

BEHIND THE BENCH: UNMASKING THE JUDICIAL ROLE IN NORTH AMERICA’S PROLONGED ACCESS TO JUSTICE CRISIS

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Delays in access to justice remain a persistent global challenge. Over the past fifty years, Canada and the United States have introduced sweeping reforms to address mounting court delays, shifting from litigant-driven adversarial models to the unorthodox approach of judge-controlled, case-managed litigation. Prioritizing judicial economy over substantive adjudication underpinned these reforms, yet delays continue to escalate. This Article argues that by positioning judges as the solution, reforms concentrated excessive managerial power in judges’ hands without adequate oversight. This shift has fostered a judicial culture of complacency, where enhanced discretionary powers paradoxically prolong delays rather than resolve them. Efficiency reforms have thus altered the dynamics of delays, creating a new problem rather than solving existing ones. Drawing on decades of Canadian and American literature, this Article reveals that judicial complacency is not isolated, but rather a systemic problem deeply embedded in practice. Heightened judicial power that lacks robust accountability has become as much a part of the problem as it was intended to be the solution. By challenging prevailing silence on the judicial role in the access to justice crisis, this Article seeks to initiate a necessary conversation about how judicial conduct perpetuates delays and why rethinking accountability structures is essential for meaningful reform.

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INTRODUCTION

[T]he judicial process is given its typical physiognomy not by the law of procedure but by the habit of mind of those who apply it.

—Piero Calamandrei, 1956¹

Access to justice is a global crisis of an overwhelming magnitude. In its influential 2019 report titled *Measuring the Justice Gap*, the World Justice Project estimated that over five billion people, or about two-thirds of the global population, do not have meaningful access to justice.² Both the right to access courts and the right to access them effectively without delays are fundamental to protecting and upholding “every legal right, freedom and obligation which exists under the rule of law.”³ Access to justice is a multidimensional concept that has evolved and expanded over time.⁴ This Article investigates an important aspect of the access to justice crisis: delays in access to courts. Delays degrade access to justice and render it meaningless.⁵ The temporality of justice significantly impacts its quality. Therefore, timeliness of judicial decisions is a factor that is integral to establishing the rectitude of justice.⁶ More particularly, this Article studies the pressing issue of excessive delays in access to *civil* courts in North America.

In Canada and the United States, access to justice is said to be at a critical and serious stage.⁷ Understandably, minimizing judicial delays

1. PIERO CALAMANDREI, *PROCEDURE AND DEMOCRACY* 14 (John Clarke Adams & Helen Adams trans., N.Y. Univ. Press 1956) (1954).

2. SARAH CHAMNESS LONG & ALEJANDRO PONCE, WORLD JUST. PROJECT, *MEASURING THE JUSTICE GAP: A PEOPLE-CENTERED ASSESSMENT OF UNMET JUSTICE NEEDS AROUND THE WORLD* 5 (2019), https://worldjusticeproject.org/sites/default/files/documents/WJP_Measuring%20the%20Justice%20Gap_final_20Jun2019_0.pdf [<https://perma.cc/HX8C-99VE>].

3. *B.C. Gov't Emps.' Union v. British Columbia (Att'y Gen.)*, [1988] 2 S.C.R. 214, 225 (Can.).

4. See LONG & PONCE, *supra* note 2, at 14.

5. Adrian A. S. Zuckerman, *Justice in Crisis: Comparative Dimensions of Civil Procedure*, in *CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE* 3, 12 (Adrian A. S. Zuckerman, Sergio Chiarloni & Peter Gottwald eds., 1999).

6. *Id.* at 6.

7. See *Canada's Backlogged Civil and Family Courts in 'Crisis,' According to Lawyers Group*, CBC NEWS (July 10, 2023, at 03:00 CT), <https://www.cbc.ca/news/canada/london/justice-delays-canada-courts-ontario-1.6900147> [<https://perma.cc/FUC5-NY4V>]; ACTION COMM. ON ACCESS TO JUST. IN CIV. & FAM. MATTERS, *ACCESS TO CIVIL AND FAMILY JUSTICE: A ROADMAP FOR CHANGE* 24 (2013), http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf [<https://perma.cc/2RAF-E42B>]; William H. Neukom & Elizabeth Andersen, *COVID-19 and the Access-to-Justice Crisis*, A.B.A.: GPSOLO, Nov.–Dec. 2020, at 36,

has been a high priority agenda for civil justice reforms in North America.⁸ Specifically, the problem of court delays has been one of the core foci of a large number of governmental and non-governmental studies, policy deliberations, academic writings and reform interventions. An analysis of this vast literature on court delays suggests that there is a pattern to the policy prescriptions that have been proffered to tackle the problem. Even though these policy prescriptions show heterogeneity, they are essentially predicated on two shared core assumptions. The first assumption flows from the adversarial model of litigation that gives wide latitude to parties and lawyers to conduct their litigation. The abuse of this latitude by legal actors (*i.e.*, party abuse) is assumed to be one of the prime reasons for court delays. This is so because the adversarial process allows these self-interested actors to make strategic—and not efficient—use of court processes, which often involves tiring out the other party or depleting them of their resources so they back down, and this results in court delays.

The second assumption is that delays can be mitigated if control of litigation is taken out of the hands of parties and given to judges. This is so because judges are neutral actors whose objectives, unlike parties and lawyers, are closely aligned with the civil justice system's objective of efficiently resolving disputes. Consequently, reforms of the litigation process in North America have tended to focus on the dual goals of progressively constricting the autonomy available to litigants and lawyers in conducting their cases and at the same time expanding judicial control over management of litigation. In short, reforms have judicialized the process of litigation. In popular language, this judicialization has been referred to as *managerial judging*. This reform direction of converting trial judges into case managers has received strong support from both the judiciary as well as the legislature.

Yet, despite a robust push towards managerial judging, the crisis of delays in the North American court systems shows no signs of abating. If anything, the quantum of delays continues to spiral upwards.⁹ For instance, the worsening of the problem is reflected in the sharp

36; see also *Hryniak v. Mauldin*, 2014 SCC 7, para. 1 (Can.) (emphasizing how Canada's access to justice is its greatest challenge, stunting its laws and adversely affecting Canadian citizens).

8. DAVID C. STEELMAN, JOHN A. GOERDT & JAMES E. McMILLAN, CASEFLOW MANAGEMENT: THE HEART OF COURT MANAGEMENT IN THE NEW MILLENNIUM xi (2000).

9. See Trevor C. W. Farrow, *A New Wave of Access to Justice Reform in Canada*, in IN SEARCH OF THE ETHICAL LAWYER: STORIES FROM THE CANADIAN LEGAL PROFESSION 164, 168 (Adam Dodek & Alice Woolley eds., 2016); Michael Lesage, *Delays Across Ontario's Superior Court Are Only Getting Worse*, CAN. LAW. (Aug. 26, 2022), <https://www.canadianlawyermag.com/news/opinion/delays-across-ontarios-superior-court-are-only-getting-worse/369343> [https://perma.cc/7JHG-MGDJ].

downgrading of both Canada and the United States on the civil justice factor of the World Justice Project Rule of Law Index (“WJP Index”).¹⁰ This factor measures, *inter alia*, the extent of the problem of judicial delays in access to the civil justice systems globally.¹¹ Just within a decade, Canada slipped down twelve places (from thirteenth position in 2012 to twenty-fifth position in 2024).¹² Within the same time period, the United States slipped down eleven places (from twenty-second position to thirty-third position).¹³ Importantly, on the sub-factor measuring the accessibility and affordability of the civil justice systems (sub-factor 7.1), Canada and the United States rank seventy-fourth and 107th respectively.¹⁴ In the 2025 Index, the picture becomes even more troubling. Canada slips yet again to twenty-sixth place, and the United States drops to thirty-seventh.¹⁵ The accessibility and affordability sub-factor reveals an even steeper decline. Canada falls to seventy-fifth, and the United States plunges to 112 out of 143 countries.¹⁶ The trajectory is no longer a gradual slide but a clear and accelerating deterioration in both countries’ civil justice performance. The worsening of the problem of

10. Compare MARK DAVID AGRAST, JUAN CARLOS BOTERO, JOEL MARTINEZ, ALEJANDRO PONCE & CHRISTINE S. PRATT, WORLD JUSTICE PROJECT RULE OF LAW INDEX 2012–2013, at 75, 150, 161 (2012–2013) (assigning Canada a civil justice factor score of 0.72 and the United States a civil justice factor score of 0.65), with WORLD JUST. PROJECT, WORLD JUSTICE PROJECT RULE OF LAW INDEX 2024, at 18, 34 (2024) [hereinafter WORLD JUST. PROJECT], <https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2024.pdf> [https://perma.cc/9YUH-XXNK] (assigning Canada a civil justice factor score of 0.68 and the United States a civil justice factor score of 0.63).

11. WORLD JUST. PROJECT, *supra* note 10, at 18.

12. AGRAST, BOTERO, MARTINEZ, PONCE & PRATT, *supra* note 10, at 75; WORLD JUST. PROJECT, *supra* note 10, at 34; see also Ab Currie, *Unreasonable Delays in the Civil Justice System Is Canada’s Greatest Weakness According to the 2019 Rule of Law Index*, CFCJ-FCJC (Jan. 13, 2020), <https://cfcj-fcjc.org/a2jblog/unreasonable-delays-in-the-civil-justice-system-is-canadas-greatest-weakness-according-to-the-2019-rule-of-law-index/> [https://perma.cc/9RZG-U9ZU] (reporting that Canada measured their lowest score of 0.47 in 2019).

13. AGRAST, BOTERO, MARTINEZ, PONCE & PRATT, *supra* note 10, at 150; WORLD JUST. PROJECT, *supra* note 10, at 34.

14. *Canada*, WORLD JUST. PROJECT: WJP RULE OF L. INDEX, <https://worldjusticeproject.org/rule-of-law-index/country/2024/Canada/Civil%20Justice> [https://perma.cc/RJ9E-MPRX] (last visited Oct. 18, 2025); *United States*, WORLD JUST. PROJECT: WJP RULE OF L. INDEX, <https://worldjusticeproject.org/rule-of-law-index/country/2024/United%20States/Civil%20Justice/Civil%20%20Justice> [https://perma.cc/795B-3VRL] (last visited Oct. 18, 2025).

15. *Canada*, WORLD JUST. PROJECT: WJP RULE OF L. INDEX, <https://worldjusticeproject.org/rule-of-law-index/country/2025/Canada/Civil%20Justice> [https://perma.cc/KWS9-CM7K] (last visited Nov. 22, 2025); *United States*, WORLD JUST. PROJECT: WJP RULE OF L. INDEX, <https://worldjusticeproject.org/rule-of-law-index/country/2025/United%20States/Civil%20Justice> [https://perma.cc/HYJ3-J47N] (last visited Nov. 22, 2025).

16. *Canada*, *supra* note 15; *United States*, *supra* note 15.

court delays has also been captured by court statistics. For instance, the data published by the Administrative Office of the U.S. Courts shows that between 1995 and 2018, the case pendency in the federal district courts witnessed a fivefold increase.¹⁷ It is important to note that this significant rise (around 400 percent) was not due to any major increase in case filings.¹⁸

The progressive worsening of the ability of civil courts in Canada and the United States to dispense justice within a reasonable time is especially significant in light of the fact that in both legal jurisdictions, around 90 percent of cases settle outside the court systems or before trial and less than 2 percent cases are adjudicated by trial.¹⁹ This Article investigates a previously under-examined cause behind delays in access to courts: the role judges play in sustaining and exacerbating court delays. It explores the ways in which judicial reception of procedural reforms that judicialize the litigation process engenders and sustains delays. This Article advances a counterintuitive argument that the civil justice reform movement's heavy reliance on judges to lead the charge against court delays is its weakest link and largely explains why reforms targeting party abuse have failed to deliver. This Article contends that ironically, the judicialization of litigation has altered the very nature of the problem of court delays and has created what can be termed as the "new problem of delays."

Whereas the old problem of delays was characterized by party abuse as the fundamental cause behind court delays, the new problem of delays

17. Jon O. Newman, *The Current Challenge of Federal Court Reform*, 108 CALIF. L. REV. 905, 906 (2020). This data refers to the increase in pendency of those cases that were pending in courts for three or more years. *Id.* Also note that between the same period, the median disposition time per case increased by 44 percent. *Id.*

18. *Id.* at 906. The number of case filings within the same period showed only a single fold increase. *Id.*

19. This is the common minimum settlement and trial rate that can be gleaned from various data-related claims made in the scholarly works. For sources on Canada, see Erik S. Knutsen, *The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada*, 36 QUEEN'S L.J. 113, 130 n.61 (2010); Warren K. Winkler, *Civil Justice Reform - The Toronto Experience Reform*, 39 OTT. L. REV. 99, 101 (2007) (claiming that the case settlement rate in Ontario courts was over 96 percent); BC JUST. REV. TASK FORCE, EFFECTIVE AND AFFORDABLE CIVIL JUSTICE: REPORT OF THE CIVIL JUSTICE REFORM WORKING GROUP TO THE JUSTICE REVIEW TASK FORCE 90 (2006) (95 to 97 percent of cases in British Columbia (B.C.) courts do not reach trial); Catherine Piché, *Administering Justice and Serving the People: The Tension Between the Objective of Judicial Efficiency and Informal Justice in Canadian Access to Justice Initiatives*, 10 ERASMUS L. REV. 137, 137 n.3 (2017). For a collection of studies that have produced statistical accounts of settlement rates in Canadian provincial judicial systems, see TREVOR C. W. FARROW, CIVIL JUSTICE, PRIVATIZATION, AND DEMOCRACY 115, 132 (2014). For statistics relating to the United States, see Carrie Menkel-Meadow, *Essay, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 502 (1985); PATRICIA A. EBENER, COURT EFFORTS TO REDUCE PRETRIAL DELAY: A NATIONAL INVENTORY 21, 24-26 (1981).

is primarily driven by judges themselves. This new problem of delays is essentially the problem of unaccountable judicial managerialism. Reforms have unwittingly engendered this problem by progressively vesting in judges an almost absolute level of power to control the litigants and the litigation process, but yet they have established no mechanism whatsoever to ensure the effective and positive application of these powers.²⁰ This power-without-accountability case management framework protects and sustains judicial complacency perpetuating a judicial culture that encourages legal actors to act in ways that are not in keeping with the spirit of reforms. Put another way, civil justice reforms have practically granted judges the license to judicial inaction, which, in turn, has allowed the perpetuation of party abuse—the very same mischief that the reforms intended to abolish in the first place.

By not addressing the problem of managerial unaccountability, policymakers continue to display an ostrich effect bias.²¹ Despite being cognizant of an increasing corpus of evidence indicating that judges have shown a lack of commitment to crack down on party abuse, reforms have systematically strengthened judicial control over litigation management in the hope to *goad* judges into action. This Article argues that reform directed towards managerial judging have altered the procedural reality within which litigation is conducted today. Furthermore, it contends that new reform approaches will not succeed unless their understanding of the problem of delays takes into account the changed nature of the problem, *i.e.*, parties cause delays because judges do not commit to reforms. The new problem of delays therefore posits that judges are as much part of the problem as they are part of the solution.

This Article is organized into several interconnected sections. The initial sections systematically demonstrate how, over the past five decades, civil justice reforms that shifted litigation control to judges have inadvertently produced the new problem of delays. To illustrate this central theme, this Article examines three core pillars of the contemporary litigation framework—case management, proportionality, and judicial sanctions—each discussed in its own section. In the final section, this Article reflects on the misalignment between contemporary judicial accountability mechanisms and the case-managed litigation system. It argues that while the reforms successfully reallocated litigation control to judges, they failed to introduce the necessary internal measures to hold judges accountable for how they exercise—or fail to exercise—their expanded powers. This absence of managerial accountability for

20. See Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 104 (1995).

21. Ostrich effect bias refers to the tendency to avoid or ignore negative information because it is uncomfortable to confront, even when doing so worsens underlying risks.

judges not only deepens enforcement challenges but also intensifies delays. Ultimately, the analysis demonstrates that enhancing judicial authority without robust internal accountability measures has fundamentally transformed the nature of litigation delays.

I. THE MAKING OF THE NEW PROBLEM OF DELAYS

In what follows, this Article illustrates the new problem of delays by taking up, as examples, three of the most fundamental reforms that have dramatically altered the litigation process in Canada and the United States. These reforms effected such alterations by drastically reversing the traditional power dynamics that exist in an adversarial litigation system. These three reforms are (a) case management, (b) proportionality, and (c) sanctions.

The discussion begins by showing that each of these reforms was triggered by the assumption—correct under then-existing circumstances—that abuse of litigation autonomy by lawyers and parties led to court delays. The discussion then shifts to a showing of how each of these reforms increased the judicial oversight over the litigation process in order to check party abuse. Finally, the discussion demonstrates that these reforms have failed to deliver because of a lack of commitment on the part of judges to implement them.

A. Case Management

Case management refers to “a system that manages the timing and events of a lawsuit as it passes through the justice system, from the initiation of a case until it is resolved through withdrawal, settlement, trial or other disposition.”²² It is a procedural regime that institutionalizes the court’s power to take control of the litigation so that cases can be resolved promptly and efficiently.²³ To this end, case management schemes authorize judges to make a wide array of administrative decisions regarding the conduct of litigation.²⁴ To control the pace, most

22. CANADIAN CTR. FOR JUST. STAT., CIVIL JUSTICE PROJECT: THE USE OF TIME LIMITS AND NOTIFICATION IN CIVIL CASE MANAGEMENT 4 (1999).

23. See *Civil Case Management*, ONTARIO (Mar. 8, 2022), <https://www.ontario.ca/page/civil-case-management> [<https://perma.cc/2PBH-9QKL>].

24. See Larissa Clare Pochmann Da Silva, *Judicial Case Management: The Stay of Pending Claims in Repetitive Cases Provided by the Brazilian Civil Procedure Code of 2015*, 6 ATHENS J.L. 51, 52 (2020). Case management is not a specific procedural technique. *Id.* Rather, it is a combination of techniques that judges deploy to control the pace and the content of a litigation both during its pre-trial and trial phases. *Id.* For examples of various case management tools, see Doris I. Wilson, *Managing Litigation in Canada*, CFCJ-FCJC (NEWS & VIEWS), no. 5, Fall 2002, http://www.cfcj-fcjc.org/sites/default/files/docs/news_and_views/newsviews05-en_0.pdf [<https://perma.cc/6RMF-89JJ>].

procedural frameworks allow—and often require—judges to establish a strict timetable within which parties must conduct the litigation. For instance, Rule 16 of the Federal Rules of Civil Procedure (FRCP) *requires* judges to issue a scheduling order setting deadlines for completion of the principal pre-trial steps in the litigation, namely: completion of discovery, filing of pre-trial motions, joinder of parties, and amendment of pleadings.²⁵ Judges are expected to compel parties to strictly adhere to these time limits. Judges also have wide discretion when it comes to managing trial activities. Arguably, judicial imposition of deadlines is one of the central features of the contemporary case management schemes in North America and is regarded as the most important tool for effective litigation management.²⁶ Case management schemes also enable judges to circumscribe the content of litigation by authorizing them to set limits on the volume of procedures that parties and lawyers can resort to during the pre-trial and trial phases.²⁷

1. Why Case Management Was Introduced: Historical Background

Case management became codified in the United States in 1983 when the FRCP was amended “to make case management an express goal of pretrial procedure.”²⁸ Case management entered a large majority of Canadian provinces in the 1990s.²⁹ Institutionalization of case management into procedural frameworks in North America was a judicial and legislative response to control the abuse of party autonomy. In the United States, adoption of the FRCP in 1938 led to a massive increase in party autonomy.³⁰ This happened because the FRCP was modeled on flexible and permissive features of equity rather than common law.³¹ The

25. Peterson, *supra* note 20, at 69.

26. *See id.* at 67. The CBA Report of 1996 recommended that case management systems, in the least, must at the least provide for “the establishment, monitoring and enforcement of timelines.” CAN. BAR ASS’N, REPORT OF THE CANADIAN BAR ASSOCIATION TASK FORCE ON SYSTEMS OF CIVIL JUSTICE 36 (1996).

