality is unique because it has been interpreted loosely and generously since the recent decision of the Supreme Court of Canada in Marcotte.*[158]

In *Marcotte*, the Supreme Court then referred to both individual and collective proportionality. The latter 'considers judicial resources and individual hearing times, relative to other files active within the court system'.[159]

Proportionality was formally codified in the Quebec civil procedure law reform of June 2002. As Professor Piché explains:

> *[The reform] brought the enactment of the Act to reform the Code of Civil Procedure (S.Q., c. 7). The Act's purpose was to provide speedier, more efficient, and less costly civil justice, improve access to justice and increase public confidence in the civil justice system. The reform codified a rule, in Article 4.1 of the Code of Civil Procedure ('C.C.P.'), that litigants must master their case, and that they must not act unreasonably or excessively. They are, instead, required to be litigants in 'good faith'. Importantly, Article 4.2 C.C.P. introduced proportionality, as a cornerstone of the reform.*[160]
>
> *[…]*
>
> *[T]he combination of Articles 4.1 and 4.2 C.C.P. increased the judge's role in that respect, to avoid excessive costs and delays, and bring a fairer balance in the use of the courts by the parties. Procedural proportionality found its natural place in this new culture, moving along from a mere procedural policy to what the Supreme Court of Canada recently deemed to be a 'fundamental' principle of civil procedure, as opposed to a simple interpretative principle. Indeed, the Supreme Court noted, last year, that:*
>
> > *The principle of proportionality set out in Art. 4.2 C.C.P. is not entirely new. To be considered proper, a proceeding must be consistent with it. Moreover, the requirement of proportionality in the conduct*

> *of proceedings reflects the nature of the civil justice system, which, while frequently called on to settle private disputes, discharges state functions and constitutes a public service. This principle means that litigation must be consistent with the principles of good faith and of balance between litigants and must not result in an abuse of the public service provided by the institutions of the civil justice system.*[161]

These reforms echo those to the **UK Code of Procedure,** summarised as below and discussed above:

> *The court must further the overriding objective by actively managing cases [...] including (a) encouraging the parties to co-operate with each other in the conduct of the proceedings; [...]*[162]

This was improved upon in 2016 with the new Quebec Civil Code of Procedure. Article 18, in the chapter 'Guiding principles of procedure' provides that:

> *18. The parties to a proceeding must observe the principle of proportionality and ensure that their actions, their pleadings, including their choice of an oral or a written defence, and the means of proof they use are proportionate, in terms of the cost and time involved, to the nature and complexity of the matter and the purpose of the application.*
>
> *Judges must likewise observe the principle of proportionality in managing the proceedings they are assigned, regardless of the stage at which they intervene. They must ensure that the measures and acts they order or authorize are in keeping with the same principle, while having regard to the proper administration of justice.*

On 30 June 2023, amendments to the Quebec Civil Code of Procedure entered into force,[163] making various changes to the Quebec Civil Code of Procedure to simplify procedure and reduce delays. Salient among these amendments are the following:

> *The law then modifies the Code of Civil Procedure to:*
>
> > *(1) provide that the file that has been the subject of mediation or of a pre-court protocol is tried by preference; and*

(2) allow the court to refer the parties back to mediation when the parties have entered into a mediation agreement.

The law also introduces a specific procedural route applicable to civil claims brought before the Court of Québec (less than $100,000). It provides, to this end, simplified rules applicable to such requests in order in particular to provide that:

(1) A case protocol is not required and there are time limits for completing certain procedural steps;

(2) The statements set out in an originating application shall not exceed five pages in length unless the court decides otherwise;

(3) The limit below which it is prohibited from holding an oral examination for discovery is increase to $50,000;

(4) Each of the parties is entitled to only a single oral pre-trial examination where the amount claimed or the value of the property claimed in the judicial application is equal to or greater than $50,000, unless the court decides otherwise; and

(5) In lieu of the testimony of one of their witnesses on the facts of the dispute, a party may produce an affidavit from the witness. An affidavit shall not exceed five pages in length, unless the court decides otherwise; and

(6) The parties must seek a joint expert opinion in cases where the amount claimed or the value of the property claimed in the judicial application is less than $50,000, unless the court decides otherwise.[164]

The law aims first and foremost to promote mediation and arbitration in small claims by empowering the government to oversee them all. This authorisation makes it possible in particular to provide for the cases in which a dispute must be submitted to mediation and the cases in which free arbitration is offered to the parties. In matters of small claims, certain judgments may be made based on the file. Furthermore, the aforementioned amendments allow notaries in practice for ten

years or more to be named to the bench to diversify the pool of applicants.[165]

Chapter 5

Summary and Recommendations

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5.1. Summary

Meaningful access to justice is increasingly conceived as inviting an equilibrium between individual litigant needs, including more traditional (however cumbersome) procedural safeguards and evidence standards, and collective values. This equilibrium should alleviate pressure on public resources (including judicial time) to make room for others in queue. This in turn entails renewed emphasis on:

