

Effective and Affordable Civil Justice

REPORT OF THE CIVIL JUSTICE REFORM WORKING GROUP
TO THE JUSTICE REVIEW TASK FORCE

November 2006



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Executive Summary: Our Vision

The Civil Justice Reform Working Group was formed to explore fundamental change to British Columbia's civil justice system from the time a legal problem develops through the entire Supreme Court litigation process. This mandate includes all types of non-family civil matters. A list of our members and a description of our mandate and methodology are included in Appendix A. We envision a civil justice system that assists citizens in obtaining just solutions to legal problems quickly and affordably. This vision involves providing everyone, regardless of their means, with access to civil justice through two broad strategies:

- providing integrated information and services to support those who want to resolve their legal problems on their own before entering the court system, and
- providing a streamlined, accessible Supreme Court system where matters that can be settled are settled quickly and affordably and matters that need a trial get to trial quickly and affordably.

This report provides three key recommendations for implementing these two strategies; the third recommendation has eight components.

The first recommendation involves the introduction of a “hub,” a single place where people can go to get the information and services they require to solve legal problems on their own. The hub will:

- coordinate and promote existing legal-related services
- provide legal information
- establish a multidisciplinary assessment/triage service to diagnose the legal problem and provide referrals to appropriate services, and
- provide access to legal advice and representation if needed through a clinic model.

The second recommendation is that parties to Supreme Court actions attend a case planning conference before they engage the system beyond initiating and responding to a claim. The conference will address:

- settlement possibilities and processes

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- narrowing of the issues
- directions for discovery and experts
- milestones to be accomplished
- deadlines to be met, and
- setting of the date and length of trial.

The third recommendation proposes a complete rewriting of the Supreme Court Rules. We recommend that the new rules:

- create an explicit overriding objective that all proceedings are dealt with justly and pursuant to the principles of proportionality
- abolish the current pleading process and instead adopt a new case initiation and defence process that requires the parties to accurately and succinctly state the facts and the issues in dispute and to provide a plan for conducting the case and achieving a resolution
- limit discovery, while requiring early disclosure of key information
- limit the parameters of expert evidence
- streamline motion practice
- provide the judiciary with power to make orders to streamline the trial process
- consolidate all three regulations regarding the Notice to Mediate into one rule under the Supreme Court Rules, and
- provide opportunities for litigants to quickly resolve issues that create an impasse.

There are five key principles that form the underlying basis of this vision:

- Proportionality—the amount of process used will be proportional to the value, complexity and importance of the case (Appendix B)
- Flexibility and matching—the process used will be designed to fit the needs of the case and the parties (Appendix C)
- Judicial intervention—judges and masters will take a more active role in the management and resolution of cases (Appendix D)
- An expanded role for lawyers—lawyers will use an expanded toolkit that reflects a multitude of process options to assist their clients in quickly arriving at just solutions (Appendix E)
- Preservation of the rule of law—the new system must support and be guided by the rule of law (Appendix F).

Our recommendations address what we perceive as a widening gap between our current system and our vision. The indicators of this gap (described more fully in Appendix G) include:

- a decrease in the number of civil filings
- a decrease in the number of traditional trials

- a dramatic increase in trial length
- high levels of public dissatisfaction with the civil justice system indicated by empirical research and anecdotal evidence, and
- similar trends experienced by other Canadian jurisdictions and common law jurisdictions around the globe.

“Too expensive, too complex and too slow.” These are the words used by many members of the public and litigants of all types in British Columbia to describe our present civil justice system. While our present system has many excellent features, maintaining the status quo is not an option; fundamental change is necessary. We believe our recommendations will help people solve their legal problems quickly and affordably.

Summary of Recommendations

Recommendation 1: Create a central hub to provide people with information, advice, guidance and other services they require to solve their own legal problems.

Recommendation 2: Require the parties to personally attend a case planning conference before they actively engage the system, beyond initiating or responding to a claim.

Recommendation 3: Create new Supreme Court Rules.

Recommendation 3.1: Rewrite the Supreme Court Rules based on an explicit overriding objective that all proceedings are dealt with justly and pursuant to the principles of proportionality.

Recommendation 3.2: Replace the current pleadings process with a new process requiring the parties to accurately and succinctly state the facts and the issues in dispute as well as the plan for conducting the case and moving to resolution.

Recommendation 3.3: Limit available discovery, while requiring early disclosure of key information.

Recommendation 3.4: Reduce expert adversarialism and limit the use of experts in accordance with proportionality principles.

Recommendation 3.5: Streamline motion practice by resolving issues at the case planning conference and by placing limits on the hearing process.

Recommendation 3.6: Empower the judiciary to make orders to streamline the trial process.

Recommendation 3.7: Consolidate all three regulations regarding the Notice to Mediate into one rule under the Supreme Court Rules.

Recommendation 3.8: Provide opportunities for litigants to resolve issues that create an impasse early and cost-effectively, but limit interlocutory appeals.

1

An Information/Assistance Hub

Recommendation 1: Create a central hub to provide people with information, advice, guidance and other services they require to solve their own legal problems.

This will be accomplished by:

- supporting dispute prevention and planning through plain language, legal education, preventive law and systems design;
- facilitating access to mediation or other dispute resolution processes;
- creating a central hub initiated by government and guided by an advisory board of key stakeholders to:
 - coordinate and promote existing legal-related services
 - provide legal information and appropriate referrals to other services
 - establish a multidisciplinary assessment/triage service to diagnose the problem and provide referrals to appropriate services
 - provide access to legal advice and representation if needed through a clinic model; and
- resolving two key barriers to lawyers participating in legal advice clinics:
 - conflict of interest issues
 - unbundling of legal services.

1.1 Our vision of the hub

Our vision is for British Columbia’s civil justice system to establish a single place (the “hub”) where people with legal problems can find help. The hub will provide a variety of different types of assistance to help people solve their legal problems quickly and effectively, including:

- a central source of legal information
- coordination and promotion of legal-related services
- a multidisciplinary assessment/triage service to diagnose the problem and provide referrals to appropriate services
- access to legal advice and representation, if needed, through a clinic model.

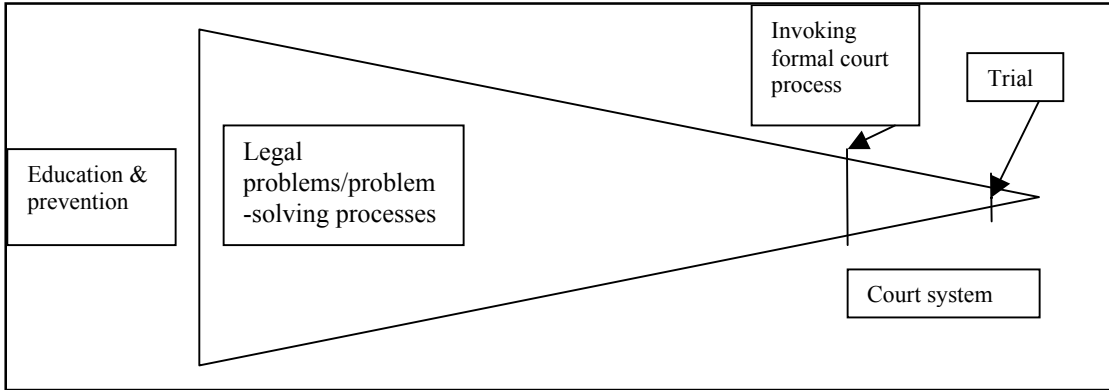
1.2 An effective pre-action system

While it is upon the strong foundation of the court system that we can build a more effective pre-litigation problem-solving system, the vast majority of disputes are resolved without commencing a court action. In this context, the court system is only one part, albeit a very important part, of the “legal

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system”¹ and it is usually invoked long after the problem develops. At its most simple level, we can imagine the entire legal system as a triangle, as shown in Figure 1.

Figure 1: The legal system as a triangle



In this chapter we will refer to problems with a legal component as “legal problems,” even though we recognize that most problems are multifaceted—that is, they have financial, relational and emotional aspects, as well as legal characteristics.² As shown in Figure 1, over time, some legal problems may become disputes, some of those may reach the steps of the courthouse, and a very small minority will be adjudicated in court.³ There is a natural funnelling or winnowing process through which legal problems are resolved.

Most people want to resolve their own legal problems early, directly and privately. Even those who require the assistance of a lawyer want to be part of the decision-making about both process and result. Assuming that people have access to the information and services they require to make good decisions about the resolution of their legal problems, they should be encouraged to try to resolve problems on their own. The difficulty, however, is that people do not often have easy access to the information, skills, advice and other services that they need to obtain a just resolution of their legal problems on their own. Some settle their legal problems by withdrawing or giving up; others end up in the court system when another form of resolution was available and more appropriate for their situation. A person with a legal problem could spend significant time and resources bouncing around in the present system without solving the problem.

¹ The term *legal system* is used deliberately to acknowledge that the problem may need the assistance of institutions other than the courts (i.e., administrative tribunals, government agencies, etc.).

² Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (UK: Hart Publishing, 1999).

³ Less than 3% of civil cases filed in BC are adjudicated through a traditional or summary trial. (For more information, see Appendix L: The Trial Rate.)

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The present civil justice system requires people to embark on a complex journey in order to resolve their problem. Unless a person has enough resources to hire a lawyer at the outset, there is no single place that the person can go to get the information and assistance he or she needs to resolve the legal problem.

Our aim is to ease that journey, by:

- promoting dispute prevention
- encouraging early and direct problem-solving
- making information, processes and services available in one place
- providing a guide to help people select the best processes for their problem, and
- assisting people in manoeuvring through the processes they have selected to reach a resolution.

Related to this vision is the need to streamline the steps required to commence a proceeding. If people wish to initiate a legal proceeding in a court or tribunal, ideally they should be able to complete and file a single form at any registry rather than having to sort out which level of court, registry location or administrative body is appropriate. The concept of a “single justice window” deserves further research in order to simplify the system for the user and reduce the confusion caused by multiple specialized registries. We are including this topic in our list of matters requiring additional consideration in Appendix P: Topics Needing Further Consideration.

1.3 Dispute prevention and planning

With proper planning, many legal problems can either be avoided altogether or resolved through specially designed resolution mechanisms. Although the literature assigns creative titles to this approach, such as “preventive law,” “private ordering” or “conflict management,” it really involves common-sense planning.

There are a number of ways to encourage this approach, including the use of plain language, education, preventive law, and systems design and planning. These topics are explained more fully in Appendix H: Pre-action Issues.

1.4 Assisting people in resolving their own legal problems

The need for information and assistance

If the system is to encourage effective problem-solving, it must make information and assistance as simple and accessible as possible. Each person

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has a different level of need for information and assistance.⁴ For the purpose of our analysis, we focused on the following related needs:

- legal information
- facilitation services (facilitated negotiation, mediation, conciliation, etc.)
- legal advice, and
- legal representation.

Existing services

In the course of our research, we discovered that while most of the ingredients for a workable pre-litigation problem-solving system already exist, they are not well catalogued, coordinated, promoted, streamlined or evaluated. (A summary of information about existing services and coordination is included in Appendix H: Pre-action Issues.) As a result, information and assistance is difficult to find and varies significantly in different areas of the province. Considerable effort is required to bring all the pieces of this puzzle together into a coherent whole.

The information and assistance hub

The first step towards achieving these goals is to create a single place that is well known by the public and easy to find, where people can obtain access to all of the information, services and advice they require. This place is referred to in this report as the “hub.”⁵ The hub will enable people to access the system more quickly and effectively. It will simplify access by providing one place for people to go to begin the resolution process.

The hub will also be a place where people can obtain information about, and referral to, the appropriate organizations for dealing with their problems, including administrative tribunals. Since people use different pathways to obtain information, the hub should have a physical presence in as many

⁴ The report from a March 2005 summit, “The Future of Self-Represented Litigation,” jointly sponsored by the US National Center for State Courts and the State Justice Institute, provides a wealth of information about access to justice issues in the US, with a focus on the self-represented litigant. Two important themes of the summit were the wide range of needs self-represented litigants have to which programs and service providers must respond, and the importance of the triage/matching process: “Individual litigants will best be served, and a fully accessible system built, when programs take into account the level of service that each litigant needs and directs that litigant to that service. That assessment will need to take into account three factors: the type of case, the particular facts of the case, and litigant characteristics.” National Center for State Courts, *The Future of Self-Represented Litigation: Report from the March 2005 Summit*, <http://www.ncsconline.org/>, 11. **Note:** All websites referenced in this report were accessed on September 20, 2006, unless otherwise noted.

⁵ Initially, we used the terms *single door* or *information central* to describe this important concept. However, when the Family Justice Reform Working Group released its report, *A New Justice System for Families and Children*, it was apparent that they had reached similar conclusions and called their concept “the hub.” The Civil Justice Reform Working Group has adopted this term as equally applicable to civil non-family problems.

locations as possible (possibly in courthouses), and it should also be accessible through the Internet and by telephone.⁶ Investment in effective technology has proved to be a key part of the success of similar programs, such as the Citizen’s Advice Bureau in the UK. Information about the hub should be available in brochures stocked in public places (libraries, courthouses, community agencies, government offices, etc.), and it should be promoted as the place where people can obtain assistance to solve their legal problems.

The details of governance and funding for the hub will need to be clearly defined. However, we suggest that government take a lead role in coordinating design and implementation efforts. We propose the formation of an advisory board involving representatives of all key stakeholders to provide advice and guidance and that regular “summits” of all participants be organized to ease communication, to benefit from everyone’s ideas, and to ensure that all stakeholders are engaged.

Facilitation services, legal advice and representation

In general, we believe that the legal system functions more effectively if litigants receive legal advice and, particularly for those matters entering the court system, legal representation.⁷ There are multiple sources of legal advice available for people (including the small business community) who cannot afford to retain a lawyer to assist them, but these sources are not well coordinated, they often involve eligibility criteria, they are not universally available throughout the province, and, since they rely largely on volunteers, the demand quickly outstrips the supply.

We believe there is a need, using a health care analogy, for a multidisciplinary (legal and non-legal) “triage” process that would provide a “diagnosis” of the problem and referral to whatever services are appropriate for the problem. Such services might include translation services, debt counselling, mediation, facilitation, neutral evaluation, legal advice and legal representation. With appropriate training and resources, this form of “triage” could be provided by a wide range of skilled personnel.⁸

⁶ Several examples of excellent websites from around the world providing legal and other information are listed in Appendix H: Pre-action Issues.

⁷ Hazel Genn states, “. . .if legal advice is obtained or agencies or other advisers provide positive assistance, the likelihood that a resolution will be achieved is increased.” Genn, *Paths to Justice* (note 2), 252.

⁸ For example, in the emergency department of a hospital, triage is conducted by a trained nurse who makes some initial decisions and recommendations. The Family Justice Reform Working Group report recommends a system that exists within a larger “rights-based envelope,” but proposes to restrict the parties from actively engaging the rights-based (court) system before attending a consensual dispute resolution session. This approach was found to be essential in family law disputes where adversarial tactics can seriously impair family relationships. Therefore, the proposed system offers information and options such as counselling, mediation and problem-solving tools, but allows access to the court system

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An expanded version of the hub could serve, through a clinic model, those people who need access to other types of services, including legal advice and representation. The clinic approach could take many forms, including an “in-person model” (e.g., Access Justice⁹), but it could also include the use of other technology tools, such as the Internet (on-line advice), the telephone (e.g., LawLINE¹⁰) or audio/video-conferencing.¹¹

In designing and implementing this comprehensive hub, strategies will be required for outreach and translation so that the services offered are accessible to people from different cultures and backgrounds. This will undoubtedly add cost, but it is necessary if the service is to be inclusive. In addition, to the extent that legal advice or representation is appropriate, people visiting the clinic must be able to obtain a convenient and timely referral.¹² Ideally, these additional resources would be in the same building (or nearby), which raises important questions about location, facilities and resources.¹³

Lawyer involvement

The clinic models highlighted in this chapter may depend in part upon the keen involvement of lawyers and law students on a largely pro bono basis. In order to encourage lawyer involvement in pro bono activities, it is necessary

only if necessary. This approach is intended “to build a cultural expectation that the responsibility for resolving disputes is, at least in the first instance, the responsibility of the family members themselves.” (Family Justice Reform Working Group, *A New Justice System for Families and Children: Report of the Family Justice Reform Working Group to the Justice Review Task Force*, May 2005, http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf, 40). While we support this form of “pre-action protocol” for family matters, we do not advocate it for civil non-family disputes. The hub will attempt to match the problem to the appropriate process, but will not make participation in such a process a pre-condition of accessing the court system.

⁹ The Western Canada Society to Access Justice was established in 1990 with the following vision: “To provide first-class *pro bono* lawyers assistance to all persons who cannot obtain Legal Aid or afford a lawyer, through *pro bono* clinics throughout the Western provinces (BC, Alberta, Saskatchewan and Manitoba).” It operates 61 clinics in BC with the assistance of over 400 lawyers donating approximately two hours each per month. (Western Canada Society to Access Justice, *Access Justice, Justice for All*, <http://www.accessjustice.ca/>.) Access Justice is one of many pro bono organizations in BC.

¹⁰ LawLINE is operated by the Legal Services Society as a toll-free hotline that provides persons who satisfy a financial test with legal information, referrals and some legal advice. (Legal Services Society, “Phone Services,” http://www.lss.bc.ca/resources/phone_services.asp.)

