THE LENGTH OF CIVIL TRIALS AND TIME TO JUDGMENT IN CANADA: A CASE FOR TIME-LIMITED TRIALS

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That access to justice remains out of reach for most Canadians is undisputed. How to address that dilemma is a harder question. One repeatedly discussed barrier to access in the civil litigation context is the phenomenon of lengthy trials, which drive up costs for litigants, monopolize scarce judicial resources and threaten to delegitimize our judicial system by putting a litigant's "day in court" out of reach. Discussions about access to justice, legitimacy and procedural reform in the civil justice system are well served if they rest on an empirical foundation. However, there is a dearth of statistical information with respect to civil, non-jury trials in Canada. For most jurisdictions, it is impossible to determine from publicly available sources how many civil trials occur every year in Canada, and in the case of every jurisdiction, how long those trials are. This original study reports data regarding the number (with limitations) and duration of civil non-jury trials in Ontario, British Columbia and the Federal Court of Canada, the length of time to judgment and the relationship between those two factors. This statistical evidence goes some distance in helping us understand the morphology of the Canadian trial system. It establishes that fairly modest reductions in average trial lengths would permit many additional trials to be heard in Canadian courtrooms annually. Materially increasing the number of bench trials that can be conducted improves access to justice. Trial time limits can reduce the average cost of litigation to litigants. Statistical analysis does not tell us if some trials are "too long" and provides no means of identifying those that may be. Whether a given trial is or is likely to be "too long" is in substance a normative question. That normative question has both systemic and particularistic aspects, both of which need to be considered by a trial judge. This article explores both quantitative and normative factors informing

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Opinions expressed in this article are the authors' own and do not reflect the views of their respective firms. The authors are indebted to Sam Campbell, George Collister, Quin Giordano, Wesley Lui, Katie O'Meara and Mohit Sethi, all of whom collected and processed the datasets, over and above their duties as articling students with Borden Ladner Gervais in 2019. The authors wish also to thank Mayer Alvo and Kirsten Crain, who provided comments on initial drafts, and Borden Ladner Gervais for providing logistical and other support. Thanks in particular to Jason Howg, Kathy Paterson and Amy Courdin. Finally, the authors wish to thank the Canadian Legal Information Institute ("CanLII") and Marcus Gaillie of the Canadian Patent Reporter ("CPR") for kindly providing information with respect to their databases.

the debate over time-limited trials, concluding that Canadian civil justice systems are well-placed to begin implementing discretionary, judge-ordered time-limited trials.

C'est incontestable : l'accès à la justice est encore déficient pour la majorité des Canadiens, et régler ce problème est tout un dilemme. Dans le contexte du litige civil, l'un des grands obstacles à la justice est la longueur même des procès, ce qui monopolise les maigres ressources judiciaires, gonfle les coûts pour les plaideurs et menace de délégitimiser notre système judiciaire en repoussant encore et toujours le jour où ces derniers peuvent se faire entendre en cour. Lorsque vient le temps de débattre de l'accès à la justice, de légitimité et de réforme procédurale dans le système de justice civile, il est bon d'avoir un support empirique. Or, il y a peu ou pas de données statistiques sur les procès civils sans jury au Canada. Pour la plupart des ressorts canadiens, il est impossible de déterminer à l'aide des sources ouvertes au public combien de procès civils se tiennent chaque année, et pour tous les ressorts, il est impossible de savoir combien de temps ils durent. Cette première étude en son genre rapporte le nombre (sous certaines réserves) et la durée des procès civils sans jury en Ontario, en Colombie-Britannique et à la Cour fédérale du Canada ainsi que le délai de jugement et la relation entre ces deux derniers facteurs. Ce matériel statistique est d'une utilité certaine pour mieux comprendre la morphologie du système judiciaire canadien. Il montre aussi qu'il suffirait d'une modeste réduction de la durée du procès moyen pour que davantage d'affaires soient instruites annuellement par les tribunaux canadiens. Accroître tangiblement le nombre de procès pouvant se dérouler devant juge ne peut être que bénéfique pour l'accès à la justice, et limiter la durée des procès serait aussi gage de réduction du coût moyen pour se faire entendre en justice. L'analyse statistique ne peut nous dire si certains procès sont « trop longs », ni comment relever ceux qui pourrait l'être. Savoir si un procès dure ou risque de durer « trop longtemps » est en substance une question normative. Cette question a des facettes systémiques et d'autres particulières, les deux types devant être pris en compte par le juge du procès. Le présent article examine les facteurs quantitatifs et normatifs qui façonnent le débat sur la limite de durée des procès, et se termine par la conclusion que les systèmes de justice civile du pays sont bien placés pour se donner, à la discrétion des juges, des limites aux délais de procédure.

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1. Introduction

Despite commendable reform initiatives in recent years, access to justice remains a matter of fundamental concern.[1] Various barriers have been identified and discussed, including the cost of engaging in litigation and the substantial delays in both pre-trial[2] and trial processes. As regards the

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[1] See e.g. Chief Justice Richard Wagner, "2018 Address" (Delivered at 7th Annual Pro Bono Conference, Vancouver, 4 October 2018), online: <www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx> (in which the Chief Justice noted that "we have made progress" but that the Canadian justice system "still face[s] the same" access to justice issues, including costs, delays and lack of access to information).

[2] There is a considerable literature on pre-trial delay and particularly on the "motions culture" which drives the cost of civil litigation and delays ultimate resolution. Much of this consists of observations by trial judges. See e.g. the reasons of Justice David Brown of the Ontario Superior Court of Justice in *Kaptyn v Kaptyn*, 2011 ONSC 542, as well as *Romspen Investment Corp v 617666 Canada Ltée*, 2012 ONSC 1727, and *George Weston Ltd v Domtar Inc*, 2012 ONSC 5001. Justice Brown has continued to condemn motions culture as a Justice of the Ontario Court of Appeal. See *2363523 Ontario Inc v Nowack*, 2018 ONCA 286. Closer statistical analyses of pre-trial delay and the reasons

latter, the length of civil trials, and associated costs, is often cited as an important aspect of the access to justice challenge. In *Hryniak v Mauldin*, the Supreme Court of Canada observed that "protracted trials" can cause Canadians to "give up on justice," and emphasized that a "proportionality principle," balancing accessibility and timeliness with the truth-seeking function of the courts, should "act as a touchstone for access to civil justice."[3] The Court's pronouncement in *Hryniak* echoed comments made by the Honourable Coulter A. Osborne, former Associate Chief Justice of Ontario, in his 2007 Report on Civil Justice Reform, in which he asserted that "meaningful improvement in access to justice can be achieved only if … resources committed to a particular litigated issue are *proportional* to what is at stake."[4] Justice Osborne recommended that pre-trial judges should therefore "be vested with the authority to impose time limits" on trials.[5]

Answering the question whether litigants are "giving up on justice" as a result of the length (and associated cost) of civil trials, and whether orders limiting the length of civil trials may be useful in improving access, requires that we know more about the morphology of the civil trial system than we do. How many civil trials are there in Canada? How long do these trials last? Is their length increasing or decreasing? How long do Canadian judges take to issue decisions following the conclusion of a trial (and thus, after waiting for trial, how long must litigants continue to wait for "justice")? Are longer trials associated with longer "reserve" periods (the period between the end of a trial and the date on which a decision is issued)? Answers to these questions tell us something about access to justice. They are also relevant to the issue of proportionality.

Unfortunatley, even rudimentary data regarding the number and length of trials or reserve periods in Canada is largely unavailable, let alone data regarding how the length of trials or reserve periods affects access to justice. The Annual Report of the Supreme Court of British Columbia publishes useful statistics regarding the number of civil, family and

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therefore would be of considerable assistance in addressing access to justice issues. This article, however, concentrates on the separate subject of the duration of trials and the time to judgment, rather than pre-trial delay.

3 *Hryniak v Mauldin*, 2014 SCC 7 at paras 24–25, 30. The immediate issue in *Hryniak* was the ambit of the summary judgment rule. That said, the Court's criticism of "protracted trials" and call for a culture shift "away from the conventional trial" leads directly to the question of orders limiting the duration of trials.

4 *Civil Justice Reform Project: Summary of Findings and Recommendations*, Honourable Coulter A Osborne, QC (Ontario: Ministry of the Attorney General of Ontario, 2007) at 8 [*Osborne Report*].

5 *Ibid* at 101.

criminal trials heard annually in the province, but does not publish detailed statistics regarding the length of trials.[6] The Canadian Centre for Justice Statistics publishes statistics on criminal trials only. Statistics Canada does produce a yearly report, the Civil Court Survey, on the number and type of civil trials.[7] But the Survey counts *any* proceeding before a judge or master "to examine and determine issues of law or fact between the parties to an action" as a "trial", and *each day* of such proceedings as a separate "trial." The Survey thus reports 20,467 "trials" of non-family civil actions in superior courts in 2018–2019—a number not useful to an analysis of actual trials. Nor does the Civil Court Survey include (and the authors understand that Statistics Canada cannot presently generate)[8] statistics with respect to the length of civil (non-family) trials, how long it takes judges to decide those trials following their conclusion, and whether those respective periods are related.[9] The fact is that we are largely unaware of how many civil trials there are or how long they are.

Reliable data relevant to these questions could help underwrite practical discussions about management and reform of Canada's civil trial systems. Statistical analysis may tease out comparative detail and establish empirically grounded hypotheses, including whether or not some trials are simply "too long"—in the sense that judicial resources (and litigants' funds) are consumed disproportionately to the matters or sums at issue—and whether, in appropriate cases, pre-trial orders limiting the length of trial would improve access to justice not only for directly affected litigants but across our justice system.

To begin building that factual framework, we have undertaken the largest-to-date survey of the frequency and length of Canadian trials, as well as reserve periods. This article proceeds in two parts. We begin by using statistical methods to explore and answer two basic questions: how long do civil trials take? (the "time-in-trial" question), and how long does it take judges to decide them? (the "time-to-judgment" question). We then set out a case for time-limited trials as a case management technique and consider criteria that judges might consider in making time-limited trial orders.

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6 "Annual Report of the Supreme Court of British Columbia" (2017), online (pdf): <www.bccourts.ca/supreme_court/about_the_supreme_court/annual_reports/2019_SC_Annual_Report.pdf>, figure 11 at 63–64.