- Flexibility of both procedural process and those framing the submission of evidence. This is a recurring feature identified, as is differentiation or the idea that 'not all claims require the same level of process'.
- Litigant empowerment (by providing accessible legal information, a task technology can facilitate) and inclusivity of the needs of self-represented and vulnerable litigants (with accessibility as part of access).
- As an adjunct of simplified procedure and more pliable rules of evidence, a culture of responsible co-operation in good faith between attorneys and a partnership between litigants and courts (to facilitate cost-effective co-operative discovery and submission). This may be inculcated through CLE as well as procedural reforms.
- Proportionality and simplification (specialised tribunals), addressing the concern that the cost of litigation often and increasingly outweighs the value of the claim.[166]
- Consistency. Setting out clear expectations and clarifying obligations is also part and parcel of active (or its more nuanced counterpart) facilitated case management.

- Finally, but no less importantly, technological transformation, as described in the opening chapters, which is central to enabling nimble, cost-efficient case management. Key illustrations of this transformation include but are not limited to: (a) user-centred litigant edification; (b) directed funnelling towards options in process; (c) virtual hearings (which may be enhanced by augmented reality); and (d) ODR, when appropriate and subject to aforementioned cautions (particularly, mindful procurement as opposed to automatic outsourcing).

5.1.1. Confidence since COVID

For more generally, as Piché (2011) and others observed, there is a tendency for people involved in a civil case to become disillusioned about the ability of the system to affect a fair and timely resolution to a civil justice problem'.[167] This is even more true since the recent turbulations or 'justice debt' lamented by former Chief Justice McLachlin:

> *Coupled with diminished funding is the problem of diminished expectations. COVID-19 has meant increased delays in resolving people's legal problems, as courthouses have reduced capacity and justice support agencies have been silenced as non-essential. We know that pre-pandemic, many people had given up on courts and tribunals to resolve their legal problems. The curtailments and closures caused by COVID-19 have exacerbated this situation.*
>
> *This is a dangerous situation. When people give up on the justice system, they also stop believing in the rule of law. Unable to use the law to obtain the benefits it accords them, they view the system as alien and elite. The law is not their law; it is the law of a privileged and empowered class. This in turn undermines trust in all our democratic institutions. Not only did the pandemic make operating the justice system more difficult, but it also added to the cases needing to be processed. The pandemic exacerbated domestic violence and mental illness. It further marginalised people already experiencing social disadvantage, increasing demands on courts and tribunals for decisions relating to welfare and housing. And it showed us the limits of technology. If you don't have minimum digital literacy, don't own an iPad or*

> *computer, or can't connect because you don't live in a city, e-filing and in-person hearings aren't likely to help you.*[168]

Although civil justice reform initiatives across the Commonwealth are varied, a few common threads have already been identified herein. To reiterate, simplified procedure features proactive judicial shepherding of cases aimed at mitigating delays and costs (see, for example, the Singaporean model: Foo et al. 2014).[169]

5.1.2. A caution: challenges relating to the active (or facilitated) case management model and proportional procedure.

Judges taking active control of cases can have unintended repercussions on independence and public confidence. To cite Kettinger's pertinent elucidation:

> *Court management operates in the institutional dichotomy between accountability and independence. The optimum level of effective protection of legal rights is achieved if the two principles are in equilibrium. Court management and judicial independence are, therefore, not mutually exclusive in principle…*
>
> *Court management operates in the dichotomy between the quantity and quality of judicial performance. Rapid judgments (in line with the requirement that justice be dispensed speedily) and many judgments (in line with the requirement of efficiency) are not necessarily good judgments in formal respects (in terms of procedural guarantees) or in substantive respects (in terms of material accuracy). Here again, management must be used to find a balance between the diverging constitutional requirements.*[170]

In sum:

> *A new system is thus created where court users become 'clients' of sorts of the civil justice system instead of being treated as mere beneficiaries of the law. This focus in our civil justice system on efficiency is problematic if one considers how fundamental just and equitable processes are to society. Efficiency must be considered simultaneously with fair- ness and justice.*[171]

In satisfying the overriding objective of proportionality, '[t]he essential question … concerns the extent to which the powers of the court can be increased without thereby sacrificing other values which are held to be vital to the due administration of civil justice'.[172]

Questions therefore arise as to possible interference with due process and fairness and indeed the perception of independence – even impartiality – of the truly active judge who serves as a facilitator of sorts between the parties. Lord Greene MR too warned of the dangers of 'intrusive case management' when the judge 'descends into the arena and is liable to have his vision clouded by the dust of the conflict'.[173] Coupled with relaxed formalities of both evidence and procedure, such changes can offend the adversarial safeguards inherent of the common law and their reinforcement of ritual and ceremony (this argument is stronger if hearings are on Zoom etc.).