¹¹ Preliminary research indicates that clinics can operate using a number of different models, including paid staff (e.g., Legal Services Society’s LawLINE), volunteers (e.g., UBC Law Students Legal Advice Clinics, Salvation Army, Access Justice), or a combination of paid staff and volunteers (e.g., the Supreme Court Self-Help Information Centre [SHIC] pilot). The SHIC operates with a very small experienced and well-trained staff but requires an “army” of volunteers to meet the need. Most US clinics appear to operate with a small staff (two people) and many volunteers (in the hundreds), plus significant support from stakeholders (courts, government, law firms, social service agencies, etc.). This is also the model used by the Citizens’ Advice Bureau in the UK.

¹² We were advised that SHIC referrals to the Access Justice clinics involved up to a five- to six-week wait for an appointment.

¹³ We acknowledge the work of the SHIC as an example of careful planning, co-operation and collaboration among interested stakeholders. The evaluations to date confirm that it is providing excellent services within the constraints of its present structure.

to address two critical issues that constitute barriers to such involvement: the availability of “unbundled legal services” and more relevant conflict of interest rules.

Unbundling of legal services

Traditionally, there is an assumption that once a lawyer is retained, the lawyer is responsible for providing full representation through to final resolution. Full representation, however, is simply not affordable for everyone. Consistent with the desire to resolve problems on their own, many people prefer to seek legal advice on discrete tasks or portions of the problem rather than hand the entire problem over to a lawyer. The ability to hire a lawyer only to perform discrete tasks, such as advice, negotiation, document review, document preparation, or limited representation, is called “unbundling.”¹⁴

We support a move towards the unbundling of traditional legal representation to permit increased consumer choice and affordability. Unbundling is an essential ingredient of a successful hub clinic model. Legislation permitting unbundling is seen in the US as essential in order to provide people of modest means with legal representation.

In 2005, the Law Society of British Columbia formed a task force to examine the unbundling issue.¹⁵ We support the efforts of the Law Society in this area and encourage a speedy resolution of the issue of this barrier to access to legal advice, pro bono or otherwise. We note that solicitors (lawyers practising in areas other than litigation) commonly provide unbundled legal services.

¹⁴ While this approach has a variety of labels, including the US terms *limited scope assistance* and *discrete task representation*, in this report we will use the term *unbundling of legal services*. The American Bar Association (ABA) has done significant work to encourage pro bono legal services in the US, including amending its model rules of professional conduct to relax conflict restrictions for pro bono services and to permit unbundling of legal services. See the ABA Modest Means Task Force’s *Handbook on Limited Scope Legal Assistance* (American Bar Association, Modest Means Task Force, *Handbook on Limited Scope Legal Assistance: A Report of the Modest Means Task Force*, [Chicago: American Bar Association, 2003], <http://www.abanet.org/litigation/taskforces/modest/home.html>), which contains an excellent summary of the issues and how they have been handled in various states, and the ABA Standing Committee on Pro Bono and Public Service’s *Supporting Justice: A Report on the Pro Bono Work of America’s Lawyers* (American Bar Association, Standing Committee on Pro Bono and Public Service, *Supporting Justice: A Report on the Pro Bono Work of America’s Lawyers* [Chicago: American Bar Association, 2005], <http://www.abanet.org/legalservices/probono/report.pdf>). See also Maryland Legal Assistance Network, *Changing the Face of Legal Practice: “Unbundled” Legal Services*, www.unbundledlaw.org, which describes collaboration between courts, assisted self-representation programs and the bar to create panels of attorneys willing to provide self-represented litigants with discrete task services (unbundled services), and includes a summary of unbundling programs by state.

¹⁵ Law Society of British Columbia, “Unbundling Legal Services Taskforce,” <http://www.lawsociety.bc.ca/about/TF-Unbundling.html>.

More relevant conflict of interest rules

The Law Society of BC's *Professional Conduct Handbook* provides rules prohibiting a lawyer from being in a conflict of interest.¹⁶ A lawyer has a duty to give undivided loyalty to every client and is not permitted to act for two clients who have or may have a conflict between them without their consent. In order to avoid such conflicts of interest, at the time a new client contacts the lawyer, the law firm usually conducts a detailed search of its records to ensure that it has not previously acted for anyone adverse in interest.

Some lawyers and law firms refrain from participating in legal clinics because of the concern that they may offend their jurisdiction's conflict of interest rules. In a clinic setting it would be difficult, time-consuming and costly to perform detailed conflict searches each time a new person visited the clinic. Law firms are also wary of allowing their lawyers to give advice to clinic attendees if that relationship might prohibit the firm from acting for a potential client adverse in interest to that person. The second interim evaluation report for the BC Supreme Court Self-Help Information Centre (SHIC) pilot identifies the current conflict rules as a significant reason why users cannot obtain legal advice when they need it.¹⁷

We support changes to the BC conflict of interest rules to encourage the involvement of lawyers in legal clinics, thereby supporting the expanded hub.

Pro bono (free) legal services

Pro Bono Law of BC was formed in April 2002 to promote, coordinate, and facilitate the delivery of free legal services. It developed and maintains a website (ProBonoNet, at www.probononet.bc.ca) that matches needs with

¹⁶ Conflict issues do not arise if only legal *information* is provided rather than legal *advice*. That line is sometimes difficult to draw. The SHIC has developed materials based on practices in California courts (Judicial Council of California, Administrative Office of the Courts, Access and Fairness Advisory Committee, *May I Help You?: Legal Advice vs. Legal Information—A Resource Guide for Court Clerks* [San Francisco: Judicial Council of California, 2003], <http://www.courtinfo.ca.gov/programs/access/documents/mayihelpyou.pdf>) aimed at helping staff and litigants differentiate between the two kinds of assistance (Supreme Court of British Columbia, Self-Help Information Centre, *BC Supreme Court Self-Help Information Centre* [Vancouver, BC: Author, n.d.], <http://www.supremecourtselhelp.bc.ca/pdf/laai.pdf>).

¹⁷ The ABA *Model Rules of Professional Conduct* were amended in response to concerns that a strict application of the conflict of interest rules may be deterring lawyers from serving as volunteers in programs in which clients are provided with short-term limited legal services under the auspices of a non-profit organization or a court-annexed program. Model Rule 6.5 is based on whether the lawyer has “actual knowledge” of the conflict. (American Bar Association, *Model Rules for Professional Conduct* [Chicago: Author, 2002], http://www.abanet.org/cpr/mrpc/mrpc_toc.html.) As noted in the Family Justice Reform Working Group report, this approach recognizes “that the risk to the client is substantially reduced because of the limited nature of the advice being given and the short duration of the solicitor/client relationship” (Family Justice Reform Working Group, *A New Justice System for Children and Families* [note 39], 107).

available lawyers. It has developed best practices for pro bono delivery programs in BC.¹⁸

We believe that, consistent with the altruistic reasons many lawyers had for deciding to enter law school, most lawyers want to volunteer and mandatory requirements are therefore not necessary at this time. If the conflict and unbundling issues can be resolved, it will be a matter of encouraging them to volunteer (at the firm and professional level), and rewarding them for doing so.

Disputes that require entry into the court system

Some problems are, by their nature, so intractable that they need resolution through the court system. For such problems we need to incorporate a robust, nimble and effective court system that achieves an adjudicated result as quickly and cost-effectively as possible. The remaining chapters of the report make recommendations on how to achieve this goal.

¹⁸ Pro Bono Law of BC, *Best Practices for Pro Bono Delivery Programs in British Columbia* (Vancouver, BC: Author, n.d.), http://probononet.bc.ca/content/pdf/Best_Practices.pdf.

2 The Case Planning Conference

Recommendation 2: Require the parties to personally attend a case planning conference before they actively engage the system, beyond initiating or responding to a claim.

In order to enable those matters that can be settled to be settled faster and more cheaply and to enable those matters that need to go to trial to get to trial faster and more cheaply, a firm procedural foundation is needed. This foundation will be provided by requiring the parties to personally appear at a case planning conference (CPC) before they actively engage the system.¹⁹

The case planning conference will address:

- settlement possibilities and processes
- narrowing of the issues
- directions for discovery and experts
- milestones to be accomplished
- deadlines to be met, and
- setting of the date and length of trial.

2.1 Background

In our consideration of how to reform our civil justice system, we were consistently told that many litigants, whether individuals, small businesses or sophisticated large corporations, want early and cost-effective resolution, they want an opportunity to be heard, and they want to play a key role in the resolution of their dispute.²⁰ They sometimes need to engage the court system to resolve their disputes, but few want to proceed all the way to trial. Most want their “day in court”—not a long and costly court battle.

While the vast majority of cases do not proceed to trial,²¹ they do not always settle early, cost-effectively or to the satisfaction of the parties. Most

¹⁹ Similar to the conferences under Rule 68 and Rule 60E, the case planning conference will not be mandatory in every case. We suggest, however, that it must be held before the system is engaged beyond initiating or responding to a claim. This is explained further in section 2.5 of this report.

²⁰ Diana Lowe, “What Do Clients Really Want from the System and From their Lawyers?” (Power Point presentation by the Canadian Forum on Civil Justice Forum at the “Restructuring Justice” conference, June 9–10, 2005). Referred to in Barbara Young, Q.C., “Change in Legal Culture: Barriers and New Opportunities” (discussion paper prepared for the BC Justice Review Task Force, February 2006), http://www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp, and in Chief Justice Donald Brenner and Allan Seckel, Q.C., Deputy Attorney General, “Are We Listening?” *The Advocate*, 64, Part 2, March 2006.

²¹ For more information, see Appendix L: The Trial Rate.

settlements take place late in the proceedings, after significant process and legal costs have already been expended.²² Research from Ontario indicates that many litigants settle or withdraw their claims as a result of financial pressures or “litigation exhaustion,” leaving them deeply dissatisfied with both the process and the outcome.²³

Therefore, the litigation process must be streamlined through:

- early identification of issues and interests
- ensuring that the amount of process is proportional to the value, complexity and importance of the case, and
- increased judicial intervention to establish and enforce timelines for completing major litigation events.

Active judicial involvement to change culture

In exploring the potential barriers to achieving these goals, we identified several “cultural” obstacles, which are described in Appendix I: Cultural Issues. One such obstacle is that many lawyers automatically take a familiar, adversarial approach to litigation, which is not consistent with early resolution and which often results in unnecessary delay and cost to the parties.

Current court rules and legal training reinforce these obstacles, and they will likely prevail if the conduct of the action is left entirely to the parties (and their counsel). We concluded that a fundamental change is necessary in order to shift these ingrained cultural beliefs and practices in any significant way. This change will require early and active judicial involvement in cases.

Getting to resolution

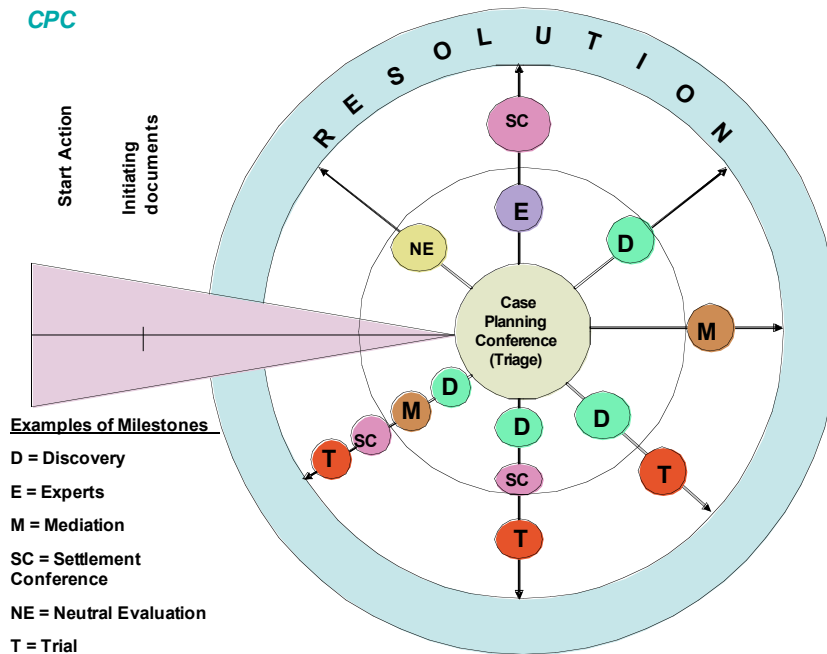
The centrality of the CPC in the new litigation process and the variety of resolution pathways that can be created to suit the particular case are shown in Figure 1.

²² Dr. John Hogarth and Kari D. Boyle, *Is Mediation a Cost-Effective Alternative?: Statistical Analyses and Observations* (Personal Injury Project Report, University of British Columbia Faculty of Law, Program on Dispute Resolution, April 13, 2002), <http://www.law.ubc.ca/drcura/research/personal.html>.

²³ Carl Barr, “The Myth of Settlement” (paper presented at the Annual Meeting of the Law and Society Association, Chicago, May 28, 1999), <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/MythofSettlement.pdf>.

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Figure 1: Pathways to resolution



Unlike the present system, which involves a linear process leading eventually to a full trial (the “litigation highway”), the system depicted in Figure 1 is distinctly non-linear. One of the unique features of the CPC is the recognition that there are many different pathways to resolution. The parties, with the assistance of the CPC judge, will create a plan (recorded in a CPC Order) prescribing the steps (milestones) and tools needed to address the unique aspects of their dispute and to remove barriers to resolution.

In Figure 1, resolution is displayed as the outer rim of the wheel, which can be reached through numerous pathways (spokes). Each pathway includes a different series of steps and decision-points. Some pathways will involve a trial; other pathways will include a variety of milestones that will assist the parties in achieving resolution.

Building upon existing initiatives

The proposed CPC model builds upon two existing initiatives in the BC Supreme Court: the Expedited Litigation Project Rule and the judicial case conference.

Under the existing Rule 68, the Expedited Litigation Project Rule, before being permitted to deliver any interlocutory applications, parties are required

to personally attend a case management conference.²⁴ The conference is therefore not mandatory in every case, but only in those matters actively engaging the court system. While the effectiveness of this conference has not yet been formally evaluated, anecdotal evidence indicates that it can be very useful in clarifying and narrowing the issues and creating a proportional case plan that encourages earlier resolution.

The existing Rule 60E implemented a Family Law Judicial Case Conference Pilot Project.²⁵ Parties who have participated in judicial case conferences²⁶ report high satisfaction levels with the process and outcome.²⁷ Although counsel were initially wary of the process, many now embrace it as a very useful exercise that meets many of their clients' needs and, in most cases, results in either earlier resolution or a significant narrowing of the issues. Creative counsel have begun to use this conference proactively to achieve better outcomes by, for example, voluntarily exchanging financial information prior to the conference.²⁸ Recent amendments to the rule will make the exchange of such information mandatory.

2.2 Matters for discussion at the CPC

The CPC will be an extensive conference. The CPC judge will facilitate a problem-solving discussion between the parties with respect to settlement, case management and planning. Matters for discussion will include:

- what the case is about
- the possibilities for resolution of the entire matter or of key issues
- the dispute resolution method best suited to the particular circumstances of the case
- the value, complexity and importance of the case
- the type and amount of discovery necessary, if any
- the parameters of the use of experts
- appropriate limits on the length of trial
- the setting of milestones and deadlines, including a firm trial date.

²⁴ Rule 68(38) requires personal attendance of the parties, and the intention is that counsel may not appear in place of a party. A similar approach is taken for small claims settlement conferences (see Small Claims Rule 7(4)).

²⁵ As of July 1, 2006, a rules amendment will convert this process from a pilot to a permanent rule.

²⁶ Rule 60E(1) prohibits a party from bringing an interlocutory application until a judicial case conference has been conducted.

²⁷ Supreme Court of British Columbia, Family Law Committee, *Evaluation of the Family Law Judicial Case Conference Pilot Project*, <http://www.courts.gov.bc.ca/sc/family%20law/Rule%2060E%20Evaluation%20Report.htm>.

²⁸ Early judicial intervention is beneficial not only in family law matters, but in all types of actions. The needs of litigants to be heard, to play a key role in the resolution of the dispute, and to resolve their legal problems fairly and quickly exist whether the dispute is a family issue or a general civil matter.

2 – THE CASE PLANNING CONFERENCE

We struggled to achieve an appropriate balance between the desire to move the focus from the “litigation track” to resolution and the need to set a trial date at the CPC to provide focus for the parties. A summary of the considerations relevant to this issue is included in Appendix J: Setting a Trial Date at the CPC.

Given the stated purpose and goals of the CPC, and the limited time available, formal interlocutory applications will not be considered. However, the parties and counsel should identify any interlocutory issues that will require adjudication and, if those issues cannot be resolved during the CPC, then the case plan will incorporate an application as one of the milestones.

2.3 Powers of the CPC judge

The CPC judge will have extensive powers to order:

- limits on discovery of all types;
- the delivery of summaries of facts, issues and relief requested;
- limits on the amount of time the parties have for completion of steps standing in the way of resolution, if any, including examinations for discovery, document discovery, delivery of “will say” statements, and expert reports, if any;
- directions with respect to experts, if any, including:
 - the number of experts the parties may call
 - whether an expert may be called on certain issues
 - whether the parties must use a single joint expert on a certain issue
 - when expert reports and the facts upon which the expert’s opinion is based must be disclosed;²⁹
- mediation, a neutral case evaluation or other dispute resolution process;
- delivery of offers to settle;
- limits on the length of trial;³⁰ and
- any other orders to produce an efficient and proportional resolution of the case.³¹

The CPC judge will also have the power to set the deadlines for the case plan and the consequences for non-compliance.³²

²⁹ See Recommendation 3.4 on limiting the use of expert witnesses.