7 See Information Table 35-10-0115-01, "Number of events in active civil court cases by type of event, Canada and selected provinces and territories" (29 November 2019), online: *Statistics Canada* <www.150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510011501>.

8 E-Mail communication with Statistics Canada, on file with the authors, September 7, 2019.

9 All subsequent references in this paper to "civil trials" exclude family law trials.

2. Statistical Analysis of Time-to-Trial and Time-to-Judgment

A) Data Sources

Published reports of court judgments provide an accessible data pool. Where reports disclose the number of trial days, the last day of trial, and the date upon which judgment was rendered, we have good estimates of the time-in-trial and the time-to-judgment.[10] These are important indicators of judicial workloads. They also provide comparative data between courts, and (potentially) over time.

Not all judgments provide that information; reporting practices vary among jurisdictions. However, reports of the Ontario Superior Court of Justice, the Supreme Court of British Columbia and the Federal Court of Canada provide, as a matter of course, specific information with respect to the number of days of trial, the last day of trial, as well as the date of judgment.

Accordingly, for the purposes of this article researchers accessed Ontario Superior Court of Justice and Supreme Court of British Columbia judgments[11] published on CanLII for the period of January 2014 to June 2019, and judgments of the Federal Court of Canada published in the Canadian Patent Reporter for the period January 2009 to May 2019.[12] From these three data pools they selected trial or summary trial judgments. These were defined as proceedings in which *viva voce* evidence was called. We excluded family law judgments since they are a separate species of litigation, and jury trials because no reasons are issued. This produced a pool of 2,531 decisions, of which 932 were Ontario Superior Court of Justice decisions, 1,524 were Supreme Court of British Columbia decisions, and 75 were Federal Court decisions.[13]

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[10] Good, but not incontestable. Reporting errors can be made. For example, in the case of reports from the Canadian Patent Reporter ("CPR"), all decisions that reported a trial time of a single day were reviewed. Several reports were determined to be in error and were corrected in the CPR dataset. Where the judgment reported multiple days of trial on its face, no further inquiry was made. No additional inquiry was made in respect of reports in CanLII databases.

[11] Both the Ontario Superior Court of Justice and Supreme Court of British Columbia are provincial superior courts and referred to accordingly in this paper.

[12] Resource constraints prevented sampling CanLII decisions prior to January 2014.

[13] As stated in *supra* note 6, although the *BC Annual Report* publishes statistics regarding the number of civil trials heard by the Court, the Report does not publish similarly detailed information regarding the length of trials or reserve periods. In order to

B) Limitations of the Data

Our analysis of the CanLII data for the period produced far fewer decisions from Ontario than it did from British Columbia. This is an unlikely result given Ontario's substantially greater population and substantially greater number of judges.[14]

On inquiry we determined that CanLII receives reports from the Supreme Court of British Columbia from a central BC authority.[15] As a result, we have a relatively high degree of confidence that CanLII is reporting all or nearly all of the judge-alone decisions in that province. In Ontario, however, CanLII receives and publishes only those decisions which representatives of Ontario's judicial districts choose to submit.[16] As a consequence, there is no assurance that CanLII reports all or nearly all of the civil judge-alone decisions in Ontario. Our count of 932 reported Ontario trials, compared to 1524 British Columbia trials, indicates that it does not.

It is possible, however, to estimate the total number of civil, non-family bench trials in Ontario by assuming that Ontario superior court judges sit, on average, the same number of non-family judge-alone civil trials as their counterparts in British Columbia. On that basis, we estimate that 4,100 civil bench trials were conducted in Ontario in the period under review.[17] The 932 Ontario cases in our dataset should therefore be understood as a sample from a total of approximately 4,100 civil bench trials.[18] A sample of 932 cases is sufficient to characterize the subset of Ontario cases that judicial district representatives choose to report with a reasonable degree of statistical precision, but we cannot rule out the

conduct an analysis of the number *and* length of trials, as well as reserve periods, we have used our own data built from the CanLII database.

14 While numbers vary with time, as of November 1, 2019, Ontario had 283 sitting superior court judges, and British Columbia 105. Both numbers include supernumeraries and exclude members of the courts of appeal.

15 Email communication with CanLII, October 8 and 10, 2019, on file with the authors.

16 *Ibid.*

17 Our estimate of 4,100 cases for Ontario is based on a simple ratio: multiplying the 1,524 civil non-jury cases decided in British Columbia in the 66-month period under study by the ratio of 283 judges sitting on the Ontario Superior Court of Justice to 105 judges sitting on the British Columbia Superior Court yields, yielding approximately 4,108 trial (= 1524 × 283/105). See *supra* note 14.

18 There is no guarantee that the Ontario cases that have been counted are a *representative* sample of all cases sought to be counted. Our observations and conclusions must be read with that caveat in mind.

possibility that the Ontario dataset is unrepresentative of the broader population of civil bench trials in Ontario.

The exclusion of family law and civil jury trials is an important, but not critical, limitation on the count of the total number of civil trials in both Ontario and British Columbia. Our informal survey of a number of judges suggests that they sit, on average, less than one civil jury trial each year. More significantly the Supreme Court of British Columbia reported that it heard 490 civil trials and 186 family trials in 2019; in other words, family court trials are a significant portion of the court's workload.[19] Our count of cases may also be affected by bench trial decisions that are made by endorsement, rather than published formal reasons.[20]

The CPR publishes written decisions provided to it by the Federal Court. Virtually all trial decisions in the Federal Court are made in writing and are provided to and published by the CPR.[21] It follows that the CPR can be considered as minimally affected by either reporting or selection bias in respect of the number and duration of intellectual property trials in the Federal Court.

With these reservations and limitations in mind, it remains possible to make useful observations with respect to two primary questions: (1) the distribution of durations of civil judge-alone trials (the "time-in-trial" question) and of the time that it takes to decide them (the "time-to-judgment" question); and, (2) the relationship between the duration of a trial and its time to judgment.[22] The answers to these questions can be expressed in terms of graphical displays, such as histograms, box plots and scatterplots; summary statistics, such as ranges, means and percentile points, including medians; and measures of association, such as correlation and regression coefficients.

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[19] *BC Annual Report*, 2019, *supra* note 6 at 63–64.

[20] Decisions by endorsement can take various forms. Bench trials that are settled before their conclusion result in endorsements, rather than formal decisions. There are, as well, full trials in which the decision is delivered orally, rather than by formal written reasons. The number of these "decisions from the bench" may be appreciable, and they are not necessarily confined to short trials. One judge noted in communication with the authors that trials of considerable length can still end in oral reasons if the issues are simple. It was also suggested to the authors that some Chief Justices and regional Senior Justices urge their judges to deliver oral judgments whenever reasonably possible, a phenomenon worthy of further study.

[21] Email communication with Marcus Gaillie, Editor, Canadian Patent Reporter, September 5, 2019, on file with the authors.

[22] Because CanLII data prior to January 2014 was not sampled, the study is considerably hampered in analysis of trends over time. As a result, no observations are made or conclusions offered regarding trends.

C) Descriptive Statistics: Ranges, Means, Medians, Histograms and Associations

The "range" spanned by a dataset is simply the interval from the smallest to the largest value it contains. In this study, the range is the interval between the numbers of trial days of the shortest and longest trials, or the interval between the numbers of days of the shortest and the longest reserve period.

A "mean" is the average. For the time-in-trial question, it is the average per trial number of trial days, based on all the trials in a given dataset, for the period. For the time-to-judgment question, it is the average number of days that were required for the court to render a judgment for all the cases in the dataset. In other words, it is the period of time during which the decision was "under reserve."

A "percentile" of a group of observations is the value below which a given percentage of the observations fall. For example, the 25th percentile, also termed the "1st quartile," is the value below which 25 per cent of the observations fall. The 50th percentile, also called the "median," is the middle value—the point at which there are as many values below as there are above it. In terms of the "time-in-trial" question, the median value is the point at which there are as many trials of shorter duration as there are of longer duration. In terms of the "time-to-judgment" question, it is the point at which there are as many judgments which were reserved for a shorter period of time as there were for a longer period of time.

A mean that is greater than the median commonly occurs when the data are skewed by a long "upper tail." The location of the median—the middle value—is insensitive to the specific values of the data items that exceed it. Thus, an extended upper tail "pulls" the mean upward without affecting the median. So, for example, if a hypothetical time-in-trial data set consists of five trials with durations of 1, 2, 3, 4, and 5 days, the median is 3 days and the mean is 3 days. If, however, the data set consists of five trials with durations of 1, 2, 3, 4, and 10 days, the median remains 3 days, but the mean is now 4 days. The mean has been "pulled" upward by the last "upper tail" value.

A histogram depicts the number of data points in specified ranges (often called "bins"). It tells us something about the shape of the distribution of the data including, in particular, the degree to which it is skewed.

"Correlation" and "regression" coefficients are measures of how strongly two variables—in this case the time-in-trial and the time-to-judgment—are related. Correlation coefficients range from -1 to +1, where a correlation of 1 indicates a perfect one-to-one relationship and a correlation of 0 indicates no relationship. In the context of this article, the correlation coefficient tests the assertion that longer reserves are associated with longer trials, though not necessarily *caused* by longer trials. Regression coefficients quantify the relationship in terms of how much longer the reserve period is likely to be for each one-day increase in time-in-trial, on average.

D) Summary of Results

Subject to the limitations in the data described in Section 2(B), Table 1 reports the number of bench trials in each of the three selected jurisdictions as well as range, mean, and median in respect of both the "time-in-trial" and "time-to-judgment" questions.

Table 1

(All figures rounded to nearest whole number)

Jurisdiction	Number of Trials	Time-in-Trial (Days)					Time-to-Judgment (Days)				
		Lowest	Highest	Mean	?<=Mean	Median	Lowest	Highest	Mean	?<=Mean	Median
Ontario	932	1	91	7	70%	5	0	659	98	61%	67
British Columbia	1,524	1	237	8	66%	6	0	743	127	58%	99
Federal Court	74	1	41	13	64%	10	7	680	163	55%	126

As can be seen, the mean time-in-trial was approximately 7 days in Ontario, 8 days in British Columbia and 13 days in the Federal Court. The mean time-to-judgment was 98 days in Ontario, 127 days in British Columbia, and 163 days in the Federal Court. In every case, the mean substantially exceeds the median. As explained above, this reflects the effect of an extended upper tail, which inevitably "pulls" the mean upward without affecting the median. An interesting question remains: what is the nature of the tail? Is the fact that the average substantially exceeds the mean due to: (a) a small number of "outlier" trials, or reserves, of extraordinary length; or, (b) a larger concentration of trials or reserves that are longer than the median, but not inordinately so; or, (c) some combination of the two?