27. For instance, judges have the discretion to manage the discovery process by both restricting its scope and placing formal limits on discovery methods. *See* Peterson, *supra* note 20, at 64, 67.

28. Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2134 (2018) (quoting FED. R. CIV. P. 16(a) advisory committee’s notes to 1983 amendment).

29. *See* CANADIAN CTR. FOR JUST. STAT., *supra* note 22, at 6–18.

30. Richard L. Marcus, *Reining in the American Litigator: The New Role of American Judges*, 27 HASTINGS INT’L & COMPAR. L. REV. 3, 11–13 (2003) [hereinafter Marcus, *Reining in the American Litigator*].

31. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 (1987); *see also* Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1563 (2003) [hereinafter Marcus, *Slouching Towards Discretion*] (“[T]hey draw

codification of equity norms in the FRCP expanded the latitude available to lawyers and parties. The highly constricting common law pleading³² and code pleading³³ systems were replaced by the expansive system of notice pleading.³⁴ This meant that parties were not required to precisely plead the grounds of claims or defenses at the initial stages of lawsuits.³⁵ The FRCP also introduced a liberal discovery mechanism and gave parties a broad array of discovery devices.³⁶ As one scholar puts it, “[o]f all the actors involved in American litigation, then, as of the 1970s it might be said that the ones who had enjoyed the greatest increase in procedural discretion were the lawyers.”³⁷

It was evident by the 1970s that discovery abuse had become a major issue.³⁸ The adversarial nature of the litigation process was incentivizing partisan litigants and overzealous lawyers to abuse discovery by deploying it to delay cases.³⁹ Concerns about discovery violations led to a consensus that a more aggressive judicial oversight was needed.⁴⁰

their essence more from the relaxed and discretionary background of equity than the confining orientation of the common law.”).

32. Early nineteenth-century American common law pleading, derived from English practice, aimed to narrow disputes to a single issue. This was necessary to fit cases within the limited forms of action (*i.e.*, writs) available, resulting in a highly inflexible system. See Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 4 (1988). This system of pleading prioritized the form over the cause of action. Even minor departures from the prescribed ways of pleadings were not tolerated. *Id.* at 4–5.

33. Code pleading (or fact pleading) in the United States was introduced by the Field Code of 1848. *Id.* at 5. The Field Code attempted to dilute the rigidity of common law pleading by discarding the practice of reducing the dispute to a single issue. *Id.* However, by the end of nineteenth century, fact pleading had become a “hodgepodge of pleading” rules due to legislative manipulation and judicial misinterpretation. *Id.* at 6. Both common law pleading and fact pleading greatly restricted lawyer autonomy. Marcus, *Slouching Towards Discretion*, *supra* note 31, at 1580.

34. The FRCP introduced notice pleading, which requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Notice pleading requires the plaintiff’s pleading to simply inform the defendant of their complaint. See William H. J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEGAL STUDS. 474, 474 (2017).

35. A very liberal amendment policy, permitting changes to claims and defenses even during trial, greatly expanded parties’ autonomy in pleading facts. Marcus, *Reining in the American Litigator*, *supra* note 30, at 11.

36. Peterson, *supra* note 20, at 64. The expansion of discovery was greatly aided by the policy laid down by the United States Supreme Court. See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

37. Marcus, *Slouching Towards Discretion*, *supra* note 31, at 1581.

38. Marcus, *Reining in the American Litigator*, *supra* note 30, at 13.

39. See Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 38–39 (2003).

40. FED. R. CIV. P. 16 advisory committee’s note to 1983 amendment (citing *ACF Indus., Inc. v. EEOC*, 439 U.S. 1081 (1979)).

Subsequently, in 1983, the FRCP was expressly amended to give judges powers to *manage* cases.⁴¹

In Canada, like in the United States, delays caused by the adversarial culture of litigation have been used as the justification for early judicial intervention to manage litigation. For instance, in the context of discovery abuse, the 2003 Report of the Task Force on the Discovery Process in Ontario (“Discovery Task Force”) stated that “[m]any difficulties can be attributed to the ‘culture of litigation’ and the traditional adversarial role of counsel, as well as to the conduct of particular lawyers.”⁴² In 2006, the Report of the British Columbia’s Civil Justice Reform Working Group (“Effective and Affordable Justice Report”)—which recommended increased judicial intervention to compel parties to conduct litigation within strict time limits—observed that adversarial litigation operated as a cultural barrier against achieving the goal of early judicial intervention and engendered wasteful delays and expenses.⁴³

Case management ostensibly takes the control of litigation out of the hands of parties and vests it in judges.⁴⁴ And by doing so, it represents a fundamental shift in the way litigation is conducted. By giving wide powers of litigation management to judges, case management converts trial judges into case managers and establishes what has been termed by Professor Judith Resnik as “managerial judging”⁴⁵—a theory of judging that authorizes decisionmakers to “take ad hoc, improvisational action in the name of administrative efficiency and effective docket management.”⁴⁶

The policy choice to give power to judges to effectively manage litigation is based on some influential research done in the 1970s, which indicated that unless judges intervene early and take charge of the litigation by imposing strict deadlines, the problem of court delays cannot be resolved. For example, the study conducted by the Federal Judicial Center in 1977 (“Flanders Study”) found that courts that were able to dispose of cases most efficiently were those that applied the “most exacting” time controls.⁴⁷ The study further observed that “a court can handle its case load rapidly only if it takes the initiative to require lawyers

41. FED. R. CIV. P. 16.

42. DISCOVERY TASK FORCE, REPORT OF THE TASK FORCE ON THE DISCOVERY PROCESS IN ONTARIO 82 (2003).

43. BC JUST. REV. TASK FORCE, *supra* note 19, at 11.

44. CANADIAN CTR. FOR JUST. STAT., *supra* note 22 at 4.

45. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–380 (1982).

46. Engstrom, *supra* note 28, at 2133.

47. STEVEN FLANDERS, FED. JUD. CTR., FJC-R-77-6-1, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 19 (1977).

to complete their work in a timely fashion.”⁴⁸ Similarly, the 1978 study conducted by the National Center for State Courts (“Church Study”) observed that “court delay can be reduced only by judges who are willing to insist that attorneys meet reasonable deadlines for the conclusion of pretrial activities”⁴⁹ These studies made early judicial intervention central to case management programs and went on to influence the 1983 FRCP amendment that introduced case management.⁵⁰

2. Progressive Expansion of Case Management Powers

An analysis of the literature on court reforms reveals that case management has been projected as one of the most effective solutions to court delays.⁵¹ The pride of place given to case management among the array of solutions to mitigate court delays is reflected in the following quote by Justice David Campbell:

Since Chief Justice Warren Burger convened the Williamsburg conference in 1971 to address serious problems of backlog and inefficiency in U.S. courts, study after study has confirmed that judicial case management is the answer. Cases resolve in less time, at lower cost, and often with better results when judges manage them actively.⁵²

In both Canada and the United States, the strengthening of case management powers of judges has been the dominant reform recommendation in the last five decades. As mentioned earlier, in 1983 case management formally entered the FRCP. Thereafter, case

48. *Id.* at 17.

49. *See* Thomas Church, Jr. et al., *Justice Delayed: The Pace of Litigation in Urban Trial Courts*, STATE CT. J., Fall 1978, at 3, 84.

50. *See* STEELMAN, GOERDT & McMILLAN, *supra* note 8, at xvi–xviii. The FRCP Advisory Committee note on Rule 16 justified the introduction of case management in federal rules based on these empirical research studies. Referring to the Flanders Study, it observed that:

Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.

FED. R. CIV. P. 16 advisory committee’s note to 1983 amendment.

51. *See, e.g.*, Jennifer D. Bailey, *Why Don’t Judges Case Manage?*, 73 U. MIA. L. REV. 1071, 1093 (2019).

52. NATALIE ANNE KNOWLTON & RICHARD P. HOLME, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *WORKING SMARTER NOT HARDER: HOW EXCELLENT JUDGES MANAGE CASES* (2014). The Institute for the Advancement of the American Legal System featured this quote on its 2014 report cover to highlight judicial case management’s crucial role in reducing delays. *Id.*

management powers of judges have seen a progressive and substantial increase. This broadening of the case management regime has been strongly supported by the legislature, judges, lawyers, legal thinktanks and academics who have repeatedly called for giving judges more power over litigation management. As early as 1989, the Harris Report called for an increase in the managerial powers of judges as the remedy against court delays.⁵³ The Brookings Report, published in the same year, also recommended heightened judicial intervention in managing the litigation process.⁵⁴ The 1990 Civil Justice Reform Act (CJRA) was the formal recognition of case management by Congress.⁵⁵ Congress promulgated the CJRA to “implement the ‘benefits of enhanced case management.’”⁵⁶ Subsequently, in 1993 the FRCP was amended to give judges greater control over pre-trial process.⁵⁷ In 2010, the Duke Conference recommendations further bolstered the judicial role in control of litigation by issuing a unanimous call for more active involvement of judges in case management.⁵⁸ In more recent years, the 2016 Call to Action Report gave a clarion call to courts to take charge of case management from filing until disposition.⁵⁹ Further, several important surveys have shown widespread support for judicial case management.⁶⁰

As in the United States, progressive increase in case management powers is also a noticeable feature of the Canadian deliberations on civil justice reform. In 1996, the final report of the Ontario Civil Justice

53. Jeffrey J. Peck, “*Users United*”: *The Civil Justice Reform Act of 1990*, 54 L. & CONTEMP. PROBS. 105, 107–08 (1991); see also Avern Cohn, Comment, *A Judge’s View of Congressional Action Affecting the Courts*, 54 L. & CONTEMP. PROBS. 99, 101–02 (1991) (“The report recommended closer judicial control over the discovery process and better judicial management of cases.”).

54. BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 3 (1989).

55. See Peterson, *supra* note 20, at 72–73; see also Engstrom, *supra* note 28, at 2134 n.21 (establishing that while judges accepted case management in the 1970s, it was not until the 1990s that Congress decided to recognize case management through a formal act).

56. Marcus, *Slouching Towards Discretion*, *supra* note 31, at 1589 n.111 (quoting S. REP. NO. 101-416, at 16 (1990), as reprinted in 1990 U.S.C.C.A.N. 6802, 6819).

57. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., AMERICA’S AILING CIVIL JUSTICE SYSTEM: THE DIAGNOSIS AND TREATMENT OF THE FEDERAL RULES OF CIVIL PROCEDURE 5 (2009), https://iaals.du.edu/sites/default/files/documents/publications/americas_ailing_civil_justice_system.pdf [<https://perma.cc/48W8-TDNC>].

58. Bailey, *supra* note 51, at 1079–80.

59. NAT’L CTR. FOR STATE CTS., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 16 (2016), <https://iaals.du.edu/sites/default/files/documents/publications/cji-report.pdf> [<https://perma.cc/LUS8-UZ9A>].

60. See Bailey, *supra* note 51, at 1083 & n.49; see also EMERY G. LEE III & THOMAS E. WILLGING, FED. JUD. CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2010) (summarizing the findings of three such surveys).

Review (“Blair Committee Report”) was published.⁶¹ The Report advocated that all courts in Ontario adopt case management for civil cases.⁶² In the same year, the report of the Canadian Bar Association Task Force on Systems of Civil Justice (“CBA Report”) was also published.⁶³ The Report emphasized the need for early judicial intervention and called for all courts in Canada to take up case management.⁶⁴ The Report’s recommendations deeply influenced Canadian inquiries into adoption of case management features within the federal and the provincial legal system.⁶⁵ For instance, in 1998, the Québec Bar published the *Mémoire sur le Rapport de la Justice Civile au Canada* wherein its Quadripartite Committee endorsed the CBA’s recommendation of early judicial intervention for Québec.⁶⁶

The 2001 Ferland Report made a rather forceful suggestion that case management by judges should be one of the cornerstone principles of the civil procedure framework in Québec.⁶⁷ It also recommended that Québec’s Code of Civil Procedure give more power to judges to manage cases.⁶⁸ In 2003, Ontario’s Discovery Task Force came out with its report on discovery reforms.⁶⁹ The report recommended an expansion of case management in the Ontario civil justice system.⁷⁰ It also recommended that courts be given powers to manage the discovery process for non-

61. ROBERT A. BLAIR, HEATHER COOPER, TERRENCE J. O’SULLIVAN & MARY MCCONVILLE, CIVIL JUSTICE REVIEW: SUPPLEMENTAL AND FINAL REPORT (1996).

62. *Id.* at xxi–xxii.

63. CAN. BAR ASS’N, *supra* note 26.

64. *Id.* at 36.

65. Wilson, *supra* note 24.

66. LE COMITÉ QUADRIPARTITE SUR LA JUSTICE CIVILE AU CANADA, MÉMOIRE SUR LE RAPPORT DE LA JUSTICE CIVILE AU CANADA [THE QUADRIPARTITE COMMITTEE ON CIVIL JUSTICE IN CANADA, SUBMISSION ON THE REPORT OF CIVIL JUSTICE IN CANADA] 30 (1998).

67. *See* COMITÉ DE RÉVISION DE LA PROCÉDURE CIVILE, LA RÉVISION DE LA PROCÉDURE CIVILE: UNE NOUVELLE CULTURE JUDICIAIRE [THE REVIEW OF CIVIL PROCEDURE: A NEW JUDICIAL CULTURE] (2001) [hereinafter *UNE NOUVELLE CULTURE JUDICIAIRE*], <https://numerique.banq.qc.ca/patrimoine/details/52327/42457>; *see also* Piché, *supra* note 19 at 145 (explaining the influence the Report had on legislation, reforming civil procedure in Québec to reduce delays).

68. *UNE NOUVELLE CULTURE JUDICIAIRE*, *supra* note 67, at 32. The Ferland Report’s recommendations for stronger judicial case management were supported by a 2006 Québec report. *See* LE MINISTÈRE DE LA JUSTICE, RAPPORT D’ÉVALUATION DE LA LOI PORTANT RÉFORME DU CODE DE PROCÉDURE CIVILE [EVALUATION REPORT OF THE LAW REFORMING THE CODE OF CIVIL PROCEDURE] 73 (2006). Several of the Ferland Report’s recommendations were incorporated in Québec’s Code of Civil Procedure in 2003 and subsequent revisions. Rosalie Jukier, *The Impact of Legal Traditions on Québec Procedural Law: Lessons from Québec’s New Code of Civil Procedure*, 93 CANADIAN BAR REV. 211, 227 (2015).

69. DISCOVERY TASK FORCE, *supra* note 42, at 1.

70. *See id.* at 4.

case-managed proceedings.⁷¹ In 2006, BC's Effective and Affordable Justice Report envisaged a more active role for judges in management of cases.⁷²

In 2006, another important report was published in Canada: the Into the Future Report. This Report, which marked the tenth anniversary of the CBA Report, was drafted with the expectation that it would serve as the roadmap for future civil justice reforms in Canada.⁷³ This Report also recommended that all Canadian courts provide for earlier judicial intervention to manage cases.⁷⁴ In 2013, the Action Committee on Access to Justice in Civil and Family Matter issued its Roadmap to Change Report. The Report declared that the Canadian access to justice problem had become serious, and its civil justice system was in urgent need of change.⁷⁵ To fill the gap between reform ideas and their actual implementation, the Report suggested a nine-point Access to Justice Roadmap.⁷⁶ One of the important recommendations featured in the Committee's Roadmap was the promotion and availability of case management in all suitable cases.⁷⁷ It is worth noting that the Canadian case management reform efforts have been significantly shaped by the Woolf reforms in the UK.⁷⁸

3. The Almost Absolute Judicial Control over Litigation

Progressive increase in judicial case management powers have come to grant judges an almost absolute control over management of cases. A close examination of North American procedural frameworks shows that there is hardly any aspect of litigation that judges do not have the power to control. The corollary is that contemporary case management regimes barely leave parties with enough procedural autonomy—at least on paper—that they can either use or abuse.⁷⁹

In what follows, this Article catalogues, in no particular order, a non-exhaustive list of powers that judges today possess to control the

71. *Id.* at 88.

72. BC JUST. REV. TASK FORCE, *supra* note 19, at 60.

73. MARGARET A. SHONE, INTO THE FUTURE: CIVIL JUSTICE REFORM IN CANADA 1996 TO 2006 AND BEYOND 6 (2006).

74. *Id.* at 19.

75. ACTION COMM. ON ACCESS TO JUST. IN CIV. & FAM. MATTERS, *supra* note 7, at 1.

76. *Id.* at 10.

77. *Id.* at 16.

78. *See* Piché, *supra* note 19, at 141. The Woolf reforms were a landmark overhaul of the U.K. civil justice system that made early judicial involvement and structured case management central to controlling delay and cost.

79. Scholars of civil procedure are intrigued by the extent to which procedural restructuring has increased judicial control and reduced party autonomy. *See* JANET WALKER & LORNE SOSSIN, CIVIL LITIGATION 268 (2010).

litigation process. The aim of this exercise is to help the reader assess the severity with which contemporary case management regimes restrict party autonomy in both pre-trial and trial phases of the litigation. It will also inform readers about the expansive nature of control that judges today can exercise over litigation.⁸⁰

Under contemporary case management schemes, judges have the power to: (a) impose deadlines within which parties must complete the principal pre-trial steps,⁸¹ (b) modify or extend case management deadlines,⁸² (c) disapprove case timelines proposed by parties,⁸³ (d) direct parties to participate in pre-trial conferences or create management plans for pre-trial and trial phases of the litigation,⁸⁴ (e) direct parties to participate in alternative dispute resolution processes (ADR),⁸⁵ (f) compel parties to participate in settlement conferences,⁸⁶ (g) control and limit discovery,⁸⁷ (h) fix the trial date,⁸⁸ (i) decide whether the trial would be

80. As a caveat, it must be noted that while most procedural regimes display the illustrated set of controlling powers, some do derogate from them in specific instances.

81. *See, e.g.*, Supreme Court Civil Rules, B.C. Reg. 168/2009, ss. 5-1, 5-3(1)(a) (Can.); CAL. R. CT. 3.728; Rules of Civil Procedure, R.R.O. 1990, Reg. 194, ss. 77.04(1)(d) and 50.07 (1)(a) (Can.); Alberta Rules of Court, Alta. Reg. 124/2010, ss. 4.4(2) and 4.6 (Can.); The Court of King's Bench Act, C.C.S.M. c. C280, s. 50.05(4)(f) (Can.).

82. Supreme Court Civil Rules, B.C. Reg. 168/2009, ss. 3-5(5)(b), 5-3(1)(b) (Can.); Code of Civil Procedure, C.Q.L.R. c. C-25.01, s. 158(5), (7) (Can.); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 77.04(1)(a), (d) (Can.); Alberta Rules of Court, Alta. Reg. 124/2010, s. 4.7(2) (Can.).

83. *See, e.g.*, COLO. R. CIV. P. 16(b)(19).

84. *See, e.g.*, Code of Civil Procedure, C.Q.L.R. c. C-25.01, s. 150 (Can.); FED. R. CIV. P. 16; Supreme Court Civil Rules, B.C. Reg. 168/2009, s. 5-1(2) (Can.); Rules of the Supreme Court of the Northwest Territories, N.W.T. Reg. (Nu.) 010-96, s. 283 (Can.).

85. This context presents two distinct regulatory frameworks: those that legally mandate party participation, and those that empower judges to order ADR or permit parties to request it. *See, e.g.*, Supreme Court Civil Rules, B.C. Reg. 168/2009, ss. 5-3(1)(o), 9-2 (Can.); ALA. CODE § 6-6-20(b)(3) (2024); COLO. REV. STAT. § 13-22-311 (2024).