Similarly, differential case management, whereby high-volume, ′low-value' cases or 'ordinary' disputes, associated with most litigants' needs (as distinguished from complex corporate matters), are funnelled towards extra-judicial resolution (settlement or ODR – automated or AI-mediated dispute resolution). This risks conjuring up suspicions of a two-tier, 'poor man's' justice of sorts.

Accordingly, and for purposes of the paramount values of confidence and legitimacy, does proportionality signify that litigants' 'ordinary' disputes have no room in the courts and state resources are reserved for complex corporate actors? As the Victoria Law Reform Commission (2008)[174] observed:

> *Although disputes of relatively low value or importance should clearly not require disproportionate private or public resources for their resolution, there is a vexed policy issue as to whether high value civil disputes should be permitted to consume substantial publicly funded court resources, particularly where the parties in dispute are commercial leviathans involved in a commercial dispute with purely financial dimensions and where such parties can readily afford the costs of mediation, arbitration or other 'private' methods of resolving their dispute.*

Overall, changes to case management risk inadvertently undermining the quality of justice and access to dispute resolution forums, which are either public in character or at

least perceived as such in the eyes of litigants. Accordingly, changes to case management must be implemented with a view towards mitigating against this risk and improving access to justice. For:

> *one danger of excessive judicial case management is that it provides comfort to the second species of practice by fostering passivity in the profession. It risks encouraging over-reliance upon the court to dictate to parties how their litigation will run. That makes it all too easy for lawyers to abdicate their statutorily mandated responsibility to resolve disputes in a cost-effective manner for their clients. Initiative and responsibility are shifted to judges. Also, it may provide detailed and unnecessary process around which much work must be done. Litigation practitioners are reduced to fee-collection machines.*[175]

5.1.3. A few additional words of caution: Front-loading and judicial well-being

An additional concern is the burden that more active case management places on judges themselves in terms of micromanagement and control. This aside from posing an affront to the perception of impartiality (as the judge becomes actively involved in processes), may be an overwhelming, unfamiliar role, thereby threatening their well-being.

This may become a significant disadvantage inherent to active (or even facilitated) case management, as recognised in Australia. Cognisant of these considerations, a more nuanced iteration of the active case management model is being pursued in parts of Australia amid concerns that excessive front-loading may in turn be burdening courts. The emphasis on flexibility should therefore focus on reducing opportunistic behaviour as distinguished from 'real issues' (*Aon* case) and tackling delay.

5.2. Recommendations

As noted, and subject to the above cautions, this Guide makes the following recommendations based on insights distilled from a multi-jurisdictional survey:

- 'Formalism must not prevent participation or hinder comprehension'.[176]

- In addition, litigant-centric case management (or what Iavronne-Turcotte [2016] refers to more narrowly as 'citizen-centered') in 'Re-Centering Justice' is a key pillar of case management reform.[177] In other words, redesigning courts from a user's perspective.

5.2.1. Making procedure more pliable

As Alan Uzelac opines in this vein, collaborative law can serve as an antidote to the erosion of confidence in an overly rigid, technical and expensive adversarial system.[178]

Although procedural safeguards necessarily engender some delay, *undue* delay is especially problematic and risks jeopardising trust in the justice system.[179] Therefore, the challenge for case management reform is to focus on mitigating unnecessary delays by eliminating, or at least curtailing, overly rigid procedural requirements, which translate into disproportionate costs.

Since the rigidity of procedural safeguards can only be contextually assessed, bestowing greater discretion on judges who are well-positioned to waive or diminish cumbersome and complex procedural exigencies for more routine instances (the hallmark of 'active' or facilitated case management) serves to reduce unnecessary hurdles.

Moreover, good faith, ethical lawyering, where advocates are held responsible for fabricating artificial delays or exacerbating undue procedural zeal by disingenuously insisting on superfluous formalities or hindrance is a related facet of reform. Daan Asser accordingly submits that a change in attorney culture ('procedural attitude'), featuring joint responsibility for greater co-operation between the parties to reduce costs (collaborative lawyering) is a path forward.[180]

In other words, in reimagining case management, more pliable procedure signifies purposive deployment of procedural safeguards by advocates, aided by judicial oversight, rather than zealously insisting on postponements due to formalities that are unnecessary in the context of the dispute at bar and – perhaps most importantly – merely serve to raise costs.

5.2.2. Shifting away from micromanagement: facilitation rather than overly active involvement

In this vein, Cabral (2018) elucidates an essential distinction: 'case management is targeted from a macro- procedural perspective, in what could be called multiple-cases management.[181] The biggest difference is that these techniques promote large-scale solutions'. Rather than micro-managing each case on an individual ad hoc basis which risks not only overwhelming the judge and making exigent demands but compromising the perception of impartiality and perhaps even independence as judges' productivity is surveilled.