³⁰ We suggest default limits using proportionality principles, as explained in Appendix B: Proportionality.

³¹ BC Supreme Court Rule 68(41) could be used as a starting point for the types of orders that could be made by the CPC judge.

³² On more complex cases (keeping proportionality in mind) the order could contemplate additional CPCs as milestones.

2.4 Information disclosed prior to the CPC

Section 3.2 discusses the importance of meaningful initial filings and suggests a format and process to help the parties avoid the problems inherent in the present practice of pleading. Under this new process, the documents initiating and responding to the action will be short and succinct statements of the essence of the claim or defence (unlike the cumbersome and unhelpful pleadings often produced by the current process). Ideally, this new process will help to create a culture of collaboration that encourages parties and their counsel to jointly create a proposed case plan prior to the CPC.

Earlier understanding of the case and consideration of planning options will assist in achieving better resolutions for the parties. If these objectives are accomplished, then there will be no need for further documentation to be prepared or filed prior to the CPC.

2.5 Application and timing

The CPC will apply to Supreme Court proceedings of all types but will not be held in every case. It will be both party and system driven. That is:

- a party may requisition a CPC at any time after the case initiation and response documents have been filed, and the CPC will be scheduled within 30 days of filing the requisition; and
- a CPC must be held prior to engaging the system through:
 - delivering a non-emergency interlocutory application³³
 - requiring attendance at examinations for discovery, or
 - issuing a formal demand for discovery of documents.

The voluntary exchange of information, settlement meetings (especially ones that include the parties), mediation and other steps that assist the parties in reaching resolution are encouraged and will contribute to a more effective CPC should one be necessary.

2.6 Miscellaneous considerations

Location

CPCs will be held in the courthouse and will be presided over by a judge or master.

³³ A list of permitted applications will be developed, likely including applications for interlocutory injunctions, restraining orders, orders extending time for service or for substitutional service, and so on.

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Time

A meaningful conference of this type requires time for the parties to talk, to inquire and to explain. CPCs should therefore be set for 60–90 minutes.

Who attends

Parties must attend in person with full authority to make planning and/or settlement commitments in the case.³⁴ Counsel, if any, must attend with their clients. Participation of clients or counsel through the use of technology, such as telephone or video conferencing, should be available for any subsequent CPCs, but for the first CPC only in extraordinary circumstances. We recognize that this restriction may impose a burden on parties who live in remote locations, but the proven benefits of in-person participation justify such a restriction.

Confidentiality

In order to encourage full and candid discussion, the CPC will be a “confidential” process and discussions will be considered to be “without prejudice” and protected from disclosure.³⁵ However, given that the CPC also incorporates management and planning functions, any applications made by a party during the CPC and discussions specifically related to an order made as a result of a CPC should be stated to be “on the record.” Only those portions of the tape or digital recording stated to be “on the record” may be ordered to be available to the parties and counsel in the event of an appeal.

Number of CPCs

Although the proposed process assumes that only one CPC will be held in most cases, it is possible that some cases may require more than one CPC. The rules will define a class of complex cases requiring dedicated judicial assistance.³⁶ Apart from those cases, while a judge will not automatically be seized of the case in the CPC, the guiding principle should be that subsequent CPCs, if any, should involve the same judge or master if possible, keeping in mind that this approach creates practical and administrative challenges.

³⁴ For parties that are not individuals, the representative must have full authority to make decisions on behalf of the party or have access to a group of persons who collectively have such authority (see Rule 68(38)). Counsel may attend in addition to, but not in place of, a client.

³⁵ If CPCs are recorded, the tape or digital record will not be available to a party or counsel without an order of the court.

³⁶ This would be similar to the “20+ Program” created by Practice Direction (November 20, 1998).

For those cases that proceed to trial, a trial management conference will be scheduled.³⁷

Selection and training

In order for increased judicial involvement to be effective, the CPC judge will need a range of skills and tools to fit the needs of the case at hand. These will include various dispute resolution skills to assist the parties in resolving the matter during the conference and the ability to lead a collaborative process to design a unique case plan. As this role of judges and masters is new, we strongly recommend that all judges receive training on how to conduct CPCs and that CPC judges be selected, in part, on the basis of their dispute resolution skills and their commitment to this process.

After the CPC, the parties will be required to fulfill the terms of the CPC order, specially designed for their case, within the time limits specified. As stated above, a party may requisition a further CPC if necessary. To reduce cost, technology should be utilized for these subsequent CPCs to involve all parties and counsel by video or telephone.

2.7 What success will look like

While this process will require some front-end loading of time and costs, we believe that these costs will be outweighed by the benefits of an early and meaningful conference. The CPC initiative will be considered a success if:

- fewer parties refrain from commencing actions or abandon actions because of cost, complexity and delay
- more actions are resolved early and to the satisfaction of the litigants
- the overall process costs to litigants are reduced to a level proportional to the value, complexity and importance of their dispute
- the number and length of contested chambers applications is reduced³⁸
- the process is sufficiently affordable that there are an increased number of trials for those matters that need an adjudication, and
- trials are scheduled earlier, take less time and are more focused.

³⁷ The Rule 68 model for a pre-trial conference could be followed. See section 3.6 of this report for a more detailed discussion of trial management issues.

³⁸ This appears to be the result of the judicial case conference process in family matters.

3

New Supreme Court Rules

Recommendation 3: Create new Supreme Court Rules.

Considering that we are recommending a number of significant changes to the Supreme Court Rules and that these rules have not undergone a major revision in 16 years, we recommend that the Supreme Court Rules be rewritten. A brief history of revisions to the rules is included in Appendix K: Supreme Court Rules. The new rules should be designed to further the vision and goals in this report and should incorporate our recommendations using plain and concise language.

We concluded that effective change can best be accomplished through a combination of strong leadership and the imposition of new court procedures. With respect to the latter goal, we did not attempt to draft new Supreme Court Rules. Rather, this chapter describes the principles upon which such rules should be based and provides recommendations about specific areas that should be addressed on a priority basis.

In accordance with our mandate, we have directed our efforts to rules governing general civil matters and not family cases. In doing so, we support the recommendation of the Family Justice Reform Working Group that there should be a separate set of Family Rules applicable to both the Supreme and Provincial courts.³⁹

The new rules must reflect the key principles that form the basis of our report. These principles (discussed in Appendices B to F) include proportionality, matching and increased judicial intervention.

3.1 A new object of the rules

Recommendation 3.1: Rewrite the Supreme Court Rules based on an explicit overriding objective that all proceedings are dealt with justly and pursuant to the principles of proportionality.

The new rules should require that whenever the court exercises any power under the rules or interprets any rule, it will consider the case's:

- monetary value

³⁹ Family Justice Reform Working Group, *A New Justice System for Families and Children: Report of the Family Justice Reform Working Group to the Justice Review Task Force* (September 2005), http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf, Recommendation 14, 114.

- importance to the jurisprudence of the province, and
- complexity, in terms of the number of parties and the nature of the issues.

Currently, Supreme Court Rule 1(5) states that “The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.” This statement does not entirely reflect the vision of the civil justice system presented in this report. While we do promote the just, speedy and inexpensive resolution of proceedings, the rule refers to a “determination” on the “merits,” which limits the objective of the rules to adjudications by the court. While we do not mean to minimize the vital importance of obtaining adjudication by the court in appropriate cases, the reality is that less than 3% of cases receive any type of final adjudication (see Appendix L: The Trial Rate).

Further, this rule fails to reflect our vision of proportionality. Not every case can be decided quickly and inexpensively. The goal to be sought, however, is for the time and expense involved in the litigation process to be proportional to the value, importance and complexity of the case. This is not intended just to be a lofty goal, mentioned from time to time when no other arguments are to be found. This must be a mandatory requirement for all litigants and courts to follow.

In the UK, the court rules are governed by an overriding objective of dealing with cases justly.⁴⁰ Dealing with a case justly includes dealing with it in ways that are proportionate to:

- the amount of money involved
- the importance of the case
- the complexity of the issues, and
- the financial position of each party.

It does not end there, however, as just a principle. The rules in the UK specifically require the court to:

- give effect to the overriding objective when it exercises any power under the rules or interprets any rule,⁴¹ and
- only allot the case a share of the court’s resources proportionate to the magnitude of the case, while taking into account the need to allot resources to other cases.⁴²

The court must further the overriding objective by “actively managing cases,” which includes:

⁴⁰ UK, Department for Constitutional Affairs, *Civil Procedure Rules*, Rule 1.1, http://www.dca.gov.uk/civil/procrules_fin/contents/parts/part01.htm

⁴¹ UK, *Civil Procedure Rules*, Rule 1.2.

⁴² UK, *Civil Procedure Rules*, Rule 1.2.

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- encouraging co-operation
- identifying the issues at an early stage
- encouraging alternative dispute resolution or otherwise assisting the parties in settling
- fixing timetables, and
- generally ensuring the quick, efficient and cost-effective handling of the case.⁴³

The parties are also required to help the court further the overriding objective.⁴⁴

While we do not suggest importing the entire UK approach, we strongly agree with many of these principles and suggest the adoption of the following to replace Rule 1(5):

1. The object of these rules is to ensure that all proceedings are dealt with justly and that the amount of time, process and expense incurred by the parties in reaching the resolution of a case is proportional to the significance of the case.
2. The significance of a case is the court's discretionary assessment of the case's:
 - a) monetary value;
 - b) importance to the jurisprudence of the province; and
 - c) complexity, in terms of the number of parties and the nature of the issues.
3. The court must give effect to the object of these rules when it exercises any power under the rules or interprets any rule.
4. The court must allot each case only a share of the court's resources that is proportionate to the significance of the case, while taking into account the need to allot resources to other cases.
5. The court must further the object of these rules by actively managing cases through the case planning conference, under rule X, and other conferences.
6. The parties (and counsel) are required to help the court further the object of these rules.

⁴³ UK, *Civil Procedure Rules*, Rule 1.4.

⁴⁴ UK, *Civil Procedure Rules*, Rule 1.3.

3.2 A new case initiation process

Recommendation 3.2: Replace the current pleadings process with a new process requiring the parties to accurately and succinctly state the facts and the issues in dispute as well as the plan for conducting the case and moving to resolution.

The new process will:

- replace the Writ and Statement of Claim with a document that includes a case management and resolution plan
- reduce the time for service
- provide the blueprint for the case planning conference (CPC), and
- be certified by a statement of truth.

Background

The current litigation system starts with a series of documents, called the “pleadings,” which are intended to be the blueprint schematics of a case. (For a description of the various types of documents that currently constitute the pleadings, see Appendix M: Pleadings.) “The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court.”⁴⁵ In other words, they should set forth the basics of what the claim is about: what was the alleged wrongdoing of the defendant, what damages did the wrongful act cause, which facts are in dispute, and what are the defences?

It sounds fairly straightforward, yet many complain that pleadings have long ceased to function as the blueprint of a case. Instead, they are complex, convoluted and evasive documents, drafted strategically to leave as many avenues of attack or defence open to the parties as possible. The lack of discipline in pleadings, therefore, may be partly responsible for the high cost of litigation.

As a result, we need a new approach that will:

- simplify the commencement of litigation
- move counsel out of the old mindset around pleadings, and
- provide the foundational information necessary for our proposed case planning conference (CPC, discussed in Chapter 2).

Based upon the above considerations, we propose the following.

⁴⁵ *Homalco Indian Band v. British Columbia* [1998] B.C.J. No. 2703 (Q.L.) (S.C.).

The Dispute Summary and Resolution Plan

In place of the present pleadings process, the parties will each be required to file a document, perhaps called the “Dispute Summary and Resolution Plan” (DSRP), which will:

- succinctly describe the claim and response
- define the issues in dispute, if known
- state the relief requested, and
- propose a case management and resolution plan.

Service of the DSRP

We believe that the one-year period for service allowed under the current rules is excessive and should be limited to 60 days from filing. The limitation period applicable to a particular type of claim provides sufficient time for a party to decide whether to file a claim. If the defendant cannot be located for service or there are other good reasons, the court may extend the service deadline.

It is our understanding that when a Writ is filed to preserve a limitation period, it is not uncommon for the matter to then lie dormant until just before the one-year period expires. If this occurs, then the plaintiff potentially pays for the time and effort to prepare the initial Writ and then again for counsel to get up to speed in time to either serve the document or to apply to renew the Writ. Although there was concern that 60 days may not be long enough to allow parties to conduct settlement negotiations, which might be hampered by knowledge of a pending legal action, we are moving into the world of electronic filing where new actions may well be public knowledge. Technology has also increased our ability to locate and serve defendants, even if they are located in other countries. On balance, we believe that a shorter time limit for service will avoid unnecessary cost, reduce delay and encourage early resolution.

The role of the CPC judge

The DSRPs will be discussed at the CPC. The CPC judge will assist the parties and counsel in further exploring, identifying and narrowing the issues, in order to canvass resolution possibilities and to develop the case plan. The case plan may require preparation of a joint statement of facts, a list of the issues in dispute, or a more complete statement in summary form of the material facts on which the party relies, depending on the circumstances of the particular case. In this way, the initial documents will allow the parties to collaboratively create a blueprint for their case with the assistance of the CPC judge.⁴⁶

⁴⁶ This process may require some amendments to rules on pleading cases based on fraud, libel or other cases mentioned in Rule 19(11), (11.1) and (12).

We believe that this change in the way cases are initiated will change the opening litigation dynamic. The DSRP will force the parties to think about resolution options, which we hope will encourage an early dialogue between the parties about resolution. We anticipate that eventually, parties and counsel will accomplish much of the collaborative planning process prior to the CPC, and the CPC judge’s role will be to affirm and facilitate that plan through appropriate orders.

Technology

The DSRP could be prepared using computer technology, such as an interactive filing assistant that would guide the party (or counsel) through the process and limit what could be included in this initial document. Other jurisdictions have implemented interactive software programs to help litigants prepare and file their court documents. BC’s Ministry of Attorney General has recently instituted such a practice in the Small Claims Division of the Provincial Court, called the Filing Assistant (available on-line at <https://webapps.ag.gov.bc.ca/FilingAssistant>). There is no reason why a similar system could not be used in the Supreme Court to assist the parties and their counsel in creating meaningful initiating documents. We believe that using an interactive process will not only make filing simpler for self-represented litigants, it will also help counsel adjust more quickly to the rules of the new case initiation process.

Ideally, such a system should be set up not only to print forms for manual filing, but also to allow the completed form to be filed on-line. It should also be designed to be as accessible as possible for all types of users.

The statement of truth

Each party will be required to certify that he or she believes that the facts set out in that party’s initial document are true.⁴⁷ In the absence of a “statement of truth,” the parties are free to plead the theoretical, which can lead to lengthy documents listing possible facts and explanations that are not helpful in defining the case or the issues in dispute. “Boilerplate” statements of claim and defence in motor vehicle personal injury matters are a good example of this type of hypothetical pleading. The use of statements of truth has been adopted in both the UK and Australia.

Of course, the possibility still exists that a party could falsely certify something as being true. While we cannot hope to develop an enforcement mechanism to ensure that this never happens, we believe that because the parties will have to be present at the CPC and will have to directly answer to

⁴⁷ Further consideration of the effects of this recommendation on the ability to plead in the alternative may be required.

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the CPC judge about allegations made and certified as true, the tendency to allege unsupported facts will be greatly curtailed.

Existing pleadings

We recommend abolishing all of the existing pleadings except for the Petition.

We believe that the practice of filing a Writ dates back to old English law and procedure and is no longer required. (See Appendix M: Pleadings for more information.) Similarly, the “Appearance” under old English law was the formal submission of a party to the jurisdiction of the court, and the parties were able to file “limited Appearances” to contest the jurisdiction of the court. There is, however, no reason why the defendant’s DSRP could not achieve the same objective.⁴⁸

We did not identify any serious problems associated with the process used for Petitions. We are told that Petitions are generally processed through the system efficiently. Therefore, no recommendations will be made regarding Petitions.

3.3 Limiting discovery

Recommendation 3.3: Limit available discovery, while requiring early disclosure of key information.

We propose to:

- eliminate interrogatories;
- require the parties to produce only those documents:
 - referred to in the party’s pleading
 - to which the party intends to refer at trial, or
 - in the party’s control that could be used by any party at trial to prove or disprove a material fact;
- eliminate oral discovery without leave or consent for cases valued at \$100,000 or less;
- for cases valued at greater than \$100,000, absent leave, require each party to be available for oral discovery by all parties adverse in interest for a maximum (in total) of one day (the parties may consent to one additional day of discovery);
- require the parties, by a date to be set at the CPC, to exchange “will-say” statements, indicating:

⁴⁸ The new rules would have to either specifically allow the DSRP to be used to contest the jurisdiction of the court without being considered to be an attornment or create another mechanism to do so. Time limits for filing the defendant’s DSRP will have to be reconsidered.

- the name and address of each witness
- a brief point-form summary of the evidence expected to be provided by the witness, and
- the identity and substance of any document, not previously disclosed, that the witness may refer to at trial.