86. Rules of Court, N.B. Reg. 82-73, s. 50.07 (Can.); Supreme Court Civil Rules, B.C. Reg. 168/2009, s. 12-2(9)(n) (Can.).

87. *See, e.g.*, Supreme Court Civil Rules, B.C. Reg. 168/2009, s. 5-3(1)(f), (g), (h) (Can.); Code of Civil Procedure, C.Q.L.R. c. C-25.01, s. 158 (Can.); The Court of King's Bench Act, C.C.S.M. c. C280, s. 50.05(4)(d) (Can.); *see also* Peterson, *supra* note 20, at 64 & n.85 (discussing the powers to limit discovery under rules 26, 30, 33, 34 and 35 of the FRCP).

88. *E.g.*, CAL. R. CT. 3.728(6); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, ss. 50.07, 76.10(5)(c) (Can.); COLO. R. CIV. P. 16(b)(16).

a jury or a non-jury trial,⁸⁹ (j) control the length of the trial,⁹⁰ (k) control the length of the opening statement,⁹¹ (l) limit the length of oral arguments,⁹² (m) control the time available for parties to present evidence,⁹³ (n) impose time limits on direct and cross-examination,⁹⁴ and (o) impose a joint expert witness or limit the number of witnesses parties can call.⁹⁵ Aside from these powers, procedural rules virtually give judges plenary powers to take any action they deem necessary for the efficient disposal of cases.⁹⁶

As is evident, many aspects of litigation that are typically controlled by parties and lawyers in a traditional adversarial model of litigation are now controlled by judges through their case management powers. Moreover, in most instances, judges do not have to wait for parties to file motions to trigger the application of case management powers. Barring few situations, the procedural rules enable judges to apply these powers *sua sponte*.⁹⁷ However, even in cases where rules do not allow

89. See, e.g., CAL. R. CT. 3.728(4); Supreme Court Civil Rules, B.C. Reg. 168/2009, ss. 12-2(9)(b), 12-6(5) (Can.).

90. E.g., CAL. R. CT. 3.728(6); Code of Civil Procedure, C.Q.L.R. c. C-25.01, s. 158(1) (Can.); Supreme Court Civil Rules, B.C. Reg. 168/2009, s. 5-3(1)(q) (Can.); see also Engstrom, *supra* note 28, at 2142–43 (discussing judicial authority to impose time and procedural limits in trials, while noting the lack of evidence on whether such powers are being used more frequently).

91. E.g., Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 76.10(2), (5)(d) (Can.); Supreme Court Civil Rules, B.C. Reg. 168/2009, s. 12-2(9)(f), (j) (Can.).

92. E.g., Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 76.10(2), (5)(d) (Can.); see also Engstrom, *supra* note 28, at 2143 (discussing how judges limit closing arguments).

93. E.g., Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 76.10(2), (5)(d) (Can.); Court of King's Bench Rules, Man. Reg. 553/88, s. 50.05(4)(o) (Can.); see also Engstrom, *supra* note 28, at 2144 (discussing how judges can restrict the time available to present evidence).

94. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, ss. 20.05(2)(i), 76.10(2), (5)(d) (Can.); Supreme Court Civil Rules, B.C. Reg. 168/2009, s. 12-2(9)(f) (Can.); N.S. Civ. P.R. 5.13(4)(h) (Can.).

95. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 76.10(5)(a) (Can.); Code of Civil Procedure, C.Q.L.R. c. C-25.01, s. 158(2) (Can.); Supreme Court Civil Rules, B.C. Reg. 168/2009, s. 5-3(1)(j)–(k) (Can.); Court of King's Bench Rules, Man. Reg. 553/88, s. 50.05(4)(h) (Can.); see also George P. Fletcher, *Some Unwise Reflections About Discretion*, 47 L. & CONTEMP. PROBS. 269, 271 (1984) (discussing trial judge discretion to limit expert witnesses).

96. See, e.g., CAL. R. CT. 3.727(20)–.728(13); Supreme Court Civil Rules, B.C. Reg. 168/2009, ss. 5-3(1)(v), 12-2(9)(q) (Can.); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, ss. 50.07(1)(c), 77.04(1)(e) (Can.).

97. Some procedural rules require a party's motion before a judge can exercise powers like dismissing a case for delay. For example, Alberta's *general delay* and *drop-dead* rules, and similarly, Ontario's Rule 24 of the Rules of Civil Procedure, mandate a motion for dismissal due to delay or non-prosecution. Alberta Rules of Court, Alta. Reg. 124/2010, ss. 4.31(1), 4.33(2) (Can.); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 24.01(1) (Can.).

judges to exercise their judicial powers, courts have held that the contingent nature of the application of those rules does not bind judges and therefore does not limit them from applying the rules on their own accord. Such an application of the rules has been justified on the basis of the inherent power doctrine.⁹⁸

4. Judges Do Not Apply Case Management Rules

The contemporary rules of procedure and appellate decisions interpreting the scope of managerial powers give judges a tremendous amount of control over the conduct of litigation. These wide powers of case management have been vested in judges so that they can, among other things, minimize delays by checking the abuse of the legal process by parties and lawyers.⁹⁹ Unfortunately, there is an increasing amount of evidence demonstrating that judges do not actively manage cases, despite having all the powers to do so.¹⁰⁰ This judicial disengagement is antithetical to the success of case management regimes because the entire philosophy of case management pivots on early judicial intervention in litigation.

In the following subsection, this Article catalogues the various instances which underline the fact that case management has not worked because of a lack of commitment on the part of judges. As mentioned previously, legal actors, scholars, and policymakers have repeatedly called for judges to take a more proactive role in management of cases. This repeated insistence on case management over a long period of time is, in and of itself, quite telling. The repeated reminder to judges to apply their case management powers shows that they have continuously failed to do so. The Honorable Judge Jennifer Bailey brings out this distinction in her very succinct observation in a 2019 research paper on case management. She states:

Calls for case management to contain cost and delay have come from the Chief Justice of the United States, the Conference of Chief Justices, state bar and Supreme Court commissions, and the American Bar Association. The continuing demand for case management in virtually every lawyer survey, state bar

98. For example, Rule 41(b) of the Federal Rules of Civil Procedure allows dismissal for lack of prosecution upon defendant's motion. While the rule itself does not explicitly allow judges to initiate dismissal, the Supreme Court's ruling in *Link v Wabash Railroad*, 370 U.S. 626 (1962), established that judges possess inherent powers beyond those listed in the rules. *Id.* at 630–31. Through subsequent legal decisions, these inherent powers have become firmly established as a legitimate source of judicial sanctioning authority. *See, e.g., Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 561 (3d Cir. 1985).

99. *See* Bailey, *supra* note 51, at 1139–40.

100. *See id.* at 1093–94.

commission, task force, and civil justice report over recent years evidences that judicial case management is not occurring on a day-to-day basis in today's civil courtrooms. Notwithstanding broad calls for judicial case management, most judges still don't case manage—if they did, calls for case management would not be persistent and relentless.¹⁰¹

a. Judges Do Not Impose Time Limits

Judge Bailey's observation is very pertinent, for we find that the problems that initial studies on case management cautioned us against—problems that defeat successful implementation of case management objectives—continue to persist even after North America's experience with judicial management of cases for over half a century. For instance, take the Flanders Study, which was published in 1977 (and which led to the codification of case management in the FRCP in 1983).¹⁰² Its central recommendation was that if courts were to resolve cases faster, then case management schemes must impose strict timelines within which litigants ought to conduct the litigation.¹⁰³ Understandably, over the years, imposition of timelines has become a staple feature of case management schemes in Canada and the United States. Whatever the design of case management schemes—judicially imposed or statutorily established—they invariably set deadlines that litigants must meet.¹⁰⁴ However, in practice, we find that it is one of the most neglected aspects of judicial application of case management.

There is a strong basis to argue that judges do not impose case management time limits strictly. For example, take a case management rule which authorizes judge-imposed time limits. Rule 16 of the Federal Rules of Civil Procedure—the principal site where case management is codified—requires judges to formally declare, through a scheduling order, time limits for the conduct of litigation.¹⁰⁵ Rule 16 scheduling

101. *Id.* at 1071.

102. *See* Flanders, *supra* note 47; ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 21 (1984).

103. *See* Flanders, *supra* note 47, at ix–x.

104. Many case management systems grant judges the authority to establish litigation timelines, rather than imposing fixed deadlines. Typically, this involves a procedural step where judges and parties collaborate to create a schedule. *See, e.g.*, FED. R. CIV. P. 16(b)(1)(B); Code of Civil Procedure, C.Q.L.R. c. C-25.01, s. 148 (Can.); Supreme Court Civil Rules, B.C. Reg. 168/2009, s. 5-3(1)(a) (Can.). Once established, these judicially set timelines are intended to strictly govern the case's progression until its conclusion. *See* CAL. R. CT. 3.728; Alberta Rules of Court, Alta. Reg. 124/2010, s. 1.4(2) (Can.); COLO. R. CIV. P. 16(b).

105. *See* FED. R. CIV. P. 16(b)(1). For details of the content of a scheduling order, *see* FED. R. CIV. P. 16(b)(3)(A).

orders are binding on parties for the entire duration of the litigation and can be modified only for “good cause” and after judges’ approval.¹⁰⁶ However, when a nationwide survey was conducted by the Federal Judicial Center in 2012 on the early stages of litigation, only 15 percent of the respondents reported that judges did not modify the scheduling order during the trial and enforced all the deadlines.¹⁰⁷ Further, 96 percent of respondents reported that judges adopted the litigation deadlines proposed by parties either without modification or with only minor modification.¹⁰⁸ Judges either accepted the party-suggested schedule as proposed or made only minor adjustments.

Similar to the United States, the problem of dilution of pre-trial orders has also been the focus of reform studies in Canada. Recognizing the need to reform pre-trial rules, the Osborne Report of 2007 pointed out that to make pre-trial a meaningful event, judges must be “more aggressive in setting out timetables for any remaining steps needed to get the action ready for trial.”¹⁰⁹ The report further cautioned trial judges not to interfere with time limits set at the pre-trial stage so they could remain meaningful.¹¹⁰

Québec is another example where rule makers have established fixed timelines in the statute itself instead of giving judges discretion to establish them. In 2002, Québec amended its Code of Civil Procedure to introduce a 180 day “peremptory” deadline (calculated from the date of “service of the motion to institute action”¹¹¹) within which a case must be readied for trial.¹¹² In other words, the new rule mandated parties to conclude the “entire pre-trial process . . . within six months.”¹¹³ The purpose behind this case readiness rule was to speed up court proceedings.¹¹⁴ Sending a clear message to litigants that any delay caused by their conduct would have serious consequences, the rule introduced a

106. FED. R. CIV. P. 16(b)(4), (d). For the reasons why a scheduling order should be binding, see Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 787 (1981).

107. EMERY G. LEE III, FED. JUD. CTR., *EARLY STAGES OF LITIGATION ATTORNEY SURVEY: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1, 7* (2012).

108. *See id.*

109. COULTER A. OSBORNE, *CIVIL JUSTICE REFORM PROJECT: SUMMARY OF FINDINGS & RECOMMENDATIONS* 95 (2007).

110. *Id.*

111. Jukier, *supra* note 68.

112. An Act to reform the Code of Civil Procedure, S.Q. 2002, c. 7, s. 14 (Can.); *see also* Jukier, *supra* note 68, at 228 (discussing amendments to Québec’s Code of Civil Procedure).

113. Jukier, *supra* note 68, at 228.

114. An Act to reform the Code of Civil Procedure, S.Q. 2002, c. 7 (Can.) (Explanatory Notes).

strict sanction against deviations from it, namely, if litigants failed to adhere to the timeline, the delay would trigger a presumption that their case has been discontinued.¹¹⁵ While the rule allowed judges the discretion to extend the deadline, it limited extensions only to cases “warranted by the complexity of the matter or special circumstances.”¹¹⁶ However, when an evaluation of the 2002 amendment was conducted three years later, the evaluation report (*Rapport d’évaluation*) found an exponential rise in the number of requests to extend the 180-day deadline.¹¹⁷ Critically, the report revealed that judges approved extension requests in a staggering 95 percent of cases, accepting virtually any justification offered by parties.¹¹⁸ Furthermore, judges consistently deemed these extensions reasonable.¹¹⁹ Similarly, requests to waive penalties for missed registration deadlines were routinely granted (in 88.7 percent of cases by the Superior Court and in almost all cases by the Court of Québec).¹²⁰ This pattern of lenient extension practices was corroborated by findings from another report evaluating the 180-day rule.¹²¹

Judicial inability to implement timelines seems to be a pervasive leitmotif as far as the failure of case management regimes to control delays is concerned. The 2009 Pacer Study in the United States noted that a surprisingly high number of pleading extensions (in 40 percent of the cases) were being filed (and granted by judges), which halted cases almost as soon as they started.¹²² Commenting upon pleading extensions, the 2010 Trial Bench Views Survey noted that “strong majorities of trial court respondents grant 90 percent or more pleadings extensions.”¹²³

115. An Act to reform the Code of Civil Procedure, S.Q. 2002, c. 7 (Can.).

116. Code of Civil Procedure, C.Q.L.R. c. C-25, s. 110.1 (Can.) (repealed 2015).

117. See *Rapport d’évaluation de La Loi Portant Réforme Du Code de Procédure Civile*, *supra* note 68, at 17 (finding that within a period of less than three years, 2003–05, the number of extension requests increased by more than fivefold in the Superior Court).

118. See *id.* at 18–19.

119. *Id.* at 19.

120. *Id.* at 20.

121. Marie José Longtin, *An Assessment of the 2002 Civil Procedure Reform in Québec* 5 (Canadian Forum on Civ. Just. 2006 Conf.: *Into the Future*, Standards for the New Millennium – Meeting Public Expectations, 2006), <https://www.cfcj-fcjc.org/sites/default/files/longtin-en.pdf> [<https://perma.cc/9UMJ-AWQ6>].

122. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 55 (2009) [hereinafter PACER STUDY].

123. Corina Gerety, *Trial Bench Views: IAALS Report on Findings from a National Survey on Civil Procedure*, 32 PACE L. REV. 301, 330 (2012). Further, the survey noted that a large majority (more than 80 percent) of both state and federal judges in the United States saw requests for deadline extension as a prominent contributor to court delay. *Id.* at 329. See also CORINA D. GERETY & BRITTANY K.T. KAUFFMAN, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SUMMARY OF EMPIRICAL RESEARCH ON

Both the Pacer Study and the Trial Bench Views Survey concluded that despite judges being aware that requests for extensions and continuances delayed case processing, they themselves were freely granting them.¹²⁴ The Pacer Study noted that around “90% of all motions to extend deadlines are granted in every court.”¹²⁵

Thus, we see that while in theory, judges possess an extensive authority to impose time limits to curb dilatory behavior of lawyers and litigants, in practice, the judicial (non) implementation of case management rules has produced antithetical trends that echo Flanders’s observations made in 1977 that in American courts, time limits were “honored more in the breach than in the observance.”¹²⁶ The Pacer Study and the Trial Bench Views Survey, separated by more than thirty years from Flanders’s work, demonstrate the continued accuracy of his observation.

At this point, an important question that arises is why judges are behaving in this manner despite the increase in their judicial case management powers. While a full exploration of the reasons is beyond the scope of this Article, it is the author’s working hypothesis that the reasons for widespread judicial complacency or hesitation in implementing efficiency reforms is predominantly attitudinal. Even though civil justice frameworks in Canada and the United States have visibly transitioned into a judge-led hybrid model of litigation, judicial leadership nevertheless seems to still reel under the nostalgia of common law judging. The problem is essentially that while the North American civil justice landscape has reinvented itself into its twenty-first century avatars of case-managed legal systems, the judicial leadership—entrusted to drive the system—remains stuck in the twentieth century mindset. The author will be presenting a detailed examination of the reasons in a future work.

b. Judges Do Not Enforce Case Management Rules

There is a severe problem of nonenforcement of case management rules beyond those that deal with time limits. Lack of enforcement is affecting both types of case management schemes: those that leave the

THE CIVIL JUSTICE PROCESS: 2008–2013 37 (2014) (noting also that about 80 percent of judges indicated granting more than 90 percent of extensions requests). Interestingly however, the survey noted that when judges were asked to reflect on their own role in creating delays due to grant of extensions, a lesser number of judges perceived that their decision to grant them significantly delayed case processing. *See* Gerety, *supra*, at 330; *see also* Bailey, *supra* note 51, at 1085–86 (noting that judges indicated their role in delaying rulings and court continuances was less their responsibility than it was the responsibility of court rules).

124. *See supra* notes 122–123 and accompanying text.

125. PACER STUDY, *supra* note 122, at 7.

126. Flanders, *supra* note 47, at 17.

decision to deploy case management to judicial discretion as well as those that statutorily mandate their deployment.¹²⁷ In what follows, this Article will take up two examples of each type of scheme to show how they have failed to deliver due to lack of judicial enforcement.

(i) Nonenforcement of *Discretionary* Case Management Schemes

The Civil Justice Reform Act (CJRA) was promulgated by Congress in 1990.¹²⁸ The Act was a congressional recognition of case management and institutionalized it in the federal legal practice in the United States. The CJRA was hailed as “one of the most significant American efforts to curb the delay and cost of civil litigation.”¹²⁹ Under the Act, courts in ten pilot federal districts were to devise individual case management improvement plans.¹³⁰ Further, they had to consider six case management principles and six case management techniques for implementation.¹³¹ The CJRA, however, did not *require* the adoption of these principles and techniques and left their enforcement completely to the discretion of judges.¹³² While on paper, the CJRA seemed like a formidable rejoinder to court delays, in practice it failed to deliver. One of the primary reasons for CJRA’s failure was the lack of judicial support for its implementation.¹³³ The RAND Corporation Report of 1996, which assessed the impact of the legislation, found that a majority of federal district courts judges did not give effect to the CJRA requirements.¹³⁴ Citing judicial reluctance to apply its core principles, one scholar went so far as to suggest that the courts actively sabotaged the CJRA.¹³⁵ Judicial failure to support the implementation of the CJRA has been commented upon in several scholarly works.¹³⁶

127. Many case management regimes are discretionary. Judges have the discretion to implement them or not to implement them. For example, in Alberta and Ontario, the decision to deploy case management belongs to judges. *See* Alberta Rules of Court, Alta. Reg. 124/2010, s. 4.13 (Can.); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, ss. 77.01, 77.05(2) (Can.).

128. John Burritt McArthur, *Inter-Branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 U.S.F. L. REV. 551, 553 (1999).

129. *Id.*

130. *Id.*

131. JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 3–4 (1996).

132. McArthur, *supra* note 128, at 553, 555.

133. Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 237–38 (1997).

134. McArthur, *supra* note 128, at 594.

135. *See id.* at 555, 594.

136. For example, Professor Burbank mentions that judges failed to commit to the CJRA. *See* Burbank, *supra* note 133, at 236. For an in-depth examination of the legal

(ii) Nonenforcement of *Mandatory* Case Management Schemes

Judicial nonenforcement occurs in both discretionary and mandatory case management schemes, as illustrated by the Florida scheme. Florida case management rules statutorily mandate judges to actively manage cases from the early stages of litigation. Rule 2.545 of the Florida Rule of Judicial Administration, which has been captioned as “Case Management,” states:

The trial judge *shall* take charge of all cases at an *early stage* in the litigation and *shall control the progress* of the case thereafter until the case is determined. The trial judge *shall take specific steps to monitor and control the pace of litigation*, including the following: (1) assuming early and continuous control of the court calendar ¹³⁷

The rule further states that “[j]udges and lawyers have a professional obligation to conclude litigation as soon as it is reasonably and justly possible to do so.”¹³⁸

Although Florida’s case management is mandatory, its judicial implementation shows a wide disconnect between knowing the obligation and actively managing cases.¹³⁹ Judge Bailey’s highly informative study on the implementation of case management in Florida civil courts (“Florida Court Study”), found that in the majority of instances when the case commenced, Florida judges did not issue case management orders to set the litigation timelines.¹⁴⁰ Further, the study found that judges did not take the responsibility of actively managing cases and left the management largely to lawyers.¹⁴¹ Judges did not intervene unless cases became dormant or delays became problematic.¹⁴² The study also found that all major litigation events were set down only upon attorney requests and that judges “move[ed] cases from court event to court event based on what the parties set down before them.”¹⁴³ Also, when it came to pre-

pushback against the implementation of the CJRA and its eventual downfall because of insufficient backing from the judiciary, see McArthur, *supra* note 128, at 556–78, and Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 195–219 (1997) (discussing the judiciary’s interest in preserving its own discretionary powers through the enactment of the CJRA and otherwise).

