THE FEDERAL COURTS' ADVANTAGE IN CIVIL PROCEDURE

Gerard J Kennedy[1]

This article considers whether procedure in the Federal Court and Federal Court of Appeal (the "Federal Courts") is more efficient than in many large superior courts and thus is better suited to facilitating access to justice. Through a combination of analyzing rules and case law and interviews with judges and lawyers, the author concludes that there is significant truth to this hypothesis. After giving an overview of particularly distinct aspects of Federal Courts procedure, various reasons for the difference in efficiency in court procedure are considered. It is ultimately concluded that Federal Courts' procedure's efficiency is due to a confluence of factors. Some of these are not realistically applicable to other jurisdictions, such as a relatively small court and confined subject matter jurisdiction. But others are very applicable, including: a friendly but strict registry; case management; enforcement of rules; and judicial specialization. While the article is largely praising of Federal Courts procedure, areas of potential improvement are considered, including court composition, the integration of civil law; and limitations due to confined subject matter jurisdiction (which is a double-edged sword for access to justice). But ultimately, the article is complimentary towards initiatives and culture in the Federal Courts that have been to the benefit of access to justice.

Dans cet article, l'auteur se demande si la procédure appliquée à la Cour fédérale et à la Cour d'appel fédérale (les « cours fédérales ») est plus efficace

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que celle utilisée dans beaucoup de grandes cours supérieures, et donc si elle facilite davantage l'accès à la justice. Au moyen de règles d'analyse, de jurisprudence et d'entrevues avec des juges et des juristes, l'auteur conclut que cette hypothèse présente un degré de véracité non négligeable. Après un survol des aspects particulièrement distinctifs de la procédure des cours fédérales, il examine diverses raisons pouvant expliquer l'écart d'efficacité dans les procédures judiciaires. Il arrive à la conclusion que l'efficacité procédurale des cours fédérales est attribuable à une convergence de facteurs, dont il n'est pas réaliste d'en appliquer certains à d'autres instances, comme une cour d'assez petite taille ou un tribunal spécialisé dans un champ de compétence restreint. Mais d'autres facteurs sont parfaitement applicables : un greffe convivial, mais rigoureux; la gestion des dossiers; l'application des règles; et la spécialisation judiciaire. L'article fait surtout l'éloge de la procédure des cours fédérales, mais l'auteur traite aussi de points d'amélioration potentielle, à savoir la composition d'un tribunal, l'intégration du droit civil et les restrictions d'un champ de compétence aux limites étroites (une arme à double tranchant pour l'accès à la justice). Finalement, l'auteur de cet article inscrit sa réflexion dans le même courant que les initiatives et la culture des cours fédérales; des initiatives et une culture favorisant l'accès à la justice.

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1. Introduction

The problem of access to civil justice in Canada, and the potential of procedural law to exacerbate that problem, is notorious.[2] In some cases, however, procedure can facilitate the prompt and inexpensive resolution of civil actions, truly facilitating access to justice. Given the potential for procedure to facilitate or impede access to justice, provinces have sought to amend their procedures, albeit in different ways, to serve access to justice.[3] But while this problem has most extensively been studied and discussed with respect to provincial procedure, the Federal Court and Federal Court of Appeal (collectively, the "Federal Courts") have a reputation, noted in

[2] See e.g. *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at para 1 [*CCD*]; *Hryniak v Mauldin*, 2014 SCC 7 at para 1 [*Hryniak*].

[3] See e.g. the discussion in *Hryniak*, *supra* note 2 and Coulter A Osborne, QC, Civil Justice Reform Project: Findings and Recommendations (Ontario Ministry of the Attorney General, November 2007), online: <https://tinyurl.com/yf2r74w7> [perma.cc/C4X5-STUD] [Osborne Report].

case law[4] and other scholarship,[5] for particularly prompt procedure. One Federal Court judge has stated that colleagues from other courts have referred to Federal Courts procedure as "the gold standard."[6] This article investigates whether this reputation is earned and concludes that Federal Courts indeed have an "advantage" in their procedure.[7] Once this is understood, lessons can be drawn to potentially improve access to justice through the use of procedure both in the Federal Courts and across the country while also recognizing which characteristics of the Federal Courts may not be easily replicable.

Part 2 sets the stage for the analysis by concisely explaining the relationship between procedural law and access to justice before Part 3 gives a primer on the role of the Federal Courts in Canada's court structure. Part 4 is then doctrinal, noting particularly distinct aspects of Federal Courts procedure to assist litigants and their lawyers engaging Federal Courts procedure. Building on Part 4, Part 5 concludes that there is significant truth to the perception that Federal Courts procedure ***does*** stand out for being efficient and timely: intellectual property trials are resolved in less than two years (partially, as FCA1[8] observed, to comply with international treaties that affect certain intellectual property litigation), while judicial reviews are resolved within months. Progress in the large superior courts, however, is measured in years. Various potential causes of this are explored. Finally, Part 6 looks at what Federal Courts procedure can teach other Canadian jurisdictions about procedural innovations that facilitate access to justice, particularly regarding specialized judging, clearer procedural rules, the relative unimportance of inherent jurisdiction, the significant benefits of case management, and the importance of culture existing alongside formal rules. It is ultimately concluded that some positive aspects of Federal Courts procedure are, realistically, inherent to the Federal Courts given their particular jurisdiction. But significant lessons can still be learned that could potentially result in the greater use of procedure to facilitate access to justice in the Federal Courts and elsewhere.

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4 See e.g. *Brake v Canada (Attorney General)*, 2019 FCA 274 at para 29.

5 See e.g. Gerard J Kennedy, "Civil Appeals in Ontario: How the Interlocutory/Final Distinction Became So Complicated and the Case for a Simple Solution?" (2020) 45:2 Queen's LJ 243 at 284.

6 Interview with FC3.

7 Inspired by John H Langbein, "The German Advantage in Civil Procedure" (1985) 52:4 U Chicago L Rev 823.

8 See the explanation of the pseudonym system, *infra* note 83.

2. Procedural Law and Access to Justice[9]

"Access to justice" can mean different things depending on the context. But irrespective of how broadly one defines access to justice, the concept is inclusive of the ability of courts (and administrative tribunals, for that matter)[10] to resolve cases quickly and with minimal financial expense. As Chief Justice Wagner noted in *British Columbia (Attorney General) v Council of Canadians with Disabilities*, "[a]ccess to justice means many things" but for certain purposes, such as the public interest standing that he needed to consider in that case, "access to justice refers broadly to 'access to courts.'"[11] As such, though making procedure quicker and less expensive would not "solve" Canada's access to justice crisis, procedural law's ability to practically achieve "access to courts" must be studied.[12]

This procedural conceptualization of access to justice may not be sufficient for understanding access to justice, but it is necessary. It also accords with *Hryniak v Mauldin*.[13] Like Chief Justice Wagner in *CCD*, Justice Karakatsanis, writing for a unanimous Court, noted that much of the blame for the access to justice issues plaguing Canada's courts is frequently laid at the feet of court procedure.[14] Though civil procedure is designed to be efficient and predictable,[15] ensuring prompt resolution of actions on their merits, procedure can often have the opposite effect.[16] In response to this, she called for greater use of summary judgment as a potentially quicker and more proportionate way to dispose of matters.[17] The spirit of *Hryniak*, however, expands beyond summary judgment, including motions to strike/determine questions of law,[18] the scope of

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9 I have written about these matters before: see e.g. Gerard J Kennedy, "*Nevsun*, *Atlantic Lottery*, and the Implications of the 2020 Supreme Court of Canada Motion to Strike Decisions on Access to Justice and the Rule of Law" (2021) 71 UNBLJ 82 [Kennedy, "Motions to Strike"]; Gerard J Kennedy & Lorne Sossin, "Justiciability, Access to Justice and the Development of Constitutional Law in Canada" (2017) 45 Fed L Rev 707 at 710.

10 See e.g. Lorne Sossin, "Designing Administrative Justice" (2017) 34:1 Windsor YB Access Just 87.

11 *CCD*, *supra* note 2 at para 35, citing Kennedy & Sossin, *supra* note 9 at 710.

12 Of course, extensive procedure is sometimes necessary to achieve a just result, which is one of the reasons that efficiency and proportionality are not synonymous: Trevor CW Farrow, "Proportionality: A Cultural Revolution" (2012) 1:3 J Civ Litigation & Practice 151.

13 *Hryniak*, *supra* note 2 at paras 2, 23–33.

14 *Ibid* at paras 2, 27–29.

15 David Bamford et al, "Learning the 'How' of the Law: Teaching Procedure and Legal Education" (2013) 51:1 Osgoode Hall LJ 45 at 56.

16 See e.g. *CCD*, *supra* note 2; *Hryniak*, *supra* note 2.

17 See *Hryniak*, *supra* note 2.

18 See e.g. *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 18 [*Atlantic Lottery*], citing, e.g., Stephen GA Pitel & Matthew B Lerner, "Resolving Questions of Law:

discovery,[19] vexatious litigant orders,[20] and dismissals of manifestly abusive proceedings.[21] Throughout this, it must be remembered that extensive procedure can be "proportionate" when necessary to achieve a just result.[22]

Ultimately, it must be remembered that, other things equal, if procedure makes litigation more affordable and quicker, it is to the benefit of access to justice, even if it is not a complete understanding of access to justice. Is Federal Courts procedure more affordable and quicker? The rest of this article will investigate this. Because, if it is, lessons may be applicable to the superior courts.

3. Federal Courts: What Are They?

A) Constitutional Framework and History[23]

Understanding the characteristics of Federal Courts procedure requires understanding the courts' jurisdiction. This, in turn, requires a brief return to history and the first principles of the Canadian court system. The superior courts of the provinces are Canada's courts of "inherent" jurisdiction, essentially possessing jurisdiction analogous to the historic jurisdiction of the High Court of Justice of England and Wales.[24] As part of their constitutional authority to create additional courts to facilitate the administration of justice, provinces and the federal government are permitted to create additional courts.[25] Each province, for instance, has created provincial courts. The provincial courts, with judges appointed by the provincial government, and superior courts, with judges appointed by the federal government, are very roughly analogous to "lower" and "higher" courts that existed at Confederation, with the "lower" courts addressing ostensibly less important but often more urgent matters more

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A Modern Approach to Rule 21" (2014) 43 Adv Q 344 at 351–52.

19 See e.g. *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc*, 2014 ONSC 660 at paras 86–87.

20 See e.g. *Unrau v National Dental Examining Board*, 2019 ABQB 283 at para 941.

21 See e.g. *Raji v Borden Ladner Gervais LLP*, 2015 ONSC 801 at para 8.

22 Another reason that "proportionality" is not synonymous with "efficiency": Farrow, *supra* note 12.

23 For a comprehensive overview of the history of the Federal Courts and their predecessor courts, see Ian Greene, "A Brief History of the Federal Court of Appeal and the Federal Court" in Martine Valois, Ian Greene, Craig Forcese & Peter McCormick, eds, *The Federal Court of Appeal and the Federal Court: 50 Years of History* (Toronto: Irwin Law, 2021) 5.

24 See e.g. *MacMillan Bloedel Ltd v* Simpson, 1995 CanLII 57 at paras 27–33 (SCC).

25 Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell/Thomson Reuters, 2016) at 7-1-7-3.

efficiently and locally.[26] Ever since Confederation, the provinces have also had provincial courts of appeal, whose judges are appointed by the federal government, to correct legal errors and ensure consistent application of the law.[27]

Provincial superior courts have inherent jurisdiction in most private law disputes.[28] With that said, the Fathers of Confederation expressed concern about those courts interpreting federal law in different ways.[29] Section 101 of the *Constitution Act, 1867*, giving the federal government authority to create additional courts for the better governance of Canada, was one way to address this.[30] In the 1870s, the Mackenzie government created both the Exchequer Court and the Supreme Court of Canada.[31] The latter, which is a court of statutory jurisdiction[32] despite having constitutional status,[33] makes final determinations of law on matters of national public importance[34] or where a statute otherwise prescribes jurisdiction to the Supreme Court.[35]

The Exchequer Court, on the other hand, was a trial court with a more discrete purpose. Inspired by the English Court of Exchequer,[36] the Exchequer Court had circumscribed jurisdiction on matters such as federal taxation, revenue (connected to the name), and Crown liability. The Exchequer Court was not given first-instance authority over all federal statutes, such as the *Criminal Code*. In fact, its members were the

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26 Greene, *supra* note 23 at 8–9; the need for greater efficiency in the provincial courts was noted by, e.g., *R v Jordan*, 2016 SCC 27.

27 Greene, *supra* note 23 at 8–9; *Housen v Nikolaisen*, 2002 SCC 33.

28 Greene, *supra* note 23 at 8–9. Issues of property, contract, and tort being quintessentially property and civil rights and thus within provincial jurisdiction. For a discussion of the division of powers, see e.g. *Multiple Access Ltd v McCutcheon*, 1982 CanLII 55 (SCC); *General Motors of Canada Ltd v City National Leasing*, 1989 CanLII 133 (SCC). See also Malcolm Lavoie, *Trade and Commerce: Canada's Economic Constitution* (Montreal and Kingston: McGill-Queen's University Press, 2023).

29 Lavoie, *supra* note 28 notes that s. 94 of the *Constitution Act, 1867* gives Parliament power to make common law related to property and civil rights with provincial consent, but this provision has never been used.

30 Greene, *supra* note 23 at 9.

31 *Ibid* at 9–10.

32 Jurisdiction of the Supreme Court of Canada is confined by the *Supreme Court Act*, RSC 1985, c S-26 [*SCA*].

33 *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 [*Nadon Reference*], describing the implications of s 41(d) of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

34 See e.g. *SCA*, *supra* note 32, s 40(1).

35 See e.g. *Criminal Code*, RSC 1985, c C-46, ss 691–693.

36 The Honourable Frank Iacobucci, "The Federal Court of Canada: Some Comments on Its Origin, Traditions and Evolution" (1990) 11:3 Adv Q 318.

Supreme Court judges, all of whom were also *ex officio* members of the Exchequer Court who served on the Exchequer Court "part-time" and would occasionally serve on appellate panels from their own decisions.[37] This was unsatisfactory, and the Exchequer Court formally became independent from the Supreme Court in 1887, with one full-time judge.[38] Until 1945, the court had a second member, originally a quasi-judicial "referee", then an "assistant judge", and finally a "puisne judge". This position was always held by a Quebec francophone, as the first judicial position (later renamed "President") was only held by anglophones.[39] The Exchequer Court's jurisdiction expanded slightly over the decades, with intellectual property and especially taxation taking on a larger portion of the docket, which had originally largely concentrated on Crown liability.[40] The court expanded to have a complement of seven judges by 1961.[41] Even so, a serious backlog in cases began to develop, prompting reform.

B) The Federal Court of Canada: Creation and Present Jurisdiction

The circumstances in the Exchequer Court, including the backlog, were a significant reason why the Federal Court of Canada, with Trial and Appeal Divisions, was created in 1971. But such backlog could have been addressed by appointing more judges, so it was not the only reason for the Court's creation. The post-World War II era saw a large expansion of the administrative state,[42] with important new laws such as the *Canada Labour Code*[43] and the *Canada Pension Plan*[44] exemplifying the creation of federal administrative power. This, in turn, prompted a large increase in the number of judicial review applications. Judicial reviews of federal government actions largely proceeded in the provincial superior courts and created a potential for inconsistent judicial interpretations of federal laws. Even outside the judicial review context, inconsistent interpretations

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37 Greene, *supra* note 23 at 10.

38 *Ibid* at 10–11.