5.2.3. Clear standards framing the procurement of court technology

Hadfield observed years ago, prior to many of the above cited procedural and technological reforms, that we may be witnessing a fundamental shift from public adjudication to private settlement[182]. Inter alia, the danger of this insidious transition if taken to an extreme menaces independence (as per Chapter 3) and may also generate a two-tier justice system or even the perception of a 'poor man's justice' (economy class justice).

More specifically respecting mandatory ODR, Piché for her part, described '[a] culture where privatisation is viewed as the "better option" to be encouraged,' noting that:

> *While reform is in theory justifiable by the need to control costs and delay, it appears to be founded upon a need to evacuate from the system those cases that are not 'worthwhile' and do not need to be addressed judicially. The question is, however, which such cases should be staying within the system, and how does one determine whether they are justiciable?*[183]

It stands to reason that the cardinal value of legitimacy can be threatened if democracies are perceived as outsourcing justice through staunch pressure to divert towards Alternative Dispute Resolution (ADR) or even private sourced ODR, or if differential procedure leads to every person's case being funnelled towards simplified procedures and specialised tribunals. Meanwhile, a fraction of complex corporate cases

benefit from the public courts and their rituals. As Gelinas et al. (2014) cautioned, it bears asking:

> *Does faster process necessarily mean a more satisfactory one that enhances trust? Efficiency in perspective as a means not an end rhetoric of efficiency must be viewed with caution. They stress the importance of collecting empirical data with regards to our assumptions.*

A recent panel of the Canadian National Judicial Institute posed the following question:

> *We can agree that digital portability of documents with the advent of electronic filing and case management platforms presents huge resource-saving opportunities. Is the reluctance to move to remote hearings partly attributable to a reluctance to embrace new ways of submitting and absorbing evidence.*[184]

Technological transformation changes courts' needs regarding physical legal infrastructure and, accordingly, their budgetary considerations, as Sir Vos observed about the future of the civil litigation process.

A rewarding practice canvassed above is setting up – as many Commonwealth courts have done – a co-ordinating group to share developments and best practices, including but not limited to developing criteria for audits and evaluating technologies and most importantly, implementing government procurement criteria and best practices for private systems.

5.3. Conclusion

This Guide's stated purpose was to provide principled and practical guidance to the judiciary and to responsible policy-makers on case management. Accordingly, in exploring useful insights, it has dwelled upon the advantages and challenges of digitisation and procedural reform at a high level of abstraction, in the context of increasingly scarce resources and technological transformation.

Thus, by setting forth a comparative overview of Commonwealth jurisdictions, this contribution endeavours to shed light on the way forward in the quest to better case management and procedure. The Guide identified several values and objectives common to the measures implemented in

Commonwealth jurisdictions. These best practices might serve as a bedrock for continued and future innovations in a manner consistent with the fundamental values of court administration.

In this vein, courts throughout the Commonwealth are increasingly open to innovation, modernising procedures and processes with an eye towards facilitating access to justice. They are what the Chief Justice of the Supreme Court of British Columbia called, 'embracing disruptive changes', implementing forward-thinking practices and services that are convenient and intuitive for a populace whose expectations have changed dramatically, yet secure and trustworthy in a delicate and ever-changing global reality, replete with cybercrime. As noted, the integration of technology to court processes precipitated by the advent of COVID-19 has served to carve out a more active role for judges and litigants themselves, reminiscent of the inquisitorial system referenced above, where judges are tasked with more active oversight of the process.

The turbulence of the pandemic affords the proverbial opportunity to revisit and reimagine how we construe the rules of evidence and procedure, with a goal towards simplifying to promote new thinking. COVID-19 will reveal the inefficiencies and gaps in how we deliver justice to Canadians and allow us to build a better justice system that combines the strengths of the current system with new thinking on how to run our justice institutions more efficiently and humanely.[185]

Endnotes

1 See, for example, Action Committee on Court Operations in Canada (no date), 'Roadmap to Recovery', available at: www.fja.gc.ca/COVID-19/Orienting-Principles-Reducing-Backlog-and-Delays-Principes-d-orientation-reduire-les-engorgements-et-delais-eng.html.

2 Chan, P and CH van Rhee (eds.) (2021), *Civil Case Management in the Twenty-First Century: Court Structures Still Matter*. Springer Singapore, Singapore.

3 Action Committee on Court Operations in Response to COVID-19 (no date), 'Orienting Principles on Backlog Reduction', 8, available at: www.fja.gc.ca/COVID-19/pdf/Orienting-Principles-Reducing-Backlog-and-Delays.pdf

4 Bell, V. (2019). Cultural change - the shift from party autonomy to court-managed litigation. *Brief*, 46(8), 14–20.

5 See: Zuckerman, A (2013), *Zuckerman on Civil Procedure.* Sweet and Maxwell, London

6 See: Schwab, WH (2004), Collaborative Lawyering: A Closer Look at an Emerging Practice, *Pepperdine Dispute Resolution Journal* Vol. 4 Issue 3, available at: https://digitalcommons.pepperdine.edu/drlj/vol4/iss3/4 (in turn citing generally Fisher, R, W Ury and B Patton (1991), *Getting To Yes: Negotiating Agreement Without Giving 2nd ed.,* Penguin Books, New York, NY.