137. FLA. R. JUD. ADMIN. 2.545(b)(1) (emphasis added).

138. FLA. R. JUD. ADMIN. 2.545(a).

139. Bailey, *supra* note 51, at 1124.

140. *Id.* at 1119.

141. *Id.*

142. *Id.* at 1118–19.

143. *Id.* at 1119. Similar findings about Rule 16 scheduling orders have been reached elsewhere too. For instance, when the Trial Bench Views Survey asked

trial procedures, they were mostly dictated by the choice of each individual judge.¹⁴⁴ Ironically, the Florida Court Study noted that judges were quite aware that managing the progress of litigation was a responsibility cast on them by rules and were even highly opposed to the view that lawyers should manage cases.¹⁴⁵

(iii) Nonenforcement of Case Management: Evidence from Empirical Surveys

The problem of judicial nonenforcement of case management rules has been one of the primary findings of several national and state surveys in the United States (though, the severity of the problem remains less visible due to the lack of compiled evidence). For instance, the 2009 Survey by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System (“ACTL Survey”) stated that the American civil justice system was “in serious need of repair” and harped on the need for judges to manage cases more actively.¹⁴⁶ The survey observed that “[w]here abuses occur, judges are perceived not to enforce the rules effectively.”¹⁴⁷ The 2010 Arizona Bench and Bar Survey found that 55 percent of judges either never enforced Arizona’s mandatory disclosure requirements or did so only occasionally.¹⁴⁸ The 2009 survey of the members of the National Employment Lawyers Association (“NELA Survey”) found that more than half of the respondents (64 percent) were of the view that judges did not enforce federal rules as written.¹⁴⁹ In another national survey conducted in 2009, nearly half of the respondents *disagreed* that judges

respondents about the extent to which judges adopted the discovery plans proposed by parties in preparing the scheduling order under Rule 16 of the Federal Rules of Civil Procedure, 96 percent of the respondents stated that judges adopted parties’ discovery plans with minor or no modification. *See* LEE III, *supra* note 107, at 7, 15.

144. Bailey, *supra* note 51, at 1115–16.

145. *Id.* at 1123–24. A strong majority of judges interviewed (77 percent) strongly disagreed with the proposition that lawyers were capable of managing cases efficiently. *Id.* at 1124.

146. AM. COLL. OF TRIAL LAWS. TASK FORCE ON DISCOVERY & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2009) [hereinafter ACTL FINAL REPORT].

147. *Id.*

148. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEY OF THE ARIZONA BENCH AND BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE 26 (2010) [hereinafter ARIZONA BENCH AND BAR SURVEY].

149. REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT’L EMP. LAWS. ASS’N, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009, at 26 (2010).

consistently applied the rules.¹⁵⁰ And, in a 2016 study based on consultations with lawyers and judges across numerous U.S. cities, researchers found that lawyers consistently cited the lack of timely and active judicial intervention, particularly in cases requiring it, as a primary driver of excessive discovery costs and delays.¹⁵¹

Instances of nonenforcement of rules targeting delays are also noticeable in Canadian procedural frameworks. For example, Rule 24 of the Ontario Rules of Civil Procedure allows judicial discretion to dismiss actions on grounds of delays.¹⁵² However, R. Lee Akazaki suggests that Ontario judges have hardly applied this important procedural provision designed to curb delays, noting that:

Practicing lawyers will attest to the reluctance of the courts to enforce the rule despite many years of inaction on the part of plaintiffs or their lawyers to move a matter to trial. . . . Despite the availability of the relief and its occasional enforcement, few would now trumpet Rule 24 as an effective tool for removing backlogs from the civil court system.¹⁵³

Other instances where judges have not enforced rules that target abuse and delays will be discussed in subsequent sections of this Article.¹⁵⁴

B. The Principle of Proportionality

Inclusion of the principle of proportionality is one of the hallmark shifts in the North American civil justice landscape. Simply put, the concept of proportionality refers to “matching the extent of the procedure to the size of the dispute.”¹⁵⁵ The core assumption underlying the principle’s inclusion in procedural frameworks is that an amplification of procedural efficiency amplifies access to justice.¹⁵⁶ Viewed this way, proportionality is essentially a principle of judicial economy as well as of utilitarianism.¹⁵⁷

150. See A.B.A. SECTION OF LITIG., ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 8 (2009).

151. Lee H. Rosenthal & Steven Gensler, *A Report from the Proportionality Roadshow*, 100 JUDICATURE 14, 16 (2016).

152. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 24 (Can.).

153. R. Lee Akazaki, *Unconscionable Delay of Civil Justice: Is It Also Unconstitutional?*, 32 ADVOCS. Q. 277, 287 (2007).

154. See *infra* Section I.C.2.

155. Colleen Hanycz, *More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform*, 27 CIV. JUST. Q. 98, 100 (2008).

156. *Id.* at 103–05.

157. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 19, 25 (2015); see also COMMONWEALTH OF AUSTRAL., MANAGING DISCOVERY:

Proportionality creates a fundamental shift in judicial philosophy. It changes the way litigation is managed and resolved. Under the traditional North American model of litigation, parties were entitled to *have their day* in court.¹⁵⁸ This adjudication philosophy entitled parties to make a full-blown use of all interlocutory pre-trial procedures available to litigate their cases.¹⁵⁹ Proportionality restricts this party entitlement by rationing the amount of procedure and court time that litigants can use.

One of the primary justifications that undergirds this conservationist approach is that “all cases are not equal.”¹⁶⁰ Under the traditional model of litigation, all procedures were equally available to all cases, irrespective of their “value, complexity or importance.”¹⁶¹ This translated into time and cost disproportionate to the need of cases. The introduction of proportionality has attempted to alter this approach. Lee Rosenthal and Steven Gensler aptly capture the core principle of proportionality by using a Rolling Stones metaphor: “You can’t always get what you want, but you’ll get what you need.”¹⁶² Contemporary North American procedural frameworks now allow parties procedural autonomy only to the extent commensurate with the magnitude of their disputes.¹⁶³ The logic behind this approach is that a proportionate application of procedure would make courts “more timely, efficient, fair and affordable.”¹⁶⁴ Accordingly, day to day litigation management decisions, such as the amount of discovery parties can demand, the number of interrogatories they can request, the number of experts they can call, and the duration of trial are all to be made on the basis of the value, complexity, and importance of their cases. Application of proportionality improves court efficiency not only by minimizing case duration by rationing procedures but also by conserving courts’ time and resources, which they could then make available for resolution of other pending cases.¹⁶⁵

1. Why Proportionality Was Introduced: Historical Background

Proportionality was introduced in the North American legal systems in response to court delays and increasing litigation costs. It has been

DISCOVERY OF DOCUMENTS IN FEDERAL REPORTS 64 (2011) (noting that proportionality embodies utilitarian ideas).

158. BC JUST. REV. TASK FORCE, *supra* note 19, at 55.

159. *Id.*

160. *Id.* at 54.

161. *Id.*

162. Rosenthal & Gensler, *supra* note 151, at 20.

163. BC JUST. REV. TASK FORCE, *supra* note 19, at 54.

164. *Id.* at 53.

165. UNE NOUVELLE CULTURE JUDICIAIRE, *supra* note 67, at 38–39 (observing that the rule of proportionality must also apply on a collective basis).

viewed as a practice that enhances courts' accessibility by making them more efficient and cost-effective. As per Professor Colleen Hancyz:

Assumptions underlying the principle of proportionality hold that high costs and delays in the litigation process discourage disputants from accessing the courts as a means to resolving disputes. . . . The proportionality principle has emerged in an environment marked by a growing awareness of the shrinking access to civil justice caused by escalating fees and delays.¹⁶⁶

The proportionality principle entered the American federal procedural framework implicitly through the 1983 amendment to the FRCP.¹⁶⁷ The principle was, however, formally spelled out in the FRCP in 2015.¹⁶⁸ The principle also pervades discovery reforms at the state level.¹⁶⁹ Proportionality entered the Canadian access to justice narrative in 1995 with the publication of the Blair Committee Report.¹⁷⁰ However, that report was an Ontario specific study. The national push for adoption of

166. Hancyz, *supra* note 155, at 106.

167. Paul W. Grimm, *Are We Insane: The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure*, 36 REV. LITIG. 117, 123 (2017) [hereinafter, Grimm, *Are We Insane*]; see also John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 457 (2010) (noting that the tools for proportionality analysis were first introduced in the 1983 amendments to the FRCP, specifically through Rules 26(b)(2) and 26(g)).

168. The principle was explicitly added to the FRCP by the 2015 amendment which modified Rule 26. The modified rule stated that the parties could "obtain discovery regarding any . . . matter that [was] . . . *proportional to the needs of the case.*" See FED. R. CIV. P. 26(b)(1) (emphasis added).

169. Several U.S. states have resorted to either implementing discovery reforms statewide by including the principle in their respective procedural rules or in piecemeal fashion by applying the principle through pilot projects (limited to specific types of litigation or to litigation in specific counties). An example of the former approach is Utah's rules of civil procedure. Utah made statewide rule changes in 2011 to make proportionality the controlling standard for the discovery process in the state. See Philip J. Favro & Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 933, 940 (discussing Utah's 2011 overhaul of Rule 26, which introduced a sweeping proportionality mandate by limiting discovery to information that meets defined proportionality standards). See also PAULA HANNAFORD-AGOR & CYNTHIA G. LEE, UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS, FINAL REPORT 1 (2015) (explaining that the Utah Supreme Court's 2011 revisions to Rules 26 and 26.1 made proportionality the central principle governing discovery, placed the burden on the requesting party to show relevance and proportionality, and authorized courts to allocate discovery costs to ensure proportionality). In contrast, states like Colorado and New Hampshire have incorporated proportionality through pilot projects that are limited in their scope. See the discussion regarding Pilot Project Rules 1.3 and 7.2 in COLORADO CIVIL ACCESS PILOT PROJECT, CHIEF JUSTICE DIRECTIVE 11-02 (2012).

170. ROBERT A. BLAIR, SANDRA LANG, TERRENCE J. O'SULLIVAN & MARY MCCONVILLE, CIVIL JUSTICE REVIEW: FIRST REPORT 261 (1995).

proportionality came from the 1996 CBA Taskforce Report which advocated for more flexible and proportional procedures.¹⁷¹ Progressively, many Canadian provinces specifically incorporated the principle into their procedural rules.¹⁷² In provinces where the proportionality principle has not been spelled out in rules, it has been adopted through judicial precedents.¹⁷³ One key difference between the American and Canadian approaches to proportionality is that, while the principle has largely been deployed as a safeguard against discovery abuse in the United States, in Canada its scope is not limited to discovery. Rather, the principle is a pervasive feature of both the provincial and the federal procedural frameworks¹⁷⁴ and is one of their main organizing principles.¹⁷⁵

Reform interventions have justified the need to bring proportionality into play on the grounds that self-interested actors of the legal system (*i.e.*, parties and lawyers) abuse court procedures for strategic gains, which results in delays and expense. For instance, in justifying the inclusion of proportionality in the FRCP, the 1983 Advisory Committee on Civil Rules of the Judicial Conference (“Advisory Committee”) noted that the spirit of the rules was undermined when discovery tools were used as tactical weapons rather than for fact-finding.¹⁷⁶ This misuse led

171. Piché, *supra* note 19, at 142.

172. JONATHAN L.S. HODES, AN INTRODUCTION TO DOCUMENT DISCOVERY IN CANADA 7 (2017).

173. *Med. Shoppe Can. Inc. v. Devchand*, 2012 ABQB 375, para. 11 (Can.); *Nova Scotia v Roué*, 2013 NSCA 94, para. 51 (Can.); *see also Hryniak v. Mauldin*, 2014 SCC 7, para. 31 (Can.) (holding that the proportionality principle is impliedly applicable in cases where it has not been codified in the procedural scheme).

174. Even though Canada’s Federal Court Rules contains elements of proportionality, process has been set in motion, which, if successful, will make proportionality one of the cornerstones of the federal rules. *See* GOV’T OF CAN., CANADA GAZETTE, PART I, VOLUME 155, NUMBER 15: RULES AMENDING THE FEDERAL COURTS RULES [PROPORTIONALITY, ABUSE OF PROCESS AND FEDERAL COURT OF APPEAL MOTIONS] (2021), <https://www.canadagazette.gc.ca/rp-pr/p1/2021/2021-04-10/html/reg1-eng.html> [<https://perma.cc/542Q-SG39>].

175. Favro & Pullan, *supra* note 169, at 938; *see also* Gerard Joseph Kennedy, *Hryniak*, the 2010 Amendments, and the First Stages of a Culture Shift?: The Evolution of Ontario Civil Procedure in the 2010s, at 2 (Jan. 2020) (Ph.D. Dissertation, Osgoode Hall Law School of York University) (noting that proportionality, codified in Rule 1.04(1.1) of the Ontario Rules, serves as a guiding principle that shapes the entire civil procedure framework); Justin W. de Vries & Angélique Moss, *Brave New World!: The Cost of Proportionality in Will Challenges and Guardianship Disputes* 1, DE VRIES LITIG. LLP (Apr. 14, 2014), <https://devrieslitigation.com/wp-content/uploads/2014/01/Brave-New-World-by-Justin-de-Vries-and-Angelique-Moss.pdf?v=m> [<https://perma.cc/S5LV-PUBG>] (observing that Ontario’s 2010 civil justice reforms expressly adopted proportionality as an overarching interpretive principle, linking it to discovery, summary judgment, and cost-related procedural rules).

176. FED. R. CIV. P. 26 advisory committee’s notes to 1983 amendment.

to disproportionately costly and time-consuming proceedings.¹⁷⁷ They conceptualized proportionality as a limit on the scope of discovery sought by parties or permitted by the court.¹⁷⁸

In Canada, party abuse of litigation autonomy—afforded to them by the adversarial process—has also been blamed for delays and has served as a justification for employing proportionality. For instance, the British Columbia’s (B.C.) Effective and Affordable Civil Justice Report from 2006—that endorsed making proportionality the overriding objective of B.C.’s procedural rules—called upon judges to take control of proportionality implementation since parties could not be relied upon to do so.¹⁷⁹ The Report substantiated its suggestion on the ground that parties and lawyers cannot be allowed to control court procedures because left to their own devices, these actors would perpetrate intolerable delays.¹⁸⁰ Further, to ensure a more timely civil justice system in B.C., the report recommended that proportionality be the overarching theme of procedural law.¹⁸¹ In a more recent instance, in 2021 the Rules Committee of the Federal Court of Appeal and the Federal Court recommended the inclusion of the proportionality principle in Canada’s Federal Court Rules.¹⁸² The Committee sought to justify its recommendation on the ground that parties abuse their procedural autonomy under the Federal Court Rules to delay cases. The Committee observed:

[P]arties sometimes make excessive or disproportionate use of rights under the Rules. These excesses include the use of procedures to delay cases and the adoption of behaviours disproportionate to the objective of achieving an expeditious, just and cost-effective judicial decision. The excessive use of procedure is of particular concern in the context of the disclosure of exhibits. . . . [T]he Rules do not provide parties and decision-makers with sufficient tools to enforce or promote proportionality.¹⁸³

Similar justifications for the adoption of proportionality have also been proffered by scholars and judges.¹⁸⁴

177. *Id.*

178. Grimm, *Are We Insane*, *supra* note 167, at 124.

179. BC JUST. REV. TASK FORCE, *supra* note 19, at 18 (Recommendation 3.1).

180. *Id.* at 60.

181. *Id.* at 53.

182. GOV’T OF CAN., *supra* note 174.

183. *Id.*

184. For instance, according to Justice Warren Winkler, “if the adversarial process is left to itself, it often actively discourages proportionality. There is always one more issue that can be raised or one more expert who can be consulted in an attempt to

2. Judicialization and Progressive Expansion of Proportionality

Like case management, application of proportionality turns on judicial initiative. Rules of proportionality *establish* the judicial authority to intervene in litigation so that judges can regulate the procedural autonomy of parties and lawyers.¹⁸⁵ These rules vest judges with broad discretion to narrowly tailor and limit court processes available to parties.¹⁸⁶

Since the introduction of the principle of proportionality in the American and Canadian procedural frameworks in the 1980s and the 1990s, respectively, there has been a progressive strengthening of the judicial role in its application. In the United States, the FRCP amendments since 1983 have contemplated an increasing judicial involvement in enforcement of rules of proportionality. For instance, the declared objective of the 1983 amendment was to give authority to judges to be “more aggressive” in limiting the amount of discovery in order to guard against its disproportionate use.¹⁸⁷ Subsequently, the FRCP was amended in 1993 to “‘enable the court to keep tighter rein on the extent of discovery’ and to invest district court judges with the express right to place limits on depositions, interrogatories, and requests for the production of documents.”¹⁸⁸ In 2000, the FRCP was amended again to give courts a stronger role in regulating the extent of broad and contested discovery requests.¹⁸⁹ The 2000 amendment was driven by persistent concerns of discovery delays, and active judicial involvement was seen as the remedy against the problem of disproportionate discovery.¹⁹⁰ Another amendment touching upon proportionality was made in 2015.¹⁹¹ The Advisory Committee, in the explanatory note to the amendment, indicated that the present amendment reflected, yet again, the necessity

vanquish the other party.” See Warren K. Winkler, *Professionalism and Proportionality*, 27 ADVOC.’ J. 6, 7 (2009). Writing in the context of the proportionality push in Canada and the U.K., Professor Colleen Hancyz has argued that the adversarial legal system encourages lengthy and complex litigation, as lawyers lack a financial incentive to pursue cost-effective resolutions for their clients. See Hancyz, *supra* note 155, at 106–07.