The answer to that question, addressed in Section 2(F), tells us something about the basic morphology of the trial system. Before addressing that question, a preliminary comment is in order.

E) An Initial Observation on Time-in-Trial Data

It bears recognizing that the civil non-family bench trials in the dataset used for this article account for a relatively small proportion of judicial time. In the 66 months of the study period, British Columbia judges decided 1,524 dataset cases, averaging about one dataset decision per judge every 4.5 months.[23] We also know that the actual number of trials heard is at least somewhat greater than represented in our CanLII dataset; for example 312 trials for 2017 as reported by the Supreme Court of British Columbia, compared to 226 in our dataset.[24] We do not know the total number of bench trials in Ontario, but are aware of no evidence that they occurred at any lesser or greater rate than in British Columbia. On those assumptions, British Columbia judges, on average, were engaged in bench trials (taking dataset trials from BC, not the higher number of trials reported by the Supreme Court of British Columbia) for about 22 days per year, and their Ontario colleagues about 19 days per year.[25]

This is not, of course, all of the trial time of the members of the Ontario and British Columbia benches. One would need to add jury trials and unreported bench trials. There are, additionally, more family and criminal law trials (taken together) than civil trials.[26] Finally, judges incur workload in the lead-up to a trial, such as addressing scheduling and procedural matters and disputes (and that workload is not alleviated by a settlement reached immediately before the commencement of a trial). That analysis is outside of the scope of this study.

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23 See *supra* note 13.

24 "Annual Report of the Supreme Court of British Columbia" (2017), online (pdf): <www.bccourts.ca/supreme_court/about_the_supreme_court/annual_reports/2017_SC_Annual_Report.pdf> at figure 11. We picked calendar year 2017 for this comparison because it is the most recent year in our dataset for which we may reasonably assume that the overwhelming majority of all cases heard in that year received judgments by June 2019. A total of 226 BC trials in our dataset began in 2017 or earlier and ended in 2017 or later, so had at least one trial day in 2017; for 187 trials all trial days occurred in 2017. These two counts are 72.4 per cent and 59.9 per cent, respectively, of the 2017 count of 312 cases "heard" in that year.

25 *Ibid.* The number of judges, including supernumerary judges, sitting in each of the three jurisdictions during the study did not vary appreciably from the number sitting as of November 2019.

26 *Ibid.* Figure 11 of the Annual Report of the Supreme Court of British Columbia for 2017, for example, reports 370 and 190 civil and criminal trials heard in comparison to 312 civil trials.

Federal Court judges, of whom there were 42 during a study period of just over ten years, decided a total of 74 intellectual property trials—about one every six years per judge, on average. Federal Court judges do not conduct jury trials. As described in Section 2(C), there is no reason to believe that there were unreported decisions in full intellectual property trials, but there may have been bench trials interrupted by mid-trial settlements.

The relatively limited number of civil bench trials ought not to be taken as an indication that there is not a high demand for judicial time to conduct those trials, or substantial resulting delays impacting civil litigants' ability to access the justice system. The backlog of civil cases awaiting trial is substantial, and, given the shutdown of the courts during the COVID-19 pandemic, is very likely to get worse. Non-family civil cases are often pre-empted by criminal, and sometimes by family, cases. The Chief Justice of the Supreme Court of British Columbia reports that in 2019, the Court heard more than twice as many "long trials" (defined in the report as trials taking "anywhere from several months to several years to complete") compared to 2018, "limiting the availability of assigned judges to hear other matters."[27] The Chief Justice reported that the delay for civil trials, excluding motor vehicle accidents, was generally 17 months in Vancouver and New Westminster, and an average of 15 months for other registries in the province.[28] The lack of available trial dates was "most acute for civil proceedings," and even when civil trials were finally scheduled, about 14 per cent were "bumped" and rescheduled, depending on the locale, "caus[ing] additional expense and inconvenience to litigants as a result of wasted preparation time and travel costs for witnesses and experts."[29] There are no readily available comparable statistics for either Ontario or the Federal Court. Anecdotal evidence suggests that a two-week bench trial added to the trial lists in those jurisdictions today would not likely be heard for a period of between 18 and 24 months, depending on the metropolitan area. Regardless of the reliability of the anecdotal evidence for Ontario and the Federal Court, the Chief Justice's point is well taken—there is no shortage of demand for civil bench trials.

Finally, on no account should the data reported in this study be taken as indicative of judicial workloads generally. Trial work is only part of the work that judges do. Our focus in this paper is only on a particular aspect of their work.

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27 *Supra* note 6 at 2–3.

28 *Ibid* at 4.

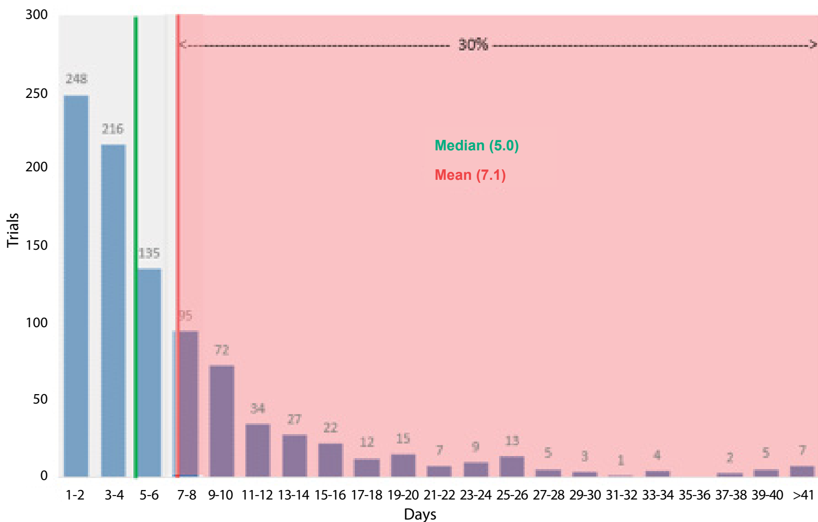
29 *Ibid* at 3–4.

F) Time-in-Trial

Figures 1, 2 and 3 help answer the question with which we left off in Section 2(D). Is the fact that in all cases the average time-in-trial and time-to-judgment substantially exceeded the medians due to: (a) a small number of trials, or reserves, of extraordinary length; or, (b) a larger number of trials or reserves that are longer than the median, but not inordinately so, or (c) some combination of the two?

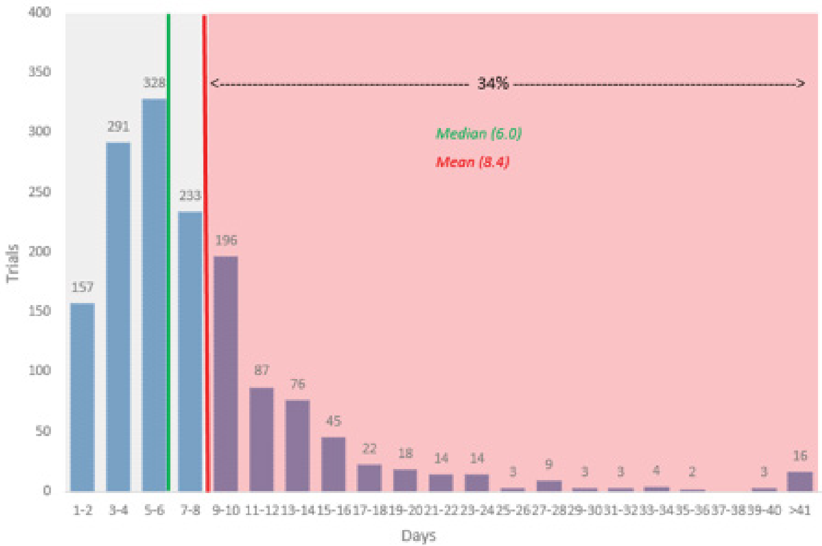
Figures 1, 2 and 3 depict the time-in-trial distributions for each of the three jurisdictions as histograms, as well as the median and the mean in each jurisdiction. Because the mean exceeds the median in all three jurisdictions, it is potentially helpful to know what percentage of trials exceed the average for all cases in that jurisdiction. That percentage is displayed in each Figure both visually (as a shaded area) and numerically.

Figure 1—Time-in-Trial in the Ontario Superior Court of Justice



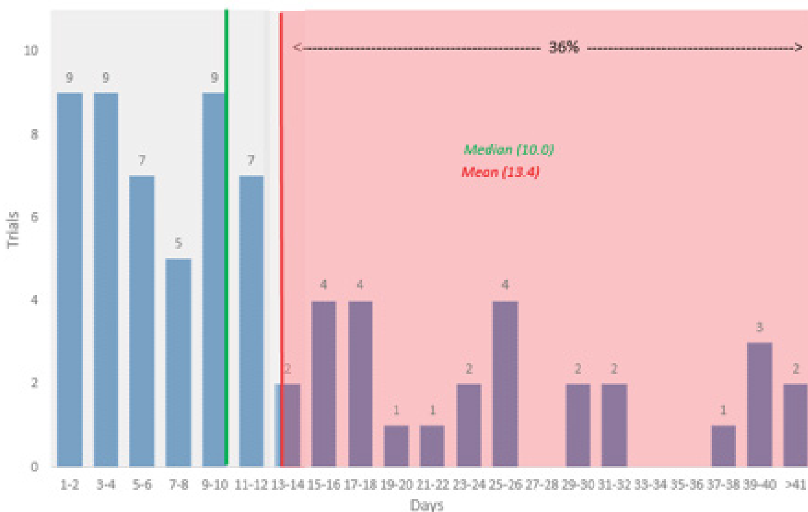
The median length of civil non-jury trials in Ontario was 5 days. The mean was 7.1 days. Seventy per cent of trials occurred within the mean (i.e. lasted 1 to 7 days). Thirty per cent of trials exceeded 7 days.