39 *Ibid* at 11–16. This unique history became important again in the *Nadon Reference*, *supra* note 33, and whether the *SCA*, *supra* note 32 actually should be interpreted to exclude former Quebec lawyers serving on the Federal Court and Federal Court of Appeal from being eligible to appointment to the Supreme Court of Canada.

40 Greene, *supra* note 23 at 11.

41 *Ibid* at 14–15.

42 See e.g. Gerard J Kennedy, "Wither the Divisional Court? Looking at the Past, Analyzing the Present, and Querying the Future of Ontario's Intermediary Appellate Court" (2021) 53:1 Ottawa L Rev 93 at 100 [Kennedy, "Div Ct"]; Graeme A Barry, "Spectrum of Possibilities: The Role of the Provincial Superior Courts in the Canadian Administrative State" (2005) 31:1 Man LJ 149 at 150.

43 SC 1966–67, c 62.

44 *Canada Pension Plan Act*, SC 1965, c 51.

of the same federal law—such as something being tax-deductible in Lloydminster, Alberta, but not Lloydminster, Saskatchewan—would be chaotic.[45] To the Pierre Trudeau government, and particularly its first Minister of Justice, John Turner, this was unacceptable.[46] Turner thus proposed the creation of the Federal Court of Canada, which would not just have the Exchequer Court's jurisdiction over intellectual property, Crown liability, and taxation matters. Rather, it would also have jurisdiction over maritime law and, much more importantly, federal administrative law.[47] The single court would also have two divisions—the Trial Division and the Appeal Division.

This was controversial, with predictable provincial cries that this infringed on provincial jurisdiction and/or that an Ottawa-based court would be too far removed from the places where litigants actually encountered federal administrative agencies.[48] Contemporaneous criticisms also emerged from legal scholars such as John Willis, who feared courts such as the proposed Federal Court of Canada would entrench the right to judicial review and impede the administrative state from fulfilling its potential.[49] Turner, however, proceeded. He also viewed the Federal Court as a potential source of national unity, with this being one of the reasons that judges were obliged to reside in the National Capital Region, despite the fact that they would travel throughout the country for hearings.[50] The Tax Court of Canada ("Tax Court") was created as a separate trial court in 1983 to have original jurisdiction in federal taxation matters, though its decisions remained appealable to the Federal Court, Appeal Division.[51]

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45 Thanks to FCA2 for this example.

46 Greene, *supra* note 23 at 17. Trudeau personally had little to do with planning the Federal Court, but he was supportive (*ibid* at 18, n 66, citing Richard W Pound, *Chief Justice W.R. Jackett: By the Law of the Land* (Montreal: McGill-Queen's University Press, 1999) at 216).

47 Greene, *supra* note 23 at 17, citing Pound, *supra* note 46 at 213.

48 Greene, *supra* note 23 at 18–19.

49 This criticism was also levelled against James C McRuer and his proposal that the Divisional Court be established in Ontario, largely to address judicial reviews based on expanding administrative action in Ontario. See e.g. John Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18:4 UTLJ 351 at 354. At the same time, the Exchequer Court was reorganized into what later became the Federal Court and Federal Court of Appeal, expanding its jurisdiction over judicial reviews of federal government action: Christopher Moore, *The Court of Appeal for Ontario: Defining the Right of Appeal, 1792-2013* (Toronto: University of Toronto Press, 2014) at 133. I also discuss this in Kennedy, "Div Ct", *supra* note 42 at 100.

50 Greene, *supra* note 23 at 17–19.

51 Pia Zambelli, "Paradigm Shift: Towards a New Model for Refugee Status Determination in Canada" 51:1 UBC L Rev 229 at 252.

The Federal Court of Canada originally had a single Chief Justice and Associate Chief Justice, responsible for the appeal and trial divisions, respectively.[52] The courts were then separated in 2003 into the Federal Court (largely with the jurisdiction of the former Trial Division) and the Federal Court of Appeal (largely with the jurisdiction of the former Appeal Division).[53] This independence, sought by the Court's former Chief Justice Frank Iacobucci, among others, was considered desirable for several reasons, including that it was awkward for judges to sit on appeals of their colleagues' decisions.[54] The Federal Court now has jurisdiction[55] over judicial reviews of federal government decisions,[56] certain claims against the federal Crown,[57] certain intergovernmental disputes,[58] intellectual property litigation,[59] maritime law,[60] national security matters,[61] Indigenous land and treaty claims,[62] and citizenship, immigration, and refugee law.[63] It can also address constitutional issues that arise in the context of its jurisdiction.[64] In many of these areas, jurisdiction is exclusive; intellectual property[65] and certain claims against the Crown[66] being notable exceptions. The constitutional power of the superior courts to review government action may not be able to be entirely ousted. Still, superior courts will decline to exercise that jurisdiction when the Federal Court has jurisdiction, barring truly exceptional circumstances such as

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52 Greene, *supra* note 23 at 19.

53 *Ibid* at 44ff.

54 *Ibid* at 44.

55 *Ibid* at 5.

56 *Federal Courts Act*, RSC 1985, c F-7, s 18 [*FCA*].

57 *Ibid*, s 17.

58 *Ibid*, s 19.

59 *Ibid*, s 20.

60 *Ibid*, s 22.

61 See e.g. *Immigration and Refugee Protection Act*, SC 2001, c 27, s 77 [*IRPA*]; *Prevention of Terrorist Travel Act*, SC 2015, c 36, s 42; *Secure Air Travel Act*, SC 2015, c 20, ss 11; *Canada Evidence Act*, RSC 1985, c C-5, ss 38, 38.01–38.15.

62 Usually in the context of judicial reviews (see e.g. *Labelle v Chiniki First Nation*, 2022 FC 456, concerning a band election and *Brokenhead Ojibway First Nation v Canada (Attorney General)*, 2009 FC 484, concerning a land and treaty claim) or claims for damages against the Crown (see e.g. *R v Guerin*, 1982 CanLII 5272 (FCA), rev'd on other grounds, *Guerin v R*, 1984 CanLII 25 (SCC)).

63 As noted by various grants of jurisdiction in the *IRPA*. See e.g. *IRPA*, *supra* note 61, ss 72, 77.

64 See e.g. Brian J Saunders, QC, The Honourable Donald J Rennie & Graham Garton, QC, *Federal Courts Practice, 2022* (Toronto: Thomson Reuters, 2021) at 9, relying on *Northern Telecom v Communications Workers*, 1983 CanLII 25 (SCC); *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 at paras 59–63.

65 Saunders, Rennie & Garton, *supra* note 64 at 31.

66 See e.g. *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 [*TeleZone*].

seeking the writ of *habeas corpus*, guaranteed by s. 10(c) of the *Charter*.[67] And even there, superior courts often yield to Federal Court process and remedies given the Federal Court's speed.[68] The Federal Court of Appeal, on the other hand, has jurisdiction over certain administrative appeals prescribed directly to it,[69] as well as appellate jurisdiction over decisions of the Federal Court[70] and Tax Court.[71]

This is important to understand from a procedural perspective because, as FCA1 observed, many aspects of the *Federal Courts Rules* were written when there was only one court. This makes the Federal Court akin to Alberta,[72] New Brunswick,[73] Nova Scotia,[74] Ontario,[75] and Prince Edward Island,[76] with trial and appellate civil procedure rules being codified in a single document. British Columbia,[77] Manitoba,[78] Newfoundland and Labrador,[79] and Saskatchewan,[80] on the other hand, distinguish between the court of appeal and superior court procedural rules. There is no one obviously preferable way to do this. There is efficiency to be had in procedural rules being present in one location, and having similar laws in different fora creates familiarity. At the same time, it can create a somewhat large document with over 500 Rules[81] (FCA1 expressed some concern about the *Federal Courts Rules*' presentation) and a lack of tailoring between the different courts.

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67 *May v Ferndale Institution*, 2005 SCC 82.

68 See e.g. *Heiser v. Bowden Institution*, 2022 ABCA 300 [*Heiser*].

69 See e.g. *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), s 13; *FCA*, *supra* note 56, s 28.

70 *FCA*, *supra* note 56, s 27(1).

71 *Ibid*, s 27(1.1).

72 *Alberta Rules of Court*, Alta Reg 124/2010 [*Alberta Rules*].

73 *Rules of Court*, NB Reg 82-73.

74 *Nova Scotia Civil Procedure Rules*, Royal Gaz Nov 19, 2008.

75 *Rules of Civil Procedure*, RRO 1990, Reg 194 [*Ontario Rules*].

76 *Prince Edward Island Rules of Civil Procedure*.

77 *Supreme Court Civil Rules*, BC Reg 168/2009 [*BC SC Rules*], *contra Court of Appeal Rules*, BC Reg 297/2001.

78 *Court of King's Bench Rules*, MR 553/88 [*MB KB Rules*], *contra Court of Appeal Rules*, MR 555/88.

79 *Rules of the Supreme Court, 1986*, SNL 1986, c 42, Sch D, *contra Court of Appeal Rules*, NLR 38/16.

80 *The King's Bench Rules*, Sask Gaz December 27, 2013 2684, *contra The Court of Appeal Rules*.

81 By comparison, the *BC SC Rules*, *supra* note 77 have 25 Rules, if broken down into many subrules.

4. Federal Courts Procedure: Particular/Better Characteristics

This section seeks to give a doctrinal overview of distinct aspects of Federal Courts procedure, relying on legislation, the *Federal Courts Rules*,[82] case law, and interviews with judges and lawyers experienced in Federal Courts procedure. Many of these characteristics have analogues in provincial procedural law, but reading the case law and/or interviewing the subjects led to the conclusion that they are applied distinctly in the Federal Courts. Judges were selected based on solicitation from the Office of the Chief Justice (for the Federal Court) and judges with significant experience writing on procedure (for the Federal Court of Appeal). Lawyers were approached based on having significant experience in both the Federal Courts and Ontario courts. Comparisons will be made to other provincial procedures, particularly Ontario's, as appropriate. This section cannot be doctrinally exhaustive regarding the particularities of Federal Courts procedure. It should also be recognized that Federal Courts judges are not neutral sources regarding it (though the lawyers arguably are not either). Their opinions should be tested to ensure that they are supported by case law and/or others' opinions. But their experience is still immense and worth considering. Based on these various sources, this section will provide highlights of what is particular—and it is suggested, better—about Federal Courts procedure to help practitioners and test this article's hypothesis. Interviewees are referred to pseudonymously, with two exceptions.[83]

A) Case Management

An obvious doctrinal and institutional difference in Federal Courts procedure—apparent in rules, case law, and the interviews—is the emphasis on case management. Introduced into the *Federal Courts Rules* in 1998, cases are to be managed in the Federal Court, with very discrete exceptions. This is unlike most provinces, such as Ontario, where mandatory case management is exceptional.[84] This is usually done by associate judges, who receive training as mediators. Exceptionally, judges

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82 SOR/98-106 [*Federal Courts Rules*].

83 The Federal Court judges are referred to as FC1, FC2, and FC3. The Federal Court of Appeal judges are referred to as FCA1, FCA2, and FCA3. The retired judges, both of whom served on both the Federal Court of Appeal and the Trial Division of the Federal Court, are referred to as RFC1 and RFC2. The litigators will be referred to as L1, L2, L3, and L4. Some interviewees were content to be referred to by their names. However, it became awkward to refer to some interviewees by name and others by pseudonym. Two interviewees (Justices of Appeal David Stratas and Richard Boivin) will be referred to by names in two discrete areas where they speak about personal experiences.

84 *Ontario Rules*, *supra* note 75, Rule 77.01. A comparision of the effects of mandatory case management in Ontario was beyond this article's scope.

will manage a case themselves.[85] The judge-to-associate judge ratio in the Federal Court is, as of June 2023, approximately four-to-one. By comparison, the judge-to-associate judge ratio in the Ontario Superior Court of Justice is closer to fourteen-to-one.[86] This ratio enables associate judges to actively manage cases, particularly complex intellectual property cases,[87] encouraging settlement and resolving preliminary motions.[88] FC1 estimated that 95% of case management is done by associate judges, with rare cases having judges case manage due to expectations that interlocutory relief will be sought outside the associate judges' jurisdiction.

All active litigators and Federal Court judges praised case management as a source of efficiency. L4 called case management "the most important difference" in making litigating in the Federal Courts more efficient than in the Ontario Superior Court of Justice. L1 and L2, both of whom regularly litigate on the Commercial List of the Ontario Superior Court of Justice, noted some similarities between the efficiency caused by case management on the Federal Courts and that on the Commercial List—with the Commercial List often being cited as the gold-plated procedure that can be found in Ontario.[89] L2 summarized her feelings, noting, "I would much rather have a case management judge than have to be left at sea with no way to access a judge except for booking a motion three years from now." FC1 said case management "has had huge impact, and I think it is the reason why our courts moved so quickly compared to all the other courts," particularly drawing on her experience as a practising lawyer in the Federal Court and Ontario Superior Court of Justice. FCA1, though now on the Federal Court of Appeal, described case management as "extremely effective" during his time on the Federal Court.

FC3 noted the near-elimination of dismissal for delay motions since the rise of case management. A July 2022 CanLII search revealed two Rule 167 dismissals for delay motions since 2010, both of which were

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85 As noted in an interview with FCA2, as well as the Federal Court's website, Federal Court, "How It Works" (last modified 7 October 2022), online: <https://tinyurl.com/hvftnj9v> [perma.cc/8XHF-42JA].

86 Based on a comparison of the courts' websites: Superior Court of Justice, "Judges and Judicial Officials", online: <https://tinyurl.com/3zebcrxp> [/perma.cc/MR3H-MZ3T]. *Contra* Federal Court, "Members of the Court" (last modified 19 February 2024), online: <https://tinyurl.com/ydzssvm4> [perma.cc/YW3S-YVLZ].

87 As noted in interview with FC2, and which became an issue in leading to a recusal request in *Osmose-Pentox Inc c Société Laurentide inc*, 2007 FC 504, aff'd, 2007 FC 844, aff'd, 2008 FCA 178.

88 Associate judge jurisdiction is discussed in more depth at *FCA*, *supra* note 56, s 13 and the *Federal Courts Rules*, *supra* note 82, Rule 50.

89 See e.g. The Honourable Warren K Winkler, "The Vanishing Trial" (2008) 27(2) Advocates' Soc J 3 at 4.

unsuccessful.[90] The extreme rareness of such motions is apparent, and case management must surely be contributing to this. By comparison, between 1997 and 2009, over a hundred cases considered dismissal for delay.

Justice of Appeal Rothstein (as he then was) emphasized the importance of case management judges in the oft-cited *Sawridge Band v Canada*:

> Case management judges must be given latitude to manage cases. This Court will interfere only in the clearest case of a misuse of judicial discretion. This approach was well stated by the Alberta Court of Appeal in *Korte v. Deloitte, Haskins and Sells* (1995), 36 Alta. L.R. (3d) 56, paragraph 3, and is applicable in these appeals. We adopt these words as our own.
>
> > This is a very complicated lawsuit. It is subject to case management and has been [for some time]. The orders made here are discretionary. We have said before, and we repeat, that case management judges in these complex matters must be given some "elbow room" to resolve endless interlocutory matters and move these cases on to trial. In some cases, the case management judge will have to be innovative to avoid having the case bog down in a morass of technical matters. Only in the clearest cases of mis-use of judicial discretion will we interfere. In this case, the carefully crafted orders made by the case management judge display a sound knowledge of the rules and the related case law. In particular, the order contains a provision that the parties are free to return to the case management judge for relief from the imposition of any intolerable burden imposed by the order. No clear error has been shown and we decline to interfere. While there may be some inconvenience to some of the parties, this does not translate into reversible error. We are not here to fine tune orders made in interlocutory proceedings, particularly in a case such as this one.[91]

Given that associate judges cannot resolve the merits of most cases, a judge will need to come aboard should a settlement not occur. While this creates some inefficiency, it appears to be a cost worth paying for other efficiencies that result from case management, which so many cases and interviewees praised as resulting in prompter proceedings. In fact, when judges case manage, they cannot resolve the case on the merits unless

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[90] *Sweet Productions Inc v Licensing LP International SÀRL*, 2022 FCA 111, reinstating Prothonotary Steele's order dismissing the defendant's motion to dismiss the action for delay, and rev'g, 2021 FC 216; *Morand v Bank of Nova Scotia (Scotiabank)*, 2017 FC 85.