185. UNE NOUVELLE CULTURE JUDICIAIRE, *supra* note 67, at 63.

186. Letter from Arthur R. Miller, Professor, Harvard L. Sch., to Peter G. McCabe, Sec’y, Comm. on Rules Prac. & Proc. 2 (Feb. 10, 2005), https://www.uscourts.gov/sites/default/files/fr_import/04-CV-219.pdf [https://perma.cc/EA2F-AJ75] (quoting *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998)). As per Professor Arthur Miller, whose efforts led to the inclusion of proportionality in the FRCP in 1983, the 1983 proportionality amendment was intended to foster judicial restriction of discovery abuse. *Id.*

187. FED. R. CIV. P. 26 advisory committee’s notes to 1983 amendment.

188. Miller, *supra* note 186, at 2.

189. FED. R. CIV. P. 26 advisory committee’s notes to 2000 amendment.

190. *Id.*

191. FED. R. CIV. P. 26 advisory committee’s notes to 2015 amendment.

of ongoing and close judicial involvement in cases that proved resistant to effective party management.¹⁹²

The push towards proportionality has also come from studies and surveys that have concluded emphatically in favor of inclusion of the principle in rules of procedure. For instance, the 2010 Duke Conference resolutely advocated for the use of proportionality in discovery management.¹⁹³ Recognizing the unanimous consensus at the Conference to limit discovery to what was proportional to the case's needs, the Conference Subcommittee Report observed that by prioritizing proportionality, discovery in civil litigation could more consistently fulfill the FRCP's goal of just, speedy, and inexpensive case resolutions.¹⁹⁴ National surveys in the United States have come to similar conclusions. For instance, one of the principal recommendations of the 2009 ACTL Survey was that "[p]roportionality should be the most important principle applied to all discovery."¹⁹⁵

In the Canadian context, progressive expansion of proportionality is evidenced by the fact that the principle, as noted earlier, has increasingly become an integral aspect of provincial procedural frameworks.¹⁹⁶ The principle has also found strong endorsement in several Canadian studies that have focused on court delays. For instance, the inclusion of proportionality has been supported by the 2001 *La Révision de la Procédure Civile: Une Nouvelle Culture Judiciaire* (Québec),¹⁹⁷ the 2006 *Rapport d'évaluation de la Loi Portant Réforme du Code de Procédure Civile* (Québec),¹⁹⁸ the 2006 Effective and Affordable Justice Report (British Columbia),¹⁹⁹ the 2007 Osborne Report (Ontario),²⁰⁰ the 2010 Sedona Canada Commentary on Proportionality in Electronic Disclosure and Discovery,²⁰¹ the 2012 Report of the Subcommittee on Global

192. *Id.*

193. ADVISORY COMM. ON CIV. RULES, REPORT OF THE DUKE CONFERENCE SUBCOMMITTEE 1 (2014), https://www.uscourts.gov/sites/default/files/fr_import/CV2014-04.pdf [<https://perma.cc/K9HJ-XN9S>].

194. *Id.* at 4.

195. ACTL FINAL REPORT, *supra* note 146, at 7.

196. For province-wide detail of procedural rules that reflect the proportionality principles, see SEDONA CONF., THE SEDONA CANADA COMMENTARY ON PROPORTIONALITY IN ELECTRONIC DISCLOSURE & DISCOVERY: A PROJECT OF THE SEDONA CONFERENCE WORKING GROUP 7 (WG7) SEDONA CANADA 27–35 (2010).

197. UNE NOUVELLE CULTURE JUDICIAIRE, *supra* note 67, at 38–39.

198. See *Rapport d'évaluation de La Loi Portant Réforme Du Code de Procédure Civile*, *supra* note 68, at 63.

199. BC JUST. REV. TASK FORCE, *supra* note 19, at 18–20.

200. COULTER A. OSBORNE, CIVIL JUSTICE REFORM PROJECT: SUMMARY OF FINDINGS & RECOMMENDATIONS, at xxiii (2007) (Recommendation 79).

201. See generally SEDONA CONF., *supra* note 196 (providing commentary defining proportionality and guidance within Canadian law).

Review of the Federal Courts Rules,²⁰² the 2013 submission of the National Immigration Law Section of the Canadian Bar Association,²⁰³ and the 2021 Regulatory Impact Analysis Statement issued by the Federal Court Rules Committee.²⁰⁴ The application of proportionality also received a resounding endorsement from the Canadian Supreme Court's 2014 *Hryniak v Mauldin*²⁰⁵ ruling.²⁰⁶ Through this ruling, the Supreme Court issued a clarion call for shifting the Canadian legal culture towards proportionality so that the civil justice system could be made more accessible.

3. Judges Do Not Apply the Proportionality Principle

From the foregoing, it is abundantly clear that the application of the proportionality principle has been a high priority agenda for the civil justice reform movement in both the United States and Canada. It is also quite evident that since the decades of the 1980s and the 1990s, respectively, policy makers in both jurisdictions have made considerable efforts to curb the practice of the disproportionate use of parties' procedure by bringing in proportionality-based restrictions.²⁰⁷ As noted earlier, minimizing court delays and litigation costs is at the core of this crackdown on the abuse of process by parties.²⁰⁸ And as we saw with case management, the application of proportionality has also been judicialized by vesting the control over its application entirely in the hands of judges. Thus, the decision whether to impose proportionality is completely a judicial prerogative.²⁰⁹ Unfortunately, judicialization of proportionality regimes have failed to deliver results. In the following, this Article analyzes the issue of judicial nonenforcement of proportionality in the United States and Canada.

202. SUBCOMM. ON GLOB. REV. OF THE *FED. CTS. RULES*, REPORT OF THE SUBCOMMITTEE 20–21 (2012), https://www.fct-cf.ca/Content/assets/pdf/base/ENG_Global%20review%20report%20FINAL.pdf [<https://perma.cc/2ADU-9NCG>].

203. NAT'L IMMIGR. L. SECTION, CAN. BAR ASS'N, *FEDERAL COURT RULES CONSULTATION* 1–2, 5 (2013), <https://cba.org/getmedia/784d2eac-8582-4f6b-bb03-a380b9495790/13-04-eng-39d87ac7-ac2b-4233-b697-ce5bfcbbfc51.pdf> [<https://perma.cc/5MWF-5UPG>].

204. GOV'T OF CAN., *supra* note 174.

205. 2014 SCC 7 (Can.).

206. *Id.* at para. 2, 32.

207. *See* discussion *supra* Section I.B.2.

208. *See* discussion *supra* Section I.B.1.

209. Note that some procedural frameworks make proportionality implementation a judicial obligation. *See, e.g.*, Code of Civil Procedure, C.Q.L.R. c. C-25.01, s. 18 (Can.). However, it is not clear on what parameters the judicial discharge of proportionality obligation can be evaluated.

a. Judicial Nonenforcement of Proportionality in the United States

Unfortunately, the inclusion of proportionality in the American procedural frameworks has failed to curb discovery abuses and delays. This diagnosis is borne out by the fact that (a) judicial nonenforcement of proportionality is the primary justification that policymakers have used—and ironically so—to further strengthen the judicial control over the proportionality imposition, and (b) empirical surveys have repeatedly concluded that judges are not enforcing proportionality limitations to curb party abuse of court processes (including discovery). The discussion that follows will elaborate on these two aspects, with the help of illustrations.

(i) Reflections from the FRCP Proportionality Amendments

Multiple revisions to the Federal Rules of Civil Procedure have been made to enhance judicial capacity to enforce proportionality. When we analyze the reasons for bringing these changes, interesting facts emerge. Most proportionality amendments were precipitated due to the perceived failure of the then-existing proportionality framework in curbing abuse of process and the delays caused by such abuses. Policymakers attributed this failure primarily to the judicial nonenforcement of the principle.²¹⁰ Further, the proportionality amendments represent repeated attempts by policymakers to *encourage* judges to take proportionality implementation more seriously. Recall that in the United States, introduction of proportionality rules was in response to widespread discovery abuse.²¹¹ When the 1983 amendments introduced the principle for the first time in the federal procedural framework, the Advisory Committee explained the move by stating that there has been a general lack of willingness on the part of district judges to curtail the use of discovery tools.²¹² Reflecting on the purpose of the amendment, the Committee noted that the goal was to prevent excessive or unnecessary discovery by empowering courts to limit discovery and to motivate judges to more strongly identify and discourage its overuse.²¹³

The 1993 amendment further restricted party autonomy in conducting discovery by further fortifying judicial control over discovery management.²¹⁴ This fortification was effected by giving judges the

210. Grimm, *Are We Insane*, *supra* note 167, at 128; *see also* FED. R. CIV. P. 26 advisory committee's note to 2000 amendment ("[C]ourts have not implemented these limitations with the vigor that was contemplated.").

211. FED R. CIV. P. 26 advisory committee's note to 1983 amendment.

212. *Id.*

213. *Id.*

214. *See generally* FED R. CIV. P. 26 advisory committee's note to 1993 amendment ("Textual changes are then made . . . to enable the court to keep tighter rein on the extent of discovery.").

power to place additional constraints on discovery's scope and extent.²¹⁵ However, it was the failure of both the 1983 and 1993 amendments in controlling disproportionate discovery that created the need for yet another amendment in 2000. Reflecting on the impact of both amendments, the Advisory Committee conceded that, notwithstanding the seventeen-year existence of proportionality factors as a limitation on discovery's scope, they had not yielded their intended effect, and that courts had not implemented these limitations with sufficient vigor.²¹⁶ The 2000 amendment, therefore, explicitly spelled out the proportionality factors that lawyers and judges had to take into account in discovery management. However, even the 2000 amendment failed to mitigate the problem of disproportionate discovery.²¹⁷ Explaining the reasons which led to this failure, Judge Paul Grimm and Attorney David Yellin observe:

Lawyers will tell you that the [factors imposing] limits on discovery currently found in [Rule 26] have not done much to curb overbroad requests, and that, although the factors could be very effective means to protect against overbroad and burdensome discovery, *they will only do so if they are actually understood by lawyers and enforced by judges, neither of which, experience suggests, appears to be the case.*²¹⁸

The fact that proportionality amendments failed to curb discovery abuse is significantly reinforced by the remarks of Professor Arthur Miller—the very originator of the proportionality reform²¹⁹—who commented in 2013 that “there is not yet any showing that the amendments made in 1983, 1993, and 2000 to narrow discovery have had any effect.”²²⁰

215. *Id.*

216. Grimm, *Are We Insane*, *supra* note 167, at 128; *see also* Matthew T. Ciulla, Note, *A Disproportionate Response? The 2015 Proportionality Amendments to Federal Rule of Civil Procedure 26(b)*, 92 NOTRE DAME L. REV. 1395, 1402 & n.49 (2017) (citing FED R. CIV. P. 26 advisory committee's note to 1993 amendment).

217. Ciulla, *supra* note 216, at 1402–03.

218. Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 515 (2013), *quoted in* Matthew T. Ciulla, Note, *A Disproportionate Response? The 2015 Proportionality Amendments to Federal Rule of Civil Procedure 26(b)*, 92 NOTRE DAME L. REV. 1395, 1402 n.52 (2017) (alteration in original) (cleaned up) (emphasis added).

219. Ciulla, *supra* note 216, at 1402.

220. ADVISORY COMM. ON CIV. RULES, SUMMARY OF TESTIMONY & COMMENTS, AUGUST 2013 PUBLICATION 139, 173 (2014), https://www.uscourts.gov/sites/default/files/fr_import/CV2014-04.pdf [<https://perma.cc/2ED2-T8NH>]. A similar observation was also made by the Sedona Conference. Sedona Conf., *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 14 SEDONA CONF. J. 155, 158–59 (2013).

The 2015 amendment was yet another attempt by policymakers to *encourage* judges to impose proportionality restrictions in discovery. Although proportionality entered the FRCP in 1983, the term proportionality *per se* was not expressly mentioned in the text of the FRCP. The 2015 amendment made the reference to proportionality more direct by making the term textually explicit in the rules.²²¹ Supporting the proposal to make proportionality explicit, the Duke Conference Subcommittee Report observed that the move would dissuade parties and judges from inflating the scope of discovery disproportionately.²²² According to one scholar, the explicit endorsement of proportionality by the Advisory Committee was to empower and *obligate* judges “to use their broad discovery power and discretion to carry out the proportionality directive.”²²³

However, the success of the 2015 amendment has been doubted. For instance, skeptical of the efficacy of the judicial operation of the proportionality regime, Judge Grimm raises some very pertinent questions:

A popular definition of insanity describes it as doing the same thing over and over again, and expecting different results. For over thirty years, the Federal Rules of Civil Procedure have been serially amended to require federal trial judges to ensure proportionality during pretrial discovery in civil cases. . . . Still, many have complained that the federal judges have failed to promote proportionality. Recently, the Supreme Court approved yet another series of civil rules changes directing judges to ensure that discovery is proportional. *But if the proportionality requirement has already been in the rules for over thirty years without inducing judges to fulfill their obligation to manage discovery, what makes this latest amendment any more likely to achieve success?* . . . And, if achieving proportionality is possible, why have judges failed to do so? Is it because they are resistant to doing what the rules require?²²⁴

(ii) Evidence from Empirical Surveys

The foregoing analysis of proportionality amendments to the FRCP clearly suggests that lack of judicial initiatives to restrict disproportionate discovery has been—as repeatedly admitted by the Advisory

221. AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 14, 42 (2015).

222. ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 193, at 125–26.

223. Ciulla, *supra* note 216, at 1413.

224. Grimm, *Are We Insane*, *supra* note 167, at 118–19 (emphasis added).

Committee—a major concern for procedural policymakers in the United States. The lack of judicial commitment to address discovery abuse, however, is also evidenced by the findings of several national and state surveys of lawyers and judges in the United States. On the one hand, these surveys show that abuse of discovery by parties is rampantly thriving. On the other hand, tellingly, they also show an acute lack of judicial enforcement of proportionality provisions to limit such abuse. The discussion that follows presents some of the important inferences drawn by these surveys with respect to discovery abuse and proportionality enforcement.

(iii) Discovery Abuse Is Rampant

In the 2009 NELA Survey, about 70 percent of respondents disagreed with the view that progressive changes to the FRCP rules of discovery had significantly reduced discovery abuse.²²⁵ Likewise, when the 2009 ACTL Survey asked respondents the same question, 53 percent of them disagreed.²²⁶ In fact, 65 percent of the NELA Survey respondents and 45 percent of ACTL Survey respondents stated that “discovery is abused in almost every case.”²²⁷ Similarly, in the survey of the American Bar Association members that was also conducted in 2009 (“ABA Survey”), more than half of the respondents (51 percent) also reported that discovery abuse reaches almost all cases.²²⁸ Moreover, as per the ACTL Survey, abuse of discovery is also a problem with e-discovery.²²⁹ The NELA, ABA and ACTL surveys also found that lawyers usually do not seek the court’s intervention to limit discovery using its proportionality powers even though procedural rules obligate both judges and lawyers to factor in proportionality in discovery planning.²³⁰

225. HAMBURG & KOSKI, *supra* note 149, at 34. The 1976 Pound Conference brought discovery abuse into sharper focus within the context of discourse on judicial delays. *Id.*

226. TASK FORCE ON DISCOVERY, THE AM. COLL. OF TRIAL LAWS. & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL. SYS., INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 5 (2008) [hereinafter ACTL INTERIM REPORT].

227. HAMBURG & KOSKI, *supra* note 149, at 30; ACTL INTERIM REPORT, *supra* note 226, at A-4.

228. ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT, *supra* note 150, at 62.

229. 63 percent of the respondents stated that lawyers abuse e-discovery. ACTL INTERIM REPORT, *supra* note 226, at A-4.

230. ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT, *supra* note 150, at 76 (60.9 percent of all respondents saying that lawyers do not often request limitations on discovery); HAMBURG & KOSKI, *supra* note 149, at 31 (54.1 percent of all respondents); GERETY & KAUFFMAN, *supra* note 123, at

The finding of rampant discovery abuse by these three nationwide surveys was also echoed in another national survey—Civil Litigation Survey of Chief Legal Officers and General Counsel—conducted a year later.²³¹ The survey highlighted widespread discovery misconduct. Specifically, almost 40 percent of respondents reported frequent violations of discovery rules, over 60 percent cited frequent harassment or obstruction, and more than 70 percent indicated parties routinely overused discovery procedures beyond what was necessary.²³² More recently, in the context of e-discovery, a 2020 survey of federal judges explicitly noted that discovery misconduct was on the rise and 90 percent of it was intentional.²³³ Besides national surveys, widespread misuse of the discovery process has been flagged by state level surveys. For instance, the 2010 Arizona Bench and Bar Survey reported high instances of misuse of disclosure norms by lawyers for gamesmanship purposes with no consequential sanctions imposed by judges.²³⁴

(iv) Judicial Nonenforcement of Proportionality Rules Is Equally Rampant

National and state surveys have also revealed some hard-hitting truths about the judicial operation of the American proportionality regime. The findings of these surveys strongly corroborate the inferences drawn by the Advisory Committee regarding the failure of proportionality provisions. Under the American proportionality framework, imposition of proportionality by judges does not require a motion from parties.²³⁵ Judges have complete discretion to apply proportionality restrictions in cases they deem fit.²³⁶ Recall from previous discussions that encouraging early involvement of judges and an

46 (ACTL Survey); *see also* FED. R. CIV. P. 26(b)(2)(C) (requiring the court to limit discovery considering proportionality factors).

231. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL 1–2, 4 (2013).

232. *Id.* at 2.

233. 6th Annual Federal Judges Survey, EXTERRO, INC., 6 (2020), https://go.exterro.com/1/43312/2020-01-27/ch54fs/43312/210013/Judges_Survey_2020.pdf [<https://perma.cc/8QW3-C8LF>] (last visited Oct. 5, 2025).

234. GERETY & KAUFFMAN, *supra* note 123, at 9.

235. *See* FED. R. CIV. P. 26(b)(2)(C) (“On motion or on its own, the court must limit the frequency or extent of discovery . . .”).

236. Both the U.S. and Canadian Supreme Courts have affirmed that judges possess broad and plenary discretion to apply proportionality in civil procedure. *See Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (affirming that Rule 26 grants trial judges broad authority to control the scope and sequence of discovery to ensure proportionality); *Hryniak v. Mauldin*, 2014 SCC 7, para 31 (Can.) (affirming that proportionality is an inherent and pervasive aspect of judicial discretion, empowering judges to shape and manage procedure even in the absence of express codification).

aggressive use of proportionality restrictions by them has been the main thrust behind the several proportionality amendments that were made to the FRCP.

However, four national surveys found that federal judges do not apply proportionality restrictions on their own accord. The Trial Bench View Survey reported that judges did not invoke proportionality frequently.²³⁷ It found that 59 percent of judges “almost never” invoked proportionality on their own volition, while 29 percent did so only occasionally.²³⁸ In the ABA Survey, 76 percent of all respondents reported that judges do not invoke the proportionality rule *sua sponte*.²³⁹ In the NELA Survey, 67.7 percent of the respondents reported the same,²⁴⁰ while in the ACTL Survey, the proportion of respondents reporting that judges do not invoke proportionality on their own initiative was 76.8 percent.²⁴¹

Further, 58.8 percent of all ABA Survey respondents stated that judges do not impose proportionality to limit discovery despite explicit party requests.²⁴² A notable 48.5 percent of NELA Survey respondents answered similarly.²⁴³ A majority of ACTL Survey respondents also reported that the proportionality principle was not enforced to curb discovery abuse.²⁴⁴ In another state-based survey, only one out of every five respondents stated that judges frequently enforced presumptive discovery limits.²⁴⁵ Moreover, a 2012 nationwide survey from the Federal Judicial Center found that judges discussed proportionality of discovery in only 24 percent of scheduling conferences, and that they imposed discovery limitations only in about 16 percent of such conferences (*i.e.*, less than 4 percent of all scheduling conferences held).²⁴⁶

237. Gerety, *supra* note 123, at 344–45.

238. *Id.*

239. ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT, *supra* note 150, at 77. (Independently, 62.6 percent plaintiff’s attorneys and 81.2 percent defense lawyers stated that judges do not invoke proportionality on their own.).

240. HAMBURG & KOSKI, *supra* note 149, at 31.

241. Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 773 n.32 (2010).

242. Paul W. Grimm, *The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burden, or Can Significant Improvements Be Achieved Within the Existing Rules*, 12 SEDONA CONF. J. 47, 50 n.16 (2011).