Background

In the current system, after the parties have exchanged pleadings the litigation usually moves into the “discovery phase.”⁴⁹ While there are many other ways to become more informed about each other’s cases, most lawyers are accustomed to using the formal discovery methods to do so, such as:

- the disclosure of documents
- answers to interrogatories
- admissions
- oral examination of the other party⁵⁰ under oath.

Although the information obtained through the discovery process may lead the parties to a resolution of the case or a fairer trial process, discovery is also a major element in the cost of litigation.⁵¹

Many lawyers have commented that while discovery tools have successfully eliminated trial by ambush, they have replaced it with something that may be as bad or worse—trial by avalanche. We compared approaching the discovery stage of litigation to standing on the edge of a dark abyss. As litigants move forward they are required to descend into the abyss, and only the wealthiest are able to crawl up and out the other side.

We therefore recommend:

- limiting the scope of document discovery
- eliminating interrogatories
- restricting oral discovery based on the value of the case, and
- requiring the exchange of will-say statements.

⁴⁹ It is possible for information to be exchanged voluntarily, either directly or through a more informal process such as mediation.

⁵⁰ Persons who are not parties to the action may also be examined (with leave of the court) under Rule 28.

⁵¹ The First Report of the Ontario Civil Justice Review estimated the legal fees for each litigant in a case that completes a three-day trial (in 1995) to be about \$38,000, or about 191 lawyer hours at \$200 per hour (60 hours—\$12,000—were for trial preparation and trial). Out of that, 25 hours were for oral discovery and 10 hours were for document preparation, for a total cost of about \$7,000. This does not include discovery-related motions or any expenses involved in discovery. The report notes, however, that Toronto masters estimated that a quarter of all motions brought before them involved discovery issues. (Ontario Civil Justice Review, *First Report* [Toronto, ON: Ministry of Attorney General, 1995], <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/>, ch. 11.4, s. 2.)

Document disclosure

Lawyers consistently report that the quantity of documents required to be disclosed in today’s litigation has increased significantly and is a major contributor to increasing cost and delay for the parties.⁵²

We believe that the main cause of this explosion is the broad rule of relevance declared in Britain at the end of the 19th century in the *Peruvian Guano* case.⁵³ The case ruled that one must disclose every document that contains information that may, either directly or indirectly, enable a party to advance his or her own case or to damage the opposing party’s case. This includes documents that may fairly lead to a train of inquiry that would advance a party’s own case or damage the case of the opposing party.

The *Peruvian Guano* approach has been eliminated in the jurisdiction where it was created (the UK) and replaced with a more restrictive test.⁵⁴ A similar approach has been taken in BC, in the Expedited Litigation Project Procedure Rule (Rule 68). Instead of the *Peruvian Guano* approach, the parties must only disclose:

- all documents referred to in the party’s pleading
- all documents to which the party intends to refer at trial, and
- all documents in the party’s control that could be used by any party at trial to prove or disprove a material fact.⁵⁵

We believe that the expedited litigation (Rule 68) approach to document production properly balances the burden of document disclosure with fairness. The rule ensures that all documents that are material to the case are disclosed, but that marginally related documents are not required to be disclosed and copied, and then to be read and analyzed by the party who requested the documents—all at substantial cost to the litigants.

For these reasons, we recommend that the Rule 68 requirement for document production be applied to all cases. We expect this recommendation to result in a reduction in the cost of litigation without any material consequence to the outcome of cases.

⁵² Some people believe that this has been caused, in part, by advances in information technology. The First Report of the Ontario Civil Justice Review estimated about \$2,000 in legal fees for document production for each side in cases requiring a three-day trial in 1995. This cost has undoubtedly increased, not just because of inflation, but because trials have become far more complex over the last 10 years.

⁵³ *The Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano* (1882), 11 Q.B.D. 55, 63.

⁵⁴ UK, *Civil Procedure Rules*, Rule 31.6. In Queensland, Australia, similar rules apply. Litigants must only disclose documents that are directly relevant to an allegation in issue in the pleadings or in the proceedings. (Queensland, *Uniform Civil Procedure Rules*, 1999 [as in force December 19, 2005], Rule 211).

⁵⁵ BC, *Supreme Court Rules*, Rule 68, s. 16.

Interrogatories and Notices to Admit

In addition to document exchange, the discovery phase of litigation also includes requests to admit facts, and interrogatories. While we believe that Notices to Admit have a very useful purpose, we have heard many complaints about the use and misuse of interrogatories. In today’s word-processed world, interrogatories can be cranked out by computer without sufficient thought to their purpose and usefulness. They are typically strategically answered by lawyers, not by the parties. They are time-consuming (and therefore costly) to answer, are often answered vaguely, and generally do not produce enough of a benefit to justify the cost. Interrogatories are sometimes used for tactical reasons to harass the other party or delay the proceedings.

Because interrogatories typically have a high cost with little benefit, they have been eliminated entirely in Rule 68. We considered allowing interrogatories for more complex or higher-value cases, or allowing interrogatories with leave of court. These views were ultimately rejected, however, because interrogatories are costly and do not produce many benefits, regardless of the value or complexity of the case. We therefore recommend that interrogatories be eliminated for all cases. We expect that this recommendation will reduce the cost of litigation without any material negative effect on outcomes.

Examinations for discovery

An examination for discovery is a very labour-intensive and therefore costly process.⁵⁶ In addition, while conducting an oral discovery may be just another part of a lawyer’s “day at the office,” it can be a very intimidating and stressful experience for the client. It can also cause the client lost time from work and other substantial inconvenience.

Considering that less than 3% of cases get to a summary or full trial,⁵⁷ the only potential benefit of oral discovery for the vast majority of cases is to assist the settlement process. While this is an important aspect of discovery, does it justify unlimited discovery without regard to the magnitude of the dispute? Are there not other more cost-effective ways of facilitating the early disclosure of information in order to encourage settlement?

⁵⁶ The First Report of the Civil Justice Review (note 51) estimated that the legal fees for an oral examination for discovery to each litigant (assuming a two-day examination for discovery on a case that goes on to a three-day trial) were (in 1995) approximately \$5,000. (As stated in note 52, this cost has risen over the last 10 years, because lawyers’ hourly rates have increased and cases have become more complex.) The estimate did not include the costs associated with responding to undertakings, reporting to clients, purchasing and reviewing transcripts or the substantial cost of discovery-related motions. (Ontario Civil Justice Review, *First Report*.)

⁵⁷ See Appendix L: The Trial Rate.

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The Ontario Simplified Rules Committee pointed out to the Ontario Civil Justice Review that oral discovery is really not essential in every case, particularly those at the lower end of the monetary range.⁵⁸ The Canadian Bar Association’s Systems of Civil Justice Task Force reported these same concerns and recommended that all jurisdictions in Canada “limit the scope and number of oral examinations for discovery and the time available for discovery...”⁵⁹ In BC, oral discoveries are not allowed in small claims cases or, in the Rule 68 pilot registries, in cases valued at less than \$100,000, except by consent or order. In the UK, there are no examinations for discovery, regardless of the value of the case.

Our conclusion, therefore, is that the cost of oral discovery often outweighs the benefits. In order to incorporate proportionality principles into discovery practice, we must place restrictions on the process available to the disputing parties, while maintaining fairness. We believe that the limitations on oral discoveries in Rule 68 help to ensure that the cost of litigation will be proportionate to the value of the case.

We therefore recommend that no oral discovery be allowed, except by order or consent, for all cases valued at \$100,000 or less.

In keeping with proportionality principles, for cases that are valued at more than \$100,000, we recommend that, absent leave, each party (regardless of the number of parties adverse in interest) be available for an oral examination for discovery for a maximum of one day. The parties may agree to a second day of discovery, but any further discovery may only be conducted with leave of court.

The one-day limitation is, admittedly, somewhat arbitrary, but we believe that some measure must be set and that one day should be enough time to conclude all necessary oral examination of a party in the vast majority of cases. The estimated value of the case and further limitations on discovery will be determined at the CPC. (See section 2.3).

Will-say statements

In order to obtain some of the information that may be lost with the discovery limitations outlined above, and in order to encourage the early exchange of information, we recommend that the parties exchange a list of the witnesses that each party intends to call at the trial of the action, along with a summary

⁵⁸ Ontario Civil Justice Review, *First Report*, c. 14, para. 18, citing the “Draft Report of the Simplified Rules of Civil Procedure Committee,” December 1994, 6–7.

⁵⁹ Canadian Bar Association, *Report of the Task Force on Systems of Civil Justice* (Ottawa, ON: Author, 1996), <http://www.cba.org/CBA/pubs/main/orderdown.aspx>, Recommendation 16(a), 43.

of the evidence that the party believes the witness will give at trial. This would include:

- the name and address of the witness
- a brief point-form summary of the evidence expected to be provided by the witness, and
- the identity and substance of any document, not previously disclosed, that the witness may refer to at trial.

These statements will be required to be updated if the substance of a witness' expected testimony changes or if new witnesses are discovered. This approach was recommended by the Systems of Civil Justice Task Force.⁶⁰ The date for the exchange of these statements will be set at the CPC.

We believe that such statements will, in a cost-effective manner, provide the parties with a concise summary of what testimony the opposing party plans to introduce into evidence. Having such knowledge will advance the discussions between the parties and will promote the earlier resolution of disputes.

3.4 Limiting the use of experts

Recommendation 3.4: Reduce expert adversarialism and limit the use of experts in accordance with proportionality principles.

Recommendation 3.4 includes the following components:

- Adopt a new rule to establish that it is the duty of an expert to help the court on the matters within his or her expertise and that this duty overrides any obligation to the person from whom he or she has received instructions or payment.
- Require the expert to certify (in the expert's report) that he or she is aware of and understands this duty.
- Require the parameters of expert testimony to be discussed at the CPC and require the CPC judge to provide directions, based upon proportionality principles, on the use of experts, including:
 - which issues require expert testimony
 - how many experts are appropriate
 - whether a joint expert is appropriate on one or more issues
 - court appointment of an expert
 - deadlines for early disclosure of the information upon which the expert's opinion is based, including test results
 - the delivery of expert "will-say" statements

⁶⁰ Canadian Bar Association, *Report of the Task Force on Systems of Civil Justice*, 42.

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- deadlines for delivery of expert reports, and
- whether the opposing experts should meet and confer.
- Unless otherwise ordered, in cases valued at \$100,000 or less, limit each party to one expert only, plus one expert to rebut the evidence of the opposing expert, if necessary.
- Require experts who give evidence in the proceeding to disclose only the facts, including test results, upon which they relied in forming their opinion.

The need for change

One of the significant cost items in litigation is the use of expert witnesses to provide opinions on scientific or technical issues. The Honourable Geoffrey Davies, A.O., has been an outspoken advocate of reform in the area of experts for over a decade. He identified three major reasons why change from the traditional approach was necessary.⁶¹

- Adversarial bias and polarization—The natural human tendency to feel the need to do your best for the side you represent results in the polarization of opinions and may result in a distortion of both the real question and the real answer. The result is often a “battle of the experts.”
- Complexity—The more complex the question the harder it is for the non-expert judge to determine the extent to which contradictory expert opinions are reliable.
- Cost—There is waste and duplication in selecting and discarding experts, preparing experts for trial, and cross-examining opposing experts.

We believe that all of these factors are contributing in some measure to the high cost and inefficiency of our present expert witness processes. The new rules must support greater reliability, increased accuracy, decreased adversarialism and lower cost for expert witnesses.

The duty of the expert

In the UK, the rules of court state, “It is the duty of an expert to help the court on the matters within his expertise.... This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.”⁶² Queensland, Australia has taken the same approach.⁶³

⁶¹ Honourable Geoffrey L. Davies, A.O., “Court-Appointed Experts” (paper presented at the “Restructuring Justice” conference, June 9–10, 2005). (A previous version of this paper is available at http://www.courts.qld.gov.au/hidden/ca_davies.htm.) See also Justice Margaret Wilson, “The New Expert Witness Rules” (breakfast address to the Australian Insurance Law Association, Brisbane, Queensland, October 28, 2004), <http://www.courts.qld.gov.au/publications/articles/speeches/2004/Wilson281004.pdf>.

⁶² UK, *Civil Procedure Rules*, Rule 35.3.

⁶³ Queensland, Australia, Uniform Civil Procedure Amendment Rule (No. 1) 2004, section 7, Part 5—Expert Evidence, s. 426. <http://www.legislation.qld.gov.au/LEGISLTN/SLS/2004/04SL115.pdf>.

While such a rule may be difficult to enforce, it sets an important standard for experts to follow. It serves as a reminder to experts that they are not advocates and that their primary duty is to the court, not to the party who hired them.

We believe that there is no down-side to this approach and that it may help reduce the adversarial nature of the relationship between experts in today’s litigation. For these reasons, we recommend the adoption of a rule similar to the UK and Australian rules on the duty of an expert. We additionally recommend that experts certify, as part of their report, that they are aware of and understand this duty.

Independent experts

In BC, the court may appoint an independent expert on any relevant question.⁶⁴ The court may choose the expert if the parties cannot agree upon one. The court, after consulting with the parties, instructs the expert. The rule further states that “The remuneration of the expert shall be fixed by the court....”⁶⁵ Anecdotal evidence, however, suggests that this rule is rarely used.

We are of the view that the ability to appoint independent experts is underused. We recommend that the possibility of appointing an independent expert be considered, when appropriate, at the CPC.

A single joint expert

The UK and Australia have implemented reforms (outlined in Appendix N: UK and Australian Approaches to Expert Witnesses) involving court-appointed single joint experts. These reforms have not been without controversy and have not yet been formally evaluated. In BC, the new Expedited Procedure Project Rule (Rule 68) allows the court to order the parties to use a single joint expert. The rule has not, however, been in place long enough to determine whether this aspect of the rule is being used and, if so, whether it is being used effectively.

Mindful of the mixed results of the new joint expert rules in the UK, we are not ready to recommend a broad requirement for the use of a single joint expert or for the pre-litigation appointment of single joint experts.

The role of the CPC judge

In keeping with the overriding principle of proportionality, we recommend that the issues related to experts be dealt with at the CPC. For those cases

⁶⁴ BC, *Supreme Court Rules*, Rule 32A.

⁶⁵ BC, *Supreme Court Rules*, Rule 32A(5). Under subsection 6 the court may also require security for payment.

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involving expert evidence, the CPC judge will facilitate discussion and provide orders and directions with respect to:

- which issues require expert testimony
- the appropriate number of experts
- whether a joint expert is appropriate on one or more issues
- court appointment of an expert
- deadlines for early disclosure of information upon which the expert’s opinion is based, such as test results, and
- deadlines for delivery of expert reports.

Many differences of opinion between experts focus on disparate interpretations of underlying facts. In these situations, the CPC judge may also order that the opposing experts meet to identify the areas on which they agree or disagree and to narrow the issues.

We believe that the present Rule 68 limitations on expert witnesses for cases valued at \$100,000 or less sets an appropriate general rule, which should be adopted province-wide for that group of cases.⁶⁶

Using the \$100,000 threshold will maintain consistency with Rule 68 and with our approach to discovery limitations described above. Having such a general rule in place will also assist the parties in pre-litigation planning on the use of experts. Absent other considerations, the general rule will apply. However, the CPC judge will not be bound to:

- accept either party’s valuation of the claim
- allow only one expert per side in cases valued at less than \$100,000, or
- allow more than one expert per side for cases in excess of \$100,000.

In exercising discretion to deviate from the rule, the CPC judge will also consider:

- the number of issues in the case that require expert evidence, and
- the relative benefit to be gained by the proposed expert evidence compared to the cost and time required.

Counsel will not have to worry about liability issues for failure to hire a sufficient number of experts, as the issue will be determined by the court.

We believe that providing the CPC judge with the discretion to place limits on the use of experts will provide the most flexible and most fair approach to

⁶⁶ Rule 68 states, “Unless the court orders otherwise, a party to an expedited action is entitled, under Rule 40A, to tender the written statement of, or to call to give oral opinion evidence, not more than (a) one expert of the party’s choosing, and (b) if the expert referred to in paragraph (a) does not have the expertise necessary to respond to the other party’s expert, one expert to provide the required response.”

matching the available process to the size and complexity of the claim. Although consideration of the issue of experts will take some time at the CPC, we believe that this will be well worth the investment, as we expect it to reduce cost by reducing the number of experts, reducing the issues to those clearly in dispute, and reducing the adversarial nature of the relationship between opposing experts.

Other cost issues

In BC, there is another reason why parties may be hiring multiple experts. Under current BC law,⁶⁷ the calling of an expert witness to testify at trial waives the solicitor-client privilege⁶⁸ that normally exempts experts from revealing their communications⁶⁹ with the client’s lawyer. As a result, lawyers routinely require production of the expert’s entire file during testimony in order to discredit the opinion of the expert. To avoid this disclosure requirement but still obtain the needed advice from experts, some counsel hire one expert to testify at the trial and a second expert who will not appear at trial but who will only provide the party with advice. The advising expert’s file remains protected from disclosure. This approach multiplies costs.

Parties need access to the facts upon which the expert’s opinion is based, but we believe that the benefits to be gained from full disclosure of an expert’s file are outweighed by the cost of the resulting incentive to hire a second consulting expert. We therefore recommend that experts whose reports are served must disclose only the facts, including test results, upon which the expert has relied in forming his or her opinion. The expert’s opinion and the facts upon which it is based must, however, be disclosed early in the proceedings.