Figure 2—Time-in-Trial in the Supreme Court of British Columbia



With respect to British Columbia, the median length of civil, non-jury trials was 6 days. The mean was 8.4 days. Sixty-six per cent of trials occurred within 1 to 8 days. Thirty-four per cent of trials exceeded 8.4 days.

Figure 3—Time-in-Trial in the Federal Court of Canada



In the Federal Court, the median trial length was 10 days. The mean was 13.4 days. Sixty-four per cent of trials occurred in 1 to13 days. Thirty-six per cent of trials exceeded 13 days.

Time-in-trial is substantially longer in the Federal Court than it is in the Ontario or British Columbia superior courts. That may be due to the fact that the Federal Court trials examined are intellectual property trials, the vast majority of which adjudge two relatively complex forms of liability—the validity of the intellectual property rights in question, and whether such rights were infringed; both of which must be premised on a construction of the claims in issue. That being said, many if not most intellectual property trials in the Federal Court are bifurcated for liability and damages.[30] That is not the case in provincial superior courts, where bifurcation of liability and damage adjudication occurs much more rarely.[31] The length of time-in-trial in the Federal Court may also be a function of the fact that Federal Court trial judges try fewer cases than do their colleagues in the provincial superior courts (see Section 2(E)).

G) Observations with Respect to Time-in-Trial

There is a noteworthy consistency between all three systems with respect to the percentage of trials that exceed the average duration in each system, from a low of 30 per cent in Ontario to a high of 36 per cent in the Federal Court. This suggests a general rule: one-third of civil bench trials, regardless of jurisdiction, are likely to exceed the average in terms of duration.

Additionally, the sweeping, long-tailed curves that one can imagine superimposing on Figures 1, 2 and 3 suggest that the skewness driving the differences between median and mean time-in-trial is a function of both a small number of unusually long "outlier" trials *and* a larger number of trials that are somewhat longer than the median. A more detailed summary of the data in terms of percentiles sheds a little more light on the issue. Table 2, below, breaks the time-in-trial data down into quartiles and, for good measure, into the 10th and 90th percentiles (neither of which has any special standing; they are merely convenient descriptive statistics for the lower and upper tails of the distributions).

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30 A bifurcated trial is a trial "that is divided into two stages, such as for … liability and damages." See *Trial*, Black's Law Dictionary, 11th ed (Thomson Reuters, 2019).

31 See e.g. Osborne Report, *supra* note 4 at 100 (noting that bifurcation of trials in Ontario is "the exception").

Table 2

(All figures rounded to nearest whole number)

Jurisdiction	Number of Trials	Time-in-Trial (Days)							
		Mean	Min	P10	P25	Median	P75	P90	Max
Ontario	932	7	1	1	2	5	9	16	91
British Columbia	1524	8	1	2	4	6	10	15	237
Federal Court	74	13	1	1	5	10	18	32	41

Table 2 shows that 90 per cent ("P90") of trials are completed within 16 days in Ontario, where the median is five days; 90 per cent within 15 days in BC, where the median is six days; and, 90 per cent within 32 days in the Federal Court, where the median is ten days. This tells us that, generally, 40 per cent of trials exceed the median by a factor of no greater than three.[32] One reasonable conclusion that can be drawn is that, of the trials that are longer than the median length, there are a relatively large number within at least hailing distance of the median. That suggests that if one is disposed to economize judicial resources by limiting trial time, then limiting the time of trials within that hailing distance is at least as important as limiting the time of so-called "monster" trials.

H) Time-to-Judgment

Figures 4, 5 and 6, depict the time-to-judgment distributions for each of the three jurisdictions as histograms. Again, the Figures provide the median, mean, and percentage of trials completed in excess of the average duration for all cases in the jurisdiction.

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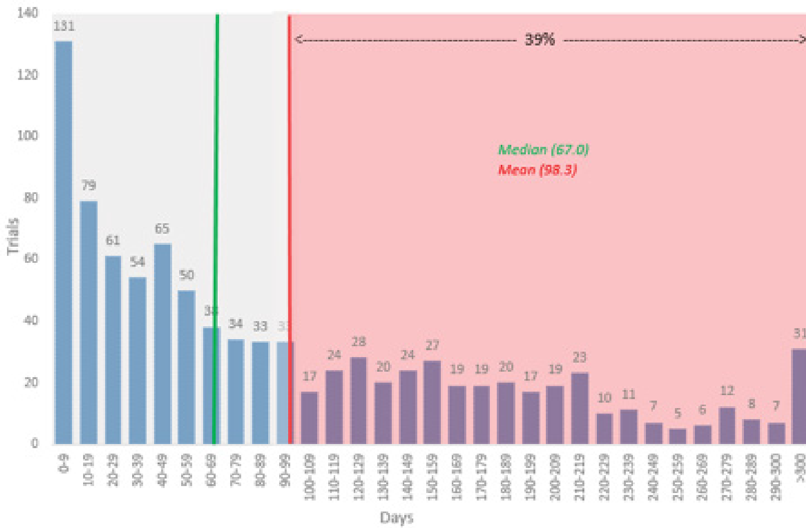
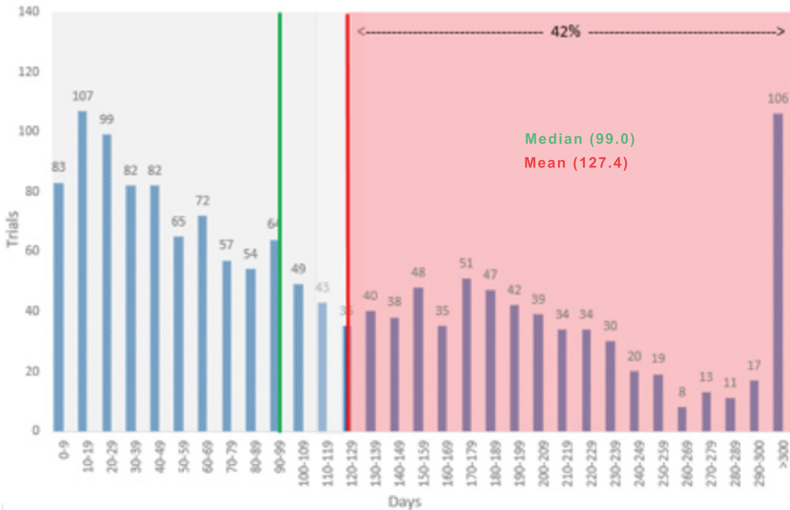
[32] This is so because 40 per cent of all trials must fall between the 50th percentile (median) and 90th percentile, and all three 90th percentiles are close to three times the corresponding medians (16, 15, and 32, compared to 5, 6, and 10).

Figure 4—Time-to-Judgment in the Ontario Superior Court of Justice



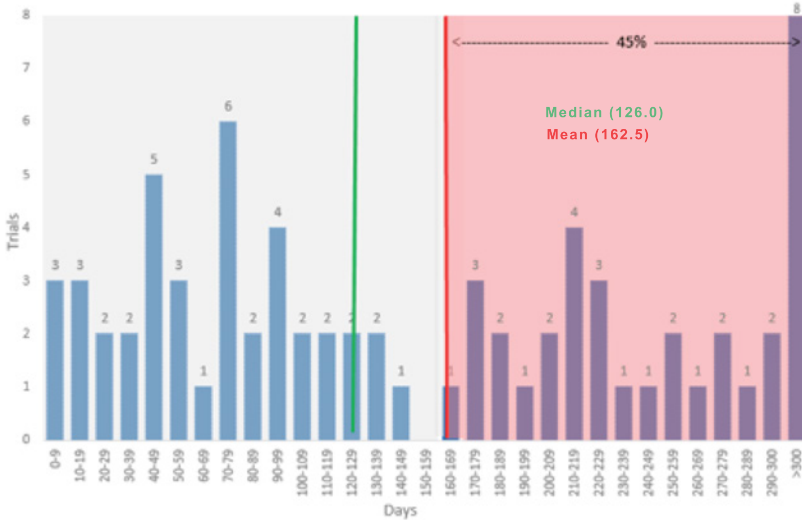
The median time-to-judgment in civil non-jury, non-family trials in Ontario was 67 days. The mean was 98.3 days. Sixty-one per cent of judgments were rendered in 98 or fewer days. Thirty-nine per cent of judgments exceeded that average value, and some 1.5 per cent exceeded 400 days.

Figure 5—Time-to-Judgment in the Supreme Court of British Columbia



The median time-to-judgment in civil non-jury, non-family trials in British Columbia was 99 days. The mean was 127.4 days. Fifty-eight per cent of judgments were rendered in 127 or fewer days. Forty-two per cent of judgments exceeded that average value. Just over 2.6 per cent exceeded 400 days.

Figure 6—Time-to-Judgment in the Federal Court of Canada



The median time-to-judgment in the Federal Court was 126 days. The mean was 163 days. Fifty-five per cent of judgments were rendered in 162 or fewer days. Forty-five per cent of judgments exceeded that average value. Just over 5.4 per cent exceeded 400 days.

I) Observations with Respect to Time-to-Judgment

As with time-in-trial, time-to-judgment in the Federal Court is substantially longer than it is in the Ontario or British Columbia superior courts. As we noted earlier with respect to time-in-trial, this may have something to do with levels of experience in intellectual property law or the factual complexities raised by intellectual property cases tried by Federal Court judges.

Again, there is a noteworthy consistency between all three systems with respect to the percentage of reserve periods that exceed the average duration in each system, from a low of 39 per cent in Ontario, to a high of 45 per cent in the Federal Court. This again suggests a general rule—about two out of every five judgments, regardless of jurisdiction, are likely to exceed the average days of time-to-judgment in that jurisdiction.

J) Association of Longer Time-to-Judgment with Longer Time-in-Trial

Are longer trials followed by longer reserve periods? Table 3 helps to answer that question by showing percentile values of time-to-judgment *within* groups of trials defined in terms of quartiles of time-in-trial, for each jurisdiction. Put differently, for each jurisdiction we first sort trials into four quartile groups based on time-in-trial, and then compare the distributions of time-to-judgment among these four groups.