[91] 2001 FCA 338 at para 11.

there is consent,[92] which is rarely given.[93] A July 2022 CanLII search found only one instance of such consent.[94] This is unsurprising as a case management judge has likely expressed an opinion on a case's merits, and parties may not believe that they will have been given a truly fair hearing should the case management judge hear the merits.[95] There is some additional risk of inefficiency should interlocutory relief be sought in a case where an associate judge is case managing but lacks jurisdiction to give the particularly sought relief. However, when Minister of Justice Peter MacKay sought feedback on phasing out prothonotary (the then-name) positions and having their work performed by new judicial positions, both the bench and the bar objected to any prospect of phasing out the positions.[96] In the stakeholders' views, notably that of the Intellectual Property Section of the Canadian Bar Association, the specialized role of prothonotaries was very valuable, and there would be a risk that it would be lost should the position be phased out.[97]

Though case management is mostly a feature of the Federal Court, it is used in the Federal Court of Appeal for certain cases, particularly, as RFC2 described, when large numbers of parties are involved. Examples include the judicial review of the TransMountain Pipeline expansion[98] ("TMX") and the challenge to the Rogers-Shaw merger.[99] The latter appeal was decided in less than one month from the Competition Tribunal's decision given the urgency of the case.[100] Regarding the TMX saga, Justice of Appeal Stratas, speaking extrajudicially, describes the experience, after initial pushback from the parties:

> Turns out that they really liked it, they had some very useful things to say. The timing was unilaterally set, and it was very tight, it was a giant case with 350,000 documents. We were going to get ready in 8-9 weeks. It was a punishing pace … In the case conference, I proposed let's do this all electronic [this was prior to COVID].

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92 *Federal Courts Rules*, *supra* note 2, Rule 266.

93 Interview with FC1.

94 *Olympia Interiors Ltd v Canada*, 1999 CanLII 7992 (FC).

95 *Hardy Estate v Canada (Attorney General)*, 2013 FC 728 at para 72.

96 FC2 and FC3. See also Letter from Christopher Wilson (Chair, Intellectual Property Section of the CBA) & Paul Harquail (Chair, Federal Courts Bench and Bar Liaison Committee of the CBA) to The Honourable Peter MacKay (18 February 2015), online: <https://tinyurl.com/msmkfu2r> [perma.cc/2L5U-RVUL].

97 *Ibid*.

98 *Chief Ron Ignace, et al v Canada (AG),* et al (A-321-19) (consolidated with files A-323-19, A-324-19, A-325-19, A-326-19 and A-327-19).

99 Orders and Directions given in *Commissioner of Competition v Rogers Communications Inc, et al*, File A-286-22.

100 *Canada (Commissioner of Competition) v Rogers Communications Inc*, 2023 FCA 16.

> All of you are all computer literate, they were all enthusiastic. This was September 2019, for the first time in this court it was an entirely electronic proceeding, and there wasn't a scrap of paper. In September through early November, things got finished on time, 79 orders, directions, reasons, and judgments were rendered to deal with the disputes along the way. Four offices of the registry were involved: Toronto, Ottawa, Calgary, Vancouver. Which happened to be 4 of our 5 biggest registry offices, who got trained on electronics.

Clearly, Justice of Appeal Stratas is not a disinterested observer in this regard. But his perspective is very interesting, and he notes it made the transition to the pandemic easier, as "it made the transition to electronics during the pandemic easier" with electronic filings and office procedures having been refined due to the TMX litigation.

B) Proportionality

Rule 3 of the *Federal Courts Rules* holds that:

> **3** These Rules shall be interpreted and applied
>
> **a)** so as to secure the just, most expeditious and least expensive outcome of every proceeding; and
>
> **b)** with consideration being given to the principle of proportionality, including consideration of the proceeding's complexity, the importance of the issues involved and the amount in dispute.

Similar rules regarding the justness, expeditiousness, and least expensive outcome of every proceeding are found throughout the provincial civil procedure rules.[101] Accordingly, it may not be a unique part of Federal Courts procedure.[102] But FC3, a judge and former prothonotary of the Federal Court, emphasized the importance of the principle in the Court's work. Proportionality has been criticized for creating "more access to

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101 See e.g. *MB KB Rules*, *supra* note 78, Rule 1.04(1.1); *BC SC Rules*, *supra* note 77, s 1.3(2); *Alberta Rules*, *supra* note 72, s 1.2(4); *Ontario Rules*, *supra* note 75.

102 See e.g. Farrow, *supra* note 12; Gerard J Kennedy, "*Hryniak* Comes to Manitoba: The Evolution of Manitoba Civil Procedure in the 2010s" (2021) 44:2 Man LJ 36 [Kennedy, "Manitoba"], discussing Manitoba; Gerard Joseph Kennedy, Hryniak*, the 2010 Amendments, and the First Stages of a Culture Shift?: The Evolution of Ontario Civil Procedure in the 2010s* (PhD Dissertation, York University, Faculty of Graduate Studies, 2020) at 16ff [Kennedy, *Dissertation*], discussing Ontario; Barbara Billingsley, "*Hryniak v. Mauldin* Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials" (2017) 55:1 Alta L Rev 1 at 20ff, discussing Alberta.

less justice."[103] However, it can and has been defended as being notably different than efficiency, seeking to holistically evaluate the extent to which a particular procedure is necessary to achieve a just outcome.[104] Nonetheless, there is emerging scholarship, based on analyses of both Ontario[105] and Manitoba[106] procedures, that questions proportionality's ability to actually make a difference in how procedure is applied on a day-to-day basis, at least in the absence of accompanying particularized amendments to procedural law.[107] The next section shows it has been integrated into summary procedure determinations.

C) Summary Procedures

Proportionality is often realized in the increased emphasis on using summary procedures, such as summary judgment motions and motions to strike. In fact, proportionality and summary procedures have frequently been analyzed together, both in scholarship[108] and, even more clearly, by the Supreme Court of Canada in *Hryniak*.[109] In *Hryniak*, Justice Karakatsanis, for a unanimous Court, held that a "culture shift" was required in the conduct of civil litigation to move away from the trial as the paradigm of appropriate dispute resolution. She proposed that other procedural mechanisms—most notably, summary judgment—be turned to as equally valid ways to resolve civil actions on their merits.[110] Though *Hryniak* explicitly addressed summary judgment, its spirit has been held to have broader application, including on motions to strike.[111] Have these affected Federal Courts procedure?

1) Summary Judgment and Summary Trial

Summary judgment and summary trials have been available in the Federal Court for decades. Rule 215 allows for summary judgment, which "shall" be granted if the Court is satisfied that "there is no genuine issue for trial with respect to a claim or defence."[112] If a judge is satisfied that the only genuine issue for trial is the amount a party is owed or is a question of law,

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103 Colleen M Hanycz, "More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform" (2008) 27:1 CJQ 98.

104 See e.g. Farrow, *supra* note 12.

105 Kennedy, *Dissertation*, *supra* note 102.

106 Kennedy, "Manitoba", *supra* note 102.

107 See e.g Kennedy, *Dissertation*, *supra* note 102 at 263, 267.

108 *Ibid*; see e.g. Farrow, *supra* note 12.

109 *Supra* note 2.

110 *Ibid* at paras 2, 32.

111 See e.g. *Atlantic Lottery*, *supra* note 18, discussed in Kennedy, "Motions to Strike", *supra* note 9.

112 *Federal Courts Rules*, *supra* note 82, Rule 215(1).

a judge "may" grant summary judgment with a reference to determine the amount in the former situation and resolve the question of law in the latter.[113] This ability to resolve a question of law if it is the only genuine issue for trial is consistent with increased use of motions to strike, as discussed below. A judge "may" also direct a partially unsuccessful summary judgment motion to proceed by summary trial, which is similar if distinct.

Rule 216 allows for summary trial. Summary trial allows for a more intense interrogation of evidence, notably through "hybrid" uses of *viva voce* and affidavit evidence.[114] In this sense, *Hryniak*'s analysis of Ontario expanding the availability of summary judgment is actually more analogous to summary trial in the Federal Court, as Justice of Appeal Stratas noted in *Manitoba v Canada*.[115]

In *Manitoba*, Justice of Appeal Stratas further held that, given the different language between Ontario's *Rules* and the *Federal Courts Rules*, *Hryniak* did not affect the "substantive content" of procedures in the Federal Court.[116] Relying on Justice of Appeal Gauthier's decision in *Burns Bog Conservation Society v Canada*, he held that there is "no genuine issue for trial" if it can be demonstrated, on the basis of the legal arguments and affidavit evidence as tendered on the summary judgment motion, that there is "no legal basis" for the claim.[117] Interpreting the *Rules*, which must first and foremost be based on their text,[118] this distinguishing of the *Ontario Rules*[119] is eminently sensible.

At the same time, Justice of Appeal Stratas also acknowledged in *Manitoba* that the concerns expressed in *Hryniak* about access to justice and proportionality, enshrined in Rule 3, still guide procedure in the Federal Courts.[120] Indeed, in *Viiv Healthcare Company v Gilead Sciences Canada, Inc*,[121] in the context of the summary trial (not sought in *Manitoba*), he held, much like Justice Karakatsanis in *Hryniak*,[122] that the appropriateness of summary judgment or summary trial will "depend" on specific circumstances of specific cases, as these procedures can impede

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113 *Ibid*, Rule 215(2).

114 *Ibid*, Rule 216(3).

115 2015 FCA 57 at para 15 [*Manitoba*].

116 *Ibid* at para 17.

117 *Ibid* at para 15, citing 2014 FCA 170 at paras 35–36.

118 See e.g. Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59:4 Alta L Rev 919, exploring nuances in this area of the law.

119 *Supra* note 75.

120 *Manitoba*, *supra* note 115 at para 17.

121 2021 FCA 122 [*Viiv Healthcare*].

122 *Hryniak*, *supra* note 2 at para 32.

or facilitate access to justice in light of the specific circumstances in which they are used.[123] He noted that the *Federal Courts Rules* do not prescribe that discovery must have taken place prior to summary judgment or summary trial.[124] He also held that objections to the suitability of summary trial should generally be made at the summary trial itself and not through pre-emptive motions.[125] He provided further guidance that judges' determinations of the appropriateness of summary judgment and summary trial are to be informed by three operating principles:[126] 1) the explicit words of the *Federal Courts Rules*, reflecting the primacy of text in interpreting regulation;[127] 2) permitting parties to generally prosecute and defend cases as they see fit (recognizing that this is not absolute but judicial intervention should be rare[128]); and 3) Rule 3's general invocation of proportionality, reflecting the previous subsection. Within this overarching framework, and being respectful of judicial discretion, he endorsed Federal Court case law that aids in determining the appropriateness of summary procedures,[129] such as that of Justice Boivin (as he then was) in *Tremblay v Orio Canada Inc*:

> The plaintiff bears the burden of demonstrating that a summary trial is appropriate … In deciding whether a file lends itself to a summary trial, a judge may consider, among other things, the complexity of the matter, its urgency, the cost of taking the case forward to a conventional trial in relation to the amount involved … whether the litigation is extensive, whether the summary trial will take considerable time, whether credibility is a crucial factor, whether the summary trial will involve a substantial risk of wasting time and effort and whether the summary trial will result in litigating in slices.[130]

But cases such as *Viiv Healthcare*, where Justice of Appeal Stratas upheld the appropriateness of a summary trial resolution, as well as the explicit words of FC2, FC3 and L4, indicate that any recent increase in summary judgment/summary trial is mostly found in the intellectual property context: most other matters in the Federal Court's jurisdiction are immigration or judicial review matters and accordingly proceed by application, rather than trial, so there is little need to dispense with a trial. But that is not to suggest that this is not important in the intellectual property context. Marshall Rothstein, a former Federal Court and Federal Court of Appeal judge later elevated to the Supreme Court of

123 *Viiv Healthcare*, *supra* note 121 at para 41.
124 *Ibid* at para 17; Saunders, Rennie & Garton, *supra* note 64 at 588.
125 *Viiv Healthcare*, *supra* note 121 at paras 19–21.
126 *Ibid* at paras 15–19.
127 Mancini, *supra* note 118.
128 *Ibid* at paras 23–25.
129 *Ibid* at para 38.
130 2013 FC 109 at para 24 [citations omitted].

Canada, has explicitly suggested greater use of summary judgment (and presumably, in the Federal Court, summary trials) in the intellectual property context,[131] as it is the area of Federal Court jurisdiction where trials are most common. Though Justice of Appeal Mactavish cautioned against summary judgment in the intellectual property context given the prevalence of expert witnesses (importing issues of credibility) and their inappropriateness if a trial date has been set, it is important to not be excessively cautious given their potential to achieve access to justice.[132]

Though summary judgment and summary trial are available in the Federal Court, there appears to be recognition that they are available in limited circumstances. FC1 described a "very tiny" uptick in their use post-*Hryniak*. As noted below in Part 5.A.2, 2021 saw 13 of 14 summary judgment motions brought be granted, and all three summary trial motions brought be granted. This indicates stability, predictability, and a relative lack of unsuccessful motions that do not advance a case's merits. As such, the need for greater use of summary judgment or summary trials may not be as acute in the Federal Court as in certain provinces. FCA2 noted, "we were already with the program on summary judgments [prior to *Hryniak*]. So *Hyrniak* for us was nothing."

An additional area where summary judgment could potentially become more common is aboriginal law. In granting a motion for summary judgment in *Saskatchewan (Attorney General) v Witchekan Lake First Nation*, Justice of Appeal Rennie noted that credibility issues should generally not be decided on summary judgment motions, but still can be, with many applications not requiring *viva voce* evidence. He also invoked the spirit of *Hryniak* and the aforementioned cases in noting how summary judgment has a role to play in an efficient procedure. He further cautioned that the notion that summary judgment is an exceptional procedure should be guarded against.[133]

2) Motions to Strike and Motions to Determine a Question of Law

Rule 221 allows for motions to strike, while Rule 220 allows for motions to determine a question of law. These are related motions as they seek legal determinations independent of the parties' evidence.[134] Indeed, evidence is explicitly prohibited on motions to strike because the allegations are

131 Marshall Rothstein, "Access to Justice and Intellectual Property Litigation" (2014) 27:1 IPJ 1 at 5–6.

132 *Gemak Trust v Jempak Corporation*, 2022 FCA 141.

133 2023 FCA 105 at paras 31–40.