7 International Academy of Collaborative Professionals Available at https://www.collaborativepractice.com

8 https://www.justicedevelopmentgoals.ca/blog/fragility-and-resilience-the-lessons-of-2020-and-the-potential-of-2021

9 See: Sourdin, T (2021), 'Chapter 4: Courts and technology', available at: www.elgaronline.com/view/9781788978255.00008.xml; see also: Krans and Nylund (2021), *Civil Courts Coping with Covid-19*. Eleven International Publishing, The Hague and following the discussion on the 'unforeseen and unpredictable' impact of COVID on courts, which required immediate adjustment or as they call it 'resilience, readjustment and reorientation'.

10 Van Rhee, C. H., Uzelac, A (2015), *Evidence in Contemporary Civil Procedure: Fundamental Issues in a Comparative Perspective*. Ius Commune Europaeum; 139. Larcier-Intersentia, Brussels

11 Shetreet, S (2016), 'The Duties of Fairness and Impartiality in Non-Judicial Justice', *Asia Pacific Law Review*, Vol. 21 No. 2, available at: www.tandfonline.com/doi/abs/10.1080/10192557.2013.11788273.

12 See, for example: the international trend toward considering the public's experiences with and perceptions of justice: Roberge, J-F (2013), 'Perspectives on access to justice and dispute prevention and resolution: the Canadian experience', *Dutch-Flemish Mediation and Conflict Management* Vol. 17, No. 2, 13–27. See also: the recent example of the province of Saskatchewan (Canada), available at: www.slaw.ca/2023/05/03/bringing-online-consumer-dispute-information-and-resolution-to-saskatchewan/. The Canadian province instituted a new guided pathway platform to help resolve consumer disputes. It is summarised as follows: the goal of the 'Consumer Rights' pathway is to help consumers and businesses resolve issues in a fast, efficient and fair manner. It is an interactive pathway that takes the user through a series of questions and answers that provide plain-language information about the user's rights

and responsibilities, applicable legislation, and self-help tools to assist in resolving the consumer dispute. For consumers, the 'Consumer Rights' pathway includes communication templates, links and references that may help the consumer to resolve their issues on their own. For businesses, information is provided to assist in better understanding their obligations to consumers.

If a consumer completes the Consumer Rights pathway and believes they have a valid dispute but are unable to resolve the dispute with the tools provided, they are invited to file a dispute through the online 'Resolve My Consumer Dispute' service. This process enables consumers and businesses to negotiate directly with one another by making proposals to resolve the dispute, upload documentation, and accept or continue to negotiate a remedy for the dispute. If a resolution cannot be reached, either party can request a facilitator to provide assistance. In some cases, an independent, third-party mediator may be assigned to provide further assistance.

13 Note that this is not a direct quote. See: the Chief Justice's Speech cited in the *Lawyer's Daily* piece titled 'Quebec's Chief Justice Calls for Modernization of Courts System', 16 September 2022, available at: www.law360.ca/articles/39762/quebec-s-chief-justices-call-for-modernization-of-court-system.

14 Chan et al. (2021), *Civil Case Management for the 21st Century*. Springer, Singapore

15 Moreover, as Professor Richard Marcus (cited by Chan et al. [2021] supra.) observed: 'Any consideration of the case management approach of a nation's judicial system must begin with an appreciation of the architecture of the court system. Irrespective of jurisdiction, litigants as users of the courts are looking for a procedural experience that is efficient, cost-effective, proportionate and user-friendly. However, the judges can only do so much with the case management tools that are available to them.'

16 See: Cyberjustice Laboratory's 'Autonomy through Cyberjustice Technologies', available at: www.ajcact.org/en/.

17 Feigenson, N and C Spiesel (2009), *Law on Display: The Digital Transformation of Legal Persuasion and Judgment*. New York University Press, New York.

18 See: Sa'eed, Nigerian National Justice Institute (2019) supra. 'Yellowing paper' references antiquated practices such as the use of 'yellowing' paper pads. For a more in-depth look at the Nigerian experience in modernising justice following COVID, see: Olugasa, O and A Davies (2022), 'Remote Court Proceedings in Nigeria: Justice Online or Justice on the Line?' *International Journal for Court Administration*, Vol. 13 No. 2, 2, available at: https://doi.org/10.36745/ijca.448.

19 See, for example: the discussion in Jolowicz, A (2003), 'Adversarial and Inquisitorial Models of Civil Procedure', The *International and Comparative Law Quarterly,* Vol. 52, No. 2, 281.

20 See, for example: Piché, C (2010), 'Judging Fairness in Class Action Settlements', *Windsor Yearbook on Access to Justice*, Vol 28, 111-151. See also, Piché, C (2017), 'Le 'dialogue' des parties et la vérité plurielle comme nouveau paradigme de la procédure civile québécoise', Vol. 62, No. 3, RD McGill, 901.