Table 3

Jurisdiction	Time-in-Trial (Days)				Time-to-Judgment (Days)									
	Quartile	Number of Trials [33]	Median	Mean	Among Cases with One or More Days to Judgment									
					Zero	One or more	Mean	Min	P10	P25	Median	P75	P90	Max
Ontario	1	248	1.4	1	11	237	50.8	1	2	8	28	70	146	369
	2	293	4.0	4	2	291	90.5	1	9	26	67	140	207	522
	3	193	7.3	7	2	191	111.8	1	13	40	84	164	234	659
	4	198	18.7	15	0	198	161.0	2	34	80	148	217	293	539
	Total	932	7.1	5	15	917	99.9	1	7	24	69	154	224	659

[33] The *unequal* numbers of trials assigned to quartile bins may seem puzzling. For example, given that there were 932 trials in Ontario, why are there not 233 (=932/4) trials in each quartile bin, instead of 248, 293, 193, and 198? These unequal bin counts result from trial duration values that "spill over" quartile boundaries. For example, upon sorting the Ontario trial durations in increasing order, the 233rd member of the sorted list had a duration of two days, but so too did list members 234–248. Thus, 248 members of the list fall into the first quartile bin in the sense that their durations were less than or equal to

Jurisdiction	Time-in-Trial (Days)				Time-to-Judgment (Days)									
	Quartile	Number of Trials [33]	Median	Mean		Among Cases with One or More Days to Judgment								
					Zero	One or more	Mean	Min	P10	P25	Median	P75	P90	Max
British Columbia	1	448	2.8	3	18	430	85.4	1	10	20	55.5	132	195	743
	2	328	5.4	5	2	326	121.9	1	19	42	98.5	182	247	475
	3	429	8.4	8	0	429	141.3	1	29	60	119	196	259	733
	4	319	19.2	14	0	319	178.9	1	36	81	173	228	347	658
	Total	1,524	8.4	6	20	1,504	129.1	1	17	43	102	188	266	743
Federal Court	1	22	2.8	3	0	22	140.4	7	13	44	102.5	197	282	522
	2	17	8.2	9	0	17	111.3	39	40	47	97	162	233	257
	3	17	14.0	14	0	17	177.1	9	11	62	139	272	413	452
	4	18	30.6	29.5	0	18	224.3	18	75	131	208	263	383	680
	Total	74	13.4	10	0	74	162.5	7	23	62	126	227	302	680

A concrete interpretation of the Table based on the highlighted rows is helpful. The left-hand panel of Table 3 reports time-in-trial in each jurisdiction by quartile, while the right-hand panel summarizes time-to-judgment within each of *those* quartiles, in terms of percentiles. This is less complicated than it seems. By way of example, the highlighted row of the table represents the 193 trials in the third quartile ("Quartile 3") of time-in-trial in Ontario, with mean and median time-in-trial values of 7.3 and 7 days. In the right-hand panel of Table 3, the highlighted row shows that two of these 193 cases were decided in *zero* days

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the first quartile breakpoint of two days. Similarly, the 466th member of the sorted list had a duration of 5 days, but so too did list members 467–541. Thus, 541 members of the list fall into the first and second quartile bins, with 293 (=541–248) in the 2nd quartile bin. And so on.

and, among the remaining 191 cases, that the mean time to judgment was 111.8 days and that the courts decided 75 per cent within 164 days (shown where the highlighted "P75" column intersects with the highlighted row).

The highlighted column also shows that 75 per cent of the 237 Ontario cases falling within first quartile of time-in trial were decided within 70 days, 75 per cent of cases in the second quartile within 140 days, and 75 per cent of cases in the fourth quartile within 217 days. There is an obvious pattern. The mean and percentile columns in the right-hand panel of Table 3 show that the time-to-judgment almost always increases as time-in-trial increases. So, there is a correlation. As one examines the rest of Table 3, it becomes apparent that the correlation persists across the studied jurisdictions, with few exceptions. That consistency suggests something more: that the pattern in Table 3 did not appear by chance. Formal statistical tests conducted by the authors confirm that the pattern in Table 3 reflects a statistically significant association between time-in-trial and time-to-judgment.[34]

The highlighted row also shows, for the 191 cases with non-zero time-to-judgment, that ten per cent ("P10") of those judgments were rendered within 13 days, 25 per cent ("P25") within 40 days, 50 per cent within 84 days, 75 per cent within 164 days, and 90 per cent within 234 days. The longest took 659 days. As is apparent, even *within* the third quartile of time-in-trial, time-to-judgment ranged broadly. Looking at the rest of the table, we can see that time-to-judgment in most time-in-trial quartiles in all three jurisdictions also ranged broadly, *and* that those time-to-judgment ranges overlap from each time-in-trial quartile to the others. While the correlation between time-in-trial and time-to-judgment is statistically significant, this breadth in range, and the fact that the ranges overlap, shows that time-in-trial is by no means a *precise* predictor of time-to-judgment.

It is important to bear in mind that statistical analyses may readily document that a correlation exists, but that it is much harder to establish that that correlation represents *causation*. That caution being given, taken together, the data suggests that reducing the length of trials could reduce the time-to-judgment as well. Put differently, reducing trial time may save more than just time-in-trial.

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[34] The analysis presented in Table 3 is purely descriptive and exploratory. We also conducted more sophisticated correlation and regression analyses. For Ontario, the Spearman's rank correlation between time-to-judgment and time-in-trial was 0.44 (p-value < 0.0001), for British Columbia 0.35 (p-value < 0.0001), and for the Federal Court was 0.24 (p-value $= 0.036$).

K) What Does the Statistical Evidence Tell Us?

Stepping back, what does the statistical analysis tell us? We know that the number of civil trials we have been able to count is relatively limited, and we know that we have not been able to count all of them. We know that the duration of the trials we can count varies in the ways we have described, as does the time it takes to decide them. We know that as a general rule one-third of civil, non-family bench trials, regardless of the jurisdiction, are likely to exceed the average in terms of duration, and that about two out of every five judgments, regardless of jurisdiction, are likely to exceed the average time that it takes to decide trials. We know, as well, that there is a correlation between time-in-trial and time-to-judgment, although it is not clear that this correlation reflects causation.

Taken together, does that evidence suggest that limiting trial duration would materially improve access to justice? Bearing in mind that we are concerned in this portion of the paper only with statistical analysis, the answer is that it may well.

In British Columbia, the total number of trial days devoted to the 1,524 civil bench trials included in our CanLII dataset was 12,762. If the average time in trial could be reduced by, say, ten per cent, from 8.4 to 7.5 days, the same total number of trial days could have accommodated approximately 1,693 instead of 1,524 trials of the kind in our dataset—an increase of 169 trials of average duration over the study period, or about 31 more trials per year.[35] That is the rough equivalent of adding *11 judges* to the existing bench of the Supreme Court of British Columbia.[36] Prorating this effect over the full annual number of civil trials heard by the British Columbia

[35] Simple arithmetic shows that a ten per cent decrease in time in trial is roughly equivalent to an 11 per cent increase in the number of cases that could be heard in the same number of trial days (because the total trial days devoted to the civil bench trials considered here = [Average days per trial] × [Number of trials] = ([Average days per trial] × 90%) × ([Number of trials] / 90%) = ([Average days per trial] × 90%) × ([Number of trials] × 111.1%). More generally, "Little's Law," a theorem from queueing theory, teaches that the overall burden on the capacity of the judicial system, measured in terms of the number of concurrently active trials, will be proportional to the product of the average time in trial with the average number of trials starting per month. Thus, an 11 per cent increase in the average rate of trial starts per month can be offset by a ten per cent decrease in average time in trial with no overall change in the number of trial days.

[36] Coincidentally, as of December 31, 2019, there were nine judicial vacancies on the British Columbia Supreme Court bench. *BC Annual Report*, 2019, *supra* note 6 at 3.

Supreme Court, the benefits to that court's overall capacity may be even greater.[37]

Similar results could be obtained in Ontario. On the assumptions we have made, the effect of reducing the average time in trial by ten per cent would be the rough equivalent of adding *23 judges* to the bench of the Ontario Superior Court. Again, the benefits to the Ontario court's overall capacity are likely significantly higher, given that our dataset almost certainly undercounts the number of civil trials in Ontario.

Finally, with respect to the Federal Court, the same 11 per cent increase in judicial capacity would be the rough equivalent of adding *five judges* to the bench.

Of course, mechanistic solutions (such as an across-the-board cut to the number of days devoted to any given trial) are entirely out of keeping with our civil justice system's approach of striving to ensure each litigant receives justice. Statistical data presented here provides useful evidence with respect to the time-in-trial and time-to-judgment questions. It tells us something about the morphology of the civil trial system that we did not know before. But it does *not* tell us if some trials are "too long", and provides no means of identifying those that may be. With the case made in Section 2 that reductions in the length of Canadian civil trials would materially increase access to justice, Section 3 suggests how Canadian access to justice advocates might marshal the case for time-limited trials, and how Canadian judges may limit the length of trials to promote proportionality in the justice system.

3. Implementing Time-Limited Trials

A) How Long Is Too Long?

Whether a trial is, or is likely to be, "too long" is a question requiring assessment on a case-by-case basis. Statistical analysis simply provides a backdrop against which that assessment can be made. The standard applied in making that assessment is normative, not statistical. What then is a workable normative standard?

There are systemic and particularistic answers to that question. In a world of finite judicial resources, the purely systemic answer is that trials

[37] For example, taking the Court's report of 490 civil, non-family trials in 2019 and applying to it the same proportional increase, we can roughly predict that a ten per cent reduction in trial length would have permitted at least 50 additional trials to be heard in BC in 2019 alone.

are too long when they prevent the timely disposition of other judicial business, including (most obviously) matters set for and awaiting trial. The systemic question is answered in large part by the statistical analysis in Section 2 by observing, for example, that an overall ten per cent reduction in the length of Canadian civil trials would permit hundreds of additional trials to reach court every year. Justice delayed in pursuit of the "perfect" trial for one cause, or in service of a "hands-off" judicial approach, is justice delayed for the next trial, and those that follow it.[38] "Too much justice" is as corrosive of the legitimacy of the judicial system as too little.