134 The similarity of these two terms is noted in Kennedy, "Motions to Strike", *supra* note 9.

assumed true and so substantiating evidence is not required.[135] FC1 noted that motions to strike have long been available in the Federal Court but have rarely been successful, with FC2 adding that they are only common on judicial reviews if the proceeding is abusive or the Court was without jurisdiction. Justice of Appeal Strayer, in the oft-cited *David Bull Laboratories (Canada) Inc v Pharmacia Inc (CA)*, held that a motion to strike is appropriate if a claim was clearly "bereft of any possibility of success."[136] Building on *David Bull*, Justice of Appeal Stratas, in *Rahman v Public Service Labour Relations Board*, held that an application for judicial review should be struck only in the event of a "'show stopper' or a 'knock out punch'" deficiency.[137]

However, after the Supreme Court of Canada's decision in *Atlantic Lottery Corp v Babstock*,[138] which liberalized the availability of motions to strike to resolve questions of law, multiple Federal Court decisions have cited the case noting how motions to strike can facilitate access to justice through the prompt resolution of claims on their merits, particularly through resolving novel questions of law where the answer to the legal question does not depend on findings of fact.[139] FC1, in particular, noted that when the Federal Court lacks jurisdiction to hear a matter, a motion to strike is a prompt way to resolve the matter. Having said that, several other Federal Court decisions have queried the appropriateness of using motions to strike. Given that many aspects of Federal Courts procedure move quite quickly—with Justices of Appeal Strayer and Stratas emphasizing as much in *David Bull* and *Rahman*—not much time may be saved by a motion to strike.[140] In this vein, FC2 expressed the view that it is somewhat odd to bring a motion to strike in a judicial review, given that it is already a relatively prompt procedure. Oftentimes, the motion to strike is scheduled to be heard in conjunction with the application for judicial review.[141] This can be contrasted to a class proceeding such as *Atlantic Lottery,* where a motion to determine a legal question could be determinative and save years of litigation. FCA2 cited class proceedings as an area where a motion to determine a legal question may be more appropriate.

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135 *Federal Courts Rules*, *supra* note 82, Rule 221(2).

136 (1994), [1995] 1 FC 588 at 600 (CA), 1994 CanLII 3529 [*David Bull*].

137 2013 FCA 117 at para 7 [*Rahman*].

138 *Atlantic Lottery*, *supra* note 18.

139 *Donaldson v Swoop Inc*, 2020 FC 1089; *Misdzi Yikh v Canada*, 2020 FC 1059, discussed in Kennedy, "Motions to Strike", *supra* note 9 at 106.

140 *Rahman*, *supra* note 137; *David Bull*, *supra* note 136.

141 This was what Justice of Appeal Strayer contemplated in *David Bull*, *supra* note 136 at 597, as quoted in, e.g., *McKenzie v Conseil de la nation Innu Matimekush Lac-John*, 2017 FC 298 at para 26.

Neither motions to strike nor summary judgment/summary trial, therefore, appear particularly unique in Federal Courts procedure. But their availability should be noted. Their lack of jurisprudential prominence (a study of this nature could not undertake a complete empirical analysis) may have more to do with the fact that Federal Courts procedure is already fairly prompt, lessening the need for summary procedures. Ultimately, this seems consistent with the observation of FCA1: *Hyrniak* and its progeny have "had an effect, but not as significant as it has generally been with other courts."

D) Problematic Litigants

The Federal Courts have several ways to address problematic litigation. One of them is issuing a vexatious litigant order, which can be granted pursuant to s. 40(1) of the *Federal Courts Act*:

> If the Federal Court of Appeal or the Federal Court is satisfied, on application, that a person has persistently instituted vexatious proceedings or has conducted a proceeding in a vexatious manner, it may order that no further proceedings be instituted by the person in that court or that a proceeding previously instituted by the person in that court not be continued, except by leave of that court.

The Federal Court of Appeal recently relaxed the test to subject a litigant to a vexatious litigant order in *Canada v Olumide*.[142] Therein, Justice of Appeal Stratas made several helpful observations, including:

- victims of abusive litigation behaviour are not only other parties in the proceeding, but the public at large who cannot access the courts;[143]

- vexatious litigant orders do not bar access to the courts, but rather prescribe greater judicial scrutiny before responding parties must endure the expense of responding;[144]

- when misbehaviour is confined to a particular proceeding, a vexatious litigant order is unlikely to be necessary but, beyond that, it is a valuable tool, nor is vexatious behaviour in multiple proceedings a condition precedent before granting such an order (given that s. 40(1) contemplates that conducting "a" proceeding in a vexatious manner is sufficient to trigger its applicability);[145]

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142 2017 FCA 42 [*Olumide*].

143 *Ibid* at para 19.

144 *Ibid* at para 27.

145 *Ibid* at paras 24–25.

- vexatious litigant orders need not only be issued as a "last resort" given that they regulate, rather than prohibit, access to the courts;[146] and

- parties seeking a vexatious litigant order must present clear evidence why it is necessary but need not recount every detail of abusive litigation behaviour.[147]

Olumide should be lauded for recognizing the real access to justice implications that result from abusive litigation while also respecting the statutory criteria in s. 40 of the *Federal Courts Act*.[148]

Having said that, even though *Olumide* lowered the previously very high bar for subjecting a litigant to a vexatious litigant order, which FC3 acknowledged, the bar remains high. FC2 expressed the view that the requirement for the consent of the Attorney General is, from a policy perspective, not necessary, even though he is bound by it.[149] This places an additional procedural hurdle, albeit one prescribed by statute and which, therefore, must be respected.[150] This may indeed be overcautious, and the Alberta experience of merely requiring ***service*** of the Attorney General, rather than consent,[151] was described by FCA1 as a "Perfect solution. Seldom have I ever seen the AG have anything useful to say." Apart from the restrictive statutory criteria, the fact is that a litigant can be problematic without being "vexatious", as that term has been interpreted for purposes of s. 40 of the *Federal Courts Act*.[152]

FCA2 noted that, due to the *Federal Courts Act*, judges cannot "trigger" vexatious litigant orders on their own motion: "We have to remain independent, and we can't say you are a problematic litigant, so we are going to [declare someone a vexatious litigant] on our own motion … [it] is against the idea of a neutral court."

There is also the fact that vexatious litigant orders, though occasionally necessary, can be blunt instruments to address a problem that is real, but

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146 *Ibid* at para 26.

147 *Ibid* at paras 32–36.

148 *Supra* note 56. The importance of such respect for legislation, even in the context of responding to those who abuse the court system, is noted in Gerard J Kennedy, "The Alberta Court of Appeal's Vexatious Litigant Order Trilogy: Respecting Legislative Supremacy, Preserving Access to the Courts, and Hopefully Not to a Fault" (2021) 58:3 Alta L Rev 739 [Kennedy, "Alberta"].

149 *FCA*, *supra* note 56, s 40(2).

150 See the discussion in Kennedy, "Alberta", *supra* note 148.

151 *Ibid*.

152 *Supra* note 56. See also Saunders, Rennie & Garton, *supra* note 64 at 264ff.

can often be addressed by interventions that do not have such a dramatic impact on individuals' ability to access the courts.[153] And the Federal Courts still have tools to address problematic litigants. The first and most obvious of these was discussed above, as all problematic litigants, as per normal court practice, are assigned to case management. FC1 noted as much. The Federal Court of Appeal has assigned other litigants to a soft-version of case management when they have been causing problems for the registry, with a single judge guiding the litigant through the process.[154] These can include warnings to parties, noting that the Court has the discretion to dismiss appeals that are doomed to fail.[155] This can be particularly appropriate when the appeal is an attempt to circumvent an administrative process.[156] This assignment of problematic litigants to case management is also reflected in several decisions, where the litigants were not "vexatious litigants", but were engaged in problematic behaviour that the Court needed to address and could address more easily due to case management. Many such problematic litigants may in fact have legitimate claims that they are unable to express properly.[157] The fact is that true "vexatious litigants" are rare, even if they occupy a disproportionate amount of court resources.[158] Care must be taken, therefore, not to improperly label litigants as vexatious. Case management must also be recognized as a valuable tool to address some concerns that can arise from problematic litigation behaviour.[159]

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153 Kennedy, "Alberta", *supra* note 148.

154 See e.g. *Fabrikant v Canada*, 2018 FCA 206; *Canada (Attorney General) v Fabrikant*, 2019 FCA 174; *Canada (Attorney General) v Fabrikant*, 2019 FCA 198; *Fabrikant v Canada*, 2018 FCA 224 [*Fabrikant* Plenary].

155 *Dugré v Canada (Attorney General)*, 2021 FCA 8 ["*Dugré*"], as applied in the September 23, 2022 Practice Direction, and subsequent orders in *Dale J Richardson v Seventh-Day Adventist Church et al* (A-221-21), *Dale J Richardson v Attorney General of Canada et al* (A-277-21), *Dale J Richardson v Attorney General of Canada et al* (A-337-21), *Dale J Richardson v Attorney General of Canada et al* (A-347-21), *DSR Karis Consulting Inc v Attorney General of Canada et al* (A-158-22), *Dale J Richardson v Attorney General of Canada et al* (A-183-22), *DSR Karis Consulting Inc v The Association of Professional Engineers and Geoscientists of Saskatchewan et al* (22-A-16).

156 *Dugré*, *supra* note 155.

157 As Justice Myers noted in *Gao v Ontario (Workplace Safety and Insurance Board)*, 2014 ONSC 6497 at para 18: "even a vexatious litigant can have a legitimate complaint. It is not uncommon for there to be a real issue at the heart of a vexatious litigant's case." This was endorsed by the Court of Appeal in *Khan v Krylov & Company LLP*, 2017 ONCA 625 at para 7.

158 Kennedy, "Alberta", *supra* note 148.

159 See e.g. *Jonsson v Lymer*, 2020 ABCA 167 at para 12.

The Federal Courts may also, as FC3 observed, stay proceedings or steps therein[160], pursuant to s. 50(1)(b) of the *Federal Courts Act,* "where for any other reason it is in the interest of justice that the proceedings be stayed." This has been used to address problematic litigation that may not rise to the level of warranting a vexatious litigant order. For instance, in *Hutton v Canada (Attorney General)*, Justice Fothergill stayed several dubious actions commenced by the same person (a lawyer) pending either the Law Society of Ontario's concluding an investigation into his capacity to practice law (which would result in the stays being reconsidered) or his appointment of counsel (which would result in their automatically being lifted).[161] Justice of Appeal de Montigny (as he then was) upheld this for a unanimous Federal Court of Appeal.[162] Given the duty of counsel not to prosecute frivolous proceedings,[163] presumably, the appointment of counsel would have addressed many of Justice Fothergill's concerns. However, claims where stays are granted pursuant to s. 50(1)(b) of the *Federal Courts Act* appear to quintessentially be instances where parallel proceedings are underway or at risk of being underway.[164] As such, Justice Fothergill's decision does appear to be a unique use of the provision, though it also complies with the broad language of s. 50(1)(b).

As a pragmatic matter, the nature of Crown counsel may also help the Federal Courts address problematic litigation. Chief Justice Noël estimated that the Department of Justice is involved in at least two-thirds of proceedings in the Federal Court of Appeal.[165] FC2 also noted that problematic litigation can happen quite often in judicial reviews, where querulous litigants seek to level grievances with the government. This has been noted to be a common feature of abusive litigation in Ontario.[166] However, FCA2, FC1, and FC2 also noted that government lawyers, who

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[160] Prothonotary Lafrenière (as he then was) has noted the ability to ignore steps taken subsequent to earlier ones that have the purpose of interfering with rights properly before the Court: *Shipdock Amsterdam BV v Cast Group Inc*, 1999 CanLII 9085 at para 7, citing *Bruce v John Northway & Son Ltd* (1962) OWN 150 (Master).

[161] 2021 FC 815.

[162] *Hutton v Sayat*, 2023 FCA 22.

[163] See e.g. Law Society of Ontario, By-Law 4, *Licensing*, s 21, online: <https://tinyurl.com/2dx34j4p>.

[164] See e.g. Saunders, Rennie & Garton, *supra* note 64 at 299–302; *TeleZone Inc*, *supra* note 66.

[165] *Reference re Section 6 of Time Limits and Other Periods Act (COVID-19) (CA)*, 2020 FCA 137 at para 9 [*Covid Time Limits*].

[166] See Gerard J Kennedy, "Rule 2.1 of Ontario's *Rules of Civil Procedure*: Responding to Vexatious Litigation While Advancing Access to Justice?" (2018) 35 Windsor YB Access Just 243, which discusses Rule 2.1 of the *Ontario Rules*, *supra* note 75, which addresses litigation that is abusive on its face. For examples of abusive litigation against the government see e.g., *Asghar v Ontario*, 2015 ONSC 4071 and *Shafirovitch v The Scarborough Hospital*, 2015 ONSC 7627.

are subject to unique ethical obligations,[167] are cognizant of the need to ensure that litigants are seen to be treated fairly, even when summary procedures are used to dismiss their claims. It may be that private litigants will be tempted to shortcut procedure, even understandably, in the face of abusive litigation.[168] On the other side of the coin, however, FCA1 noted that cases where the Crown is a defendant can result in significant documentary discovery that can cause delay or expense, particularly in taxation matters.[169]

Moreover, it is possible for the registry to bring matters to the attention of judges when those judges have noted litigants have engaged in abusive behaviour in the past. FCA2 noted that 11 individuals have been identified as regularly abusing the court process in the Federal Court of Appeal. The registry will bring their actions to a judge, who will engage in "soft" case management to determine if steps need to be taken to ensure that the matters plausibly have merit, in ways that still respect procedural fairness, the *Federal Courts Rules*, and *Federal Courts Act*. This can be particularly appropriate when the responding parties are disincentivized to bring motions, lest the motion prompt more abusive behaviour, in the vein of the concerns cited.

It is worth noting that the identification of these 11 individuals are in decisions not posted to CanLII, so as to avoid embarrassing the individuals. FCA2 contrasted this to the approach in the Alberta Court of King's Bench, which, in his view, "seems to take delight in writing lurid reasons. That is not a nice thing to do."[170]

E) Directions

Directions are court practices, which can supplement, though not contradict, the *Federal Courts Act* and *Federal Courts Rules*, which can help matters progress in Court.[171] When asked about this, respondents

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167 Interview with FC2; see also Kennedy & Sossin, *supra* note 9.

168 Kennedy & Sossin, *supra* note 9, note that this should not be condoned, but can be understood, while the Crown should be subject to higher ethical obligations. See also Adam M Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule Of Law" (2010) 33 Dal LJ 1.

169 The traditional rule of disclosing "everything" from *Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882), 11 QBD 55 (CA Eng) has been moved away from in recent years with the introduction of the proportionality principle: see e.g. *Ontario Rules*, *supra* note 75, Rule 29.2.

170 Alberta's uniqueness in this regard is noted in Alanna Smith, "Legal group raises concerns about prisoner review system", *The Globe and Mail* (3 November 2022), online: <https://tinyurl.com/39cujevc> [perma.cc/HG2Z-S4HA].

171 Discussed in more depth in *Covid Time Limits*, *supra* note 165.

discussed two related but distinct phenomena. Practice Directions can be issued by the Chief Justice of either court to regulate matters of a smaller nature not regulated by the *Federal Courts Rules*. As FC3 and FCA2 expressed, such directions can be particularly helpful pending a rule change. Such directions clearly have the potential to facilitate access to justice. Having said that, their utility in the Federal Courts may be limited. For instance, FC2 expressed particular concern that directions were a "mixed bag" because parties are unaware of them (a view shared by FC3) despite FC1's view that they can be quite helpful.

The one area, however, where directions have clearly been helpful is the intellectual property context. FC2, while unsure of the utility of some directions, was firmly of the view that directions are helpful in that context given the highly sophisticated bar, while FC3 stated that directions were clearly helpful in intellectual property litigation.[172]

Case-specific directions are procedural instructions given to parties in writing in a specific case. Though they are expected to be followed, contempt sanction does not follow if the directions are ignored because they are not a court order. FCA2 said that both courts use case-specific directions to "soft case manage" a case or to give direction to the Registry. For example, if the Registry is unsure whether something should be filed (e.g., because it is late), a judge will rule by directing the Registry to either file the document or not. FCA2 considers these case-specific directions to be extremely useful in soft managing files, particularly with self-represented or difficult litigants. Such directions can assist the registry in directing self-represented litigants. Justice of Appeal Rennie recently underscored in *Njoroge v Canada (Attorney General)* that the directions are "not mere suggestions" and are expected to be followed.[173] Litigators were generally fond of such directions compared to their experience with directions elsewhere. This was expressed in comments such as L1 calling directions "a beautiful part of Federal Court practice," with L3 saying that directions are "a positive step … [litigation] can be done more expeditiously."