21 See: Quebec Code of Civil Procedure (2016), 'Bill No. 28: An Act to establish the new Code of Civil Procedure – National Assembly of Quebec, 21 February 2014 [Bill No. 28]', available at: www.canlii.org/en/

qc/laws/astat/sq-2014-c-1/latest/sq-2014-c-1.html. See generally: Brierley, JEC and RA Macdonald (Eds) (1993), *Quebec Civil Law: An Introduction to Quebec Private Law*. Emond Montgomery Publications, Toronto

'The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the jus commune, expressly or by implication. In these matters, the Code is the foundation of all other laws.' See: Civil Code of Québec, CQLR c CCQ–1991, Preliminary Provision, available at: https://canlii.ca/t/56184.

22 FN: Palmer, VV (ed.) (2012), *Mixed Jurisdictions Worldwide: The Third Legal Family*. Cambridge University Press, 2nd edition, at xiii (cite), 625–631 in Picker, C., Seidman, G. (Eds) The Dynamism of Civil Procedure - Global Trends and Developments. Ius Gentium: Comparative Perspectives on Law and Justice, Vol 48. Springer, Switzerland, available at https://doi.org/10.1007/978-3-319-21981-3_1

23 See: Hammond on mixity: 'Quebec has what has been called a mixed legal system. The concept of "mixity" refers to legal systems that have some degree of hybridity, meaning that there is a "mix of laws and judicial attributes that derive from multiple tradition-based sources". While these sources are usually from the common law and civil law traditions, they come from Indigenous and religious sources as well. Quebec is a mixed legal system in "its substantive law, its procedural rules, and its institutions of justice". For instance, even though private law in the province of Quebec is dealt with in accordance with the civilian legal tradition, procedural law and its judicial system have been greatly influenced by the common law tradition.'

Hammond, K (2020), 'Searching for a Summary Judgment Equivalent in Quebec Procedural Law', *Dalhousie Law Journal* 43–1, 1, CanLIIDocs 1654, available at: https://canlii.ca/t/svcl. See also: www.canlii.org/en/commentary/doc/2020CanLIIDocs1654#!fragment/zoupio-_Tocpdf_bk_2/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zhoBMAzZgI1TMATAEoANMmylCEAIqJCuAJ7QA5KrERCYXAnmKV6zdt0gAynlIAhFQCUAogBl7ANQCCAOQDC9saTB80KTsIiJAA.

Hammond cites: Jukier, R (2018), 'The Untapped Potential of Transsystemic Thinking' in Y Emerich and M-A Plante (eds.), *Repenser Les Paradigmes: Approches Transsystémiques Du Droit*. Yvon Blais, Cowansville.

24 See: Hammond citing Explanatory Notes and Preliminary Provision, Bill 28 (2014, c. 1): An Act to establish the new Code of Civil Procedure at para. 2, supra. footnote 17. See also: Hammond, K (2020), 'Searching for a Summary Judgment Equivalent in Quebec Procedural Law', ibid.

25 See, for example: Seidman G (2016), 'Comparative Civil Procedure' In: Picker, C. and G Seidman (eds) The Dynamism of Civil Procedure - Global Trends and Developments. Ius Gentium: Comparative Perspectives on Law and Justice, vol 48. Springer, https://doi.org/10.1007/978-3-319-21981-3_1

26 21 Rossner, M, D Tait and M McCurdy (2021), 'Justice reimagined: challenges and opportunities with implementing virtual courts', Current Issues in Criminal Justice, Vol. 33 No. 1, 94–110, available at: 10.1080/10345329.2020.1859968

27 Legg, M and H Higgins (2016), 'Responding to cost and delay through overriding objectives – successful innovation?', in Picker and Seidman, Comparative Civil Procedure, infra. Picker, C., Seidman, G. (eds) The

Dynamism of Civil Procedure - Global Trends and Developments. Ius Gentium: Comparative Perspectives on Law and Justice, vol 48. Springer, Switzerland https://doi.org/10.1007/978-3-319-21981-3_1

28 Schwab, WH (2004), 'Collaborative Lawyering: A Closer Look at an Emerging Practice', Pepperidine Dispute Resolution Law Journal Vol. 4, Issue 3, available at: https://digitalcommons.pepperdine.edu/drlj/vol4/iss3/4

29 See: www.judiciary.gov.sg/singapore-judicial-college/chief-justice-message; www.judiciary.gov.sg/singapore-judicial-college/case-management

30 As Justice Martin, Chief Justice of Western Australia (as he then was) of the International Organization for Judicial Training

31 Silver, J, TCW Farrow (2016), 'Canadian civil justice: relief in small and simple matters in an age of efficiency', articles and book chapters, 2415, available at: https://digitalcommons.osgoode.yorku.ca/scholarly_works/2415

32 See: critique of 'managerial judges' voiced regarding overly active case management more generally. For example, inter alia: Hansen, J (2006) 'Courts Administration, the Judiciary and the Efficient Delivery of Justice', available at: www.courtsofnz.govt.nz/assets/speechpapers/speech28-09-2006.pdf ('Case management has been criticised for adding to costs or to the front-end loading of costs').