The particularistic answer is that trials are too long where they are disproportionate to the matters at issue in the action, and to parties' resources. Disproportionate consumption of judicial resources has obvious systemic effects. But it also has immediate effects on the parties, who must pay for it. In 2007, a three-day civil trial was generally estimated to cost in the range of $60,000 or more, depending on the amounts and issues involved—a cost that has surely risen.[39] And the longer the trial, the more it costs to get to trial: in 2013, Canadian legal fees were reported to range up to $37,229 for a two-day civil action up to trial, $79,750 for a five-day civil action up to trial, and $124,574 for a seven-day civil action up to trial.[40] Too "perfect" or "thorough" a process may well drive costs up and so deprive litigants of access to the courts. The systemic and particularistic answers are intertwined. Both must be given consideration because, as the Supreme Court of Canada has told us, "undue process and protracted

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38 As stated by the United States Court of Appeals for the Third Circuit in a decision affirming the power of federal trial courts to impose reasonable trial time limits, "a court's resources are finite and a court must dispose of much litigation. In short, the litigants in a particular case do not own the court." See *Dequesne Light Co et al v Westinghouse Electric Co*, 66 F 3d 604, 611 (3rd Cir 1995); See *Wantanabe Realty Corp v City of New York*, No 01 Civ 10137, 2004 WL 2112566, at *2 (SDNY 2004) ("Trial courts have discretion to impose reasonable time limits on the presentation of evidence at trial. This is essential if they are to manage their dockets, and no party has an unlimited call on their time").

39 Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change*, (2013), Part 3 at 29, nn 28–29 [*Action Committee Report*].

40 *Ibid* at 4. Likewise, delays and expense associated with the civil justice system exact not only monetary but also temporal and psychological costs on litigants, including significant negative effects on employment, family and social relationships. For discussion of the private costs of accessing justice faced by individual litigants, see Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2016) 93 Can Bar Rev 3; see also Lisa Moore & Trevor CW Farrow, "Investing in Justice: A Literature Review in Support of the Case for Improved Access," (2019) Canadian Forum on Civil Justice, discussing the progressive costs of increasing trial length and noting that "[m]any people go into debt, lose their home and experience other problems as a direct result of one or more serious civil or family justice problems." *Ibid* at 56.

trials" can cause citizens to "give up on justice."[41] "Giving up on justice" has direct consequences not only for access to justice for individuals, but for the legitimacy of the court system. What is required, said the Court in *Hryniak*, is:

> a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. 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.[42]

As we have seen and will explore in further detail, one answer to the problem of lengthy trials advanced by Canadian advocates for justice reform is the time-limited trial—a mechanism that would permit judges to work with parties to shorten the Canadian civil trial, where appropriate and on a case-by-case basis.

B) Time-Limited Trials as a Case Management Tool

When the business of a court is not disposed of in a timely fashion, both legitimacy and access suffer. Facing those consequences, one must either reduce "demand" on the trial system or, alternatively, increase the "supply" of judicial resources. Arbitration systems and other methods of diversion and early resolution focus on the demand side of the equation. Case management techniques that are not forms of diversion focus on the supply side—they are intended to improve the efficiency with which judicial resources are allocated, and to ensure that the processes available to litigants are proportional to the issues in, and importance of, the case. There is a plethora of case management techniques, the most recent iteration of which (in Ontario) is the "one judge" model.[43] Time limiting orders are another case management technique. Trials subject to

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41 *Hryniak*, *supra* note 3 at para 25.

42 *Ibid* at para 28.

43 Aidan Macnab, "Pilot launched to speed civil justice", *Canadian Lawyer* (30 January 2019), online: <www.canadianlawyermag.com/practice-areas/litigation/pilot-launched-to-speed-civil-justice/275831>. Another example are the recent amendments to Rule 14.05(3)(h) of the Ontario *Rules of Civil Procedure*, which provides that an application may be brought "in respect of any matter where it is unlikely that there will be any material facts in dispute, requiring a trial." The words "requiring a trial" are new. They create a pathway to a "paper trial" in those cases where there may be material facts in dispute, but in respect of which the applications judge concludes that no trial is required. The fact-finding tools set out in rule 20.05 are not expressly set out in Rule 14.05(h) but Rule 38.10 gives the application judge the power "to give such directions as are just."

such orders are frequently referred to as "clock" or "stopwatch" trials.[44] Regardless of the moniker, for present purposes we define them as trials in which the total length of the trial is prescribed by judicial order *and* in which the court allocates a specific number of hours for the presentation of evidence to each party (not necessarily equally). A party's right to present evidence ends when its allocated period ends, subject to judicial discretion. Time-limited trial orders do for trial practice what oral submission time limits do for appellate practice.

Time-limited trial orders may strike many judges as a strident (if not draconian) trial management technique. This response is rooted in Canada's legal culture. Historically, (and at the risk of speaking overbroadly) Canadian trial judges have demonstrated a "hands-off" attitude, leaving it to counsel to call the case they wish, as they wish. There were and are of course exceptions, and many judges have attempted to exercise a degree of (sometimes testy) persuasion ("Are you going to finish this witness today, Counsel?") when confronted with overlong witnesses or trials. But "hands off" has remained a dominant principle. It is consistent with a judicial philosophy that all issues should be tried, and that the parties should, at the end of the trial, be fully satisfied they have had their "day in court."[45]

Professor Engstrom of Stanford University has articulated the basis of this philosophy in arguing that time-limited trial orders "bring into stark relief perennial trade-offs among efficiency, accuracy, and other values."[46] She notes that setting time limits "signal[s] a reallocation of power between advocate and adjudicator and call[s] into question the 'adversarial justice' model" and "risk[s] undermining the dignity and eroding the 'thoroughness' of contemporary trials."[47] There is undoubtedly truth in these arguments. How much truth, however, is arguably a function of the care with which time limitation orders are made.

In appropriate cases, time-limited trial orders can create processes which are, in keeping with the principal in *Hryniak,* at once both "fair and just" and "proportionate, timely and affordable." Time limit orders achieve those twin objectives by putting the parties and their counsel to a series of elections—what are the serious issues?, what is the most relevant evidence?, and how is it most efficiently presented in the allotted time?

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44 For a review of various terms used to refer to time-limited trials, see Nora Freeman Engstrom, "The Trouble with Trial Time Limits" (2018) 106 Geo LJ 933, 937.

45 For a discussion of Canadian legal culture in the context of lengthy trials, see Ronit Dinovitzer & Jeffrey S Leon, "When Long Becomes Too Long: Legal Culture and Litigators' Views on Long Civil Trials" (2001) 19 Windsor YB Access Just 106.

46 Engstrom, *supra* note 44 at 937. See also Elizabeth G Thornburg, "The Managerial Judge Goes to Trial" (2010) 44 U Rich L Rev 1261.

47 Engstrom, *supra* note 44 at 937.

Forcing counsel and their clients to the realization that theirs is not the only case on the court's docket, and requiring that they make sometimes difficult choices with respect to the evidence that they lead and how they lead it, imposes discipline on the trial process. Imposing that discipline does not necessarily render the resulting process unfair, and if it does judges have the discretion that they need to address any resulting unfairness.

The following sections, Sections 2(C) and 2(D), explore the use of time-limited trials in Canada and, for comparative purposes, the United States.

C) Time-Limited Trials in Canada

It has always been within the power of counsel, with the cooperation of the court, to agree on trial time limits. Some leading Canadian counsel have recommended such voluntary agreements as promoting efficiency:

> Finally, agree on time limits. Whether the time set for trial is three weeks or three months, divide the time between the plaintiff and defendant, preferably in half. In cases where I have done this, we worked on the "it's your nickel" principle. Each side could choose to spend their allotted time as they wished – objecting to evidence, opening for days on end or cross-examining extensively, but each side only had its fixed allotment of time. This approach ended up making the trial very efficient. It was particularly useful in eliminating long, meandering cross-examinations. When you only have so much time for your entire case, you will not belabour your examinations[.] I commend that [approach] for your consideration.[48]

Judge-ordered trial time limits are rare. They are, however, a regular practice before the Canadian International Trade Tribunal. The Federal Court has issued a practice direction limiting trial time under the new Patented Medicine (Notice of Compliance) regulations.[49]

Ontario has long required time-limited trials in certain cases. Pursuant to Rule 76 of Ontario's Rules of Civil Procedure, where the amount claimed

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48 David Stockwood, QC, LSM, Benjamin Zarnett & Sheila Block, "Shortening trials: Less is more" (2005) Adv J 1 at para 49 (an edited version of remarks made by David Stockwood, Benjamin Zarnett and Sheila Block at the 2005 Spring Symposium on Excellence in Advocacy). The point was additionally made that dividing the time in half works only if the size of the plaintiff's case is the same as that of the defendant. If not, an adjustment to the proportion of allowable time would have to be agreed between counsel.

49 "Notice To The Parties And The Profession Guidelines For Actions Under The Amended PMNOC Regulations" (2017), online (pdf): *Federal Court* <www.fct-cf.gc.ca/Content/assets/pdf/base/Notice%20-%20PMNOC%20Guidelines%20(FINAL)%2021sept2017%20English-REFORMATTED.pdf>.

does not exceed $200,000, or the parties so stipulate, the trial may be in summary form, in which case the evidence-in-chief is adduced by paper record only. The parties must submit a proposed trial management plan setting out allotted times for parties' opening statements, presentation of evidence, cross examinations, re-examinations and/or arguments. The trial management plan is subject to approval and variation by a judge or case management master. A trial conducted under Rule 76 may not exceed five days in duration.

Similarly, British Columbia Rule of Civil Procedure 15-1 makes provision for trials involving amounts of less than $100,000 to be conducted in three days unless the judge presiding the trial management conference decides otherwise. In these cases, at least, our justice system has decided that tightly prescribed time limitations are "proportional" to the claims at issue.

Access to justice advocates are asking for more. In his 2007 Report on Civil Justice Reform, commissioned by Ontario's Attorney General, Justice Osborne endorsed what he called "trial scheduling orders" as an effective, judge-imposed trial management tool:

> During consultations, lawyers generally agreed that orders as to how long each side will have to present their case ought to be made at the pre-trial conference. The use of time limits for oral argument in the Court of Appeal has proven to be effective. It has improved the quality of advocacy and has been well received by the court. It has also been a significant factor in eliminating the court's backlog. As well, it is a feature of court business in several U.S. jurisdictions. I see no reason why trials should not be subject to scheduling orders. The scope of the time limit orders should include:
>
> a) the total allocated time for the trial;
>
> b) the time each side will have to present its case;
>
> c) how long each side will be allowed for discrete parts of its case, e.g., opening statements; and
>
> d) limitations on how, and how much, evidence may be presented.[50]

In its 2015 publication "Best Practices for Civil Trials", The Advocates' Society endorsed time-limited trial orders in appropriate cases: [51]

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[50] Osborne Report, *supra* note 4 at 95.