F) Informal Procedure for Uncontested Relief and Motions in Writing

In the vein of "predictable informality", both FC1 and FC3 noted how, for uncontested interlocutory relief, the Federal Court has developed an

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[172] Federal Court, "Case and Trial Management Guidelines for Complex Proceedings and Proceedings under the PM(NOC) Regulations" (16 October 2020), online (pdf): <https://tinyurl.com/mrhzbd6f> [perma.cc/K9TA-S38X] [*PM(NOC)*]. These address "*PM(NOC)*" cases.

[173] 2023 FCA 98 at para 11.

informal procedure allowing this to be obtained through a simple letter submitted with a draft order. This is found in the Consolidatd General Practice Guidelines.[174] FC1 cited this alongside case management as a relatively unique and particularly helpful aspect of Federal Courts procedure. Given that most other common law jurisdictions require a formal notice of motion, affidavit, and possibly even a hearing even for uncontested motions,[175] this seems a purely common sense approach that enables the Court and the parties to spend time on actually contested matters. FCA2 added that, though practice in the Federal Court of Appeal is not set out in a practice direction, it "also entertains informal motions just like the Federal Court … most of our uncontroversial or consent or unopposed motion work is done by informal approaches to the court (e.g., by letter)."

Motions in the Federal Court of Appeal are also presumptively in writing.[176] FCA2 added that "[t]his saves much time and we have not received reports or complaints about too much being done in writing. [One] judge was able to do 51 motions in one week. Fifty-one motions heard orally would have taken months."

G) Specialization/Expertise

As noted above, the Federal Courts are statutory courts. As such, only discrete subjects find themselves within Federal Courts jurisdiction. One might hypothesize that this would lead to prompter procedure as judges become familiar with the process inherent in particular types of litigation and they do not need to "get up to speed" on the substantive law. In this vein, this is also likely to decrease errors.[177] RFC2 put this concern concretely, noting that it is easier for a handful of judges to become experts in maritime law, intellectual property, or taxation, rather than every field imaginable. RFC1 similarly noted that, on appeal, "if we got a judgment of a certain judge who had a reputation in a certain field, you would take that into account."

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174 Federal Court, "Consolidated General Practice Guidelines" (8 June 2022) at 2–3, online (pdf): <https://tinyurl.com/mr5vhhan> [perma.cc/N3K5-NT7F] (Items 4–7).

175 As but two examples, in Ontario, in order for the Court to proceed with an uncontested motion, the applicant must fill out Form 23C: Affidavit for Uncontested Trial. This is different than the usual process, but still requires the applicant to attend a hearing. In Alberta, for uncontested divorces, the applicant must file an Affidavit of Applicant for Divorce and an Affidavit of Service: essentially the process is very similar to a contested motion.

176 *Federal Courts Rules*, *supra* note 82, Rule 369.2.

177 See e.g. Gerard J Kennedy, "Jurisdiction Motions and Access to Justice: An Ontario Tale" (2018) 55:1 Osgoode Hall LJ 79 at 105 [Kennedy, "Jurisdiction"].

Is this hypothesis born out in reality? The answer appears to be yes. At the recent conference to celebrate the 50th anniversary of the Federal Courts, Thomas Cromwell cited the Federal Courts as reluctantly convincing him of the virtues of judicial specialization.[178]

This is not merely substantive but has procedural consequences as well. For example, the Federal Court has policies to ensure that, upon leave being granted to review a refugee determination, the hearing must occur within 120 days.[179] To be fair, FC2, who generally considered expertise to result in prompter procedure, stated that the Court will defer release of the granting of leave until the scheduling can be guaranteed. Similarly, the Federal Court of Appeal[180] and Federal Court[181] have repeatedly emphasized that applications for judicial review are to be summary in nature, making interlocutory motions seldom appropriate.

But even within the Federal Court's statutorily confined subject matter, there is further specialization. For example, twelve judges are assigned to address all national security matters.[182] This trend of specialization is further reflected in a current pilot project for "Chambers" of the Court in Maritime Law, Competition and Intellectual Property, and Class Actions.[183] Moreover, only a handful of judges address intellectual property trials.[184] Both judges and lawyers interviewed stated that this results in even complex intellectual property matters that proceed to trial being resolved within two years: a markedly shorter time period than could be expected of similarly complicated civil actions in Canada's most populous provinces.[185] L4 and RFC1 both noted that it would be very unusual to choose to proceed in an intellectual property matter in a superior court instead of the Federal Court, due to speed and expertise (to be sure, only the Federal Court has the power to remove a patent or

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178 The Honourable Thomas A Cromwell, QC, "The Past, Present and Future of the Federal Courts" (delivered at the Federal Court of Appeal and Federal Courth 50th Anniversary Symposium, Ottawa, 29 June 2022).

179 Interview with P2; Federal Court, "Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings" (24 June 2022) at 5, online (pdf): <https://tinyurl.com/2nrjf32s> [perma.cc/4T3X-AGPN] (Item 7).

180 *Rahman*, *supra* note 137; *David Bull*, *supra* note 136.

181 See e.g. *Ye v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16187 at para 8 (FC).

182 According to FC2.

183 See Federal Court, "Notice to the Parties and the Profession: Pilot Project: Chambers of the Court" (2 March 2023), online (pdf): <https://tinyurl.com/2p9dzhfs> [perma.cc/7G34-SSTL].

184 Interviews with FC1, FC2.

185 Lenczner Slaght, "IP Litigation in Canada 2021: Patents" (December 2021) at 3, online (pdf): <https://tinyurl.com/57n6hrma> [perma.cc/F2KS-9B9H].

trademark, meaning some intellectual property litigation ***must*** proceed in the Federal Court, but the experience of interviewees suggests that reasons for proceeding in the Federal Court extend beyond that). Of course, this does require that the court take advantage of the potential for shorter time periods, as will now be discussed.

L1 noted how certain judges become renowned experts in particular fields of law in a way that would be much less likely on a Superior Court:

> Justice Manson was an IP lawyer before. He has become a true expert on IP. Justice Stratas was an admin lawyer, but he is clearly and indisputably the leading admin judge in the country. That is of course in part because he had so much expertise before but is also in part because it is almost a full-time job for him, and he gets the benefit of thinking hard and deep about admin law all the time.

L1 also went out of his way to note that the nature of the court means that judges can become experts in areas of law that they had no exposure to prior to their appointment. He cited Justice Mactavish (as she then was), whose background was in human rights, as one of the "stars" for intellectual property trials.

To be sure, L3 criticized a lack of background in immigration law among Federal Courts judges. This was supported, almost indirectly, by RFC1 and FCA1 noting how effective the Federal Courts' reputations are for handling intellectual property, administrative law, and maritime law, without mentioning immigration cases. FCA1 conceded some problems in immigration detention cases, where matters are extremely urgent, while also noting that the Federal Court of Appeal has emphasized that excessive delay in immigration detention matters can offend both *Charter* and administrative law standards[186] and the provincial superior courts will usually not issue a writ of *habeas corpus* because the Federal Court can address detention matters more expeditiously.[187] This is an issue that has been slowly addressed over the past decade, with the appointments of Justices Diner, Ahmad, Sadrehashemi, and Go. Moreover, judges who did not practise immigration law can become experts after their appointments to the bench, with FCA1 citing Justices Roy, Kane, Fothergill, Pentney, and Mosley as examples. And FCA2 downplayed the importance of specialized subject matter jurisdiction compared to the nature of the *Rules* themselves, and/or the relationship of the registry with litigants and the judiciary. FCA3 similarly considered this specialization to be important for substance, but not procedure. But it would appear, at the very least,

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186 *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130.

187 *Heiser*, *supra* note 68.

that the specialized subject matter jurisdiction of the Federal Courts is making some difference.

H) Deadlines Actually Enforced

Something else that all judges interviewed mentioned, as well as several lawyers, is the extent to which deadlines, especially those imposed by case management, are enforced in the Federal Courts. RFC2, FC3, FCA1, FC2, and FC1 all noted this, with FC1 putting this particularly starkly as something lawyers do not understand unless they regularly practise before the Federal Courts:

> I think some people take some of the timelines prescribed in the rules as suggestions because they are used to practicing in other courts where they are not strictly enforced, whereas in our court they are strictly enforced. They see that when they go to the registry and they try to file something … [w]e have a very strict registry that enforces the rules. So, I think there is just that general approach that people don't necessarily appreciate that we enforce the rules, we enforce the timelines, and we are going to move quickly.

RFC2 noted that this applies on the appellate level as well, citing an example of adjournments: "If you want an adjournment, you will not get one unless you really meet the criteria. Whereas I tend to think in Quebec they granted adjournments pretty lightly compared to us. So, I think generally we do enforce the rules without being too rigid about it." Or, as FCA1 said, "Our attitude towards adjournment is strict—that would be an understatement. You have to have a very good reason."

This "following deadlines unless truly not warranted" attitude was reflected in comments from lawyers. L2 noted that:

> In a regular Ontario Superior Court matter, the rules set out the deadlines and they are honoured in the breach. The Federal Courts send you letters and schedule case conferences; they call you to the carpet and make you answer. For the behemoth case in which the standard deadlines in the Rules would work an injustice, the court will be flexible but still wants to know what is happening so they can manage their docket.

L4, a leading intellectual property litigator, cited the fact that "you have to follow the rules in the Federal Court" as the first reason Federal Courts procedure is quicker than Ontario procedure, followed by case management, and "early setting down of trial dates, then refusing to move them." L1 added that the setting of early trial dates (which does preclude

summary proceedings[188]) is "another huge advantage of the Federal Court. You can realistically expect to go to trial within a couple years of starting your case."

The fact that the deadlines are actually enforced in the Federal Courts is reflected in case law such as *Canada v Berhad*, in which Justice of Appeal Létourneau noted the importance of adhering to deadlines, particularly in administrative law:

> [A 30-day] time limit [for challenging a decision] is not whimsical. It exists in the public interest, in order to bring finality to administrative decisions so as to ensure their effective implementation without delay and to provide security to those who comply with the decision or enforce compliance with it, often at considerable expense. In this case, the decision of the Chairman was not challenged until, a year and a half after it was made, the respondents filed their claim for damages.[189]

This is not to suggest that time limits cannot be extended if there is an extenuating reason. This was noted in *Immuno Concepts, Inc v Immuno AG*,[190] in line with L2's comment about "behemoth" cases. However, the Federal Courts have emphasized that this is exceptional, and four factors must be considered. As Justice Bell noted in *Singh v Canada (Citizenship and Immigration)*:

> Generally, the moving party must demonstrate: a) a continuing intention to pursue the application; b) that the application has some merit; c) that no prejudice arises from the delay; and d) that a reasonable explanation for the delay exists. The underlying principle is that justice, according to law, must be done.[191]

This is hardly unfair, especially as Parliament frequently imposes time limits such as limitations periods that must be adhered to unless Parliament has provided exceptions. As Justice of Appeal Stratas held regarding limitation periods in *Canada (Attorney General) v Utah*, "judges—even the most experienced ones we have—cannot meddle with [legislation] or refuse to enforce it unless the legislation enacting it is unconstitutional."[192] The more flexible nature of time limits found in procedural rules[193] (which are regulations that generally have the discretion to depart from them in the

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188 *Federal Courts Rules*, *supra* note 82, Rule 213(1).

189 2005 FCA 267 at para 60.

190 1996 CanLII 3825 (FC).

191 2021 FC 93 at para 17.

192 2020 FCA 224 at para 15.

193 Most procedural rules contain the ability to depart from the rules in the interests of justice: see e.g. *Ontario Rules*, *supra* note 75, Rule 2.03; *Federal Courts Rules*, *supra* note 82, Rule 55.

interests of justice) should not be taken as a *carte blanche* to view the limits as simply suggestions.

By comparison, British Columbia case law has consistently given weak remedies for breaches of timelines, as noted in *Morbank Financial Inc v 0476779 BC Ltd*, which exceptionally struck pleadings only after multiple refusals to comply with time periods.[194] Justice Milman, for instance, has observed that British Columbia procedural timelines are often "honoured in the breach,"[195] the exact words used by Justice Mitchell regarding Saskatchewan timelines[196] and Justice Horkins regarding Ontario timelines.[197] As will be discussed below, this accords with previous hypotheses that an emphasis on "rules" rather than "standards" can be beneficial in procedural law.

I) Culture—And a Beloved Registry

Enforceable deadlines are part of the Federal Court's unique ***culture***. Many of the aforementioned phenomena, such as deadlines being enforced, ensuring matters are heard within a particular timeframe, or creating an informal process for uncontested relief, are not the product of the *Federal Courts Act*, *Federal Courts Rules*, or even legislation particular to areas of law, but rather an expectation that matters will proceed quickly. FC2 and FC3, both judges, noted that this is a product of culture. John Turner, when he was Minister of Justice, hoped that the development of a unique culture would result from the creation of the Federal Courts as an Ottawa-based institution, bringing together the best aspects of different parts of Canada.[198]

This is also reflected in the reputation noted by FCA2 about the registry being very receptive and helpful. He stated that the judiciary and the registry:

> talk constantly, we are very concerned about the registry and its functioning. The registry is our public face to the court. So, keeping their morale up and keeping them well staffed, well served and being responsive to their needs is important. You'll see they bring their concerns to us and we bring our concerns to them … The mechanism by which this takes place is a formal Registry Committee.

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194 2013 BCSC 2008.

195 *Pantusa v Parkland Fuel Corporation*, 2020 BCSC 1988 at para 29.

196 *Crescent Point Resources Partnership v Husky Oil Operations Limited*, 2020 SKQB 128 at para 54.

197 *Pardhan v Bank of Montreal*, 2012 ONSC 2229 at para 11, leave to appeal ref'd, 2013 ONSC 355 (Div Ct).

198 Greene, *supra* note 23 at 17–19.

FCA1 described the registry as "highly accessible [and] client-focussed," though FC1 noted that it is "strict." The implications of this culture will be discussed in more detail in Part 6.

This culture in the registry was noted by all four litigators interviewed. It is worth noting that none of these sentiments were prompted by any questions about the registry but rather generic questions about what was unique about Federal Courts procedure and what else I needed to know about it. There is no substitute for citing some of their quotes. L1 said:

> What is most unique about Federal Court procedure is that you can call the court and they will help you. My experience in the Superior Court is the staff at the counter are a little powerless to help you. I am assuming it is powerless as opposed to unwilling. Where the staff at the Federal Courts are incredibly helpful. They will explain things to you. They will make suggestions on how to expedite things and if you really need to get in front of a judge or prothonotary on an urgent basis and you explain why, they will make it happen. So, it is a really user-friendly court and that is what makes the court so unique.

L2 expressed similar sentiments:

> Comparing the Tax Court of Canada or the Federal Court (appeal and trial court) to the regular Superior Court [as opposed to the Commercial List] in Ontario at least it is night and day. The Tax Court and the Federal Court are faster. They are faster I think because you have a relatively easy way to access the judges or the registrar.

L3, generally the most skeptical of Federal Courts procedure of the four interviewed litigators, largely because of lack of being tailored to the immigration context, nonetheless agreed regarding the registry:

> I have always found the registry a friendly place. Everyone I have spoken to agrees with me that the Federal Court is much more user-friendly. People are available, accessible, they are willing to answer questions. You don't have to wait as long. I like the registry. I have always found the Federal Court registry a very positive place to deal with, I found the registrars helpful.