33 See: Alexander, RI (2020), 'Ontario Courts to Paperless? COVID-19 Could Drive Digital Change', Canadian Legal Information Institute, CanLIIDocs 562, available at: https://canlii.ca/t/srj3.

See also: Benyekhlef, K, J Bailey, J Burkell and F Gélinas (eds.) (2016), 'eAccess to Justice (Introduction)', University of Ottawa Press, Ottawa, available at: https://ssrn.com/abstract=2931382 or http://dx.doi.org/10.2139/ssrn.2931382; and more generally, inter alia: Sourdin, T and J Zeleznikow (2020), 'Courts, Mediation and COVID-19', Australian Business Law Review, Forthcoming, 8 May, available at: https://ssrn.com/abstract=3595910 or http://dx.doi.org/10.2139/ssrn.3595910. The latter cites instructive examples (p 7) including Ontario: 'As of 2 April 2020, the Court will dispense with the requirement to file documents in hard copy; will accept electronically signed documents; permit electronic service of documents where personal service is required; and will hear all criminal matters by way of telephone or video conference.' Similarly, the Supreme Court of Queensland (Australia), for its part provided: 'Parties and practitioners are only to make physical appearances where the matter cannot be "practicably dealt with by telephone or video"'. See also: 'Notice to the Profession', 20 May 2020, Ontario Superior Court of Justice, available at: www.ontariocourts.ca/scj/notices-and-orders-covid-19/notices-no-longer-in-effect/notice-to-the-profession-the-public-and-the-media-regarding-civil-and-family-proceedings-update/.

34 As recognised by the Briggs Report as early as 2016, available at: www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf. See also: Salter, S and D Thompson (2016), 'Public-centered civil justice redesign: a case study of the British Columbia civil resolution tribunal', *McGill Journal of Dispute Resolution* Vol. 3, 113–136 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2955796.

35 Salter and Thompson (2016), ibid.

36 Cashman, P and E Ginnivan (2019), 'Digital justice: Online resolution of minor civil disputes and the use of digital technology in complex litigation

and class actions', *Macquarie Law Journal*, Vol. 19, 39–79, Sydney Law School Research Paper No. #19/40, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3415229.

37 See: https://civilresolutionbc.ca/.

38 Ibid. See also: the CRT's statistics, available at: https://civilresolutionbc.ca/blog/crt-key-statistics-march-2023/ .

39 Ibid. Note that the CRT is a provincial tribunal created by British Columbia statute. The CRT is not a court, it is an administrative tribunal. It was assigned certain authority to decide civil disputes under other provincial legislation. This includes broad jurisdiction over small claims litigation for less than C$5,000; which would otherwise have been heard in the Provincial Court, as well as strata property (i.e., condominium) disputes, motor vehicle injury claims under C$50,000 and incorporated societies (not business corporations) disputes. Thus, it is difficult to apply the notion of 'case management' directly to the CRT process because it moves cases out of the litigation stream to the tribunal stream.

40 Data from the CRT's annual reports supports this proposition, available at: https://civilresolutionbc.ca/wp-content/uploads/CRT-Annual-Report-2021-2022.pdf. Note that the CRT collects regular feedback, which is published online.

41 See Canadian Bar Association *National Magazine* (2022), 'Building trust in our justice system using technology', 3 October, available at: www.nationalmagazine.ca/en-ca/articles/legal-market/legal-tech/2022/building-trust-in-our-justice-system-using-technology.

42 As per Picker and Seidman JE:

All refer to Picker, C., Seidman, G. (eds) The Dynamism of Civil Procedure - Global Trends and Developments. Ius Gentium: Comparative Perspectives on Law and Justice, vol 48. Springer, Switzerland https://doi.org/10.1007/978-3-319-21981-3_1

The Master of the Rolls is one of the most senior judges in the English judiciary. He is a judge of the Court of Appeal and is the President of its Civil Division. For greater clarity, and although an in-depth discussion of the following is beyond the scope pf this endeavour, we note that 'the courts structure covers England and Wales; the tribunals system covers England, Wales and, in some cases, Northern Ireland and Scotland'. See: Courts and Tribunals Judiciary (no date), 'Structure of the Courts & Tribunals system', available at: www.judiciary.uk/about-the-judiciary/our-justice-system/court-structure/. https://www.judiciary.uk/appointments-and-retirements/appointment-of-the-master-of-the-rolls/.

43 See: www.lawgazette.co.uk/news/master-of-the-rolls-to-create-online-funnel-for-civil-claims/5107194.article.

44 See: www.judiciary.uk/speech-by-the-master-of-the-rolls-to-the-british-and-irish-commercial-bar-association/ (2022 Speech).