[51] "Best Practices for Civil Trials", (June 2015), online: *The Advocates' Society* <www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/The_Advocates_Society-Best_Practices_for_Civil_Trials-June_2015.pdf>.

> 6.3 Oral opening and closing submissions should be time-limited, and counsel should provide written submissions (preferably with page limits) to supplement oral submissions where appropriate or as determined by the trial judge.
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> 6.4 Some trials can be conducted on a "chess clock" basis, where time is equally allocated to the parties and barring exceptional circumstances, counsel are limited to the time allocated. In most cases, counsel should be permitted to allocate that time as desired amongst direct examination, cross-examination and opening statements and closing submissions.
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> 6.5 Subject only to exceptional circumstances, the court should enforce time limits.

Outside of rules applicable to claims under $200,000, no reported Canadian case of which the authors are aware has specifically considered whether a trial judge has jurisdiction to *impose* a strict time limit on the length of a trial, to allocate that time between the parties, or to enforce the allocation by declaring a party's evidence closed on the expiry of the relevant period. Nevertheless, the applicable jurisdictional principles are clear: superior courts have broad inherent powers to control their own processes.[52] They also have a general power (and as a consequence of *Hryniak*, a responsibility) to develop and implement processes to ensure

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[52] Justice Binnie discussed the inherent jurisdiction of provincial superior courts in *R v Caron*, 2011 SCC 5:

> The inherent jurisdiction of the provincial superior courts, is broadly defined as "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51. These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" (Jacob, at p. 27) to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (p. 28). In equally broad language Lamer CJ, citing the Jacob analysis with approval (*MacMillan Bloedel Ltd. v Simpson*, [1995] 4 S.C.R. 725 (SCC), at paras. 29–30), referred to "those powers which are essential to the administration of justice and the maintenance of the rule of law. "

proportionality.[53] Additionally, courts have particular trial management powers in particular circumstances, which may vary by jurisdiction.[54]

If the formal jurisdiction to make a time-limited trial order is unclear or uncertain, that is a matter to which Rules Committees can and should speak, and upon which Courts of Appeal may well opine if they do not. The more interesting (and likely more relevant) question is *when* should such an order be made, and on which terms? To answer that question, we can start by looking to the United States.

D) The American Example

American jurisprudence provides an opportunity to assess the functioning of time trial limits in practice, including discretionary factors that Canadian judges may consider in implementing scheduling orders, useful data points regarding trial length, and critiques of time-limited trials based on decades of implementation.[55]

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[53] In Ontario, British Columbia and the Federal Court the principle is codified. Ontario's proportionality principle reads:

> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. 1.04 (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. See *Rules of Civil Procedure*, RRO 1990, Reg 194, s 1.04.

[54] These are, for example, powers that accrue to a judge on a failed motion for summary judgment. In *Abrams v Abrams,* 2010 ONSC 2703, the court commented on the powers of a judge to limit the length of trial both directly and indirectly:

> On January 2, 2010, the *Rules of Civil Procedure* finally caught up with this longstanding practice. The Rules now specifically provide that a judge who directs a trial on an unsuccessful summary judgment motion, and any judge conducting a civil pre-trial conference, may issue directions for the conduct of the trial, including that (i) the evidence of a witness at trial be given in whole or part by affidavit, (ii) any oral examination of a witness at trial be subject to a time limit, and (iii) each party deliver a concise summary of its opening statement: Rules 20.05(2)(i), (j) and (l) and 50.07(1)(c). By limiting the time for oral examination of witnesses at trial, a court can set the length of the trial.

Similarly, trial judges are often empowered, in the context of pre-trial conferences, to establish timetables and issue directions to ensure that hearings proceed in an orderly, efficient, and expeditious manner. See, for example, Ontario Rules 50.01 and 50.07(1)(a), and, by extension, the powers under rule 20.05(2)(i) to order that the oral examination of the witness at trial be subject to a time limit. See also *Federal Court Rules*, SOR/98–106, ss 263(n), 265. The practical effect of these rules is somewhat limited by the fact that they are available to pre-trial judges who are frequently loathe to "bind the hands" of trial judges.

[55] See Osborne Report, *supra* note 4 at 95, noting that time-limited trials are "a feature of court business in several U.S jurisdictions" and recommending that pre-trial judges should be vested with authority to impose trial time limits.

As context, trial time limits are well-accepted in US courts. "There is overwhelming legal support" in the United States "for trial judges imposing reasonable time limits."[56] Federal rule authority expressly authorizes the imposition of reasonable time limits,[57] and US appellate courts that have ruled on the question support orders limiting trial times in at least some circumstances.[58] Since the appearance of trial time limits in the US in the late 1970s in response to complex, protracted antitrust and patent cases, these limits have become steadily more prevalent in every type of civil matter,[59] to the point where some federal judges now impose trial time limits as a matter of course.[60] In a 2016 survey of 21 US federal judges, six

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56 Stephen D Susman & Richard L Jolly, "An Empirical Study on Jury Trial Innovations" (2017) at 103–104, online (pdf): *Civil Jury Project at NYU School of Law* <civiljuryproject.law.nyu.edu/wp-content/uploads/2016/10/sds-rlj_Empircal-Study-on-Trial-Innovations.pdf>.

57 Fed R Civ P 16(c)(2) (At pre-trial conference, court may make orders "(O) establishing a reasonable time limit on the time allowed for presenting evidence; and (P) facilitating in other ways the just, speedy, and inexpensive disposition of the action."); See also Fed R Evid 611(a) (trial judges must "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to … (2) avoid wasting time").

58 A 2017 paper reviewing the legal foundations for trial judges imposing time limits found no US jurisdiction "in which rules or laws prohibit trial courts from setting and enforcing reasonable trial time limits in civil cases." Susman & Jolly, *supra* note 55 at 105; See also Engstrom, *supra* note 43 at 948, 976–77 ("numerous appellate courts explicitly approve of the practice" of trial time limits). For federal appellate decisions affirming the power of trial judges to impose trial time limits, cited by the foregoing sources and additionally located by the authors, see *Flaminio v Honda Motor Co*, 733 F 2d 463, 473 (7th Cir 1984) ("federal district judges not only may but must exercise strict control over the length of trials, and are therefore entirely within their rights in setting reasonable deadlines in advance and holding the parties to them."); *Deus v Allstate Ins Co*, 15 F 3d 506, 520 (5th Cir 1994) ("the court has an inherent right to place reasonable limitations on the time allotted to any given trial"); *Duquesne Light Co v Westinghouse Elec Corp*, 66 F 3d 604, 610 (3d Cir 1995) (district courts may impose time limits "when necessary, after making an informed analysis based on a review of the parties' proposed witness lists and proffered testimony, as well as their estimates of trial time."); *Trepel v Roadway Express, Inc*, 40 Fed App'x 104 (6th Cir 2002) (affirming 10-hour time limit for parties to present cases following remand); *McClain v Lufkin Indus, Inc*, 519 F 3d 264, 282 (5th Cir 2008) ("a judge has special latitude in applying time limits in a bench trial").

59 For an overview of the history of time trial limits in the US, see Engstrom, *supra* note 43 at 941–946. Notably, the use of time limits has also grown in criminal trials. *US v Morrison*, 833 F 3d 491, 504 (5th Cir 2016) [*Morrison*] ("Imposing time limits during trial is a growing trend … even in criminal cases where limits are more controversial").

60 *Morrison*, *supra* note 58 at 942–948, citing examples including *Guzman v Latin Am Entm't, LLC*, No 6:13-CV-41, 2014 WL 12599345, at *1 (SD Tex 2014) ("The Court routinely imposes time limits at trial and will do so in this case"); *Arthrocare Corp v Smith & Nephew, Inc.*, 310 F Supp 2d 638, 672 (D Del 2004), aff'd in part, 406 F 3d 1365 (Fed Cir 2005) (noting the trial judge imposes trial time limits "in every civil case").

regularly used trial time limits, eight had used trial time limits, and seven had never used trial limits.[61]

In terms of implementation, US judges "establish time limits at a pre-trial conference" based on factors including "the complexity of the issues, the burden of proof on each party, the nature of the proof offered, and input from the parties."[62] Judges draw guidance regarding the mechanical implementation of time limits at trial from the American Bar Association's Civil Trial Practice Standards, which provides detailed methodological instruction, as well as the Federal Judicial Centre's Manual for Complex Litigation and Benchbook for US District Court Judges.[63]

Given the United States' long experience with time-limited trials, US appellate review of orders setting trial time limits provides a valuable starting point to flesh out the discretionary factors Canadian judges may consider when setting similar orders. As background, time-limiting trial orders are reviewable only for abuse of discretion,[64] a very deferential standard, only met according to one appellate court when the presentation of evidence was "judicially restricted to the extent that the information [became] incomprehensible."[65] If an abuse of discretion is demonstrated, the appellant must additionally show that they were thereby prejudiced,[66]

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[61] Susman & Jolly, *supra* note 55 at 6, n 14, citing the Questionnaire for Judges on Use of Jury Innovations (on file with the NYU Civil Jury Project). That is not to say that a majority of US federal judges necessarily impose trial time limits. Participating judges in a 2008 project testing (among other trial innovations) the American Bar Association's recommendation that "courts should limit the length of jury trials insofar as justice allows" imposed time limits in seven out of 35 trials. Seventh Circuit Bar Ass'n American Jury Project Commission, *Seventh Circuit American Jury Project Final Report* (2008) at 45, 47, online: <www.uscourts.gov/file/3467/download>. [SCJ Report].

[62] Susman & Jolly, *supra* note 55 at 103 (citing SCJ Report, *supra* note 60 at 44–47).