243. HAMBURG & KOSKI, *supra* note 149, at 31.

244. GERETY & KAUFFMAN, *supra* note 123, at 46 n.537.

245. ARIZONA BENCH AND BAR SURVEY, *supra* note 148, at 41.

246. LEE III, *supra* note 107, at 7. A scheduling conference—also known as a Rule 16 conference—is the event through which early judicial intervention into trial takes place, as judges are expected to use the conference to set limits, among other things, on the extent of discovery. *See* FED. R. CIV. P. 16. In short, these conferences are launching

As previously discussed, to curb discovery abuse, the 1993 amendment to the FRCP increased the judicial control over the discovery process by authorizing judges to put additional restrictions on the freedom of parties to conduct discovery.²⁴⁷ However, the Trial Bench Views Survey showed that judges had hardly put these powers to use, as over 90 percent of state judges and 75 percent of federal judges reported rarely imposing additional limits on the number of depositions.²⁴⁸ The survey further indicated that judges did not utilize proportionality to tailor discovery to the circumstances and needs of specific cases.²⁴⁹

Another problem highlighted by these surveys is the enforcement of disclosure rules. In the United States, policymakers have sought to obviate discovery abuses by substantially substituting discovery by mandatory disclosures in both the federal as well as state procedural frameworks.²⁵⁰ Disclosure rules aim to weed out the gamesmanship by front-loading the discovery process. However, state rules, much like the FRCP, have failed to deliver due to a lack of judicial commitment.²⁵¹ In 2010, when the Institute for the Advancement of the American Legal System (IAALS) surveyed members of the Arizona State Bar with respect to the functioning of civil procedure (in the Arizona Superior Court), “[o]nly one in five Arizona practitioners reported that courts ‘often’ or ‘almost always’ enforce the rule requiring disclosure of all known relevant information.”²⁵² Further, the survey found that 55 percent of the judges never enforced Arizona’s mandatory disclosure provisions or enforced them only occasionally.²⁵³ Surveys show similar judicial reluctance to enforce disclosure norms in other states. For instance, in the 2010 Colorado Bar and Bench Survey, respondents reported that judges rarely enforced disclosure obligations or excluded improperly disclosed evidence, leading to trial-by-ambush tactics by defaulting parties.²⁵⁴

Abuse of discovery and the judicial propensity to not impose proportionality has also been documented in academic writings, policy reports and academic surveys. For instance, reflecting upon the lack of

pads for case management. WILLIAM W. SCHWARZER & ALAN HIRSCH, FED. JUD. CTR., *THE ELEMENTS OF CASE MANAGEMENT: A POCKET GUIDE FOR JUDGES* 3 (2d ed. 2006).

247. See discussion *supra* Sections I.B.2, I.B.3.(i).

248. Gerety, *supra* note 123, at 304.

249. *Id.* at 342–43.

250. *E.g.*, FED. R. CIV. P. 26.

251. See discussion *supra* Section I.B.3.a(ii).

252. GERETY & KAUFFMAN, *supra* note 123, at 46; ARIZONA BENCH AND BAR SURVEY, *supra* note 148, at 26.

253. ARIZONA BENCH AND BAR SURVEY, *supra* note 148, at 26.

254. CORINA GERETY, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, *SURVEYS OF THE COLORADO BENCH AND BAR ON COLORADO’S SIMPLIFIED PRETRIAL PROCEDURE FOR CIVIL ACTIONS* 38 (2010).

judicial enforcement of proportionality, the Duke Conference Subcommittee observed that “cases where proportionality most needs enforcement are those that are not actively managed by the court.”²⁵⁵ Highlighting judges’ reluctance to manage discovery, an academic survey of federal district and magistrate judges found that 82 percent waited to intervene until a discovery dispute resulted in a motion.²⁵⁶ In another instance, judicial reluctance to manage discovery was also identified as one of the main findings by a 2019 survey of federal judges.²⁵⁷ The survey found that just 22 percent of judges viewed themselves as active case managers in e-discovery.²⁵⁸ While some scholars and reports situate the problem of discovery abuse in the structure of procedural rules, there is no doubt that judicial inaction is a large part of the problem.²⁵⁹

b. Judicial Nonenforcement of Proportionality in Canada

Canadian procedural frameworks are also beleaguered with the problem of disproportionate use of discovery devices and judicial nonenforcement of proportionality rules. Even though concerns regarding disproportionate use of discovery in Canada do not compare with the American struggle to rein in the problem, the problem has nevertheless been an enduring one. Accordingly, reforms in Canada have focused on limiting or eliminating discovery to simplify and expedite civil dispute resolution.²⁶⁰ However, the consistent acknowledgement of the excessive use of procedures in studies at both national and provincial levels, as well as the repeated recognition of the importance of timely judicial regulation of discovery through the implementation of proportionality measures, underscores the gravity of the problem.

For instance, the 1996 CBA Taskforce Report expressed concern over disproportionate use of oral discovery and recommended that all Canadian provinces restrict the scope, number, and duration of oral discovery examinations.²⁶¹ A decade later, B.C.’s Effective and Affordable Justice Report reiterated the exact same recommendation,

255. ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 193, at 125.

256. Grimm, *Are We Insane*, *supra* note 167, at 136.

257. See EXTERRO, 2019 FEDERAL JUDGES SURVEY 2 (2019).

258. *Id.* at 2.

259. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., REFORMING OUR CIVIL JUSTICE SYSTEM: A REPORT ON PROGRESS & PROMISE 17 (2015); see also Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather Than the Exception*, 87 DENV. U. L. REV., 513, 517–18, 522 (2010) (observing that proportionality limits on discovery, though embedded in the rules, are seldom enforced, and that the judicial “vigor” envisioned to restrain excessive discovery has largely failed to materialize).

260. JANET WALKER & LORNE SOSSIN, CIVIL LITIGATION 259 (2010).

261. CAN. BAR ASS’N, *supra* note 26, at 43.

citing abuse and the disproportionate cost of oral discovery.²⁶² Similarly, the 2006 *Rapport D'évaluation* (Québec) also identified disproportionate discovery examinations as a problem for Québec's legal system.²⁶³

The Canadian literature, like the American literature, also attributes the problem of disproportionate discovery to judicial nonenforcement of discovery rules. For instance, the 2003 Report of the Task Force on the Discovery Process in Ontario found discovery abuse to be thriving in the province because the judges were "reluctant to take an active role in the resolution of discovery disputes or in the enforcement of discovery obligations."²⁶⁴ Further, the literature identifies the non-imposition of proportionality rules as one of the causes for court delays. For instance, Professor Piché, now a judge of the Superior Court of Québec, has pointed to judicial underutilization of proportionality and case management as factors in Canadian court delays, and has stressed the need for its adoption. She has asserted that judges have a professional and legislative obligation to control cases and ensure proportionality to mitigate delays and costs.²⁶⁵

Calls for greater participation of judges in managing cases is yet another indication that delays and abuse of process continues to be a concern for Canada and that more is expected from judges. For instance, the Effective and Affordable Justice Report, noted previously, asserted that if the proportionality framework it was proposing were to succeed, judges needed to engage more actively with the management of litigation.²⁶⁶ Importantly, the report observed that achieving active judicial enforcement of proportionality would require judges to seriously reconsider their approach to managing cases, rather than passively relying on parties to apply the principles correctly.²⁶⁷

262. BC JUST. REV. TASK FORCE, *supra* note 19, at 27–28.

263. See *Rapport d'évaluation de La Loi Portant Réforme Du Code de Procédure Civile*, *supra* note 65, at 40.

264. DISCOVERY TASK FORCE, *supra* note 42, at 79.

265. Piché, *supra* note 19, at 140, 154; Catherine Piché, *Comparative Perspectives: Figures, Spaces and Procedural Proportionality*, 2 INT'L J. PROC. L. 145, 154 (2012).

266. BC JUST. REV. TASK FORCE, *supra* note 19, at 60.

267. *Id.*

C. Sanctions

Sanctions play a crucial role in the contemporary North American reform approaches to mitigate court delays.²⁶⁸ Structurally, they form the substratum of judicial and legislative responses to the problem of court delays.²⁶⁹ To solve the problem, civil justice reforms in North America have sought solutions in judicializing litigation by transferring the control of litigation from parties to judges. This Article has previously catalogued, in detail, the breadth of judicial powers under case management and proportionality frameworks.²⁷⁰ And it is in the context of these vast powers of control that the value of sanctions can be properly appreciated.

While case management and proportionality rules may have imbued judges with powers of litigation control, it is the sanctions regime that gives *teeth* to these powers.²⁷¹ Sanctions are the backbone of the procedural apparatus that effectuates the shift of litigation control from parties to judges. Therefore, they are considered an important tool to operationalize case management and proportionality regimes. Understandably, mitigation of delays by deterring parties from abusing court processes has been the primary purpose for imposing sanctions.²⁷²

1. The Robust, Broad, and Exacting Sanctions Framework in North America

The sanctions framework precedes the emergence of case management.²⁷³ However, the advent of case management in 1983 greatly

268. See generally, Fred Woods, *Sanctions – Stepchild or Natural Heir to Trial and Appellate Court Delay Reduction*, 17 PEPP. L. REV. 665 (1990) (analyzing the evolution of sanctions and assessing their effectiveness as a tool for reducing delay in both trial and appellate courts).

269. Carl B. Schultz, *Sanctioning Defendants' Non-Willful Delay: The Failure of Rule 55 and a Proposal for Its Reform*, 23 U. RICH. L. REV. 203, 204 (1989) (“In order to prevent delay and thereby promote the speedy resolution of disputes, the Federal Rules of Civil Procedure provide for various sanctions for delay.”).

270. See discussion *supra* Sections I.A.2, I.B.2 (progressive expansion of case management powers, judicialization, and proportionality).

271. See FERN SMITH, CASE MANAGEMENT 5 (2003) (“Judicial authority to impose sanctions if case management orders are violated plays a significant role in the success of these procedures.”).

272. For instance, the U.S. Supreme Court stated, in the context of discovery abuse, that courts should diligently apply sanctions “not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.” *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976).

273. The original FRCP came with a built-in sanctions regime. For instance, Rule 11 (certification of pleadings), Rule 37 (consequences for discovery abuse), Rule 41 (dismissal of action), and Rule 55 (default judgment) contained sanctions in their

expanded it. As judicial powers over litigation increased with the adoption of case management, so did the availability of sanctions to punish violations of case management directives. Over the years, both Canada and the United States have built an extremely robust, broad, and exacting sanctions frameworks to punish lawyers and parties for almost any deviation from procedural directives or judicial instructions.²⁷⁴ However, judges do not need specific sanctions, as they have the power to impose sanctions under their inherent power (to the extent they are judges in inherent jurisdiction courts).²⁷⁵

An analysis of the sanctions frameworks in Canada and the United States suggests that judges have at their disposal powers to check *any conceivable deviance* of parties or their lawyers from procedural directions that are issued by judges under their case management and proportionality powers. The breadth of powers assumes significance given the fact that case management regimes are largely run by ad-hoc subjective decisions of judges that allow them to tailor the procedures to the needs of the disputes at hand.²⁷⁶ In what follows, this Article briefly describes the contents and attributes of the North American sanctions regime to highlight the magnitude of control it gives judges to deter the abusive practices by recalcitrant parties and lawyers.

a. Sanctions Framework: Attributes

The sanctions regime makes available to judges a very broad range of sanctions. They can be primarily categorized into monetary and non-monetary sanctions. Regarding the former, judges may impose costs on both parties and lawyers for abusive conduct and dilatory practices.²⁷⁷ In

original version adopted in 1938. FED. R. CIV. P. 11, 37, 41, 55 (1938) (amended 1983, 1948, 1946, and 1987, respectively).

274. In the United States, besides the FRCP, authority to sanction also comes from local rules made under Rule 83 of the FRCP, which empowers federal district courts to frame rules to govern their practice. FED. R. CIV. P. 83; *see, e.g.*, E.D. MICH. CIV. R. 11.1 (“[T]he Court may impose an appropriate sanction upon the attorneys, law firms, or parties that have violated the Local Rule or are responsible for the violation.”).

275. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962); *Nick v. Morgan’s Foods, Inc.*, 270 F.3d 590, 594 n.2 (8th Cir. 2001). For examples of sanctions fashioned by judges using their inherent powers as well as for the basis of judicial use of inherent power as a source of sanctioning authority, *see* Michael Thomas Murphy, *Just and Speedy: On Civil Discovery Sanctions for Luddite Lawyers*, 25 GEO. MASON L. REV. 36, 55–58 (2017).

276. Marcus, *Slouching Towards Discretion*, *supra* note 31, at 1587.

277. For instance, Prince Edward Island’s rules subject lawyers to personal costs if they fail to attend the pre-trial conference. SUPREME COURT OF PRINCE EDWARD ISLAND, PRACTICE NOTE 4 (n.d.), <https://www.courts.pe.ca/sites/www.courts.pe.ca/files/PracticeNote4.pdf> [<https://perma.cc/5EEN-FRC6>] (Point 14). Similarly, the Texas Rules of Judicial Administration authorize judges to impose costs on “attorneys or parties filing frivolous motions or pleadings or abusing discovery procedures.” TEX. R. JUD.

addition to costs, judges can also compel parties to pay the attorney fees incurred by the opposing party.²⁷⁸ Other monetary sanctions include the payment of fines²⁷⁹ and the award of damages.²⁸⁰ The wide variety of non-monetary sanctions can be broadly categorized as follows: (a) sanctions that terminate the cause of action or issues completely or partially, (b) penal sanctions, and (c) sanctions that freeze proceedings. Examples of the first category include dismissal of the action²⁸¹ or a presumption of withdrawal of the action;²⁸² striking out of pleadings, evidence and documents;²⁸³ striking out of the defense;²⁸⁴ issuance of a preclusion order;²⁸⁵ and default judgment.²⁸⁶ An example of penal sanctions is committal for contempt. Procedural frameworks in several Canadian provinces, as well as the federal and state rules of procedure in the United States, empower judges to authorize detention of parties for violation of pre-trial and trial rules.²⁸⁷ Examples of the third category—

ADMIN. 7.2(f)(4). In Québec, a judge can order reimbursement of costs, payment of damages (including professional fees), or award punitive damages if a party's pleadings or applications are found to be abusive. Code of Civil Procedure, C.Q.L.R. c. C-25.01, ss. 54, 341, 342 (Can.).

278. *E.g.*, CAL. CIV. PROC. CODE § 128.5 (West 2025); FED. R. CIV. P. 16(f)(2); UTAH R. CIV. P. 11(c)(2).

279. FED. R. CIV. P. 11(c)(4); CAL. R. CT. 2.30(b); Alberta Rules of Court, Alta. Reg. 124/2010, s. 10.49(1) (Can.).

280. CAL. CIV. PROC. CODE § 907 (West 2025).

281. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 24.1.13(2) (Can.); FED. R. CIV. P. 16(f), 41(b); Court of King's Bench Rules, Man. Reg. 553/88, ss. 24.01(2), 24.02(1) (Can.); Rules of the Supreme Court, 1986, S.N.L. 1986, c. 42, s. 30.14(1)(b) (Can.); CAL. CIV. PROC. CODE § 2023.030(d)(3) (West 2025).

282. Under the Québec Code of Civil Procedure, if a plaintiff fails to ready the case for trial within six months of the close of pleadings, that plaintiff is presumed to have withdrawn the case. Code of Civil Procedure, C.Q.L.R. c. C-25.01, s. 177 (Can.).

283. FED. R. CIV. P. 16(f) advisory committee's note to 1983 amendment; Court of King's Bench Rules, Man. Reg. 553/88, ss. 25.11(1), 50.09(1) (Can.); SASK. KING'S BENCH R. 7-9(1) (Can.); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 34.15(1)(c) (Can.); CAL. CIV. PROC. CODE § 2023.030(c).

284. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 24.1.13(2)(c) (Can.); Rules of the Supreme Court, 1986, S.N.L. 1986, c. 42, s. 30.14(1)(c) (Can.).

285. FED. R. CIV. P. 16(f) advisory committee's note to 1983 amendment; *see also* Fred Woods, *Sanctions—Stepchild or Natural Heir to Trial and Appellate Court Delay Reduction*, 17 PEPP. L. REV. 665, 671 (1990) (sanctions may include “evidence, witness, and issue limitation”).

286. FED. R. CIV. P. 16 advisory committee's note to 1983 amendment; FED. R. CIV. P. 55; CAL. CIV. PROC. CODE § 2023.030(d)(4).

287. For instance, the New Brunswick discovery rules authorize a judge to order arrest and detention of a person who refuses to attend the examination for discovery, refuses to answer questions raised at such an examination, or refuses to produce a document that the person is bound to produce. Rules of Court, N.B. Reg. 82-73, s. 33.12(e) (Can.). Detention rule is a feature of the majority of Canadian provinces, including Newfoundland and Labrador, the Northwest Territories, Nova Scotia, and Ontario. Rules of the Supreme Court, 1986, S.N.L. 1986, c. 42 s. 53.05(1) (Can.); Rules

sanctions that freeze proceedings—include stay of proceedings²⁸⁸ and refusal to allow a party to question witnesses or submit evidence at trial.²⁸⁹ In addition to these sanctions, many procedural frameworks give judges plenary power to devise and impose *any* sanction they deem appropriate.²⁹⁰

A significant aspect of this sanctions regime is that it empowers judges to selectively impose penalties on parties, lawyers, or both.²⁹¹ Concerning lawyers specifically, judges have the authority to (a) compel them to pay costs *personally*;²⁹² (b) deny them fees and expenses;²⁹³ (c) require them to pay fines;²⁹⁴ (d) require them to participate in educational programs;²⁹⁵ (e) demote their status in a case or remove them;²⁹⁶ (f) cite them for contempt;²⁹⁷ (g) admonish, reprimand or censure their

of the Supreme Court of the Northwest Territories, N.W.T. Reg. (Nu.) 010-96, s. 705(1) (Can.); N.S. Civ. P.R. 89.11(1) (Can.); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 60.11 (Can.). For the United States, see FED. R. CIV. P. 16(f); IOWA CODE § 665.4 (2025); CAL. CIV. PROC. CODE § 2023.030(e). *See also* Allan D. Vestal, *The Pretrial Conference and the Recalcitrant Attorney: A Study in Judicial Power*, 48 IOWA L. REV. 761, 761 n.2 (1963) (explaining that an attorney's failure to attend a pretrial conference as ordered by the court is punishable disobedience).

288. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 3.04(4) (Can.); Court of King's Bench Rules, Man. Reg. 553/88, s. 50.09(1) (Can.); FED R. CIV. P. 16(f) advisory committee's note to 1983 amendment; CAL. CIV. PROC. CODE § 2023.030(d)(2).

289. DISCOVERY TASK FORCE, *supra* note 42, at 28; *see* Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 30.08(2)(a) (Can.).

290. *See, e.g.*, ME. STAT. tit. 19-A, § 251 (2025); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, ss. 24.1.13, 75.1.10(2) (Can.); Court of King's Bench Rules, Man. Reg. 553/88, s. 50.09(1) (Can.); FED. R. CIV. P. 16(f).

291. *See, e.g.*, Rules of the Supreme Court of the Northwest Territories, N.W.T. Reg. (Nu.) 010-96, s. 288 (Can.); FED. R. CIV. P. 16(f); *see also* FED. R. CIV. P. 11 advisory committee's note to 1983 amendment (“[E]liminat[ing] any doubt as to the propriety of assessing sanctions against the attorney.”).

292. For instance, under the Ontario rules, lawyers can be compelled to pay personal costs if they delay the trial without reasonable cause. *See* Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 57.07 (Can.).

293. MANUAL FOR COMPLEX LITIGATION (FOURTH) §10.154 (2004) [hereinafter MCL 4th].

294. FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment; *accord* MCL 4th, *supra* note 293, § 10.154.

295. FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment.

296. MCL 4th, *supra* note 293, § 10.154.

297. For example, California rules allow judges to hold lawyers in contempt for discovery abuse. *See* CAL. CIV. PROC. CODE § 2023.030(e) (West 2025).

conduct;²⁹⁸ (h) suspend or debar them from practice;²⁹⁹ and (i) report them to concerned authorities for initiation of disciplinary actions.³⁰⁰

Further, procedural schemes also allow judges to discipline *both* parties to the dispute—the successful ones as well as those who are unsuccessful.³⁰¹ Significantly, under the contemporary North American sanctions frameworks, most sanctions can be applied by judges *sua sponte* without requiring a motion from parties.³⁰²

b. Sanctions Framework: Breadth of Judicial Punishing Powers

Beyond its extensive range of sanctions, the framework empowers judges to target a wide range of behaviors. For instance, parties can be punished if they resist participation in ADR processes³⁰³ or participate in

298. FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment; *see also* E. Wayne Thode, *Case for the Pre-trial Conference in Texas*, 35 TEX. L. REV. 372, 376–80 (1957) (surveying judges' personal experiences with pre-trial sanctions, including reprimands).