45 Supra. https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/digital-transformation-strategy-bc-courts.pdf . For an example that is already in place in Canada, look to the Manitoba Family Resolution Services, available at: www.gov.mb.ca/familylaw/resolution/family-resolution-service.html.

46 See: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/digital-transformation-strategy-bc-courts.pdf

47 See: www.provincialcourt.bc.ca/downloads/public%20and%20media%20access%20policies/ACC-2%20-%20Access%20to%20Court%20Records.

pdf (though it in large part addresses the more sensitive criminal context, it is an important step forward); see also: https://justice.gov.bc.ca/cso/index.do; https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/digital-transformation-strategy-bc-courts.pdf

48 Sorabji, J (2021), 'Initial reflections on the potential effects of the Covid-19 pandemic on courts and judiciary of England and Wales', *International Journal for Court Administration*, Vol. 12 No. 2, 6, available at: https://doi.org/10.36745/ijca.394. See supra. footnote 38 for additional clarification regarding UK courts.

49 See UK Ministry of Justice (2022), 'CPR – Rules and Directions', available at: www.justice.gov.uk/courts/procedure-rules/civil/rules; Dentons (2022), 'ADR's place in the Digital Justice System: shifting the paradigm to focus on resolution', 9 August, available at: www.dentons.com/en/insights/articles/2022/august/9/adrs-place-in-the-digital-justice-system-shifting-the-paradigm-to-focus-on-resolution; Civil Procedure (Amendment) Rules 2023 and 153rd PD Update (the Civil Procedure (Amendment) Rules 2023 enter into force variously from 6 April 2023.

50 https://www.judiciary.uk/wp-content/uploads/2015/04/law-society-magna-carta-lecture.pdf

51 Id.

52 See: *R (Tax Returned Ltd) v Commissioners for HMRC* [2022] EWHC 2515 (Admin).

53 See: HM Courts and Tribunal Service (2023), 'Factsheet: Online Civil Money Claims', available at: www.gov.uk/government/publications/hmcts-reform-civil-fact-sheets/fact-sheet-online-civil-money-claims The Factsheet states: 'Before the service was introduced, issuing or responding to a claim was done on paper, or by using the heritage Money Claims Online Service (MCOL). This made the process slow and difficult for some users to understand. It could take more than 3 months using the non-reformed services. The project has made the process 3 times quicker (60 days from issue to allocation to track, compared with 180 days in the non-digital journey), with a settlement reached in 24 calendar days on average. The service is available 24/7 and users can log on at any time to check the progress of their case. More cases than ever before are now going through mediation. This allows higher settlement rates to be achieved.' Again, as in footnote 38 supra., we note the following regarding the court structure in the UK for greater precision: 'The courts structure covers England and Wales; the tribunals system covers England, Wales and, in some cases, Northern Ireland and Scotland.' See: www.judiciary.uk/about-the-judiciary/our-justice-system/court-structure/.

54 https://www.lawsociety.org.uk/campaigns/court-reform/news/responding-to-damages-claims-online

55 The Rt. Hon Sir Geoffrey Vos, Master of the Rolls, Roebuck Lecture 2022: Mandating Mediation - The Digital Solution, 8 June 2022

56 See: www.ttlawcourts.org/index.php/newsroom-69/annual-reports, at 75.

57 See: www.ttlawcourts.org/index.php/newsroom-69/annual-reports, at 76.

58 Judiciary of Trinidad and Tobago, 'Annual Reports', at 82, available at: www.ttlawcourts.org/index.php/newsroom-69/annual-reports.

59 See Judiciary of Trinidad and Tobago, 'Let's Talk Small Claims!', Facebook Post, available at: https://m.facebook.com/story.php?story_fbid=703341887049054&id=316830072366906&m_entstream_source=permalink&locale=hi_IN. See also: Address of the Hon. Ivor

Archie (2021–22 term), available at: www.ttlawcourts.org/index.php/newsroom-69/speeches/11029-address-of-the-honourable-the-chief-justice-mr-justice-ivor-archie-o-r-t-t-opening-of-the-2021-2022-law-term.

60 See the *Swapnil* case, available at: https://lawfoyer.in/swapnil-tripathi-v-supreme-court-of-india/.

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The Commonwealth

A well-designed case management system supports the numerous activities required to facilitate effective management of court proceedings and promote more efficient execution of court administration engendering efficacious access to justice. *A Commonwealth Guide to Case Management* promotes the efficient handling of disputes by Commonwealth judicial systems and the dissemination of Commonwealth best practices. The *Guide* will aid the adoption of improved case management systems across the Commonwealth by promoting principles of good case management, the use of technology, law, and procedure.

The Office of Civil and Criminal Justice Reform, in partnership with the Commonwealth Civil Law Working Group developed this *Guide*.

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