L4 made similar comments:

> You can also pick up the phone and call the registry. They will be nice to you, they will answer you … I have tried, once or twice, or suggested to an associate to call a registry at the Superior Court and it is like a laughable suggestion. You will never get an answer and if they give you an answer it is probably not going to be right … There seems to be a really different culture at the registry of the Federal Court, than the Superior Court. That might be for very good reasons, I think the volume

> of cases that the superior courts deal with are so high that they can't possibly give the care and attention that the Federal Court does.

FCA2, though not a disinterested observer, cited culture as the distinguishing characteristic of Federal Courts procedure:

> What separates us is culture … it is the integration of the registry with the courts. We care passionately about the registry. I really mean that. We are frightfully proud that many say we have the most client-friendly registry in the country. It is like a corporate culture in the private sector, some have a really positive culture, some not. We have a fantastic service. The registry is seen as integral to our operation … the registry for most courthouses in the country are actually physically separate [from the judges], not ours and they are usually on the same floor. These are colleagues, you bump into them.

This was consistent with FCA3's views that the registry would prepare a case file for the judges in a methodical way, in a manner that was not his experience as a lawyer before the Quebec Superior Court. The Registry Committee, for instance, exists mainly to be a liaison between the registry and the judges. It is also involved in crafting and being aware of practice directions and *Federal Courts Rules* amendments.[199] As discussed below, some of this may be due to the volume of cases—the Federal Courts have smaller caseloads compared to large superior courts. But at least some of it is also based in culture. And the impacts seem significant.

5. "Federal Court Advantage?"

Part 4 analyzed particularly distinct aspects of Federal Courts procedure based on legislation, the *Federal Courts Rules*, case law, and interviews. This section will test whether FC3 is correct that Federal Courts procedure is indeed procedure's "gold standard" or, channelling John Langbein, there is a "Federal Court Advantage."[200] This will be primarily analyzed through the lenses of delay and predictability, both of which are widely acknowledged as essential elements of analyzing access to justice. Even if they are not sufficient for an understanding of access to justice, they are, other things equal, preferred ways to procedurally advance cases.[201] This

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199 Interview with FCA2.

200 See e.g. Langbein, *supra* note 7.

201 For a discussion of the effects of uncertainty in the law, see e.g. Gerard J Kennedy, "The 2010 Amendments and *Hryniak v Mauldin*: The Perspective of the Lawyers Who Have Lived Them" (2020) 37:1 Windsor YB Access Just 21 at 55–56 [Kennedy, "Interviews"]; Gerard J Kennedy, "The rules-standards debate and Ontario Civil Procedure reform: a case for more rules?" (2022) 47:1 J Leg Philosophy 24 [Kennedy, "Rules"]; Pitel & Lerner, *supra* note 18 at 358; Erika Chamberlain, "When Unlawfulness Becomes Tortious: Misfeasance in a Public Office and Administrative Law" (2014) 44 Adv Q 489 at 503.

will be considered alongside procedure that facilitates courts arriving at the "correct" or "just" result, obviously an additional aspect of access to justice considerations.[202] As Justice Karakatsansis noted in *Hryniak*, "Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised."[203] Then, particular disadvantages of Federal Courts procedure will be considered. This section will end by assessing both this "gold" and this "lead" to determine whether FC3 is correct.

A) Lots of Gold

1) Delay

A comprehensive analysis of the length of Federal Court proceedings is beyond the scope of this article. However, case law and litigants' experience[204] convene on a consensus that intellectual property trials are often resolved in less than two years,[205] and, even very complicated cases are resolved in less than three. This is remarkably quick compared to civil claims in Alberta, British Columbia, or Ontario, where wait times for a civil trial tend to be measured in years,[206] with discrete exceptions such as the Toronto Commercial List.[207] Matters tend to proceed much more quickly in many of the smaller provinces, such as Manitoba.[208] FC1, FC2, and FC3 hypothesized that active case management, with a default for all complex cases (not just in the intellectual property context) to be case managed, is a reason for this. L4 shared this opinion, describing the case management practice in the Federal Court as a "model", and describing the speed of intellectual property litigation as "the envy of the people in the Superior Court … you can't schedule a long motion [in the Superior Court for over a year from] now. I could go to general sitting next week on a Tuesday [in Federal Court], maybe not for a long motion. For a long motion, I would probably get it next month." FC3 also observed that case management conferences were generally held remotely, either by telephone or videoconference, since long before the pandemic, giving the Federal Court an advantage when the pandemic hit.

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202 See e.g. Oscar G Chase et al, *Civil Litigation in Comparative Context*, 2nd ed (St. Paul, MN: West Academic Publishing, 2017) at 387.

203 *Hryniak*, *supra* note 2 at para 23.

204 Noted by L1 and L4 in particular.

205 The *PM(NOC)* litigation, discussed *PM(NOC)*, *supra* note 172, likely has less delay, but parsing out how this affects averages was beyond the scope of this study.

206 For instance, the *Alberta Rules*, *supra* note 72, expressly condones three year periods of delay.

207 See e.g. Winkler, *supra* note 89 at 4.

208 Noted in Kennedy, "Manitoba", *supra* note 102.

But that "less than two years" timeframe is comparatively ***long*** compared to many of the other judicial review, national security, and immigration matters that the Federal Court addresses. Such claims tend to be resolved in months, as noted by both interviewees[209] and in case law.[210] Again, this is quite quick compared to the largest common law provinces, where a full-day application or even a motion may not be scheduled for over a year.[211] Much of this seems to be attributed to deadlines actually being enforced in a way that they are not in many provinces—though, as L2 noted, this could be because the provincial superior courts are comparatively underresourced. The aforementioned extreme rarity of dismissal for delay motions buttresses the conclusion that Federal Courts procedure is comparatively quick. Lessons will be drawn from this in Part 6.

Finally, even for motions and interlocutory matters, respondents noted that the promptness of the registry and the ability to get the services of an associate judge lead to "not wast[ing] time," in the words of L4.

2) Predictability

Access to justice also requires reasonable certainty in the law. Indeed, a lack of certainty in law—both procedural and substantive—can itself be a significant access to justice impediment.[212] Procedure, like any area of the law, cannot be perfectly predictable.[213] But it is "nihilistic"[214] to suggest that procedure cannot become ***more*** predictable. And if less time is spent arguing over process as opposed to debating merits, that facilitates courts addressing matters on their merits. Christine Van Geyn recently stated, in the context of explaining decisions on how to pursue public interest litigation, "it cannot be overstated the importance of clarity in the law," with procedural uncertainty potentially preventing such litigation from ever commencing.[215]

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[209] E.g., FC2, and L1, who noted that a judicial review tends to be resolved within "7–8 months".

[210] See e.g. *Rahman*, *supra* note 137; *David Bull*, *supra* note 136 at 597.

[211] See e.g. the tales of L2 and L4.

[212] See generally Kennedy, "Interviews", *supra* note 201; Kennedy, "Rules", *supra* note 201; Chamberlain, *supra* note 201.

[213] See e.g. Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89:8 Harv L Rev 1685.

[214] See e.g. Mark Mancini, "Lingustic Nihlism" (2 November 2020), online (blog): <https://tinyurl.com/4rnzmtma> [perma.cc/2FH2-7JUJ]; Lawrence B Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma" (1987) 54:2 U Chicago L Rev 462.

[215] Christine Van Geyn, "Why Public Interest Litigation Matters" (25 July 2022) at 00h:05m:00s, online (video): <https://tinyurl.com/muz5suc8> (interview with Mark Sheeley).

Is Federal Courts procedure relatively predictable? Both experientially and jurisprudentially, the answer appears to be "yes". As noted above, many interviewees, unprompted, noted that deadlines are taken seriously and, as a result of case management, parties know what they need to do and when. Particularly strikingly, FCA1 cited predictability as the most unique aspect of Federal Courts procedure. Moreover, the availability of certain procedures, such as summary judgment and summary trial, has been described with reasonable particularity, as noted above. An August 3, 2022, Westlaw search of 2021 cases revealed just a single case where summary judgment was sought but denied[216] compared to thirteen where it was granted.[217] Moreover, there were no cases where a summary trial was sought but denied compared to three where it was granted.[218] These numbers of unsuccessful motions are tiny compared to the experience of the Ontario Superior Court of Justice, where at least dozens of unsuccessful motions are brought each year.[219] While some of this can be attributed to differing subject matter jurisdiction, compared to the Superior Court (with there being relatively few Federal Courts cases where summary judgment would be appropriate), it appears as though knowledge of the procedural law is at least partially an explanation. While the Ontario Superior Court of Justice has a larger docket (having about threefold the number of reported decisions[220]), it does not follow that there should be differential rates in unsuccessful motions. The Ontario Superior Court of Justice's docket is also considerably comprised of criminal matters, which means that the size of the docket overstates the likely difference in unsuccessful civil motions.

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216 *Immigration Consultants of Canada Regulatory Council v College of Immigration and Citizenship Consultants Corp*, 2021 FC 1434.

217 *Canada v Ferme Michel Touchette senc*, 2021 FC 906; *Canada v H & M Farm Ltd*, 2021 FC 905; *Lauzon v Canada (Revenue Agency)*, 2021 FC 431; *Canada v Horseshoe Valley Ranch Ltd*, 2021 FC 122; *Canada v Bills*, 2021 FC 928; *Canada v Kenelane Farms Ltd*, 2021 FC 924; *Patterned Concrete Mississauga Inc v Bomanite Toronto Ltd*, 2021 FC 314; *Google LLC v Sonos, Inc*, 2021 FC 1462; *Canada v Esau*, 2021 FC 123; *Canada v Bezan Cattle Corporation*, 2021 FC 397; *Kuehne + Nagel Inc v Harman Inc*, 2021 FC 26; *Winkler v Hendley*, 2021 FC 498 (this was a case with duelling summary judgment motions); *Cabral v Canada (Citizenship and Immigration)*, 2021 FC 169 (this was another case with duelling summary judgment motions).

218 *Ark Innovation Technology Inc v Matidor Technologies Inc*, 2021 FC 1336; *Vachon Bakery Inc v Racioppo*, 2021 FC 308; *Sadhu Singh Hamdard Trust v Navsun Holdings Ltd*, 2021 FC 602.

219 See e.g. Brooke MacKenzie, "Effecting a Culture Shift—An Empirical Review of Ontario's Summary Judgment Reforms" (2017) 54:4 Osgoode Hall LJ 1275.

220 CanLII reports 1,609 Federal Court decisions for 2021 compared to 4,321 Ontario Superior Court of Justice decisions.

3) Substantive Justice

Of course, efficient and predictable procedure rings hollow if it leads to substantively unjust outcomes.[221] This is one of Colleen Hanycz's principal criticisms of proportionality as a principle in civil procedure.[222] But have substantive injustices actually occurred due to Federal Courts procedure? It would be hard to be certain without reviewing each case against what "actually" happened. This would be impossible. However, not a single interviewed respondent—judge or lawyer—suggested a concern with substantive justice resulting from Federal Courts procedure. On the contrary, several pointed to case management as a "double win"—facilitating a substantively fair settlement, and providing an efficient path to a fair disposition at trial.[223] The specialized nature of Federal Court judging, being formalized with the pilot project regarding chambers, with handfuls of judges building substantive expertise in matters such as intellectual property, maritime law, and national security, would also likely lead to fewer errors, according to access to justice literature.[224]

Are there instances of claims or defences being struck due to a lack of compliance with procedural rules in circumstances where other courts may have been inclined to provide indulgences? To be sure.[225] But it is not clear that these cases would have succeeded on their merits. Moreover, given the finitude of court resources, these (potential) substantive injustices need to be weighed against the aforementioned benefits that arise from a culture that values and achieves promptness and efficiency. For instance, in *Sabok Sir v Canada*, a plaintiff agreed to comply with specific procedural requirements by a particular date, and if she did not, the defendant could move to dismiss her claim. When Prothonotary Ring dismissed her claim for failing to comply with the agreed-upon order, Justice Norris upheld her decision.[226] In such cases, the unfairness to the plaintiff in being unable to prosecute her case needs to be weighed against the unfairness to the defendant in litigating against a plaintiff who does not comply with orders, and the public as a whole, knowing that court orders will not be enforced.

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221 Chase et al, *supra* note 202 at 387; *Hryniak*, *supra* note 2 at para 23.

222 Hanycz, *supra* note 103.

223 E.g., FC1, FC2, FC3.

224 Kennedy, "Jurisdiction", *supra* note 177 at 105–106.

225 2021 alone revealed 11 cases where motions to extensions of time were refused. Many of these decisions also resulted in dismissal of the action, but often not ***because of*** the refusal to extend time: see e.g. *Mendez v Canada (Citizenship and Immigration)*, 2021 FC 1237.

226 2021 FC 82 at para 25.

B) Some Lead (Against the Gold)

The foregoing is certainly complementary to Federal Courts procedure. FCA1 described recently being at a National Judicial Institute conference where "[t]he delays, backlogs and inability to drive cases forward to trial were a preoccupation for [colleagues from Ontario and British Columbia]. The idea of a complex trial within two years and an appeal within 6 months is unfathomable to them." But where is Federal Courts procedure falling short? Because it is hardly a panacea. That will be explored in this section.

1) Class Proceedings

Class proceedings have posed particular difficulty, as FC2 and FC3 both noted. FCA2 added that class proceedings are an area where dispositive legal motions may be particularly appropriate. One of the reasons, as FC3 observed, that class proceedings have posed particular difficulty in the Federal Courts is because the division of powers puts the vast majority of class proceedings even with national scope in provincial superior courts' jurisdiction. The nature of class proceedings—which usually seek relief pursuant to multiple avenues—has created multiple instances where much of the relief sought in class proceedings, even intellectual property and competition class proceedings, is not available in the Federal Courts.[227] This can lead to potentially undesirable bifurcation.[228] This is unfortunate, given that national class proceedings are already complicated and the Federal Courts, in accordance with John Turner's vision, have the potential to be a unifying force in Canada. It might thus be an aspiration, also noted by FC2, to give Federal Courts jurisdiction over national class proceedings. FCA1 also observed that class proceedings are entirely rules-based, as opposed to statute-based, making amending the rules surrounding them less complicated. However, the division of powers remains the division of powers, and it is questionable whether the Federal Courts could be assigned class action jurisdiction without infringing on the core jurisdiction of the provinces or the superior courts.[229] A more intriguing possibility, noted by FC2, would be to give the Federal Court a role in deciding ***which*** provincial superior court "would take initial jurisdiction over a class action with national scope, and facilitate the implementation of rulings across the country."

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227 Joseph Marcus, "National Class Actions in Canada: Yet Another Call for Clarity and Coordination" (2013) *Comparative Research in Law & Political Economy. Research Paper No. 20/2013* at 53-54.

228 *Ibid.*

229 For a discussion of the importance of not infringing on the "core" jurisdiction of the superior courts over private law, see *Reference re Code of Civil Procedure (Que), art 35*, 2021 SCC 27.