299. Courts have the power to disbar or suspend lawyers from the practice if they do not cooperate in pre-trial conferences. *See Vestal*, *supra* note 287, at 777; MCL 4th, *supra* note 293, § 10.154.

300. FED. R. CIV. P. 11 advisory committee's notes on 1993 amendment.

301. For instance, article 341 of Québec's Code of Civil Procedure authorizes judges to sanction the successful party that violated the principle of proportionality or abused court process. Code of Civil Procedure, C.Q.L.R. c. C-25.01, s. 341 (Can.). Similarly, the cost-shifting provisions in Ontario, British Columbia, New Brunswick, and under the FRCP as well as state procedural rules penalize both the successful and unsuccessful parties for rejecting a fair offer to settle. *See* Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 49.10 (Can.); Supreme Court Civil Rules, B.C. Reg. 168/2009, s. 9-1(5)(d) (Can.); Rules of Court, N.B. Reg. 82-73 s. 49.09 (Can.); Federal Courts Rules, SOR/98-106, s. 420 (Can.); *see, e.g.*, WIS. STAT. § 807.01(1)–(3) (2023–24).

302. *See, e.g.*, CAL. CIV. PROC. CODE § 575.2(a) (West 2025); Rules of the Supreme Court of the Northwest Territories, N.W.T. Reg. (Nu.) 010-96, s. 288 (Can.); FED. R. CIV. P. 16(f); FED. R. CIV. P. 11(c)(3); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 60.12.

303. For instance, Maine's procedural rules empower judges to impose any sanction they deem appropriate when a party fails, without good cause, to attend a scheduled court-directed mediation. *See* ME. STAT. tit. 19-A, § 251(5) (2024). Similarly, the local rules of the District Court for the Eastern District of Missouri allow judges to impose any sanction they deem appropriate if a party willfully and negligently fails to attend any ADR conference. *See* E.D. MO. L.R. 6.05(A). In Canada, Ontario's rules allow judges the discretion to dismiss the action, strike out the defense, or impose costs if a party fails to attend mediation sessions. *See* Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 24.1.13(2) (Can.). In Alberta, judges have the power to strike out pleadings of the party that fails to attend mediation. Mediation Rules of the Provincial Court - Civil Division, Alta. Reg. 271/1997, s. 14(2)(b) (Can.). Newfoundland and Labrador's rules allow judges to stay the proceedings, strike out documents filed by the party, or award costs for failure to attend mediation. *See* Rules of the Supreme Court, 1986, S.N.L. 1986, c. 42, Sch D, Nfld. Reg. /99, s. 37A.05 (Can.). Saskatchewan, like Newfoundland

bad faith.³⁰⁴ Similarly, judges can sanction parties and lawyers if they fail to attend pre-trial conferences, do not participate in good faith, or are underprepared to participate.³⁰⁵

Previously, this Article has pointed out that imposition of litigation timelines is one of case management's most crucial aspects. These litigation timelines are either statutorily pre-instituted or are established by judges for individual cases.³⁰⁶ The sanctions framework empowers judges to punish parties if they fail to meet both these types of timelines. For instance, Québec's Code of Civil Procedure empowers judges to sanction parties if they fail to meet the case readiness deadline.³⁰⁷ This is an example of sanctioning powers with respect to statutorily pre-instituted timeframes. Further, Québec's rules authorize judges to sanction parties if they fail to meet timelines established under the case protocol.³⁰⁸ This is an example of authority to sanction judicially formalized timeframes. Contemporary procedural frameworks are replete with examples of timeline sanctions.³⁰⁹

Another variety of timeline sanction is what could be termed as sanctions for *long delays*. These sanctions are applied where a plaintiff fails to materially advance the case over a very long period. These

and Labrador, also allows judges to strike pleadings. *See* King's Bench Act, S.S. 2023 c. 28 s. 7-1(10)(a)(ii), 7-1(11).

304. For instance, under Utah rules, if a party does not participate in mediation in good faith, courts can order that party to pay punitive costs. *See* UTAH R. CIV. P. 16(d) (permitting sanctions authorized by Rule 37(b) against disobedient parties). Maine also permits sanctions and penalties for failures to make a good faith effort to participate in mediation. ME. STAT. tit. 19-A, § 251(4).

305. *See, e.g.*, SUPREME COURT OF PRINCE EDWARD ISLAND, *supra* note 277 (Point 14); Supreme Court Civil Rules, B.C. Reg. 168/2009, s. 5-2(6)(c) (Can.). For the United States, *see* FED. R. CIV. P. 16(f)(1)(A); N.D. R. CIV. P. 16(f)(1)(A).

306. *See* Code of Civil Procedure, C.Q.L.R. c. C-25.01, s. 173 (Can.); 62A AM. JUR. 2D *Pretrial Conference* § 45 (2025).

307. *See* C.Q.L.R. c. C-25.01, s. 177 (Can.).

308. *See id.* at s. 150. Case protocol is the schedule agreed to by the parties or established in conjunction with the judge that, among other things, establishes the timelines within which parties must complete the principal steps of the litigation in order to ready the case for trial. *Id.* at s. 148.

309. For instance, under the Ontario rules, a judge has the power to dismiss an action if the plaintiff fails to set the action down for trial within six months after the close of pleadings. *See* Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 24.01 (Can.). Ontario's rules further authorize judges to sanction parties if they fail to meet case management deadlines. *See* Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 3.04(4) (Can.). Similarly, New Brunswick's rules empower judges to dismiss an action if it has not been set down for trial within six months. *See* Rules of Court, N.B. Reg. 82-73 (Can.). The United States federal rules present yet another instance of judicial authority to sanction parties who fail to meet judicially established timelines. *See* FED. R. CIV. P. 16(f)(1)(C).

sanctions are mandatory in nature.³¹⁰ Apart from targeting long delays, sanctioning powers have also been granted to judges to target any delay in a case *per se*.³¹¹

This Article noted earlier that the proportionality principle was introduced in procedural frameworks of both Canada and the United States, to check the abuse of process and abuse of discovery.³¹² Sanction frameworks play a vital role in controlling these abuses by supplying judges with wide powers to punish abusive conduct. For instance, Québec's rules license judges to impose costs on parties for their failure to adhere to the proportionality principle or for misusing court procedures.³¹³ Under Ontario's rules, judges have the power to sanction parties who inflate case valuation to wriggle out of mandatory simplified procedures and thus abuse regular procedures.³¹⁴ Moreover, the rules allow judges to sanction parties that file frivolous motions or act in bad faith to delay proceedings.³¹⁵ Further, Ontario's rules also authorize judges to impose personal costs on lawyers if they delay trials without reasonable cause or unreasonably resist summary judgments.³¹⁶ Alberta's rules allow judges to sanction parties for vexatious, evasive, abusive, oppressive, improper, or excessively lengthy conduct.³¹⁷ In the United States, the Texas rules authorize sanctions, including cost awards, for parties who file frivolous motions or pleadings.³¹⁸

With respect to discovery abuse *per se*, stringent sanctions are available in several Canadian provinces. For instance, under the Ontario rules, judges can impose costs, and strike out proceedings and

310. For instance, California rules mandates judges to dismiss an action if it is not brought to trial within five years after the commencement of the action. *See* CAL. CIV. PROC. CODE §§ 583.310, 583.360(a) (West 2024). Similarly, under the Alberta "drop dead" rule, a judge must dismiss an action if there has been no "significant advance in an action" in three years. *See* Alberta Rules of Court, Alta. Reg. 124/2010, s. 4.33(2). Like Alberta, Manitoba's rules also mandate dismissal on the same ground. *See* Court of King's Bench Rules, Man. Reg. 553/88, s. 24.02(1) (Can.). Ontario's rules provide that an action must be dismissed if it has not been brought to trial within five years of its commencement. *See* Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 48.14 (Can.).

311. For instance, Manitoba's rules permit judges to dismiss any action for inordinate and inexcusable delays. *See* Court of King's Bench Rules, Man. Reg. 553/88, s. 24.02(1) (Can.).

312. But note that Canadian proportionality regimes are not limited to discovery and are much broader in scope.

313. Code of Civil Procedure, C.Q.L.R. c. C-25.01, s. 341 (Can.).

314. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 76.13(3), (7) (Can.).

315. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 20.06 (Can.).

316. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 57.07 (Can.).

317. Alberta Rules of Court, Alta. Reg. 124/2010, s. 5.3(1) (Can.). Sanctions include, among others, imposition of costs, advance payment of costs, and affecting the interest amount to which a party is entitled. *Id.*

318. TEX. R. JUD. ADMIN. R. 7.2(f)(4).

evidence.³¹⁹ In the United States, the FRCP grants judges extensive power to “sanction both discovery abuse and the failure to comply with judicial orders.”³²⁰ California’s rules present another instance where a wide array of sanctions have been made available to judges by state procedures to deal with discovery abuse.³²¹ These sanctions include both monetary and non-monetary sanctions.³²² Sanctions against discovery abuse is a prominent aspect of the procedural frameworks in a majority of American states.³²³

2. Judges Do Not Apply Sanctions

The foregoing shows that both Canada and the United States have developed a very robust regime of sanctions to control actions of parties *and* lawyers that cause delay. These sanctions are remarkable in their range (*i.e.*, the variety of available sanctions) as well as in their breadth (*i.e.*, the variety of mischiefs they address). Thus, one could say that sanctions have firmly established judicial control over litigation management. Parties, it seems, hardly have any say in how they would like their litigation to proceed. Yet, party abuse is rampant. As with case management and proportionality, an analysis of the literature on sanctions suggests that sanctions have failed to deter abuse of procedures and delay-creating behavior of litigants and lawyers. And, unfortunately, one of the main reasons for this failure is, as we have seen in the cases of proportionality and case management, a lack of judicial commitment.

a. Judicial Nonenforcement of Sanctions in the United States

The literature suggests that judges have repeatedly failed to make effective use of their sanctioning powers. Recall that sanctions have been part of the FRCP since its inception. Reflecting on the remarkable range

319. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, ss. 34.14(2), 34.15(1), 35.05 (Can.).

320. Peterson, *supra* note 20, at 64 (referring to rule 37).

321. CAL. CIV. PROC. CODE § 2023.030 (West 2004).

322. For instance, judges can impose monetary sanctions against parties that avoid conferring with the opposing side to resolve discovery disputes. CAL. CIV. PROC. CODE § 2023.020. Monetary sanctions can also be imposed against a party that misuses the discovery process as well as the lawyer who advises such a course of conduct. CAL. CIV. PROC. CODE § 2023.030. Non-monetary sanctions include: (a) issue sanctions, *i.e.*, upon a finding of discovery abuse, judges are empowered to declare a fact pleaded by the adversely affected party as established; (b) evidence sanctions, *i.e.*, judges can prohibit a party that engages in discovery abuse from introducing a given matter into evidence; and (c) terminating sanctions, *i.e.*, judges can strike out pleadings, stay the proceedings, dismiss the action, render a default judgment, or issue contempt orders if a party engages in misuse of the discovery process. *Id.*

323. *See, e.g.*, TEX. R. CIV. P. 215.3; ARIZ. R. CIV. P. 37; FLA. R. CIV. P. 1.380; COLO. R. CIV. P. 37.

of discovery sanctions in the original version of the FRCP, one study in 1940 observed that, “[w]hile the variety of the possible courses of action gives the court a wide range of discretion, a zealous judge could make discovery a word of terror.”³²⁴ However, a quick peek into the history of the operation of the federal sanctions regime suggests that non-imposition of sanctions had become a concern early on.³²⁵ The 1940 Study noted previously, in fact, went on to state that even though on paper the range of discovery sanctions looked impressive, “[s]o far . . . the tendency is apparently in the opposite direction. The courts, exhibiting a generous attitude toward the recusant party, have deemed it better to withhold the thunderbolt on condition of future compliance.”³²⁶ Within just two decades of its operation, it became clear that the sanctions framework was not deterring abuses, and that judges bore some responsibility for this outcome. In 1958, Professor Maurice Rosenberg noted that despite being cognizant of the fact that discovery was being abused frequently and intentionally, judges were not enforcing discovery rules as written and instead were circumventing them with informal, unauthorized corrections.³²⁷ Rosenberg also identified an amazing amount of leniency in the judicial enforcement of discovery sanctions.³²⁸ He noted that judges were reluctant to impose sanctions even when parties flouted their directives to curb delinquent conduct.³²⁹ Cautioning against the prevalent judicial attitude of discounting the use of sanctions, Rosenberg pertinently observed:

[Rules surrounding sanctions] will work only if judges confronted with the task have unwavering determination to make them work. There is a vital difference between a discretionary melioration of sanctions in response to mitigating circumstances, which is proper, and nullification of the rule because of antipathy for its ends or means, which is not. Due

324. Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1339 (1978) (quoting James A. Pike & John W. Willis, *Federal Discovery in Operation*, 7 U. CHI. L. REV. 297, 326–27 (1940)).

325. For instance, reflecting on the application of Rule 11 sanctions in the original FRCP, Richard Marcus notes that “[w]hatever the apparent or intended importance of this provision, it was a paper tiger, and sanctions were almost never employed.” See Marcus, *Reining in the American Litigator*, *supra* note 30, at 1593.

326. Brazil, *supra* note 324, at 1339 (quoting Pike & Willis, *supra* note 324, at 327).

327. Rosenberg noted that instead of applying the full force of sanctions, judges were issuing conditional orders of sanctions—*i.e.*, issuing a *rule nisi*—a practice not warranted by the discovery rules. Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 495–96 (1958).

328. *Id.*

329. *Id.*

enforcement of this rule should not be sabotaged by judicial pignicketiness about its involving "merely" procedural matters. Its purpose is too important to permit casual disregard.³³⁰

Rosenberg's observations regarding judicial leniency were later echoed by a substantive review of the discovery literature published by the Harvard Law Association in 1961.³³¹ The review noted that both federal and state court judges were neglecting to apply sanctions, even when faced with clear noncompliance.³³²

Subsequently, in the 1960s, Columbia University initiated the Field Survey to study discovery problems that were ailing the federal justice system.³³³ Tellingly, the survey reported that judges rarely sanctioned discovery abuses.³³⁴ Out of 527 dockets studied, effective sanctioning procedure was observed in only one docket.³³⁵ Rosenberg's work and the Field Survey results greatly influenced policymakers, and the FRCP was amended in 1970 to incorporate the changes suggested by them.³³⁶ In the explanatory note appended to the amendment, the Advisory Committee observed that "the courts do not utilize the most important available sanction to deter abusive resort to the judiciary" and that the changes in the language of discovery rules had been made to "*encourage* judges to be more alert to abuses occurring in the discovery process."³³⁷

However, later studies indicated that the 1970 amendment failed to curb discovery abuse. The 1976 Pound Conference found that discovery abuse was contributing to severe court delays. It held both lawyers and judges accountable and called for immediate action to address the

330. *Id.* at 496. Rosenberg, however, attributed the dormancy of sanctions to the design flaw and language ambiguity of discovery rules in the FRCP. According to him, judicial reluctance to apply discovery sanctions could not be checked unless the "verbal barriers" were removed by an effective revision of the rules. Brazil, *supra* note 324, at 1340 (citing Rosenberg, *supra* note 327, at 486, 489-94).

331. The Harvard Law Review Association, *Developments in the Law -- Discovery*, 74 HARV. L. REV. 940, 991 (1961).

332. *Id.* (quoted in Brazil, *supra* note 324, at 1340-41).

333. PROJECT FOR EFFECTIVE JUST., FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY: REPORT TO THE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE (1965).

334. However, note that the Field Survey also concluded that discovery abuse was not a significant problem. See Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of "Tort Reform": Has the Case Been Made?*, 42 AM. U. L. REV. 1465, 1490 n.119 (1993).

335. WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 155 (1968).

336. William T. Drescher, *Discovery Sanctions Under the Federal Rules of Civil Procedure: A Goal-Oriented Mission for Rule 37*, 29 CASE W. RES. L. REV. 603, 603 n.2 (1979).

337. FED. R. CIV. P. 37 advisory committee's notes on 1970 amendment (emphasis added).

problem.³³⁸ The Pound Conference was followed by the Report of the Special Committee for the Study of Discovery Abuse in 1977.³³⁹ The Committee concluded that major changes in the FRCP were needed to deal with the problem of misuse of the discovery process.³⁴⁰ The Committee emphasized the need to sanction parties and lawyers who misused the discovery process.³⁴¹

Reflecting on the reasons for the feeble and ineffectual application of sanctioning powers, Judge Wayne Brazil, in a widely acclaimed article published in 1978, strongly decried the claim (as advanced by Rosenberg) that the problem of desultory application of sanctions could be attributed to the language and the structure of discovery rules.³⁴² Attributing the problem squarely to judicial reluctance, he observed:

Had they been so inclined, judges probably could have relied on their general authority to control the litigation process and the more specific powers conferred by Rules 26 and 37 to justify using the kinds of disciplinary measures that the changes in Rule 37 would make available. The history of efforts to curb discovery abuse by improving the machinery for sanctions firmly supports this skepticism. This history strongly suggests that deficiencies in policing the discovery system are not attributable to the language, scope, and structure of the rules governing sanctions.³⁴³

In fact, a 1979 paper written by a district judge from California went so far as to suggest that discovery abuse and ineffective sanctions were a result of a “gentlemen’s agreement” between opposing lawyers to not press for sanctions against each other, and that this practice had the “tacit approval of the bench.”³⁴⁴

338. Ronald E. McKinstry, *Civil Discovery Reform*, 14 FORUM (A.B.A. SEC. OF INS., NEGL. & COMP. L.) 790, 791 (1979).

339. *Report of the Special Committee for the Study of Discovery Abuse*, 1977 A.B.A. SEC. OF LITIG. 152.

340. McKinstry, *supra* note 338, at 792.

341. Julius B. Levine, “Abuse” of Discovery: Or Hard Work Makes Good Law, 67 A.B.A. J. 565, 566 (1981).

342. Brazil, *supra* note 324, at 1338–42.

343. *Id.* at 1339. Judicial nonenforcement of sanctions has also been identified by research papers that have carried out a statistical analysis of data on applications of sanctions. For instance, one article found that between 1938 and 1976, judges applied Rule 11 sanctions on their own accord in only two cases. See D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some Striking Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34, 36 (1976).

344. Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 272 (1979).