We believe that this approach will eliminate the need to hire a “shadow expert,” as parties will not be concerned that the entire contents of an expert’s file must be disclosed if the expert testifies. At the same time, the rule is fair because it requires disclosure of the facts upon which an expert’s opinion is based.

⁶⁷ *Vancouver Community College v. Phillips, Barratt*, [1988] B.C.J. No. 980; 28 C.L.R. 277 (and [1987] B.C.J. No 3149, 20 B.C.L.R. (2d) 289).

⁶⁸ The solicitor-client privilege is the requirement that a lawyer not reveal written or verbal communications with his or her client, based on the theory that a person should be able to speak freely and honestly with his or her lawyer without fear that what was revealed will be used against him or her. An expert is considered to be an agent of the client, and therefore the same rules apply.

⁶⁹ In the *Vancouver Community College* case (see note 67) the communications were early drafts of the expert’s report.

3.5 Streamlining motion practice

Recommendation 3.5: Streamline motion practice by resolving issues at the case planning conference and by placing limits on the hearing process.

One element of pre-trial procedure that attracts frequent mention in discussions of civil justice reform is motion practice. Many lawyers and judges complain that interlocutory motions take up much time and expense, are a burden on the court system, and are often unnecessary. We considered many suggestions for improvement to motion practice and recommend the following:

- Require the parties to attend a case planning conference prior to delivery of any interlocutory application. The CPC judge may order an application to be resolved based on written materials only.
- Each court should consider the implementation of staggered start times for the hearing of motions.
- The new Supreme Court Rules should limit the volume of written materials that may be filed in relation to motions and the amount of time allotted for the hearing of motions. The rule should allow leave to exceed the limits, based upon:
 - the monetary value, complexity and importance of the case, and
 - whether the motion disposes of some or all of the issues in the case.

These approaches are discussed below.

Conferences

We believe that the best way to limit the filing of numerous motions is to follow the examples of Rule 60E (judicial case conference rule) in family law and Rule 68 (expedited litigation), which prohibit parties from filing motions until they have attended a conference with the court. Many issues that would normally become the subject of interlocutory motions can be discussed and resolved at such a conference. We therefore expect that the CPC will result in a substantial reduction of the number of interlocutory motions filed and a narrowing of issues on those motions that proceed.

Staggering start times

Motions are typically scheduled all at the same time, requiring parties and counsel to wait for some time before their case is called. The suggestion to stagger start times has some appeal, especially to those who have waited for hours to have a matter heard. We realize, however, that this type of scheduling

change could make scheduling more complex and could result in too much courtroom down-time. We also realize that not all courts experience delays in the hearing of motions. Therefore, we recommend that such scheduling be considered by the judiciary in each registry separately and perhaps attempted in certain registries as pilot projects.

Limiting written materials and hearing time

We would like to explore imposing limits on materials that may be filed, noting that the Supreme Court of Canada imposes limits on both material that may be filed and the time for hearing.⁷⁰

We therefore recommend that limitations on the amount of written material that may be filed in relation to motions and on the amount of time allowed for the hearing of motions be incorporated into the new court rules.

The rule should, however, allow the limits to be varied with leave. Consideration in granting leave should include:

- the monetary value, complexity and importance of the case, and
- whether the motion disposes of some or all of the issues in the case.

Deciding motions based on written materials alone

We do not support requiring all motions to be decided solely on the basis of written material. This approach would be too difficult for self-represented litigants, encourage too large a volume of written materials, and could add a layer of cost, as we do not know how many aggrieved parties would choose to request an oral hearing. However, once the need for an interlocutory application is identified, the CPC judge could order that the matter be disposed of by written argument only.

The use of technology

We do not have any specific recommendations for the use of technology to increase the efficiency and cost-effectiveness of interlocutory procedures. However, we must continue to explore the ability of technologies such as teleconferencing, videoconferencing, and on-line conferencing to increase access, improve efficiency and reduce costs.

⁷⁰ For example, under Rule 25(2) of the Rules of the Supreme Court of Canada, the memorandum of argument in an application for leave to appeal must not exceed 20 pages. (The pages must be printed in 12-point type and not exceed 500 words each.) The memorandum of argument in support of motions filed in our highest court must not exceed 10 pages (Rule 47(2)). On a hearing of an appeal, the appellant is limited to one hour.

3.6 Streamlining the trial process

Recommendation 3.6: Empower the judiciary to make orders to streamline the trial process.

This will be accomplished by:

- defining maximum default lengths of trial depending on the monetary value of the case
- requiring the parties to attend a trial management conference (TMC) between 15 and 30 days prior to the first day of trial
- assigning the trial to the judge who conducted the TMC
- providing the TMC judge with powers similar to those in Rule 68 to help the parties make the trial process more efficient
- limiting jury trials to those matters involving more than \$100,000, and
- providing the trial judge with additional powers to increase the fairness and efficiency of the trial process.

There are some disputes that will be most appropriately resolved by trial. Such disputes should be able to get to trial quickly and cost-effectively. In addition, the trial process itself must be streamlined, efficient, affordable and able to produce a just result.

Trial management at the CPC

The first “trial management” discussion will occur at the CPC. After canvassing the possibility of resolution, including the milestones that need to be reached in order to achieve a resolution, the CPC judge will help the parties define and narrow the issues. We anticipate that this will result in a shorter and more focused trial if a trial is necessary.

The CPC judge will then discuss with the parties the date and anticipated length of the trial. We believe that there should be limits on the length of trials based on proportionality principles, subject to leave. These limits will assist the parties and their counsel in the planning process, encourage brevity and decrease cost. We acknowledge that it is more difficult to be concise than long-winded and that brevity may come at the cost of increased preparation time. However, we believe that this is time well spent.

We recommend that the default maximum trial length be based on the monetary value of the case, as follows:

- cases under \$100,000—three days
- cases from \$100 to 250,000—five days
- cases over \$250,000—to be decided at the CPC.

These initial limits would be used to schedule the trial date at the conclusion of the CPC. Another set of shorter limits would be applicable to summary trials under Rule 18A.

The parties could apply for additional trial time, but the CPC judge or another judge on application should be reluctant to increase the length of the trial without convincing evidence of the complexity and importance of the case.

The trial management conference

For those matters that proceed to trial, we recommend that the parties be required to attend a trial management conference (TMC) to be held between 15 and 30 days prior to the first day of trial. The purpose of the TMC will be to ensure that the parties will be prepared for the trial and that the trial is conducted fairly and efficiently.

We support the approach taken in Rule 68, which requires each party to prepare, file and deliver to other parties prior to the conference a detailed trial brief that includes:

- a summary of the issues
- a list of witnesses and the summary of each witness’s evidence
- copies of the expert reports to be relied on at trial, and
- a list of documents to be introduced at trial.⁷¹

Preparation of this brief will focus the attention of the parties and their counsel on the key issues and encourage efficiency.

Many of these issues will have been canvassed at the CPC, and the parties must comply with any orders issued at the CPC limiting the time for trial, the number of expert witnesses, and so on.

The TMC judge may make orders to enhance the fairness and efficiency of the trial process, including:

- orders limiting time for direct or cross-examination of a witness, opening statements, and final submissions; and
- orders requiring that the direct evidence of certain witnesses be presented by affidavit.⁷²

In order to enhance the effectiveness of the TMC, we recommend that the judge assigned to the conference also be assigned to the trial.

⁷¹ See subrule 68(54).

⁷² As in subrule 68(56).

The trial process

We support the approach in Rule 68 to limit jury trials to those matters involving more than \$100,000.⁷³

Once the trial has commenced, the trial judge must have all of the powers necessary to ensure that the trial is run as fairly and efficiently as possible. Given our emphasis on increased judicial case management powers, such powers would include all of those mentioned above, including control over the use of time and the form of evidence to be presented.

This approach is consistent with our recommendations relating to motion practice, as set out in section 3.5 of this report. The directions of the CPC judge, the TMC judge and the trial judge will be guided by the principle of proportionality so that all orders are consistent with the monetary value, the complexity and the importance of the case.

3.7 Adding the Notice to Mediate to the Supreme Court Rules

Recommendation 3.7: Consolidate all three regulations regarding the Notice to Mediate into one rule under the Supreme Court Rules.

The Notice to Mediate process enables any party to a non-family action in the Supreme Court to require the other parties to attend a mediation session. It has proven to be an effective process in facilitating settlement. However, the incremental introduction of the process, applying to different areas of law, has resulted in three Notice to Mediate regulations under three different statutes:

- the Notice to Mediate Regulation, B.C. Reg. 127/98, under the *Insurance (Motor Vehicle) Act*
- the Notice to Mediate (Residential Construction) Regulation, B.C. Reg. 152/99, under the *Homeowner Protection Act*, and
- the Notice to Mediate (General) Regulation, B.C. Reg. 4/2001, under the *Law and Equity Act*.

The Notice to Mediate for motor vehicle personal injury actions is well known to lawyers who practise in this area and it is widely and successfully used.⁷⁴

⁷³ Subrule 68(14).

⁷⁴ An evaluation of the Notice to Mediate process for motor vehicle personal injury actions, conducted by an independent consulting firm, showed that in 71% of the actions mediated under the Notice, all issues were resolved. A further 10% of the actions were found to have settled after delivery of a Notice, but before the mediation session. In cases where there was not complete resolution of issues, 64% of respondents still felt that there were positive outcomes.

The Notice to Mediate (Residential Construction) Regulation applies to residential construction actions generally, but is most commonly used in the context of leaky condominium litigation. It is well known to the few lawyers who practise in this area, but does not appear to be as well known to lawyers involved in general construction litigation.

The use of the Notice to Mediate (General) Regulation has been low. In 2004 an average of 51 Notices were delivered per month, compared with 211 per month in the motor vehicle context. While the Dispute Resolution Office in the Ministry of Attorney General has promoted the Notice process, its absence from the rules is often cited by lawyers as a reason for its low level of usage.

We therefore recommend that all three regulations regarding the Notice to Mediate be consolidated into one rule under the Supreme Court Rules.

3.8 Resolving key issues early, but limiting appeals

Recommendation 3.8: Provide opportunities for litigants to resolve issues that create an impasse early and cost-effectively, but limit interlocutory appeals.

This approach involves:

- requiring that once a decision has been made on an impasse issue, all further applications in the matter be assigned to the same judge;
- adopting a presumption in favour of suspending the right to appeal orders on impasse issues until the matter has been entirely resolved;
- requiring that leave to appeal a decision on an impasse issue prior to resolution of the matter be granted only if:
 - an immediate appeal would protect the appellant from substantial or irreparable harm that would occur if the appellant were forced to wait until final judgment to bring the appeal, and
 - the order involves a controlling question of law and an immediate appeal from the order will materially advance the ultimate termination of the litigation; and
- allowing the judge who made the decision on the impasse issue to certify that the decision should be appealed prior to resolution of the matter.

Resolving impasse issues

Our vision of an effective civil justice system incorporates both encouragement for parties to resolve their own disputes and a streamlined process for those disputes that are litigated in the courts. To achieve early resolution of a problem or to settle litigation before significant cost is expended, it may be necessary to

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seek an adjudication of one or more issues that are preventing a negotiated resolution. The parties may be unable to negotiate such an issue because it is highly value-laden, or they may have fundamentally different views of the facts or how the law applies to those facts.

Assuming that the issue can be sufficiently separated from the other issues in the case, we believe that the parties should have access to a process to adjudicate such an issue quickly and cost-effectively, whether the issue arises before or during a court action.

In order to encourage early resolution of a court action involving one or more issues that are creating an impasse to resolution, the first step is the streamlined case initiation process outlined in section 4.2, in which the parties will be required to succinctly list the issues in dispute. The next step is the case planning conference (CPC). A key focus of the conference will be the joint identification of issues and a further discussion about resolution opportunities. At that stage, any key issues preventing resolution should be identified and the CPC judge will explore with the parties whether the ultimate resolution of the case would be advanced by the determination of those issues separately. The CPC judge will have the power to order that such an issue be determined and by what process. For example, the issue may require adjudication by a judge or referral to an independent expert for determination of scientific, appraisal, accounting or other technical issues.

The existing Rule 18A (summary trials) and the other processes available for resolution of impasse issues (described in Appendix O: Resolution of Impasse Issues and Interlocutory Appeals) must be revitalized. We recommend that once a decision has been made to seek a determination on an impasse issue, any further similar applications (and possibly case management as well) should be assigned to the same judge. This will avoid inconsistent rulings and duplication of evidence. The CPC judge may choose to be seized of the case or to ask that the case be assigned to another judge for this purpose.

Appeals of interlocutory orders

If early adjudication of impasse issues is to be encouraged, then the number of potential appeals from orders made on these issues will increase. We support restrictions on the right to appeal interlocutory orders, to be accomplished as follows:

- Adopt a presumption in favour of suspending the right to appeal orders on interlocutory issues until the matter has been entirely resolved. Leave to appeal would be required and leave to appeal an order prior to resolution would only be granted if the appellant demonstrates that:

- an immediate appeal would protect the appellant from substantial or irreparable harm that would occur if the appellant were forced to wait until final judgment to bring the appeal, and
- the order involves a controlling question of law and an immediate appeal from the order will materially advance the ultimate termination of the litigation.
- In deciding whether to grant leave, the court may also consider whether the point on appeal is of significance to the development of the law in the province, and whether an immediate decision on the point is necessary.
- The judge who made the decision on the impasse issue may certify that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may resolve the litigation more quickly. The Court of Appeal may, in its discretion, grant leave to appeal the interlocutory order on this basis.

The background for Recommendation 3.8 is provided in Appendix O: Resolution of Impasse Issues and Interlocutory Appeals.

4

Impact of the Recommendations on Self-Represented Litigants

In recent years, many jurisdictions have noted increasing numbers of self-represented litigants in their respective court systems. The inability (or unwillingness)⁷⁵ of litigants to obtain legal representation in a complex court system poses a number of problems. Litigants without legal representation are often confused, frustrated and ill-prepared. A Quebec Ministry of Justice report points out that unrepresented litigants pose problems not only for themselves, but also for:

- judges, who need to remain impartial yet feel obliged to intervene to assist the unrepresented litigant
- court personnel, who wish to assist the litigant but who are not permitted to provide legal advice
- the opposing lawyer, who may attempt to explain various matters to the unrepresented litigant to avoid delay, and
- the opposing party, who may incur increased costs as a result of the proceedings being prolonged by the unrepresented litigant.⁷⁶

Jurisdictions across the common law world have begun implementing reforms and programs designed to help unrepresented litigants, primarily in family law matters, navigate the court system and obtain the best possible result for themselves. These reforms involve three broad categories: informational programs, simplified forms and reduced-cost legal services.

We have strived to make recommendations in all of these areas, which we hope will alleviate some of the problems faced by self-represented litigants:

- The legal information and assistance hub should provide potential litigants with the information and assistance necessary to resolve most legal problems without litigation.
- Changes to conflict of interest rules should facilitate a greater willingness on the part of the bar to provide pro bono legal services in a clinic setting.

⁷⁵ Unrepresented litigants are broadly categorized into two groups: those who would like to have a lawyer but cannot afford one, and those who can afford a lawyer but choose not to retain one. Most studies show that the majority of unrepresented litigants are left unrepresented for financial reasons. (See Gayla Reid, Donna Senniwi, and John Malcolmson, *Developing Models for Coordinated Services for Self-Representing Litigants: Mapping Services, Gaps, Issues and Needs* [Vancouver, BC: Law Courts Education Society of BC, 2004], http://www.lawcourtsed.ca/documents/research/srl_mapping_repo.pdf.)

⁷⁶ Québec, Ministère de la Justice, *Report of the Civil Procedure Review Committee: A New Judicial Culture, Summary* (Québec City, Québec: Ministère de la Justice du Québec, 2001), <http://www.justice.gouv.qc.ca/English/publications/rapports/crpc-rap2-a.htm>.

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- Allowing the unbundling of legal services should allow litigants who cannot afford to hire counsel for an entire case to be able to hire counsel to provide some limited representation or advice on key issues.
- The proposed simplified action initiation documents should make it easier for unrepresented litigants to prepare and file the initial documents to initiate or defend a case.
- The early case planning conference should help self-represented litigants resolve cases early or plan for the events necessary to achieve early resolution.
- All of the suggested reforms, including the case planning conference, the proposed limitations on discovery and experts, and the introduction of an overriding principle of proportionality, should make litigation more affordable and therefore reduce the need for self-representation.⁷⁷

⁷⁷ For more information on the issue of self-represented litigants, see Reid et al., *Developing Models for Coordinated Services for Self-Representing Litigants* (note 75). For information on the American experience with this issue, see National Center for State Courts, *The Future of Self-Represented Litigation* (note 4).

5

Implementation and Evaluation

5.1 How to effect change

Throughout our deliberations we were very cognizant of the fact that implementing reform requires a change in long-established legal culture.⁷⁸ We know, however, that many changes in our civil justice system have been successfully implemented over the years. We believe that the change in legal culture requires two things:

- First, important changes should be imposed through the introduction of new rules of procedure. While such changes normally face resistance at first, they often stimulate a cultural shift. Nothing changes culture more effectively than a positive experience with the new process.
- Second, rule changes must be accompanied by strong, consistent and long-term leadership.