2) Confined Subject Matter Jurisdiction

At the core of the Federal Courts' difficulty in processing class proceedings is their confined subject matter jurisdiction, unlike the provincial superior courts, which have inherent subject matter jurisdiction. As Justice of Appeal Stratas has noted in both his written decisions[230] and extrajudicial commentary,[231] the statutory nature of the Federal Courts does not deprive them of penumbral or plenary powers to address all matters before them. As Benjamin L Berger has written:

> [The Federal Court] does not have default jurisdiction over any justiciable matter and the inherent power to exercise all available remedies in review of such matters; nor, however, is it simply a statutory body in the customary sense. A topical mandate from Parliament is necessary. But once such a mandate is given, and given comprehensively, the Court has the presumptive power to exercise the full range of remedies available to section 96 courts. This presumption can be rebutted by *express* statutory limitation, but in the absence of clear words of withdrawal, the Federal Court should be thought of as a court complete in its powers over the subject matters given to it by Parliament.[232]

In other words, while the Federal Courts' procedural practices cannot conflict with enabling legislation such as the *Federal Courts Act*, as noted above in the discussion of vexatious litigant orders, this is the same for other jurisdictions. Ontario courts may not enact procedures that conflict with the *Courts of Justice Act,*[233] just as Alberta courts cannot have their procedures conflict with the *Judicature Act*.[234] It is also worth remembering, as did RFC1, FCA1, and FCA3, that the Supreme Court of Canada is a statutory court and would share whatever limitations the Federal Courts may have regarding a lack of inherent jurisdiction. There are still many penumbral powers that courts possess by virtue of being courts and can be exercised to dispose of matters efficiently and justly.

Where matters become more complicated, however, is where a proceeding has elements which partially belong in the Federal Courts but partially belong in the provincial superior courts. This often arises in counterclaims and third-party claims.[235] As such, even when two claims

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230 *Marcus, supra* note 227; *Fabrikant* Plenary, *supra* note 154. See also the decision of Chief Justice Noël in *Covid Time Limits*, *supra* note 165 at para 7.

231 The Hon David Stratas, "A Judiciary Cleaved: Superior Courts, Statutory Courts and the Illogic of Difference" (2017) 68 UNBLJ 54.

232 "Our Evolving Judicature: Security Certificates, Detention Review, and the Federal Court" (2006) 39:1 UBC L Rev 101 (emphasis in original).

233 RSO 1990, c C.43.

234 RSA 2000, c J-2.

235 Saunders, Rennie & Garton, *supra* note 64 at 14.

arise from common facts, a cause of action outside the jurisdiction of the Federal Court may not proceed in the Federal Court, despite the concurrent appropriateness of the Federal Court claim.[236] This requires severance and causes delays and added expense in such cases.[237] L1 acknowledged this is not ideal. While the Crown can require that proceedings be recommenced in a provincial superior court in such circumstances, this is an asymmetric procedural right (i.e., other parties may not avail themselves of it and may need to bring both a Federal Court and a provincial superior court action).[238] And even when the matter does proceed entirely in a provincial superior court, parties are prevented from availing themselves of what is often more efficient Federal Courts procedure.

This may be inevitable. L2 acknowledged this but then added that she did not know how it could be fixed given the division of powers. In response to the idea that all matters proceed in the superior courts, she exclaimed, "Absolutely not" given the benefits of specialization and expertise, adding, "Tax is not for dabblers. Marine insurance is not for dabblers."

3) Common Law Dominance

Federal Courts procedure is also dominated by common law principles and precedents. This is revealed by a quick glance at many of the Federal Court of Appeal's leading procedural precedents, which overwhelmingly, if not exclusively, cite common law precedents.[239] RFC2, a Quebec lawyer prior to his appointment to the Federal Court, stated that the procedure was much more common law than civil law. This is not altogether surprising. Though the Court is bijural,[240] its docket is disproportionately public law compared to the provincial superior courts. FCA3, also a Quebec lawyer prior to his appointment to the Federal Court, noted it is "for sure the reality … that the court is more common law in culture." He noted that civil law is primarily likely to arise only in contract interpretation in disputes that incidentally find themselves within Federal Courts jurisdiction. After all,

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236 See e.g. *McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 at paras 55–99, where Justice of Appeal Locke struck the defendant's third-party claim in a patent infringement matter due to it being a matter of contract, thus law falling outside of the Federal Court jurisdiction. By contrast, a proceeding in Ontario involving a counterclaim of patent invalidity *in rem* would need to be moved to the Federal Court.

237 Saunders, Rennie & Garton, *supra* note 64 at 14–15, noting in particular *R v Thomas Fuller Const Co (1958) Ltd*, [1980] 1 SCR 695.

238 Saunders, Rennie & Garton, *supra* note 64 at 15.

239 See e.g. *Viiv Healthcare*, *supra* note 121.

240 The Honourable Richard Boivin, "The Federal Court of Appeal of Canada: A View from the Inside of a Bijural and Bilingual Court" (2020) 71 UNBLJ 190.

Quebec has a common law system for public law,[241] its court structure and system of judicial appointments is common law, and the Quebec *Code of Civil Procedure* is a mix of common and civil law.[242]

It is hardly clear that this is "lead"—because Federal Courts procedure works generally well and integrating Quebec civilian legal traditions may merely serve to muddy the waters.[243] Moreover, FCA1 viewed the knowledge that most judges have of both official languages as assisting in the bilingual interpretation of federal legislation[244] and allowing for those from different legal traditions to learn from each other. But it is an issue that the Federal Courts themselves are clearly cognizant of, given that a pilot project has been launched allowing litigants to use the Quebec *Code of Civil Procedure* if they wish.[245] However, FC2 and FC3 both stated that there has been little uptake of this option to date. A July 2023 CanLII search revealed that only one Federal Court of Appeal case and one Federal Court decision indicated that the project had been used.[246] While this is likely an underestimate, given cases that may not have resulted in a reported decision due to settlement or abandonment, it still indicates limited take-up.

Justice of Appeal Richard Boivin spoke on the record as the chair of the committee regarding the pilot project. Consistent with RFC2 and FC2's views, he explained that it was enacted to respond to reticence from the Quebec bar, not seen in other provinces, to use the Federal Court when there is concurrent jurisdiction. This can be particularly perplexing in intellectual property cases, when judges at the Quebec Superior Court are unlikely to have considerable experience in intellectual property law.

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241 See e.g. Julie Bédard, "Transsystemic Teaching of Law at McGill: 'Radical Changes, Old and New Hats'" (2001) 27 Queen's LJ 237 at 245.

242 Rosalie Jukier, "The Impact of Legal Traditions on Quebec Procedural Law: Lessons from Quebec's New Code of Civil Procedure" (2015) 93:1 Can Bar Rev 211; Rosalie Jukier, "Quebec Procedural Law as a Microcosm of Mixity: Implications for Legal Pedagogy, Judicial Decision-Making, and Law Reform" (2016) 62 Loy L Rev 691.

243 See e.g. *CM Callow Inc v Zollinger*, 2020 SCC 45, the disagreement between the majority and the minority regarding the appropriateness of using civil law principles in the common law of contract.

244 See e.g. *R v Daoust*, 2004 SCC 6; The Honourable Mr Justice Michel Bastarache et al, *The Law of Bilingual Interpretation* (Markham, ON: LexisNexis Canada, 2008). But for criticism of this, see Ruth Sullivan, "Some Problems with the Shared Meaning Rule as Formulated in *R v Daoust* and *The Law of Bilingual Interpretation*" (2010) 42:1 Ottawa L Rev 71.

245 Federal Court of Appeal, "Information Document for the Parties" (31 August 2023), online: <https://tinyurl.com/2p9fnreb> [perma.cc/3LMG-Q78N].

246 *MS v Canada*, 2020 FC 982; *MS c Canada*, 2021 FCA 225. "Pilot project", "projet-pilote", "procedural bijuralism", "Bijuridisme", "Code de procédure civile", and "Code of Civil Procedure" were all searched.

Justice of Appeal Boivin said that the Federal Courts have heard "for many years [from] many lawyers" that the lack of familiarity with the *Federal Courts Rules* compared to the Quebec *Code of Civil Procedure*, which does not contemplate summary judgment or lawyers' costs except as a sanction for abuse,[247] was a reason that lawyers were making these choices. He described the project as "the only place in the world … to have provincial procedural law [apply] to federal issues" and was motivated as a response to concerns expressed by practitioners. He explained that the take-up rate started "very well," but the pandemic negatively impacted that. As such, the committee has decided to continue the project as a pilot until September 2024, when its fate will be determined. If there is not more take up on using the Federal Courts in intellectual property matters from Quebec, he noted that the argument "the procedure is too complex" will have less credibility as an explanation. Even so, he added that a large number of cases is not required to make the project worthwhile—after all, it only makes sense for intellectual property and federal Crown liability cases emerging from Quebec.

4) Delay Still Present

It is also worth noting that while the Federal Court may have less delay than many large provincial superior courts, the delay can still be truly consequential. In immigration and prison matters, for instance, delays of even a few months can have profound impacts. In this vein, Lorne Waldman, one of Canada's leading immigration lawyers, has been critical of delays in the immigration context, which can take months or longer.[248] Similarly, wrongful deprivations of liberty in the prison context, pending a judicial review that may last months, can cause irreparable harm.[249] In no way does this article seek to condone these delays. By comparison, many urgent insolvency matters on the Commercial List of the Ontario Superior Court of Justice can be heard within days. Thus, while delay in the Federal Court may generally be less than in the superior courts of large provinces, there remain concerns.

Moreover, the aboriginal law context is an instance where the speed of administrative law or intellectual property is simply not present.[250] L1, FC3, FCA1, FCA2, and RFC2 all acknowledged this, which appears to be part of a general problem of delay in aboriginal law litigation: a topic

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247 CQLR c C-25.01, art 342 CCP.

248 Federal Court, "Delving into the Courts: Immigration Webinar" (29 October 2021) at 00h:54m:58s, online (video): <https://tinyurl.com/rahjx43t>.

249 See e.g. *Lavery v Canada (Deputy Commissioner, Correctional Service)*, 1996 CarswellNat 910, 116 FTR 207 (TD).

250 Subject to the caveat regarding speed in *PM(NOC)* litigation: *PM(NOC)*, *supra* note 172.

well-documented,[251] if outside the scope of this article. FCA2 suggested that this issue could be partially addressed by having a larger judicial complement on the Federal Court of Appeal. However, there is no reason to suspect that the delay in aboriginal law litigation is ***greater*** in the Federal Courts than in the superior courts. And FCA1 added that parties are generally permitted to set the timetable in aboriginal law litigation to a greater extent than in other fields "to foster settlement, reconciliation and to allow counsel to consult the band membership." Ultimately, it appears as though the Federal Courts simply suffer from the same problems of delay as other courts in the aboriginal litigation context.

5) "Too Efficient"/Rule-Bound—Especially in Immigration?

While L1 (with a background in administrative law and intellectual property), L2 (whose expertise in the Federal Courts is largely taxation), and L4 (an intellectual property litigator) all noted the speed of Federal Courts procedure and appeared to laud it, L3, an immigration lawyer, offered a cautionary tale. He agreed that "very firm" enforcement of rules and deadlines "with some flexibility" is generally a good thing. But he also noted that approximately 35 judges address 10,000 immigration leave applications each year. Giving about 15 minutes to each is deeply problematic in his view, and could largely be addressed by appointing more judges, and particularly judges with backgrounds in immigration law.

This was not a common view, but is complementary to Sean Rehaag's critiques of Federal Court practice in this area.[252] And FC2 acknowledged that, once leave is granted, hearings need to be scheduled within 120 days in the immigration context—but the granting of leave will be delayed if that scheduling cannot be accommodated. Even so, while this might be an issue of genuine concern, the prime ways to fix it would be eliminating the leave requirement and/or appointing more judges:[253] both matters beyond the Court's control. A practice of reasons for granting leave, or having leave panels of two judges, would require extrajudicial resources and less prompt procedure elsewhere. This should be considered, but it

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[251] The slow process is evident in the cases of *Southwind v Canada*, 2021 SCC 28 (more than 25 years of litigation to reach a Federal Court trial decision); *Taku River Tlingit First Nation v British Colombia*, 2004 SCC 74 (issues with a 1984 mining permit that reached finality in 2004); *Tsilhqot'in Nation v British Colombia*, 2014 SCC 44 (resolved 25 years after the first writ of summons issued, and had an initial trial spanning 5 years and 300+ days); and *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC) (374 days of trial over 3 years and 10 years from the start of trial to a final SCC decision).

[252] Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38 Queen's LJ 1.

[253] *Ibid*.

would not be a costless endeavour in terms of causing delay, not just in immigration matters but elsewhere as resources need to be diverted.

The other lawyers expressed similar views, although they were more ambivalent. L4, an intellectual property litigator who generally praised Federal Courts procedure, also noted that there could be a risk that the litigation can move too quickly, which can be damaging to lawyers' mental health, and, at times, requires a pace that does not allow counsel to properly absorb and uncover matters. She described "this rigidity in some things that obviously 90% of the time is what keeps things moving quickly and smoothly but 10% of the time becomes a problem." Meanwhile, L2 stated that "more slavish dedication to the rules is sometimes problematic when you are trying to access justice." L1 similarly expressed concern that there was too much formalism and a lack of willingness to depart from the rules, even on consent, such as in permitting reply evidence or extending a deadline to deliver a pleading. These thoughts, perhaps, indicate that while too much flexibility in procedure causes problems, too much rigidity does as well. But as L1 conceded, this may be "what keeps the trains running on time." Meanwhile, L2 acknowledged, "I understand it, because they are trying to apply the rule of law across the country and that is a clear marker that everyone is getting treated the same way." The "rules-standards debate"[254] rages on…

C) In Sum: Mostly Gold

Federal Courts procedure is not perfect. However, compared to Canada's largest common law jurisdictions, experiential, jurisprudential, and some empirical evidence all suggest that the Federal Courts address matters more quickly and predictably than the largest provinces' superior courts, particularly Ontario (to which most litigators compared). Moreover, there is no evidence that this is coming at the expense of procedural or substantive injustices: again, at least compared to these large provincial superior courts. On the contrary, the flaws in Federal Courts procedure are fairly discrete and confined to certain areas. So if Federal Courts procedure is not the gold standard compared to hypothetical utopias, it has much to teach. What that is will now be explored.

6. Lessons Learned

Federal Courts procedure appears to be comparatively prompt and efficient compared to many other procedures "on offer" in Canada. This section proposes that the above analysis can support six "lessons" about procedural law, each of which has been hypothesized elsewhere:

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254 See e.g. D Kennedy, *supra* note 213.

- specialized judging can lead to prompter and more efficient procedure;
- large courts can create inefficiencies beyond a certain point;
- enforcement of procedural rules in a more "rules" as opposed to "standards"-like manner can facilitate access to justice with relatively few of standards' downsides;
- a court lacking inherent jurisdiction is not at (much of) a disadvantage in developing procedures that facilitate access to justice;
- case management is a true boon to access to justice; and
- access to justice is facilitated just as much by culture as it is by formal rules.

Many of the lessons apply particularly to the Federal Courts. But all can also teach other jurisdictions in Canada.

A) Specialized Judging

As noted above, many respondents indicated that the fact that Federal Court judges have become specialized in particular areas of law has been a true benefit of Federal Courts procedure. L4 expressed a view of many interviewees, noting how predictable practice can result in the Federal Courts for particular areas of law, such as intellectual property litigation, with this being easier to do than "if you had fifty different types of cases." This observation, which FC1 also expressed, supports long-standing hypotheses that specialized judging is a boon to access to justice.[255]

Many of the benefits that specialized judging brings to Federal Courts procedure are indeed confined to the Federal Courts. The Federal Court addresses a disproportionate number of judicial reviews. These cases naturally lend themselves to being summary, lacking discovery (a disproportionate source of expense[256]), with the ability to supplement the

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255 Kennedy, "Jurisdiction", *supra* note 177.