[63] Engstrom, *supra* note 43 at 947–948 (citing Civil Trial Practice Standards § 12(b) (Am Bar Ass'n 1998); Fed Judicial Ctr, Manual for Complex Litigation (Fourth) § 11.644 at 127 (2004); Fed Judicial Ctr, Benchbook for US District Court Judges § 6.01 at 203 (6th ed 2013); See also Elizabeth G Thornburg, "The Managerial Judge Goes to Trial" (2010) 44 U Rich L Rev 1261, 1267–68.

[64] Thornburg, *supra* note 45 at 1312; Engstrom, *supra* note 43 at 977, citing, *inter alia*, *Sparshott v Feld Entm't, Inc,* 311 F 3d 425, 433 (DC Cir 2002) ("district court[s'] decisions on how to structure time limits are reviewable only for abuse of discretion.").

[65] *Arthur Pierson & Co v Provimi Veal Corp*, 887 F 2d 837, 838–39 (7th Cir 1989); See *Strickland Tower Maint, Inc v AT & T Commc'ns, Inc,* 128 F 3d 1422, 1430 (10th Cir 1997) ("A district court's decision to limit evidence in the interest of judicial administration will not be overturned on appeal absent a manifest injustice to the parties").

[66] Engstrom, *supra* note 43 at 977 (gathering federal case law).

a subjective "riddle" of a test requiring demonstration that the error was sufficiently serious such that it affected a party's "substantial rights."[67]

US trial judges therefore enjoy broad discretion in setting trial time limits, although appellate courts have not hesitated to speak on the propriety of those orders. To take only a few examples, appellate courts have held that trial judges act within their discretion "after making an informed analysis based on a review of the parties' proposed witness lists and proffered testimony, as well as their estimates of trial time," and where they "allocate trial time evenhandedly,"[68] although not necessarily equally.[69] Conversely, arbitrary time limitations invite reversal,[70] as well as limitations resulting in the exclusion of material evidence.[71] Appellate decisions have also analyzed the imposition or variance of time limits in the midst of trial, stating that "an allocation of trial time relied upon by the parties should not be taken away easily and without warning."[72] Due to the requirements to properly preserve an objection, show an abuse of discretion and show prejudice, reversal is rare.[73]

It is worth noting that after more than forty years of experience with time-limited trials,[74] American law, guidance and commentary remains overwhelmingly in favour of the concept, asserting that time-limited trials promote efficiency, reduce cost and even improve the quality of

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67 11 Fed Prac & Proc Civ §§ 2883, 2888 (3d ed.) (internal quotation omitted). The requirement to show prejudice resulting from a district court's error is drawn from Federal Rule of Civil Procedure 61, the "harmless error" rule.

68 *Duquesne Light Co v Westinghouse Elec Corp*, 66 F 3d 604 at 610 [*Dequesne*].

69 *Sparshott v Feld Entertainment, Inc*, 311 F 3d 425 at 433 ("parties need not always be granted equal amounts of time to try their case").

70 *Chandler v FMC Corp*, 619 N E 2d 626 at 629 (Mass App Ct 1993) (reversing where "arbitrary time limits on the witnesses' testimony ... prevented the parties from presenting their entire case to the jury"); *Ingram v Ingram*, 125 P 3d 694 at 698 (Okla Ct Civ App 2005) (reversing where trial court "arbitrarily" reduced trial time to 125 minutes per side on day of trial with no "prior notice").

71 *Doe v Doe*, 44 P 3d 1085 at 1086, 1096 (Haw 2002) (reversing where trial court's imposition of a three-hour time limit in a child custody case led to the exclusion of important evidence "bearing upon the issue of family violence"); *Turner v Belman*, No 15-1742, 2016 WL 1129367, at *1 (Iowa Ct App 2016) (limiting defendant to 7.5 minutes to "cross-examine witnesses, present evidence, and present argument" was abuse of discretion).

72 *Dequesne*, *supra* note 67.

73 Engstrom, *supra* note 43 at 976, n 273; Thornburg, *supra* note 45 at 1315 ("the deferential abuse of discretion standard and the difficulty in demonstrating harm … mean that trial management … is effectively final in the trial court in the vast majority of cases").

74 The first known time-limited trial was *SCM Corp v Xerox Corp*, 77 FRD 10 (D Conn 1977) ("an antitrust battle royale" involving "some 30,000 factual allegations"). See Engstrom, *supra* note 43 at 941.

counsels' argument.[75] Opponents concede some of these features but question others, often under the rubric of broader critiques in American civil procedure "managerial judging."[76] Professor Engstrom has ably reviewed the arguments for, and made the arguments against, time trial limits; most notably on the basis that because time trial limits in the US are neither guided by detailed positive law, nor subject to meaningful appellate review, their implementation is purportedly "inconsistent" and "arbitrary."[77] Engstrom argues that as a result, trial judges are "more likely to be affected by cognitive errors and biases than they would be if they were guided by an 'outsider perspective,'" e.g., positive law or appellate guidance; and unbounded discretion "opens the door to irrational, arbitrary, and abusive action."[78] Engstrom therefore recommends that in order to create a meaningful backstop to judicial discretion and improve consistency across federal courts, appellate courts should alter the standard of review such that parties appealing on the basis of the imposition of time limits would be required to show an abuse of discretion, but would not be required to show a resulting prejudice to their case.[79]

The appellant need not show, for example, that the trial judge proceeded arbitrarily *and* that there was a resulting prejudice. Rather, the appellate court *will* generally defer "where the judge at first instance has given sufficient weight to all relevant considerations and the exercise of discretion is not based on an erroneous principle."[80] That is a proper foundation on which to proceed with the careful, principled application of time-limited trial orders. Canadian appellate courts are less likely than their American counterparts to defer to trial judges who fail to apply a principled basis for orders limiting the length of a trial.

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[75] For jurisprudence, see *supra* note 57; Bar commentary, Civil Trial Practice Standards, *supra* note 61 ("subject to the judge's ultimate responsibility to ensure a fair trial and to afford the parties a fair opportunity to be heard," judges "should consider whether to … impose reasonable limits on trial presentation"); Civil justice reform, Civil Jury Project: *supra* note 55 (time limits the "most promising" jury trial innovation currently in use); See also Stephen D Susman & Thomas M Melsheimer, "Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases" (2013) 32 Rev Litig 431, 441–442 ("Time limits do more than just conserve judicial resources; they make for better trials").

[76] Thornburg, *supra* note 45 at 1267–1268.

[77] Engstrom, *supra* note 43 at 976. For a Canadian perspective on whether "tapered procedures have impacted the ability of our adversarial model to deliver our accurate, legally correct outcomes," albeit focusing on procedural laws governing the awarding of *inter partes* litigation costs, see Colleen Hancyz, "More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform" (2008) 27:1 CJQ 98.

[78] *Ibid* at 978–79.

[79] *Ibid* at 985–86.

[80] *Canada (Attorney General) v Fontaine,* 2017 SCC 47 at para 36.

Finally, extensive American experience with trial time limits may also help provide a framework to determine when a Canadian trial is "too long." To take one example, in the Eastern District of Texas, which has adopted trial time limits and is "one of the most active patent venues" in the US:[81] "[C]ases involving complex technology and billions of dollars in alleged damages are routinely tried in two weeks or less," and "less complex patent trials are often concluded with five or six total days of trial time."[82] In contrast, in the Federal Court of Canada, which hears a significant portion of Canadian intellectual property disputes, the median trial length was 10 days, the mean was 13.4 days, and 36 per cent of trials exceeded 13 days. Even accounting for any potential differences in trial management experience, if the Eastern District of Texas can complete billion-dollar trials in less time than the Federal Court of Canada's current median trial length, we may be more comfortable exploring the concept of trial time limits in the Federal Court.

4. Conclusion

Discussion and debate about access to justice, legitimacy, and procedural reform are well served if they rest on an empirical foundation, but there is a dearth of statistical information with respect to civil, non-jury trials in Canada, either with respect to time in-trial or time-to-judgment. While the statistical analysis marshalled here does not answer the question of whether there are trials that are "too long," or identify those that are, it does provide a backdrop against which those questions can be addressed. In particular, a modest reduction in trial length would permit significantly more matters to reach trial every year across the Canadian civil justice system.

Ultimately, the question of whether a given trial is, or is likely to be, "too long" is a normative one that needs to be assessed with systemic and particularistic criteria, including judicial workload, cost to litigants and the claims and issues involved. Failing to assess whether the length of a trial meets the Supreme Court of Canada's proportionality principle runs the risk of inhibiting access to the courts and corroding the legitimacy of the court system. Canadian civil procedure already has some experience

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[81] Susman & Melsheimer, *supra* note 75 at 441.

[82] *Ibid* at 445 (citing cases including *Saffran v Johnson & Johnson*, 778 F Supp 2d 762 (ED Tex 2011) (five day patent infringement trial involving one patent and one defendant, and resulting in $482-million jury verdict); *Synqor, Inc v Artesyn Techs, Inc*, No 2:07-CV-497-TJW-CE, 2010 WL 3860154 (ED Tex 2010) (seven day patent infringement trial, involving numerous patents and defendants, and resulting in over $95-million jury verdict); *Centocor Ortho Biotech, Inc v Abbott Labs*, 662 F Supp 2d 584 (ED Tex 2009) (five day patent infringement trial, involving one patent and one defendant, and resulting in $1.6-billion jury verdict).

with time-limited trials, particularly for smaller claims, and the power to set trial length by judicial order likely falls within courts' inherent jurisdiction.

US jurisprudence provides some guidance on the question of when such orders should be made, including criteria to guide the reasonable application of such orders. Although assessments of time-limited trials in the US are overwhelmingly positive, limited recent criticism has focused on purportedly arbitrary and inflexible application of judicial managerial powers. However, the same criticism generally acknowledges that meaningful appellate review would significantly ameliorate those concerns. Canada enjoys a lower standard of appellate review applicable to case management orders than the US. It is unlikely, therefore, that the discretion to set time limits could be wielded in Canada with the impunity that its critics say that it is being used in the United States.

What matters is that the discretion to order time limits is exercised in a considered, principled and proportionate manner, having due regard to the need to balance scarce judicial resources against the need to ensure that trials are both fair and just. But the fact that time-limited trial orders need be made on considered and principled bases does not mean that they can only be rarely made. The assessment of systemic and particularistic factors *needs to be made in every case*. Where, on balance, an order limiting the time for trial can reasonably be made, then it should be made, because justice delayed has long been recognized as justice denied.