Eventually, works of Brazil and other scholars created an impact on policymakers, and the FRCP was subsequently amended in 1983 to further tighten discovery sanctions. Citing Brazil's work, the Advisory Committee noted that the judicial reluctance was a problem in the way of effective imposition of sanctions.³⁴⁵ Consequently, the 1983 amendment inserted a new provision that *required* judges to punish lawyers who resorted to disproportional discovery.³⁴⁶

However, even the 1983 reform, and those that succeeded it, could not alter the culture of judicial inaction vis-à-vis effective application of sanctions. This Article has discussed in detail the findings of several national and state surveys conducted in the United States that show that judges do not enforce case management, proportionality, and discovery rules. These findings testify to the fact that the judicial attitude towards sanctions—that prevailed in the early years of the FRCP—has not undergone substantial metamorphosis despite reforms, for how does one enforce a rule if not by imposing remedies for its violation. Two surveys, in fact, directly spoke to this problem. About 86 percent of the respondents in the 2009 ACTL Survey reported that judges rarely imposed discovery sanctions.³⁴⁷ In 2010, when the Arizona Survey asked respondents about judicial enforcement of disclosure rules, only 21 percent stated that judges consistently imposed disclosure rules.³⁴⁸ Only 19 percent reported that rules were enforced half the time.³⁴⁹ However, 55 percent of the respondents reported that judges rarely enforced the rules.³⁵⁰

The findings of these surveys still find resonance in scholarly writings and reports that are of a more recent origin. For instance, a 2017 paper on discovery sanctions against lawyers noted that “[d]espite the attention they get for being ‘on the rise,’ sanctions against parties for conduct in discovery are relatively rare. They are rarer still against counsel, as ‘[m]ost courts apply a mild de facto presumption against sanctioning counsel for discovery misconduct’”³⁵¹

Similarly, in a survey of federal judges published in 2018, nearly 87 percent of judge respondents reported that they rarely sanctioned

345. FED. R. CIV. P. 26 advisory committee's note to 1983 amendment.

346. *Id.*

347. ACTL INTERIM REPORT, *supra* note 226, at A-4.

348. ARIZONA BENCH AND BAR SURVEY, *supra* note 148, at 26.

349. *Id.*

350. *Id.*

351. Murphy, *supra* note 275, at 62 (first quoting Willoughby et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 791 (2010); then quoting Thomas Y. Allman, *Achieving an Appropriate Balance: The Use of Counsel Sanctions in Connection with the Resolution of E-Discovery Misconduct*, RICH. J.L. & TECH., Spring 2009, at 1, 25 (second alteration in original) (footnotes omitted)).

parties for discovery mistakes in the past twelve months.³⁵² The 2017 version of the same survey had noted that judges' inaction regarding discovery misconduct by lawyers was a persistent complaint of the bar and suggested that federal judges adopt a less forgiving approach.³⁵³

b. Judicial Nonenforcement of Sanctions in Canada

There is a dearth of literature analyzing the application of procedural sanctions in Canada. Unlike the United States, we do not come across surveys or scholarly works that examine how well the sanctions regime has functioned in Canada. However, there are enough indications that judicial nonenforcement of sanctions is a concern in Canada as well.

Writing in the Canadian context, Professor Piché, as she then was, lamented the fact that judges aggravate court delays by failing in their duty to sanction violations of time limits.³⁵⁴ Indications that sanctions are not being applied effectively by Canadian courts also comes from the literature—discussed earlier in this Article—on the nonenforcement of case management,³⁵⁵ proportionality, and discovery obligations.³⁵⁶ This literature should serve as a surrogate for the argument that judges have not effectively applied sanctions to control party abuse because sanctions *are* the means through which enforcement of case management, proportionality, and discovery obligations takes place. Besides, strong indications of judicial reluctance in sanctioning abusive and dilatory behavior of parties and lawyers emerge from the influential 2003 report on the discovery process by the Ontario Discovery Task Force.³⁵⁷ In what follows, this Article catalogs some of the important observations made by the Discovery Task Force Committee regarding enforcement of discovery sanctions in Ontario.

The Task Force found that while Ontario's rules offered an "adequate range of sanctions" to judges to tackle discovery abuse, there were serious problems with the consistency and strictness of sanctions.³⁵⁸ These issues, the report indicated, were consistently raised during the consultation.³⁵⁹ The Task Force reported that it was widely perceived that judges were neither taking discovery abuse seriously nor effectively imposing sanctions.³⁶⁰ And this judicial disengagement was allowing

352. See EXTERRO, 2018 FEDERAL JUDGES SURVEY 8 (2018).

353. See EXTERRO, 2017 FEDERAL JUDGES SURVEY 14 (2017).

354. Piché, *supra* note 19, at 140.

355. See *supra* notes 109–121, 152–153 and accompanying text.

356. See *supra* notes 261–267 and accompanying text.

357. DISCOVERY TASK FORCE, *supra* note 42, at 79.

358. *Id.* at 146.

359. *Id.* at 79.

360. *Id.*

discovery abuses to thrive.³⁶¹ With respect to the statistical findings emerging from the consultation survey conducted by the Task Force, “[s]tricter enforcement of sanctions by judiciary” ranked first among the possible measures to improve the discovery process.³⁶² The measure was supported by 79 percent of the respondents.³⁶³ Accordingly, the Task Force recommended that to “deter unjustified breaches of discovery obligations,” judges must apply sanctions in ways that are meaningful and consistent.³⁶⁴

II. AN INCOMPLETE SYMBOLON: THE MISSING HALF OF CIVIL JUSTICE REFORM

This Article began by foregrounding the fact that we are now dealing with a new problem of delays because reform interventions have changed the nature of the problem. The initial reform movements were undergirded by the assumption that procedures allowed a disproportionate amount of autonomy to parties and lawyers to control the pace and the content of litigation. And this excess of autonomy was being abused by these self-serving actors to *win*, at all costs, the *battle* of litigation. Given the latitude that the original FRCP and the early Canadian procedural frameworks afforded to parties, the assumption that party autonomy required constraint and that the adversarial nature of the litigation process needed to be attenuated appears reasonable. As this Article has shown, procedural reforms have acted out this assumption to a striking degree. The entire contemporary procedural apparatus in Canada and the United States seems to be about controlling parties, holding them accountable for their conduct,³⁶⁵ and punishing them for deviations from rules. Mechanisms to restrict party abuse that this Article has discussed—case management, proportionality, and sanctions—are reflective of the policy of party control. This control has been sought to be justified in the name of efficiency, *i.e.*, saving time, expense, and resources. This Article takes no issue with the policy to demand more accountability from parties. After all, the problem of delays is serious, and courts’ time and resources will always be limited.

However, controlling parties to control delays is but one of the two assumptions that constitute the reform substructure. The other

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.* at 146.

365. For instance, Québec’s Civil Procedure Review Committee’s Ferland Report stated that it was presenting a new vision of civil procedure to counter judicial delays by establishing, among others, the principle of accountability of the parties, heightened judicial intervention, and proportionality. See *Rapport d’évaluation de La Loi Portant Réforme Du Code de Procédure Civile*, *supra* note 68, at 31–33.

assumption is that judges are the best suited legal actors to implement the policy against judicial delays. Accordingly, reforms have deemed it imperative to take control of litigation out of the hands of parties and vest it in judges. Detailed accounts of various procedural provisions that this Article has canvassed should help readers easily discern that the power to control litigation now lies with judges. In fact, the progressive strengthening of judicial control is accompanied by a gradual weakening of party autonomy. This Article takes no issue with the judicialization of litigation either. What it does take issue with is the policy of transferring powers to control litigation to judges without creating mechanisms—especially those that are internal to the judiciary—that hold judges accountable for the ways in which they exercise, or fail to exercise, these powers.

The concern with accountability is important because powers of litigation management have been granted to judges with the specific purpose of reining in the recalcitrant actors whose conduct abuses and delays court processes. Without accountability mechanisms in place, it is difficult to assess whether judges are exercising control over cases in ways that are in keeping with the spirit of reforms. The detailed cataloging of instances of nonenforcement of case management, proportionality, and sanction rules gives a clear indication that they are not. Just to illustrate the problem, we may turn to Québec and Ontario's rules. Procedural frameworks in both jurisdictions mandate that judges must factor in proportionality in managing cases.³⁶⁶ But how do we assess whether judges are following the mandate or not? Québec and Ontario's rules create no mechanism for such an assessment. Further, they also do not establish consequences (supervisory or disciplinary) for judges who do not adhere to the mandate. In the absence of accountability mechanisms, these mandates get reduced to mere hortatory statements and thus defeat the very purpose of proportionality reforms. Québec and Ontario's rules are but just two illustrations that highlight the absence of judicial accountability mechanisms—a glaringly common element of all procedural frameworks that make managerial judging their central attribute. Notwithstanding the fact that procedural frameworks cast a *duty* upon judges to enforce rules, the absence of accountability mechanisms gives judges the choice not to be bound by them.

The structure of a case-managed litigation process is markedly different from the ways in which things were done in the past. Case management has transformed the roles legal actors play in the litigation process. At the same time, it has also revamped the accountability regime that governs them. Interestingly however, under contemporary case-

366. For Ontario, see Rules of Civil Procedure, R.R.O. 1990, Reg. 194, ss. 1.04, 29.2 (Can.). For Québec, see Code of Civil Procedure, C.Q.L.R. c. C-25.01, s. 18 (Can.).

managed litigation frameworks, accountability against inefficient behavior is to be exacted from only two of three legal actors involved, *i.e.*, parties and lawyers. Even as efficiency reforms pivot entirely on active judicial enforcement, an equivalent, if not identical, framework that fixes accountability for judicial behavior that engenders delay is conspicuously absent. While case management is the duty of both litigants and judges, in the final analysis, the real responsibility of keeping litigation efficient, proportional, and timely lies with the judiciary. However, even though these responsibilities are included as an important aspect of the party-accountability regime, they do not seem to be an aspect of judicial accountability. Even as case management recasts traditional judging into its managerial avatar, the accountability framework applicable to managerial judges is the same that applied to traditional judges at the start of nineteenth century, namely, explanatory accountability, supervisory and precedential accountability, and accountability through judicial disciplining mechanisms.³⁶⁷ However, it is important to note that these traditional accountability mechanisms were designed to cater to an adversarial system of litigation. They were not built to respond to issues generated by a highly unorthodox approach of case-managed litigation process—a system predicated on an altogether different foundation. For instance, managerial judges are not accountable to explain managerial decisions because these decisions are largely unwritten and unreported.³⁶⁸ Further, appellate review—the most salient of traditional accountability mechanisms—is largely unavailable against managerial decisions. The appellate framework, in fact, has the opposite effect of insulating managerial judges from account-giving obligations.³⁶⁹

367. Appellate review and judicial precedents are two of the primary mechanisms that establish judicial accountability under contemporary case-managed systems. See Marcus, *Reining in the American Litigator*, *supra* note 30, at 9 (quoting Peterson, *supra* note 20, at 59–60). However, as Professor Richard Marcus observes, these two mechanisms were also the primary ways of ensuring judicial accountability at the beginning of nineteenth century. *Id.* (quoting Peterson, *supra* note 20, at 59).

368. Peterson, *supra* note 20, at 76; see also Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 425 (2007) (observing that managerial decisions are seldom documented or made public and often lack written explanations).

369. Appellate courts take a highly deferential approach to trial judges' decisions that are based on discretion. They only reverse a discretionary decision if the appellant can prove that the trial judge *abused* their discretion. Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 72 (2007). This standard of review is a high barrier to cross for any appellant objecting to a discretionary decision. But this standard is even more difficult to meet when the discretionary decisions being appealed are managerial ones because in appeals against managerial decisions, the appellant does not know the articulated reasons justifying why the judge used their discretion in one way or the other. Peterson, *supra* note 20, at 84. Therefore, they have no basis to criticize the decision. Further, since managerial decisions are not governed by rules but by the subjective assessment of the trial judge,

Also, since managerial decisions are largely unwritten and unreported, judicial precedents are a rarity.³⁷⁰ Importantly, managerial decisions, being *procedural rulings*, have been largely kept out of the purview of the judicial discipline process.³⁷¹ The contemporary judicial accountability framework, therefore, is out of sync with the present-day unorthodox approach to litigation where judges both control and drive the litigation.

As we have seen, reforms have been quite attentive to create a network of rules to allow judges to hold parties accountable for their delay-creating conduct. But when it comes to judges, reforms do not admit, at least overtly, that absences of managerial accountability mechanisms create a problem for enforcement of rules. The Advisory Committee in the United States and taskforces in Canada have recognized that judges are not enforcing rules. But their response has been to *encourage* judges to apply rules by giving them more powers. Lack of power, however, has never really come in the way of judicial commitment to curb party abuses.³⁷² Courts have always maintained that they have inherent authority to control court processes and have relied on this power to manage litigation even prior to the advent of case management.³⁷³ But the fact that policymakers have had to frequently *encourage* judges to restrict abuse—and we have noted this in several Advisory Committee Notes and Canadian reports—suggests the need for an accountability framework for judicial exercise of case management powers since the lack of judicial commitment to reforms continues.

Another fact that substantiates the need for an accountability framework is that although we have moved to a case-managed (and therefore, judge-centered) litigation process, we are still witnessing the prevalence of a judicial culture that used to exist in the pre-case management era. This Article has pointed out that the lack of judicial commitment to restrict delays and abuses was a problem that emerged

appellants do not have a basis in law to compare and counter the propriety of the decision. See Rendleman, *supra*, at 96.

370. Peterson, *supra* note 20, at 45, 76.

371. See Judicial Improvements Act of 2002, 28 U.S.C. § 352(b)(1)(A)(ii) (stating that a complaint may be dismissed if it is “directly related to the merits of a decision or procedural ruling”).

372. Brazil, *supra* note 324, at 1342–43 (“History strongly suggests that the problems that continue to plague the sanctioning machinery are not primarily attributable to deficiencies in judicial power.”); see Marcus, *Slouching Towards Discretion*, *supra* note 31, at 1588.

373. See Sarah M.R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIA. L. REV. 947, 984 (2010) (“It is a long-established principle of the law that a court has the inherent power ‘to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.’” (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936))); *Link v. Wabash R.R.*, 370 U.S. 626, 629–31 (1962).

within just two decades after the adoption of the FRCP. But the lack of judicial commitment to restrict these very same mischiefs persists even now, only with greater severity. While judicial reluctance in restricting parties in the pre-case management era may be understandable, continuance of this judicial attitude in the present times, is not.³⁷⁴ Procedural frameworks prior to the advent of case management were oriented towards giving maximum latitude to parties to facilitate the presentation of disputes to courts in their entirety. Parties were the drivers and judges were passive arbiters of disputes. Thus, judges were not responsible for the pace of litigation. However, case-management was specifically introduced to reverse this dynamic.³⁷⁵ It transferred the control to judges and made them responsible for managing litigation. Nonenforcement of case management rules, therefore, flies in the face of that responsibility. But if judges are able to perpetuate the same old culture of lack of commitment to restrict delays and abuses, it is because their actions do not lead to consequences.

Evidently, therefore, the reform approach to strengthening judicial control over litigation without instituting accountability mechanisms has altered the nature of the problem of delays. It has given rise to the new problem of delays where procedural frameworks allow judges the option of choosing complacency and reluctance over commitment to reforms. As is borne out by instances recounted in this Article, this judicial complacency in imposing efficiency reforms has allowed the culture of abuse and delays to flourish. At its core, case management reforms are a step towards a cultural reform of the legal system. However, when judges do not commit to case management rules, they end up perverting the objectives of reforms. When judges frequently extend deadlines, they reinforce expectations that extensions will be easily granted in the future as well.³⁷⁶ When they regularly withhold sanctions, they encourage parties to discount the value of sanctions and continue with their abusive behavior.³⁷⁷ When judges do not address discovery abuse, they are

374. The initial equity driven orientation of the FRCP allowed parties wide latitude to present the case in its entirety and on its merit. That orientation also gave judges wide procedural discretion. But the discretion was given to facilitate decisions based on the substance of the case and not on its form. See Marcus, *Slouching Towards Discretion*, *supra* note 31, at 1563.

375. Marcus, *Reining in the American Litigator*, *supra* note 30, at 4–5; see also *id.* at 13 (“[E]mergence of managerial judging—and its attendant limitations on lawyer latitude—can be seen as a response to the great broadening of that latitude effected by the adoption of the Federal Rules.”).

376. Joan Humphrey Lefkow, *What Persuades when the Judge Has Discretion?*, LITIG., Fall 2004, at 21, 24.

377. E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 313 (1986); Carl B. Schultz, *Sanctioning Defendants’ Non-Willful Delay: The Failure of Rule 55 and a Proposal for Its Reform*, 23 U. RICH. L. REV. 203, 222 (1989).

practically sanctioning a culture where it thrives.³⁷⁸ In short, when judges—whose leadership is critical to ushering in the culture of efficiency—refuse to commit to reforms, they end up perpetuating cultural stereotypes that they are expected to abolish. Thus, despite the superpowers given to judges, parties get to perpetuate the same old delay-creating tricks and tactics that reform after reform have sought to annihilate. Hence, as per the new problem of delays, parties still remain the principal culprit behind court delays, but only because judges allow them to carry out their self-serving machinations. Lack of judicial power or personnel is not the reason for court delays. Unaccountable judicial managerialism is.

CONCLUSION

To mitigate the seemingly insurmountable problem of court delays, Canada and the United States have taken decisive steps to move towards a civil justice system that privileges efficiency and judicial economy. They have done so by replacing their adversarial models of litigation with a case-managed litigation process. The contemporary structures of the North American civil justice systems are a culmination of over five decades of reforms at the federal, state, and provincial levels. Structurally, court systems in the two jurisdictions are almost unrecognizable to what they used to be until the late twentieth century. Yet, the problem of unacceptable delays continues to severely impact courts in both Canada and the United States.

This Article has identified a hitherto less understood and rarely examined cause behind the failure of case management reforms: lack of judicial commitment. This Article demonstrates that there exists a pervasive judicial complacency with respect to enforcement of efficiency reforms. What makes this Article's finding novel is that, so far, there is no scholarly work that has been able to identify judicial complacency as a major reason behind the failure of case management and proportionality reforms. One finds only scattered references in the literature regarding lack of judicial commitment to case management. This Article meticulously integrates the evidence from wide ranging sources from the Canadian and American literature and court practices, as well as sources across multiple decades, to bring the problem into a sharper focus. By collating the evidence together, this Article shows that instances of judicial complacency with respect to the enforcement of case management reforms are not sporadic or isolated but quite the opposite. The judicial behavior is pervasive and deeply entrenched in the judicial practice. Since there is no research so far that undertakes a wide-scale

378. See DISCOVERY TASK FORCE, *supra* note 42, at 144.

consolidation of evidence, lack of judicial commitment has never been regarded as one of the prime reasons for court delays. This research recognizes, and brings to the forefront of delay studies, judicial complacency in enforcing case management as one of the primary causes of court delays.

Justice system delays are both a Sisyphean and a polycentric problem that is deeply embedded in the legal history. Therefore, it is not the thesis of this Article that a single set of solutions—that is, judicial commitment to reforms—can completely resolve the problem. However, what this Article asserts is that if case management reforms are to work, judicial commitment to its enforcement is critical and must be ensured. If reforms do not see to it, then any attempt at making case management work would be merely straining out a gnat while swallowing a camel. It is imperative, therefore, that conversations about the role of judges in implementation of efficiency reforms be mainstreamed. The criticality of judicial leadership to the success of efficiency reforms is not lost on anyone. Yet, even as reforms have failed to impact, there seems to be a collective silence regarding a genuine conversation about the role of judges in that failure. Whether it is access to justice scholarship or reform studies, it is astonishing to note how they all take the judicial commitment to reforms as a gospel truth, never for a moment considering it worth scrutiny. The irony is that when judges talk about the failure of reforms, they often attribute the reasons to various factors such as lack of judges, a prevalent culture of delay within the legal profession, procedures, or outdated technology, yet they overlook their own contribution to the issue.

Ironically, the true measure of reform's effectiveness lies not in the reforms themselves, but in how judges choose to wield the enhanced powers bestowed upon them.³⁷⁹ For all the structural shifts and legislative ambitions, the spirit of change ultimately depends on the hands that interpret and apply it. In this quiet paradox, the success of transformation is tethered to the very discretion it seeks to guide—where the promise of progress must pass through the gatekeepers of justice, whose choices shape the reform's reach and resonance. It is, therefore, time to lift the cloak of invisibility from this issue. This precisely is the goal of this Article: to make the problem visible and known—to broach the unspoken and to draw attention to what too often remains hidden in the shadows of institutional discourse.

379. See Frédéric Bachand, *Les Principes Généraux de la Justice Civile et le Nouveau Code de Procédure Civile* [*The General Principles of Civil Justice and the New Code of Civil Procedure*], 61 MCGILL L.J. 447, 450 (2015).