Studies show that imposed procedural changes in large organizations are encouraged by a small but significant “change vanguard” of employees who are dissatisfied with the old system and see the imposed change as an opportunity to take action and help the reform succeed.⁷⁹ The change vanguard, confident that a committed leadership is on its side, speaks out in favour of the reforms and helps to convert more skeptical employees to the cause.⁸⁰ Support for new systems increases over time, irrespective of personal experience, as it becomes clear that the leadership is not abandoning the changes.⁸¹

While these theories may be more difficult to apply in the legal system because of the multiplicity of stakeholders, we believe that reforms can be successfully introduced if dissatisfied lawyers, judges and clients join a “change vanguard” and those in leadership roles sustain their commitment to the changes over a long period of time.

⁷⁸ For a more detailed analysis of legal culture, see Rodney Macdonald, “Legal Culture” (discussion paper prepared for the BC Justice Review Task Force, February 2005), http://www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp, and Barbara Young, Q.C., “Change In Legal Culture: Barriers And New Opportunities” (note 20).

⁷⁹ Steven J. Kelman, “Changing Big Government Organizations: Easier than Meets the Eye?” (paper prepared for the Ash Institute for Democratic Governance and Innovation, John F. Kennedy School of Government, Harvard University, 2004), <http://ssrn.com/abstract=563163>.

⁸⁰ Kelman, “Changing Big Government Organizations.”

⁸¹ Kelman, “Changing Big Government Organizations.”

Successful reform requires a coordinated effort on the part of all stakeholders in the system.⁸² Supporting such change will be of great benefit to the bar, as virtually all civil justice reform research shows that the public is demanding different ways of resolving disputes.⁸³ We therefore strongly encourage those in leadership roles in the legal community—the government, the judiciary, the Canadian Bar Association, law schools, the Law Society and leaders in the legal profession—to support and advocate for our recommended justice reform.

5.2 Implementation

Research shows that successful civil justice programs have used a collaborative design and implementation process involving all key stakeholder groups.⁸⁴ This approach improved both the quality of the program design and the level of support that was integral to successful implementation.

There is no doubt that such an approach is more complex and time-consuming, as it involves consulting with multiple stakeholders, including as many representatives of the public as possible. The results, however, will be superior in the long run. Simultaneously, the “vanguard of change” group will be identified and assembled and will meet regularly to share ideas and to monitor the progress of change.

The recommendations in this report are extensive, and implementation will require significant resources and effort from a variety of sources. In order to build and maintain a momentum for change, we recommend that, upon approval of these recommendations by the Justice Review Task Force, the extensive task of implementation and evaluation be delegated to a single body that will oversee and facilitate the process and coordinate the efforts of the

⁸² Proof of a culture shift may also be seen in changing law school curricula, which are becoming more accepting of alternative modes of dispute resolution. See Australian Law Reform Commission, “Review of the Adversarial System of Litigation: Rethinking Legal Education and Training” (Issues Paper 21, 1997), <http://www.austlii.edu.au/au/other/alrc/publications/issues/21/ALRCIP21.html>, para. 5.12.

⁸³ Brenner and Seckel, “Are We Listening?” (note 20).

⁸⁴ This kind of approach is very consistent with the approach described in the Ministry of Attorney General’s publication *Reaching Resolution: A Guide to Designing Public Sector Dispute Resolution Systems* (Ministry of Attorney General, Justice Services Branch, *Reaching Resolution: A Guide to Designing Public Sector Dispute Resolution Systems* [Victoria, BC: Author, 2003], <http://www.ag.gov.bc.ca/dro/publications/guides/design.pdf>). Good examples are the approaches taken in developing Project Magellan in the Family Court of Australia (Thea Brown, “Project Magellan” [paper presented at the Australian Institute of Criminology conference] “Child Sexual Abuse: Justice Response or Alternative Resolution,” May 2003), <http://www.aic.gov.au/conferences/2003-abuse/brown.html>) and the Unified Family Court Pilot Project in King County, Washington (Janet L. McLane, *An Evaluation of Unified Family Court Pilot Sites in Washington State: Executive Summary* [Olympia, WA: Washington State Center for Court Research, 2004], <http://www.courts.wa.gov/newsinfo/content/pdf/UFCExecSummary.pdf>).

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multitude of stakeholders interested in this important work. At least initially, government should take a lead role in the design and implementation phases.

5.3 Evaluation

Implementation plans must provide for a formal and comprehensive evaluation process. Without keeping track of key data, meaningful improvement is impossible. Recent BC justice initiatives have been structured to accommodate a comprehensive intensive evaluation process. For example, the Self-Help Information Centre and the Rule 68 pilot project were designed with a view to producing detailed evaluation reports.

Meaningful evaluation, however, cannot be reconstructed after the event. It implies that there are well-thought-out and measurable objectives and goals, comprehensive data collection before and during implementation, and an independent analysis at predefined periods. As noted in the Family Justice Reform Working Group report, the key to evaluation is comparative data and a set of standards against which performance can be measured.⁸⁵ Early steps must be taken to develop systems and processes that will capture the baseline data required to support meaningful evaluation.

The Court Services Branch of the Ministry of Attorney General has done considerable work to improve its electronic civil case tracking and management systems, including the development of the Civil Electronic Information System (CEIS), which stores case-tracking information, and the Civil Management Information System (CMIS), which allows us to retrieve and analyze the information. While these systems offer much potential, there still is a need for substantial work to be done to improve the ability to use these systems to accurately track the baseline data needed for a justice reform evaluation. We recommend that such work be done in consultation with all justice system stakeholders.

5.4 Cost-benefit analysis

At each stage of our analysis, we considered whether the benefits of a particular initiative outweighed the anticipated costs. Costs and benefits in this milieu are not merely financial in nature and are often difficult to measure, so this is more than just a mathematical exercise. For example, a trusted system of justice based on the rule of law provides important social benefits, including a well-functioning economy and social stability.

⁸⁵ Family Justice Reform Working Group, *A New Justice System for Children and Families* (note 39), 109.

The majority of our recommendations involve some form of “front-end loading” of process and resources in order to encourage early, affordable and just solutions. The underlying premise of this approach is that resources spent wisely at the outset will save costs that would otherwise have been incurred later in the system.

For example, significant resources will be required to create, implement and maintain the hub and other pre-litigation processes recommended in this report. However, we believe that an up-front investment in the provision, coordination and promotion of information and services will save money for litigants and the court system over time. In addition, consideration should be given to coordinating the “hub” recommended in the Family Justice Reform Working Group report with the similar model recommended here in order to avoid inconsistent or overlapping service delivery.

We believe that there are significant opportunities to move resources from the back end to the front end of the system through increased legal information, early information exchange, matching of process to problem, allowing only that process that is proportional to the matter, and increased judicial intervention. In addition to resolving disputes earlier, we believe that for those matters that proceed to litigation, our recommendations will result in a reduction in the number of:

- motions
- documents exchanged
- examinations for discovery, and
- experts.

We also believe that these recommendations will:

- reduce the labour-intensiveness of the litigation process, thereby reducing the cost for the parties
- reduce the number of hours spent by counsel relearning the case after prolonged bouts of inactivity
- reduce the time spent on pleadings and amendments to pleadings
- identify issues earlier, thereby saving time and money spent on extraneous issues, and
- provide more opportunities to resolve disputes earlier, regardless of the dispute resolution process employed.

While we cannot provide precise estimates, we believe that these approaches will result in savings both to litigants and to the system.

The Family Justice Reform Working Group report advocates an increase in court fees (so that the fee for taking a family matter to court more closely reflects its true cost) and using those monies to fund the pre-litigation

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“consensual dispute resolution” processes recommended in the report.⁸⁶ The risk of this approach is that, by making the court process more expensive, we would be creating new barriers to justice. Further analysis is required with respect to the magnitude of administrative savings compared to the cost of the recommended changes. The civil court fee structure should therefore be reviewed using the principles described in this report. (More information on court fees is included in Appendix P: Topics Needing Further Consideration.)

⁸⁶ Family Justice Reform Working Group, *A New Justice System for Children and Families* (note 39), 39–40.

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Topics Needing Further Consideration

In attempting to fulfill our mandate, we realized that not all of the possible options for reform could be addressed in this round of work.⁸⁷ Effective civil justice reform is an ongoing, evolutionary process. We have therefore prioritized the options and addressed in this report those issues that we consider to be the most urgent. The next round of reform efforts will focus on evaluating our recommended reforms and, at the same time, moving ahead with the next group of options. There are many topics that deserve more detailed consideration and recommendations and they are listed and discussed in Appendix P: Topics Needing Further Consideration.

⁸⁷ For a summary of the types of reforms tried in many common law jurisdictions, see Robert Goldschmid, “Major Themes of Civil Justice Reform” (discussion paper prepared for the BC Justice Review Task Force, January 2006), http://www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp.

Appendix A: The Civil Justice Reform Working Group and Its Mandate

The Civil Justice Reform Working Group was established in November 2004 by the Justice Review Task Force (JRTF). The JRTF was established on the initiative of the Law Society of British Columbia in March 2002. The objective of the JRTF is to identify a wide range of potential reform initiatives that could make the justice system more responsive, accessible and efficient.

Prior to creating the Civil Justice Reform Working Group, the JRTF formed three other working groups:

- The Family Justice Reform Working Group was formed in July 2003 to explore options for fundamental change to the family justice system in BC. The Family Justice Reform Working Group released its final report, entitled “A New Justice System for Families and Children,” in June 2005.
- The Street Crime Working Group was formed in March 2004 to recommend a new criminal justice response to street crime, with a focus on Vancouver’s downtown eastside. The Street Crime Working Group released its final report, “Beyond the Revolving Door: A New Response to Chronic Offenders,” in October 2005.
- The Mega-Trial Working Group was formed in April 2004 to recommend strategies for managing large criminal cases in BC. The Mega-Trial Working Group will release its report in the near future.

The Civil Justice Reform Working Group was formed to explore fundamental change to the BC civil justice process from the time a legal problem develops through the entire Supreme Court litigation process. This includes all types of civil matters other than family law cases. The mandate does not include the Provincial Court, but we have examined its processes and suggest that there should be consistency between the goals of the two courts.

In order to fulfill our mandate, we focused on the interests of the users of the legal system, with the aim of finding options that meet as many of those interests as possible. These interests include:

- **Accessibility**—dispute resolution processes, including the trial, that are affordable, understandable and timely
- **Proportionality**—procedures that are proportional to the matters at issue

- **Fairness**—parties have equal and adequate opportunities to assert or defend their rights
- **Public confidence**—parties are confident that the civil justice system will meet their needs, and consider it to be trustworthy and accountable
- **Efficiency**—the civil justice system uses public resources wisely and efficiently
- **Justice**—the truth, to the greatest extent possible, is ascertained and applied to produce a just resolution.

Members

The members of the Civil Justice Reform Working Group were nominated by the JRTF and represent various stakeholders. The present members are:

- Chief Justice Donald Brenner, Supreme Court of British Columbia (Co-Chair)
- Allan Seckel, Q.C., Deputy Attorney General (Co-Chair)
- Carol McEown, Legal Services Society
- Madam Justice Laura Gerow, Supreme Court of British Columbia
- Judge Dennis Schmidt, Provincial Court of British Columbia
- Master William McCallum, Rules Revision Committee
- Richard Margetts, Q.C., representing the Law Society of BC
- Jim Vilvang Q.C., representing the Canadian Bar Association, BC Branch
- Helen Pedneault, Assistant Deputy Minister, Court Services Branch
- George Macintosh, Q.C., Member at Large
- Barbara M. Young, Q.C., Member at Large
- Craig Dennis, Member at Large

We were led by our project manager, Kari Boyle, and supported by Robert Goldschmid of the Ministry of Attorney General, Dispute Resolution Office.

Methodology

In order to fulfill our mandate, we:

- met monthly from the time of our inception in September 2004;
- circulated a Green Paper⁸⁸ as widely as possible and invited submissions on the paper;
- created and administered a webpage as part of the JRTF website and provided a link to receive submissions by e-mail directly from the site;

⁸⁸ Civil Justice Reform Working Group, “Green Paper: The Foundations of Civil Justice Reform” (prepared for the BC Justice Review Task Force, January 2004), http://www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp.

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- received and reviewed a total of 35 written submissions;
- participated in a number of formal and informal consultation meetings with the bar;
- organized, in co-operation with the Continuing Legal Education Society of BC, the “Restructuring Justice” conference in June 2005 to stimulate discussion about civil justice reform in the province;
- conducted a Supreme Court file review and a litigant survey to seek additional views from the public about the civil justice system;
- divided into subgroups to conduct more in-depth investigation into three key areas:
 - changing legal culture
 - accessing the system—pre-action problem-solving, and
 - the Supreme Court process;
- conducted extensive research into civil justice reforms in other jurisdictions, primarily:
 - the rest of Canada
 - the United Kingdom
 - the United States, and
 - Australia;
- published research papers on reforms in other jurisdictions, changing legal culture, and “defensive practice” by lawyers⁸⁹;
- followed the progress of other BC reform initiatives, including Rule 68 and the increase in the Small Claims Court monetary jurisdiction; and
- many of our members spoke at the conference, “Into the Future: The Agenda for Civil Justice Reform,” jointly sponsored by the Canadian Forum on Civil Justice and the Canadian Bar Association in May 2006.

We are grateful to all those who took the time to provide their very helpful comments and suggestions, all of which were carefully reviewed and considered.

⁸⁹ All of the papers are available at http://www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp.

Appendix B: Proportionality

A key principle of our vision is that the amount of process used for a case will be proportionate to the value, complexity and importance of the case. Incorporating this principle will help make our civil justice system more timely, efficient, fair and affordable.

Our common law adversarial system of dispute resolution was not designed with cost-effectiveness in mind; it was designed to resolve conflict through a competition of adversaries. In this context the search for justice is conceived as a contest, and “advocacy” is generally understood to mean that the lawyer’s task is to take every possible step under the rules that might advance the client’s case. “The role of counsel betrays the historical links of the adversary system with the old system of trial by battle. The lawyer is the champion of the client.”⁹⁰

This attitude of thorough representation is brought to bear on every case, largely independent of the value of the case. Although some lawyers are able to effectively manage costs in relation to the amount in controversy, most are reluctant to unilaterally restrict the level of advocacy to fit the value of the case, for fear of granting the opponent an advantage.

Additionally, other than contingency fee billing common in personal injury cases, hourly billing is the accepted standard for the billing of legal services. While we do not believe that lawyers intentionally do needless work to increase their bills, we must acknowledge that the extensive advocacy required by the adversarial system is financially rewarded, whether productive or not, at least as long as there are clients willing and able to bear the cost. Further, there are pressures brought upon lawyers in many firms to meet yearly hourly billing quotas. It therefore becomes evident that our system of extensive advocacy is encouraged on a number of levels and no doubt plays a role in the high cost of litigation.

If one of the causes of excessive cost is that the adversary system requires lawyers to leave no stone unturned, part of the solution may be to limit opportunities to turn over stones and to encourage the efficient and productive use of lawyer time by restricting the process available to the disputing parties.

⁹⁰ Wayne Renke, “Litigation and the Adversary System,” in *Public Legal Education: A Guide to Canadian Law* (University of Alberta Faculty of Law and the Alberta Law Foundation), http://www.law.ualberta.ca/research/courts/adversary_system.htm#return2 (accessed June 2006).

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Restricting the process available to the parties, however, cannot be done without regard for the interest of justice and the rule of law. The answer therefore lies (at least partially) in the concept of proportionality.

The concept of proportionality is based on the principle that all cases are not equal. They vary in their monetary value, complexity and importance. Cases filed in the Supreme Court vary in dollar value from a few thousand dollars to multi-million-dollar claims. The complexity of cases varies from a minor motor vehicle accident, in which liability is admitted and a single party suffered a specific injury, to a lawsuit over environmental contamination, involving numerous parties and multi-faceted scientific and legal issues. The importance of cases varies from a slip-and-fall case that will have no bearing on the established body of law for such cases, to cases alleging violations of fundamental constitutional rights that could have a lasting and substantial impact on the law.

Traditionally, however, rules of court procedure do not distinguish cases based upon their value, complexity or importance—all cases are treated more or less the same. Many jurisdictions have therefore adopted the idea that we must “match the extensiveness of the procedure with the magnitude of the dispute.”⁹¹ In doing so, we balance the interest of justice with cost-effectiveness to increase access to justice. This is one of the most common themes in the current literature on civil justice reform. The concept applies to both the amount of procedure the parties are allowed to invoke and the amount of judicial management and resources the court must devote to a case. This approach reduces cost and tends to level the playing field between parties, as it limits the excessive use of process by the side with more resources.

Proportionality principles come into play in two possible forms:

- proportionality as a general overriding principle, and
- multi-tracking.⁹²

Proportionality as a general principle

An example of the broad application of proportionality as a general principle is the new code of civil procedure in the UK. The code is guided by an “overriding objective” enabling the court to deal with cases justly.⁹³ Dealing with a case justly is defined as dealing with it expeditiously and fairly, saving

⁹¹ Honourable Geoffrey L. Davies, A.O., *Managing the Work of the Courts*, <http://www.courts.qld.gov.au/publications/articles/speeches/Davies000097.pdf>, 9.

⁹² Also known as “expedited proceedings,” “fast track,” “simplified proceedings” or “differential case management.”