256 As noted in Kennedy, "Interviews", *supra* note 201 at 50, n 143:

> Justice Thomas Cromwell noted the counterproductivity of expanding discovery rights in extrajudicial comments in 2013 while still serving on the Supreme Court: Beverley Spencer, "The Road to Justice Reform: An Interview with Supreme Court of Canada Justice Thomas Cromwell" (July-August 2013), online: *The National* <https://tinyurl.com/44u96548> [perma.cc/35WQ-76QZ]. This is also a common hypothesis in the United States: see e.g. Judge (as

record of the tribunals below being significantly restricted.[257] Moreover, the confined subject matter jurisdiction of the Federal Courts means that there are a limited number of substantive areas of law with which judges need to become familiar. But generally, respondents seemed to echo the views of RFC1: "In the Federal Court, you simply have more confidence in a judge who is hearing your case who has experience in the field, than not." That cannot easily be replicated in the superior courts but can, to some extent, through creating "Chambers" of judges (with many judges present in multiple chambers) who hear different types of cases. As noted above, in March 2023, the Federal Court took a further step to ensure this was the case by launching a pilot project creating three specialized Chambers of the Court, namely the: (i) Intellectual Property and Competition Chambers; (ii) Maritime and Admiralty Chambers; and (iii) Class Action Chambers.[258] In October 2023, the Court announced the creation of a fourth Chambers in Aboriginal Law.[259]

The fact that Crown counsel, with their unique obligations to avoid delay, are particularly present in Federal Courts litigation may also be an inherent advantage of the Federal Courts. Moreover, FC3 and FC2 noted the specialized bar as a possible reason that there is less delay and more predictability in the Federal Courts, with FC2 noting this to be particularly the case in "a complicated patent case." Finally, in this vein, the lack of juries in the Federal Courts certainly avoids a source of delay.

However, while the Federal Courts may be particularly suited to realize the benefits of judicial specialization, that does not prevent specialization from taking place ***within a broader institution*** by informally having certain judges address particular matters. While this has been acted on

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he then was) Neil Gorsuch, "13th Annual Barbara K. Olson Memorial Lecture" (Address Delivered at the Federalist Society for Law and Public Policy's 2013 National Lawyers Convention, The Mayflower Hotel, Washington, DC, 15 November 2013), online: <https://tinyurl.com/74bn8xck> at 6:15-10:30. See also *Hryniak*, *supra* note 1 at para 29.

257 See e.g. *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22.

258 Federal Court, "Notice to the Parties and Profession: Pilot Project: Chambers of the Court" (2 March 2023), online (pdf): <https://tinyurl.com/2p9dzhfs> [perma.cc/EZ3W-LG49].

259 Federal Court, "Notice to the Parties and Profession: Pilot Project Expansion: Chambers of the Court" (24 October 2023), online (pdf): <https://tinyurl.com/4hdhvwun> [perma.cc/L6JV-BLHF].

in discrete areas, such as family law[260] and commercial litigation,[261] the extent to which this has been acted on by the superior courts is unclear. Specialization does come with disadvantages, such as if judges begin to lack openness to new ideas, especially when they come to have disproportionate influence in an area where few judges work. However, that risk can be partially addressed by obliging judges to rotate sitting in different areas of law, resulting in most superior court judges (at least in urban centres where this is feasible) having at least two specializations.[262] The Federal Court Chambers pilot project has this characteristic, with judges being assigned to multiple chambers. This *de facto* specialization is reminiscent of civilian (though, as noted above, not necessarily Quebecois) approaches to judging,[263] which perhaps also reflects the bijural nature of the Federal Courts. As L2 opined regarding this:

> One way to get the benefits of specialized judges is seen in Ontario: it is all one court, but the judges can be assigned to particular lists. Each judge has access to the full jurisdiction of the court, but they can move between lists, developing expertise, but not becoming pigeonholed.

Arguably, this should also be reflected in motion days, where a single judge has all motions in particular areas such as immigration or intellectual property, rather than all motions before the court *full stop*.

B) Are Small Courts at an Advantage?

It is often posited in economics that larger firms are at an advantage in terms of being efficient.[264] However, there comes a point where the size gets to be too great as the "firm" is diverted from its mission. Several interviewees—judges and litigators[265]—expressed sympathy for the superior courts, particularly the Ontario Superior Court of Justice and Quebec Superior Court, simply having too large a docket, leaving their registries unable to give each case the attention it deserves. L2, for instance, noted that the individualized attention and responses received from the Federal Courts registries are not dissimilar from what she has experienced in Newfoundland and Labrador. Some evidence suggests that

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260 Freda Steel, "The Unified Family Court—Ten Years Later" (1996) 24 Man LJ 381; Nicholas Bala, Rachel Birnbaum & Donna Martinson, "One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict" (2010) 26 Can J Fam L 395 at 399.

261 Winkler, *supra* note 89 at 4, cited in Kennedy, "Jurisdiction", *supra* note 177 at 106, n 121.

262 Kennedy, *Dissertation*, *supra* note 102 at 300.

263 Chase et al, *supra* note 202 at Chapter Three.

264 Ronald Coas, "The Nature of the Firm" (1937) 4:16 *Economica* 386.

265 L4, FC1, RFC2.

Manitoba[266] and Prince Edward Island[267] are similarly not overwhelmed with cases. Meanwhile, in the smaller Ontario Commercial List, L2 has received treatment more analogous to the Federal Courts. She summed up by saying, "you have a relatively easy way to access the judges or the registrar [in the Federal Courts], whereas in Ontario the gatekeepers and just simply the weight of the cases that the system has to manage precludes that kind of face-to-face individual touch." L2 further opined that being part of a "small bar", whether in a small province or a small field such as intellectual property or maritime law, means that lawyers will "behave properly" lest their reputations suffer.

There is, at a certain point, only so much that can be done about this lesson: the Ontario Superior Court of Justice has a constitutional role that it must fulfil, despite likely being underresourced. However, it is still worth noting that the superior courts of the larger provinces may have an inherent difficulty in promptly resolving cases.

C) A Case for Rules Instead of Standards?

As noted above, many of the judges and lawyers interviewed also noted that the Federal Courts take deadlines very seriously, in a way that large superior courts often do not. This accords with previous hypotheses that procedure is an area where a greater emphasis on "rules" rather than "standards" can facilitate access to justice, by allowing parties to order their procedure with particular predictability.[268] This allows parties to spend more of their time addressing a case's merits, with time spent arguing over procedure being almost definitionally unrelated to a case's merits.[269] Of course, Federal Courts procedure is not perfectly rule-like: indeed, there are few legal rules that are perfectly rule-like and it is better to conceive of rules and standards existing on a continuum rather than in all-or-nothing opposition to each other.[270] However, procedure being relatively predictable appears to have had few resulting instances of substantive injustices with significant benefits from an access to justice perspective, as has been hypothesized before.[271] This is a lesson that is applicable to other jurisdictions.

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266 Kennedy, "Manitoba", *supra* note 102.

267 Sees e.g. Kate McKenna, "Being named to PEI Court of Appeal is akin to winning the judicial lottery" (24 September 2014), online: <https://tinyurl.com/mry9p4z6> [perma.cc/BCX3-LE2E].

268 Kennedy, "Rules", *supra* note 201 at 40ff.

269 *Ibid* at 41–42, 52.

270 *Ibid* at 30.

271 *Ibid*.

D) Lack of Inherent Jurisdiction Not a (Significant) Disadvantage

It is also worth observing that a lack of inherent jurisdiction does not, in itself, appear to be a significant impediment to achieving access to justice in the Federal Courts. Whether this is because this is mostly an academic matter, given the Courts' penumbral powers (as suggested by Justice of Appeal Stratas and Professor Berger), or because the *Federal Courts Rules* and *Federal Courts Act* are well crafted enough to allow judges to respond to difficult situations, may not be perfectly clear. If anything, the primacy of the regulations and legislation appears to result in the procedure being quicker by creating more predictability. This is not to say that the statutory nature of the Federal Courts never causes any procedural problems, such as in instances where the Federal Courts have jurisdiction over only part of a proceeding. However, this appears to mostly be the result of the limited subject matter jurisdiction of the Federal Courts, which is a corollary of the Constitution. It does not appear to result from the Courts' lack of inherent jurisdiction *per se*.

E) Case Management

Virtually all respondents cited case management, which practically also functions as mandatory mediation, as a major benefit of Federal Courts procedure. This accords with significant literature praising the benefits of both case management[272] and mediation.[273] The lack of unsuccessful summary trial and summary judgment motions is also likely due, at least in part, to case management indicating whether they would be appropriate. This is certainly a lesson applicable to other courts.

In many other ways, the success of case management is complementary to Part 6.A's emphasis on the virtues of specialized judging: case management is overwhelmingly done by associate judges at the Federal Court, all of whom are trained as mediators and specialized in case management. The decision to retain the associate judge role appears to have been very wise indeed. Whatever disadvantages result from associate judges' confined jurisdiction appear to be outweighed by their specialized skill set and their closeness to the communities that they serve.[274] As L4 noted, "We used to call it 'dial a judge', you could almost get an associate

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[272] Catherine Piché, "Judging Fairness in Class Action Settlements" (2010) 28:1 Windsor YB Access Just 111 at 116–117.

[273] Jennifer L Schulz & Jocelyn Turnbull "Mediation: The 'Girly' Litigation?" (2013) 2:2 J Arbitration & Mediation 43 at 72.

[274] Associate judges are not subject to the requirement to reside in Ottawa and they have been resident across the country: see e.g. *Trevor Nicholas Construction Co Ltd v Canada*, 2004 FC 238 at para 13.

judge on the phone within hours if you really needed to. I think that is just a function of how many case managers there are per case load." L1 stated similarly, "you can get a judicial official on the phone … if it is genuinely urgent, they will help you and they will move things along … You can usually get [an associate judge] on the phone within a day or two and say look, we've hit a conundrum here."

F) Unique Culture

Many of the benefits from Federal Courts procedure appear to be due to culture. Though only some interviewees, such as FCA2 and FC1, discussed culture on their own accord (there were no direct questions about it), many recurring themes are clearly a product of culture rather than rules. These include: a strict but friendly registry; an expectation that deadlines will be followed; and a sense of duty to resolve matters within predictable time limits. The notion that access to justice requires a change in culture is also not a new hypothesis. Indeed, Justice Karakatsanis explicitly called for a "culture shift" in *Hryniak*.[275] This also accords with significant academic work, such as that done by Barbara Billingsley[276] and Nick Bala,[277] that culture is an integral part of access to justice analysis. Billingsley and Masood Ahmad interestingly argue, however, that this is best achieved through legislative change rather than informal practices.[278] This further reflects John Turner's hope for the Federal Courts: that they would develop a unique culture as a source of national unity. In this sense, while other provinces can seek to emulate Federal Courts culture, some of it may be attributable to its unique status as an Ottawa-based court with specialized jurisdiction.

In this vein, a cautionary note should perhaps be raised about Federal Courts composition. Significant debate[279] has occurred in recent years as to whether the Federal Courts should retain their requirement for judges to reside in the National Capital Region. Legitimate concern exists that this is a disincentive for aspiring lawyers, particularly from equity-seeking

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275 *Hryniak*, *supra* note 2 at paras 2, 23–33.

276 Barbara Billingsley & Masood Ahmad, "Evolution, revolution and culture shift: A critical analysis of compulsory ADR in England and Canada" (2016) 45:2–3 Common L World Rev 186.

277 Notably in family law: see e.g. Nicholas Bala, "Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 271.

278 Billingsley & Ahmad, *supra* note 276.

279 See e.g. Hallie Cotnam, "Lawyers pen open letter demanding more diverse judiciary" (20 September 2020), online: <https://tinyurl.com/2s3tyujy> [perma.cc/QFU9-9X8B].

groups, from applying to serve on the Federal Court in particular.[280] L4, who had no hesitation in saying that she prefers litigating in the Federal Courts to the Ontario Superior Court of Justice, is nonetheless critical of the Ottawa residency requirement. She noted that it is a particular disincentive for women with families or spouses with successful careers of their own to seek to join the bench—an opinion shared by FC2 (who expressed this view unprompted). She also considered the success of the Federal Courts in navigating "Zoom court" during the pandemic era as a reason why eliminating the residency requirement would not negatively affect Federal Courts' culture.

However, there also remain concerns that the Federal Courts' culture—which appears to have, among other things, resulted in relatively efficient procedure—would be compromised if judges did not need to reside in proximity to the court offices and each other. FCA2, a fan of the residency requirement, considered it important that the registry and judges' offices are proximate to each other in the Federal Court of Appeal building—something often not seen in other courts: "The registry isn't just some faceless email. I know them, I know who has children, there is a direct human connection. They don't want to disappoint us as people, and we don't want them to feel less as good public servants assisting us and our clients." In his view, the lack of interaction with colleagues and the registry would indeed be negatively affected by eliminating the residency requirement.

It is perhaps worth distinguishing the Federal Court from the Federal Court of Appeal in terms of the importance of the residency requirement. L4 acknowledged that the fact that more hearings take place in Ottawa at the appellate level and the judges work together on panels increases the importance of colleagues being physically present in Ottawa. FCA2 was firmer on his views of the importance of residency as a requirement of the Federal Court of Appeal than the Federal Court. FCA1, a former Federal Court judge, also emphasized "the very significant difference between trial and appellate courts" vis-à-vis the residency requirement: "Discussion, conferencing and sharing are the lifeblood of a well functioning appellate court. We conference around a table before, during and after appeals, and frequently have informal bilateral discussions."

RFC2 was more blunt in this regard, viewing the proposition that it would be challenging to get quality appointments due to the residency requirement as "nonsense", explaining:

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280 *Ibid.*

> I mean obviously it is harder to leave BC than Montreal to come [to Ottawa]. The reality is that it is a great job, the Federal Courts is one of the best jobs in the country. So, the *quid pro quo* is that you have to move to Ottawa to give the courts a sense of collegiality … when you are up here in Ottawa, and you can talk about more general things, you can talk about issues in cases. I mean you're not going to become a clone of somebody else, but there is interaction between judges you don't get otherwise.

It is difficult to precisely assess the extent to which Federal Courts procedure would be negatively affected by a change to the culture that would result from eliminating the residency requirement. It seems implausible, however, that it would have ***no*** effect on culture. Of course, the effects may be small and outweighed by the problems the requirement poses for recruitment of a diverse bench. FC2 expressed what is at stake here. And, of course, justice is often best served locally, and associate judges' being across the country appears to be an access to justice boon. But the notion that eliminating judges' residency requirement would be a costless endeavour should at least be queried, certainly at the Federal Court of Appeal but even at the Federal Court.

7. Conclusion

Being a federation can pose difficulties in Canada, in terms of laws being different across the country, at times even jeopardizing national unity. But apart from being practically necessary in a country with the geographic and cultural diversity of Canada, being a federation can also be a source of innovation, with positive experiments in policy in one area of the country spreading across it.[281] This article has looked at a possible source of such innovation in the realm of access to justice through the use of procedural law, specifically by analyzing procedure in the Federal Courts.

Federal Courts procedure indeed has many positive attributes that are not present in other jurisdictions. It is not perfect. And some benefits coming from Federal Courts procedure are likely to, in some way, be confined to it due to its particular jurisdiction, as well as the fact that the trial court is relatively small, supervised by an appellate court with judges (particularly Justices of Appeal Stratas, Boivin, and Rennie) renowned for their procedural acumen. However, other aspects of its procedures can certainly be emulated, in terms of specialization, a friendly but strict registry, active case management, and enforcing deadlines. In essence, "a confluence of factors"[282] has made Federal Courts procedure particularly

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[281] James M Lutz, "Emulation and Policy Adoptions in the Canadian Provinces" (1989) 22:1 Can J Political Science 147 at 153–154.

[282] The exact words of FCA1.

efficient and timely, even if not perfect. It is hoped, therefore, that this article is not only helpful from a doctrinal perspective to assist those unfamiliar with Federal Courts procedure, but will also spur discussion about further innovation in Canadian procedure. Given John Turner's hope that the Federal Courts would be a nation-building institution and a source of national unity, other jurisdictions learning from the Federal Courts would be particularly fitting as they embark on their second half-century.