⁹³ UK, *Civil Procedure Rules*, Rule 1.1 (note 40).

expense, ensuring the parties are on an equal footing, and dealing with it in ways that are proportional to:

- the amount of money involved
- the importance of the case
- the complexity of the issues, and
- the financial position of each party.

The court must only allot the case a share of the court’s resources proportional to the magnitude of the case, while taking into account the need to allot resources to other cases.⁹⁴ The court must give effect to the overriding objective when it exercises any power under the rules or interprets any rule.⁹⁵ The parties are required to help the court further the overriding objective.⁹⁶

The court must also further the overriding objective by “actively managing cases,” which includes encouraging co-operation, identifying the issues at an early stage, encouraging alternative dispute resolution or otherwise assisting the parties in settling, fixing timetables, and generally ensuring the quick, efficient and cost-effective handling of the case.⁹⁷

There are numerous reported cases in the UK defining the concept of proportionality. They include decisions on whether to admit evidence, to permit certain cross-examination, to allow additional experts to testify, to grant new trials, and to grant leave to appeal, and on other issues. In one such case before the House of Lords, Lord Hobhouse of Woodborough characterized the new proportionality rules as follows:

This represents an important shift in judicial philosophy from the traditional philosophy that previously dominated the administration of justice. Unless a party’s conduct could be criticised as abusive or vexatious, the party was treated as having a right to his day in court in the sense of proceeding to a full trial after having fully exhausted the interlocutory pre-trial procedures.⁹⁸

In *Saunders v. Williams*,⁹⁹ the English Court of Appeal relied upon proportionality principles in refusing to send a matter back for retrial of an issue:

⁹⁴ UK, *Civil Procedure Rules*, Rule 1.1.

⁹⁵ UK, *Civil Procedure Rules*, Rule 1.2.

⁹⁶ UK, *Civil Procedure Rules*, Rule 1.3.

⁹⁷ UK, *Civil Procedure Rules*, Rule 1.4.

⁹⁸ *Three Rivers District Council v. Bank of England*, [2001] 2 All E.R. 513, para. 153.

⁹⁹ [2002] E.W.J. No. 2132; [2002] EWCA Civ 673.

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We must bear in mind the question of proportionality. Under the CPR [Civil Procedure Rules] it is the duty of the court to make decisions proportionate to the issues involved. That involves a consideration of whether the amount of money at stake and the amount which a successful appellant is likely to achieve justifies the expense of remission on this issue which would involve an expensive retrial and probably expert evidence. We have to consider it from the point of view of the parties, also we have to consider the public interest, whether it is appropriate that this case should be remitted so that further court time, which of course is in much demand by litigants, should be taken, having regard to the narrowness of the possible financial outcomes in this case.¹⁰⁰

Proportionality principles are not only invoked to limit process, but may also be invoked to allow more process when appropriate. In *E.S. v. Chesterfield and North Derbyshire Royal Hospital NHS*¹⁰¹ the trial judge in a serious medical malpractice case limited the evidence to one expert in obstetrics for each side. This was reversed by the Court of Appeal, relying on the proportionality rules:

We were told that the overall value of the claim in this case may be around GBP 1.5 million. The case is a very important one to both sides. The claimant is physically impaired for her entire life by cerebral palsy. If that was the result of negligence at the very moment of her birth, the issue in the case is of the utmost importance both to her and to her family. For the doctors who face an allegation of professional negligence the case is obviously very important, too. The estimated additional fees of the second expert are around GBP 8,500 if he attends three to four days of the trial. The estimated added length to the trial (whose overall estimate is five days) is about two hours. In my view the balance of these considerations does make it proportionate and just as between the parties that this claimant is permitted to rely upon the reports of two obstetricians, not one; and the additional costs to public funds and share of the court's resources is also proportionate and just.¹⁰²

Several UK decisions also note that the obligation to deal with cases justly under proportionality and other principles increases the amount of flexibility and discretion available to judges.

¹⁰⁰ [2002] E.W.J. No. 2132; [2002] EWCA Civ 673, para. 30. The court did elect to substitute its own award in place of the trial court's judgment.

¹⁰¹ [2003] E.W.J. No. 4753; [2003] EWCA Civ 1284.

¹⁰² [2003] E.W.J. No. 4753; [2003] EWCA Civ 1284, para. 33.

Multi-tracking

In addition to adopting the guiding, overarching principle of proportionality, many common law jurisdictions around the world, including Canada, have implemented some form of multi-tracking, which involves assigning a case to the appropriate process pathway (track) based on predefined criteria. Usually, expedited or simplified rules are used for cases of lower values.

One example of multi-tracking is from the UK's system, which streams cases as follows:

- Cases where the amount in controversy is less than 5,000 GBP (\cong \$10,000 Canadian) are small claims.¹⁰³ These cases are given a very informal, quick trial, with no formal rules of evidence.¹⁰⁴ Experts may not testify or submit reports without court permission.¹⁰⁵ The parties may agree to have the claim decided on the basis of written materials only.¹⁰⁶
- Cases where the amount in controversy is less than 15,000 GBP (\cong \$30,000 Canadian) are fast-track cases. These cases are allowed an expedited process, which includes:
 - fixed costs¹⁰⁷
 - the use of a single joint expert, unless there is a good reason not to do so¹⁰⁸
 - no oral expert evidence, unless the court determines it is in the interests of justice to do so¹⁰⁹
 - limited discovery¹¹⁰
 - a fixed (or within a fixed three-week period) trial date within 30 weeks,¹¹¹ and
 - potential limits on oral evidence and cross-examinations.¹¹²
- Cases involving more than 15,000 GBP are put on the “multi-track.” Multi-track cases are case-managed by procedural judges working in teams with other judges.¹¹³

¹⁰³ UK, *Civil Procedure Rules*, Rule 26.6. For personal injury actions to be in the small claims track, the amount claimed for pain and suffering must not be more than \$1,000 GBP.

¹⁰⁴ UK, *Civil Procedure Rules*, Rule 27.8.

¹⁰⁵ UK, *Civil Procedure Rules*, Rule 27.5.

¹⁰⁶ UK, *Civil Procedure Rules*, Rule 27.10.

¹⁰⁷ UK, *Civil Procedure Rules*, Rule 28.2(5) and Part 46.

¹⁰⁸ UK, *Civil Procedure Rules*, Practice Direction 28, s. 3.9(4).

¹⁰⁹ UK, *Civil Procedure Rules*, Practice Direction 28, s. 7.2(4)(b). If oral expert evidence is to be used, it is limited to one expert per party per field, up to two fields (Rule 26.6(5)).

¹¹⁰ UK, *Civil Procedure Rules*, Rule 28.3.

¹¹¹ UK, *Civil Procedure Rules*, Rule 28.2(4).

¹¹² UK, *Civil Procedure Rules*, Rule 32.1, 32.52 and Rule 28, Practice Direction 8.4.

¹¹³ UK, *Civil Procedure Rules*, Part 29.

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Cases are directed into the appropriate track based upon responses to allocation questionnaires, which are served on the parties by the court after the defence is filed.¹¹⁴

In British Columbia, while we do not have an explicit multi-tracking system in place, such as the UK model described above, we currently do in effect have five distinct tracks:

- the small claims track (Provincial Court) for cases involving less than \$25,000
- the fast track (Rule 66), which provides faster and less costly adjudication of cases that can be tried in two days or less
- the expedited litigation track (Rule 68) for cases in the pilot registries involving \$100,000 or less
- the case management track for complex cases scheduled to take 20 or more days of trial, and
- the general Supreme Court action track for all other cases.

Although the development of the above tracks has been piecemeal, it clearly demonstrates a movement toward the implementation of proportionality principles. The recommendations we propose in this report will further add to, or replace, the above tracks, by introducing the CPC process, which will permit a case-by-case proportional matching of the process to the problem.

The general principles of proportionality described above will be implemented through the recommendations made in this report, including:

- an amendment to Rule 1(5) (Recommendation 3.1)
- rules restricting discovery and the use of expert witnesses (Recommendations 3.3 and 3.5), and
- active case management through the CPC (Recommendation 2).

¹¹⁴ UK, *Civil Procedure Rules*, Rule 26.3.

Appendix C: Matching

Related to the principle of proportionality is the concept of “matching.” In addition to the extensiveness of the procedure being proportional to the magnitude of the case, we want to ensure that the type of dispute resolution processes employed in a case are the best suited to the particular needs of the case.

Our vision of the civil justice system is that it will be flexible enough to meet the needs of the wide variety of its users. Those needs may vary from helping an individual solve a problem (before it even becomes a dispute) to ensuring the smooth and efficient trial of a complex, multi-million-dollar case.

Some cases involve intractable value and rights-laden issues that would benefit most from an early trial. Some cases need only a monetary evaluation and might be best served by direction to a neutral case evaluation. Some cases involve parties in an ongoing business or other relationship who might be able to find mutual interests with the help of a mediator. Ideally, if we try to match the dispute resolution process to the particular needs of the case, we will increase the chances of early, cost-effective and just resolutions.¹¹⁵

¹¹⁵ For a recent comprehensive discussion on the concept of matching, see Frank E. A. Sander and Lukasz Rozdeiczer, “Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centred Approach,” *Harvard Negotiation Law Review*, 11 (Spring 2006), 1 (also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=904805).

Appendix D: Judicial Intervention

The principles of proportionality and matching can, to some degree, be accomplished by setting limits on process in court rules, as has been done in Rule 68. Inevitably, however, the variety of case types will require judicial intervention to ensure that these concepts are respected. We cannot merely leave the principles of proportionality and matching to the parties in the hope that they will use them appropriately. The Honourable Geoffrey Davies, A.O., has stated:

An adversarial system in this unmodified form is a relic from a period (if there ever was one) in which courts and parties could afford to allow the lawyers to determine their own course; that is, a time when those who litigated could afford to do so and when courts were not subject to the challenges imposed by the volume and increasing complexity of modern litigation. In an unreformed condition it cannot hope to contend with these and achieve the object of providing an acceptable structure for dispute resolution. The reality is that no court system can do so by leaving the parties and their representatives to their own devices; for to do so has resulted in unendurable delay and expense in dispute resolution for the parties and those others who wait in turn in the litigation stream.¹¹⁶

Instead, we advocate a more active management role for the judiciary than is contemplated by the present system. This will require a significant change in approach for many judges, and training and support will be required.

¹¹⁶ Honourable Geoffrey L. Davies, A.O., “A Modified Adversary System: How Different Is It From Yours?” (paper delivered at the Max-Planck Institute, Hamburg, Germany, 1995), <http://www.courts.qld.gov.au/publications/articles/speeches/Davies120195.pdf>, 2.

Appendix E: An Expanded Role for Lawyers

Moving to solutions

In this report, we make several key recommendations about pre- and post-litigation procedures. The recommendations for system changes alone, however, are not sufficient. We also need to encourage lawyers to take a more active role in helping their clients move to solutions.

Lawyers are trained to quickly ascertain the relevant facts of a dispute, spot all potential legal issues that might emerge from those facts, and argue for the application of the law that results in victory for their client. These skills are essential for any good litigator.

Under the traditional approach to litigation, lawyers ignore most non-legal issues and focus on framing the client's problem in terms of applicable rights and obligations. The underlying assumption is that the source of conflict is a legal or moral principle where one side is right and the other wrong. This approach requires lawyers to take control of the client's problem, because the process transforms the matter into something that can be resolved only through expert legal analysis. As a result, the matter often becomes almost unrecognizable to the client.

The traditional litigation process involves each lawyer preparing for and pushing toward trial while marshalling the facts and law that favour his or her client. The cost of preparing for trial is incurred by the client (and by the court system), even though cases rarely reach a trial. Negotiation occurs at various stages of this process and the case typically resolves when the lawyers agree on what a neutral adjudicator would likely do or when one side reluctantly agrees to a settlement because of financial or emotional pressure (combined with the uncertainty of what the outcome will be if the case is tried). In rare cases, an adjudicator actually chooses a winner and a loser.

Many lawyers believe that they serve their clients best through this approach. They assume that clients come to them specifically for their expertise in law, not for their expertise in interest-based negotiation or conflict resolution. This assumption certainly seems logical and in many cases is accurate.

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We have learned, however, that most clients go to lawyers looking for a fast, inexpensive and reasonable solution to their problem, not for litigation.¹¹⁷ Ontario Chief Justice Roy McMurtry stated, “People attend lawyers with problems they want resolved, not with problems they want litigated.”¹¹⁸

As Pascoe Pleasance noted at a recent Canadian Forum on Civil Justice conference, “We cannot artificially remove legal problems from their context.”¹¹⁹ Many lawyers have come to understand this principle and realize that serving their client requires more than an analysis of facts and law. They have learned that disputes are often wrapped in financial, emotional, cultural and other issues. They attempt to gain insight into and understanding about these non-legal issues and analyze them along with the legal issues to find the best solution to the client’s problem. This is the approach to litigation that we support. It is known as the “problem-solving approach.” It means treating each new situation as a problem to be solved, not as a dispute to be litigated or a fight to be won.

The problem-solving approach involves expanding the range of typical responses to a client’s problem. The lawyer’s skills as a litigator and role as an advocate are still highly valued, but the lawyer brings additional skills and a broader understanding of advocacy and conflict resolution to the case.

In addition to providing the legal analysis, the lawyer, with substantial input from the client, attempts to analyze the dispute to find out why the dispute arose, what the underlying interests of the parties are, and what resolution methods (including litigation) would provide the best solution. This approach involves a greater emphasis on negotiation and the use of dispute resolution methods appropriate to the nature of the dispute and the needs of the parties. Former Associate Attorney General of the United States, the Honourable Raymond Fisher, states:

Problem solving respects the lawyers’ role as a litigator, but emphasizes that a lawyer also serves his or her client by acting as a counselor, a decision maker and a planner. Problem solving demands an examination of the true needs and interests of all those involved in a dispute, rather than looking only to

¹¹⁷ Diana Lowe, “What does the public really want from their lawyers and from the justice system?” *BarTalk* (October 2005).

¹¹⁸ This quote is attributed to R. Roy McMurtry, from an unknown source document. He went on to say, “A trial is only one way to resolve a case, yet a trial is the only option offered by the court administered legal system. Lawyers and their clients deserve better.”

¹¹⁹ Stated as part of “The Future of Civil Justice: Culture, Communication and Change” (keynote address to the Canadian Forum on Civil Justice conference, “Into the Future: The Agenda for Civil Justice Reform,” April 30–May 2, 2006, Montreal, Quebec).

the legal positions that are espoused by parties in legal pleadings.¹²⁰

This is not a new concept. The 1996 Canadian Bar Association (CBA) Task Force Report advocated the same point:

In a multi-option civil justice system, litigation lawyers must move away from a focus on rights-based thinking and adopt a wider problem solving approach. This involves a fundamental change in approach and the acquisition of new information and skills to assist clients with dispute resolution....The change in approach urged by the Task Force begins with a new focus on dispute resolution as the goal and a corresponding reduction in the antagonistic nature of the litigation process.¹²¹

This approach broadens the scope of the lawyer's involvement and fully encompasses the fundamental legal principles of our society, including respect for the rule of law.

Current rules on the role of lawyers

The Law Society of BC's *Professional Conduct Handbook* states that "Whenever the dispute will admit of fair settlement the client should be advised to avoid or to end the litigation."¹²²

The CBA *Code of Professional Conduct* states that "The lawyer should advise and encourage the client to compromise or settle a dispute whenever possible on a reasonable basis and should discourage the client from commencing or continuing useless legal proceedings."¹²³ That section is footnoted with the following:

The lawyer has a duty to discourage a client from commencing useless litigation; but the lawyer is not the judge of his client's case and if there is a reasonable prospect of success the lawyer is justified in proceeding to trial. To avoid needless expense it is the lawyer's duty to investigate and evaluate the proofs or evidence upon which the client relies before the institution of proceedings. Similarly, when possible the lawyer must encourage the client to compromise or settle the dispute."

¹²⁰ Honourable Raymond C. Fisher, speech to the CPR Institute for Dispute Resolution, January 29, 1999, New York, <http://www.usdoj.gov/odr/asgspeech2.htm>.

¹²¹ Canadian Bar Association, *Report of the Task Force on Systems of Civil Justice* (note 59), 63.

¹²² Law Society of British Columbia, *Professional Conduct Handbook* (Vancouver, BC: Author, 2006), http://www.lawsociety.bc.ca/publications_forms/handbook/handbook_toc.html, ch. 1, s. 3(3).

¹²³ Canadian Bar Association, *Code of Professional Conduct* (Ottawa, ON: Author, 2006), <http://www.cba.org/CBA/activities/code/>, 12.

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The CBA code states further that “Whenever the case can be settled fairly, the lawyer should advise and encourage the client to do so rather than commence or continue legal proceedings.”¹²⁴

In August 1999, the CBA passed the following resolution:

Resolution 99-05-A:
Dispute Resolution Processes

WHEREAS some law societies have provisions addressing the need to consider alternative dispute resolution processes in their rules of professional conduct;

WHEREAS recommendation 38 of the Systems of Civil Justice Task Force, adopted by Council at the 1997 Mid-Winter meeting...called for “every jurisdiction (to) specify in its rules of professional conduct an obligation on lawyers to explore fully the prospects of settlement with their clients and an obligation to explain available dispute resolution options to clients in relation to litigation,

BE IT RESOLVED THAT:

1. a requirement be added to the Canadian Bar Association’s model Code of Professional Conduct that legal counsel has a positive, continuing obligation to canvass with each client, in a fully informed manner, all available dispute resolution processes; and
2. the CBA urge all Canadian law societies to incorporate the same requirement into the rules governing the professional conduct of lawyers and Quebec notaries.

This resolution, however, was never acted upon. Instead, the final report of the CBA’s Standing Committee on Ethics and Professional Issues states:

Alternative Dispute Resolution

The Committee recommends that the current commentary 8 be retitled and amended to read as follows, in accordance with submissions received by the Committee from the CBA’s National Alternative Dispute Resolution Section.

Encouraging Settlements and Alternative Dispute Resolution

¹²⁴ Canadian Bar Association, *Code of Professional Conduct*, 61.

8. Whenever the case can be settled reasonably, the lawyer should advise and encourage the client to do so rather than commence or continue legal proceedings. The lawyer should consider the use of alternative dispute resolution (ADR) for every dispute and, if appropriate, the lawyer should inform the client of the ADR options and, if so instructed, take steps to pursue those options.

By way of comparison, the following approach has been adopted in the UK in a new practice direction:

The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.

It is not practicable in this protocol to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for resolving disputes:

- Discussion and negotiation
- Early neutral evaluation by an independent third party (for example, a lawyer experienced in that field or an individual experienced in the subject matter of the claim)
- Mediation—a form of facilitated negotiation assisted by an independent neutral party

The Legal Services Commission has published a booklet on ‘Alternatives to Court’, CLS Direct Information Leaflet 23 <http://www.clsdirect.org.uk/legalhelp/leaflet23.jsp>, which lists a number of organizations that provide alternative dispute resolution services.

It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR.¹²⁵

¹²⁵ UK, Department for Constitutional Affairs, *Civil Procedure Rules*, “Practice Direction—Protocols,” http://www.dca.gov.uk/civil/procrules_fin/contents/practice_directions/pd_protocol.htm, s. 4.7.

A comparison of approaches¹²⁶

Mr. George and Ms. Webster are neighbours on adjoining city lots. They have been neighbours for six years. They have a cool relationship; they don't speak often, and when they do it is usually to complain about small nuisances. Mr. George has a Jack Russell terrier that barks frequently, and Ms. Webster, from time to time, will comment on the noise. Ms. Webster has a large Mountain Ash that sits close to the property line, and Mr. George finds it a constant state of clutter. In the spring, the tree sheds white tendrils that blow across his lawn. Summer is the worst, when large clumps of berries ripen and litter his front yard, the sidewalk in front of his home and his front steps. Birds eat the berries, increasing the mess with bird droppings. Mr. George could abide the leaves that need to be raked in the fall if that were the only debris he had to clean up from this tree, but it isn't, and for him this is only a reminder of the constant work the tree creates for him. Woodpeckers have pecked at some of the large limbs, and last winter a huge branch came down in the wind and took out Mr. George's phone line.

Mr. George has tried to encourage Ms. Webster to prune the tree, at least so that the offending branches are not hanging over the property line. Whenever he brings this up, she counters with a comment about the fact that the trees he has at the back of his property diminish the light on her garden, and if he is so interested in pruning trees he should start with them. Besides, she adds, if he were really interested in a "good neighbour" policy, he would do something about his barking dog.

The back fence, which sits just slightly on Ms. Webster's side of the property line, is beginning to rot and sag, and provides little privacy between the two lots. When Mr. George brings this up (being as nice as he can) and suggests that perhaps it is time for Ms. Webster to replace the fence, she responds by telling him he is free to build his own fence.

Mr. George enjoys entertaining in his yard, and in the summertime regularly cleans up the berries from the Mountain Ash before his guests arrive, so they don't track the berries into his house. Not only are they a mess, but last summer his elderly mother slipped on a clump of the berries. Although she wasn't hurt, other than being shocked and a bit shaken, he was deeply concerned that she could have broken her hip. When he mentioned this to Ms. Webster, not only did she not apologize, she actually implied that it was his fault for not sweeping up the berries prior to his mother's arrival.

Another summer of berry-falling began, and Mr. George had had enough. While Ms. Webster was away, he decided to prune the branches that were hanging over the property line. He realized that this wouldn't stop all the

¹²⁶ Excerpted from Nancy Cameron, "A Problem Solving Approach to Dispute Resolution" (unpublished paper prepared for the Ministry of Attorney General, May 2006).

berries from falling on his property, but he was certain it would reduce the clutter.

When Ms. Webster returned from her holiday, she pulled up in front of her house and was horrified to see that her Mountain Ash had been butchered. What leaves remained on the tree were turning brown and dying. There were few branches left. The next morning she confronted Mr. George. He acknowledged that he “trimmed” the tree, told her that he had advised her of this before she left, and insisted that he did not go onto her property in order to perform the trimming. Ms. Webster took pictures of what was left of the tree, and called a lawyer.

Ms. Webster met with her lawyer and showed him the pictures of the dying Mountain Ash. She told her lawyer how much she adored the tree, that it provided a shady spot for her to sit in in the front yard, and how much she enjoyed looking out her window in the morning and watching the birds in the tree. She kept a bird feeder in the tree and the squirrels visited daily. She tried to tell her lawyer what a poor neighbour Mr. George was, and explain about his barking dog and the fact that he refused to prune his own trees. The lawyer encouraged her to stay on point and explained that there was nothing she could do to make Mr. George prune his trees, and as for his dog, if it was truly a nuisance she could call the pound and complain. The lawyer asked her how much the tree was worth, and she said she had no idea; she thought it would be impossible to replace because it was such a mature tree. The lawyer instructed her to contact an arborist and get an estimate as to what the tree was worth. As she was leaving, she told her lawyer she was concerned about how much this was all going to cost. She was on a fixed income and she would like to build a taller fence between the two properties, but couldn’t even afford to do that. He told her not to worry, that once they found out how much the tree was worth he would be able to tell her how much she was likely to win in damages, and she could pay him from the amount she collected.

An adversarial negotiation

Things were strained and quiet between Mr. George and Ms. Webster over the next two weeks. Mr. George was relieved to hear nothing further from Ms. Webster, and was enjoying his property without the nuisance of the Mountain Ash. Then he received a letter from Ms. Webster’s lawyer. The letter demanded immediate payment of \$18,000 as damages for the mutilation of the Mountain Ash. The letter detailed how this figure was arrived at, and included an estimated value of the Mountain Ash, estimates to remove the dying tree and replace it, and an amount called “punitive damages.” The lawyer went on to detail what he called Mr. George’s trespass—“if not actual trespass onto the property, then trespass into the airspace of Ms. Webster’s property.” The letter gave him one week to reply, and said that the lawyer had “instructions to

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commence litigation if this matter has not been fully resolved by the end of the month.”

Mr. George was incensed. Punitive damages? Trespass to airspace? Where was he going to get \$18,000? The tree was old, and would likely have died within a few years anyway; didn't the rotten branch that had fallen on his property prove that? And what about the nuisance to him—the mess, the clutter, and the fact that his mother could have been injured? Mr. George phoned a lawyer, and went in, with the letter and a picture of the pruned tree, for an appointment.

Mr. George was a bit nervous when he went in to see his lawyer. He had never had to hire a lawyer before. He was worried about what it was going to cost, and he was afraid of being sued. He also couldn't believe that, after all these years of having put up with that filthy tree, he was the one who was now being sued. He admonished himself for not suing Ms. Webster when his mother slipped. After meeting with his lawyer, he did not feel much better. He explained to his lawyer that he had told Ms. Webster he wanted to prune the tree and she appeared to be indifferent. She told him that he could prune the branches that hung over onto his property, as long as he didn't set foot on her property. He explained to his lawyer that he was careful not to go onto her property, and he had done all the pruning from his ladder, which was placed on his side of the property line, and that he had used a small, electric chainsaw that was attached to a pole to facilitate pruning.

His lawyer explained that there was, in fact, an argument to be made about trespass to airspace. He also explained that punitive damages were sometimes awarded by the courts so that people would know they couldn't infringe on other people's rights, and that the courts were regularly awarding punitive damages against people who had cut down trees without permission. He looked at the picture of the tree and shook his head. He told him how much it would cost to defend against a suit, and that he would likely have to pay something at the end of the suit, although he told him he thought that \$18,000 was an extravagant amount, given the circumstances, and perhaps he could counter-sue for nuisance, particularly if his mother was willing to testify about her fall. The lawyer also told him that currently the upper limit for a lawsuit in small claims court was \$10,000. If Ms. Webster wanted more than that, she would have to sue in Supreme Court, and that would be so expensive that it would not be worth the extra \$8,000 she was claiming. He went on to warn Mr. Webster that there was talk about the limit in small claims court increasing, and he would be wise to settle this matter quickly, in case the monetary limit in small claims court did increase. When Mr. George left his lawyer's office, he had authorized him to respond with an offer of \$5,000, but not a penny more.

The offers and counter offers went back and forth between the two lawyers. Ms. Webster’s lawyer started an action in small claims court. Mr. George’s lawyer told him this was good news. Good news that he was being sued? He couldn’t believe this. But his lawyer explained that, if they could settle quickly, they should be able to “get out of this” for no more than \$10,000. He convinced Mr. George to offer \$9,000, and another \$500 towards the costs Ms. Webster had paid for an arborist’s report, and the matter was settled on those terms. Mr. George and Ms. Webster avoided speaking to each other. She planted a new Mountain Ash, and Mr. George grumbled, “I can’t believe I had to pay for that tree and, even though I gave her \$9,500, she still won’t repair her fence.”

Both Mr. George’s lawyer and Ms. Webster’s lawyer did what they were hired to do: Ms. Webster’s lawyer got her compensation for the tree, and Mr. George’s lawyer was able to limit his liability, and avoid what was possibly a greater award of damages if the matter had proceeded in a different court or after the small claims limit had increased. Could they have done things differently? If they had done things differently, what would it have looked like (process), and would the outcome have been different?

A problem-solving approach

Let’s assume that things unfolded as we’ve seen in the above example, except that when Mr. George was in his lawyer’s office, the lawyer asked him this question: “What would you like to achieve?” At first, Mr. George replied that he just wanted this whole mess to go away. He had got rid of one problem (the Mountain Ash) but now he had an even bigger problem on his hands. And no one seemed to be interested in his complaints—the fact that the berries were such a nuisance; that Ms. Webster had not only refused to prune the tree when he brought it up, but that she also wouldn’t replace her rotting fence; and that he was tired of her complaints. She complained about his dog and about his trees blocking the sunlight in her garden, and she never had a pleasant word for him.

Mr. George’s lawyer asked him some more questions. Finally, Mr. George replied, “Well, if I had my way, I would actually like to have a cordial relationship with my neighbour. I would like to be able to enjoy my property without litter from her tree. I would like a new fence that gave each of us some privacy.” He then laughed and said, “and I would like it if my dog didn’t bark so much, too—but what can you do with a Jack Russell terrier?”

Mr. George’s lawyer explained to him that the threat of a lawsuit was serious, and that he believed Ms. Webster had a good case. He talked to him about the cost of a lawsuit, and explained to him that perhaps, if they wanted to work on negotiating a settlement, they could try to work towards a settlement that met

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some of his needs also. He explained mediation to him, and suggested that they might want to try mediation.¹²⁷

Mr. George was not really interested in sitting in a room with Ms. Webster “talking things out.” They had been unable to speak civilly for years, and now she was threatening to sue him. He also didn’t really like his options—letting a lawsuit go forward, or offering to pay her something to settle. He agreed that, if Ms. Webster would agree to attend, he would also.

Mr. George and Ms. Webster spent two sessions with a mediator. At first things were very tense. Ms. Webster denied the fact that Mr. George had asked her permission to trim the tree. If they couldn’t agree on the basic facts, how were they ever going to settle things? Then something amazing happened. Mr. George was explaining, again, about his anguish when his mother slipped on the berries. Ms. Webster said, “I’m sorry your mother was so upset. If I had a chance to plant a new tree, I might choose something different; those berries can be a bit of a pain. But that didn’t give you any right to kill my tree.” As they worked toward resolving things, they were encouraged to talk about things their lawyers had told them were not “legally relevant.” They talked about Mr. George’s barking dog, the rotting fence, and the fact that Ms. Webster wanted Mr. George to trim the trees at the back of his property. At the end of the second mediation session, they had agreed to go back to their lawyers and talk about settling the case on the following terms: Mr. George would pay Ms. Webster \$1,000 to remove the old tree and purchase a new one, and Ms. Webster agreed that she would choose something other than a Mountain Ash. Mr. Webster would pay for the cost of a new fence between the two properties. He would have an arborist top the trees at the back of his property to allow more light into Ms. Webster’s garden. He also agreed that he would attend a dog training course with his dog, specifically aimed at providing techniques to help curb the incessant barking.

Mr. George and Ms. Webster still would not call themselves friends. They would agree that they are civil neighbours. Ms. Webster planted a maple in her front yard, which has grown rapidly and provides shade for her in the

¹²⁷ Mr. George and Ms. Webster could have entered into a problem-solving approach in different ways. They could have done so with their lawyers. Mr. George’s lawyer suggested they use a mediator, instead of meeting together with their lawyers, for a number of reasons: He was concerned that things might be too explosive if it were a meeting with the two lawyers and no mediator, and that they might not be successful working in that way. He was concerned that if they had a discussion between the lawyers without Mr. George and Ms. Webster present, they would not be able to fully understand what was important to both Mr. George and Ms. Webster, and would have less of an opportunity to be creative in generating solutions. He was also concerned about costs, and, given the amount of the potential suit, he thought that it might be more cost-efficient if they spent time with a mediator without the lawyers present. Finally, he realized that, as neighbours, Mr. George and Ms. Webster would have a continuing relationship of some sort, and he was hopeful that a mediator might be able to assist them in coming to a settlement that could improve their relationship.

summer months, and Mr. George is happy that all the maintenance he needs to do is raking leaves in the fall. And as for Mr. George's dog, he still barks sometimes, but Mr. George has been successful in actually training him to bark less incessantly.

A litigated outcome

So what could Mr. George and Ms. Webster have been able to expect if they had proceeded to court? Mr. George's lawyer advised him that he should hire an arborist to give evidence as to whether or not the Mountain Ash was killed by the exuberant pruning or some other cause. Ms. Webster had an expert arborist of her own, testifying that the tree had a value of \$9,000.00. Mr. George's expert testified that the tree was likely "at the end of its natural life span."

Mr. George testified that he had asked Ms. Webster if he could prune the tree, and she had given him permission to do so, as long as he didn't enter onto her property. He also testified that she had asked him to "make certain the tree didn't look lopsided" when he was done, which he took to mean that she wanted him to trim both sides of the tree. Ms. Webster denied that this conversation ever took place, and said that if she had known he was going to trim the tree, she would have wanted to be there and would never have allowed it to happen when she was away.

Mr. George testified about the fall his mother had taken, and about the branch that took out his telephone line. The judge held that, if Mr. George had sued for nuisance about these two incidents, she might be able to address them, but they weren't before her. She rejected Mr. George's evidence about the conversation he said he had had with Ms. Webster, and said she preferred the evidence of Ms. George. She held that even if he had stayed on his side of the property line to do the pruning (which she found unlikely given the photographs of the pruned tree) he clearly had, at the very least, trespassed against the air space over Ms. Webster's property.

The judge calculated compensatory damages (damages to reimburse Ms. Webster for costs incurred because of loss of the tree, attempts to save the tree, removal of the old tree, and purchase of a new tree) in the amount of \$10,000.00. She awarded another \$9,000.00 in punitive damages, to deter Mr. George and others from zealous pruning of other's property in the future. She also ordered that Mr. George pay the cost of Ms. Webster's expert arborist in the case.

Since the small claims limit was still \$10,000, the amount of the judgment was reduced to \$10,000, plus the cost of the arborist.

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Ms. Webster was moderately happy with the judgment, but was upset that she could not collect the total amount, because of the limit in small claims court, and that the amount she was awarded was further eroded by legal fees. She was so angry when she did not receive the full amount of her judgment immediately, that she bought another Mountain Ash, “just so Mr. George doesn’t think he can push me around.”

Mr. George was incensed that the judge had not believed him. He resisted paying until he found out that a judgment had been registered against his property. The fence between their properties continued to rot. And the dog still barked.

Appendix F: The Rule of Law

Defined

Our vision of a new civil justice system includes the continued preservation of the rule of law, as we consider it to be one of the most fundamental aspects of our society: “At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs.”¹²⁸

The three basic elements of the rule of law, as set out by the Supreme Court of Canada, are:

- There is a body of legal rules, adopted through established procedures, to provide for normative order.
- There is one law for all.
- The exercise of all public power must find its ultimate source in a legal rule—the relationship between the state and the individual must be regulated by law.¹²⁹

The effect of alternative procedures on the rule of law

The legal system and all its procedures must facilitate the rule of law or the rule of law is rendered meaningless. We believe that all of the recommendations made in this report support the rule of law. The problem-solving approach, alternative dispute resolution and other approaches that move away from adjudication, however, have been criticized as having a negative impact on the rule of law. The basis for the criticism is the belief that in order to preserve the rule of law, the legal system should not try to be a settlement system, but should be an adjudicative system that focuses on making rulings of right and wrong. The critics say that the role of the lawyer in this system is to pursue a rights-based approach, which will not only achieve justice for clients, but will assist in the continued development of legal precedent.

A version of this viewpoint is found in the following excerpt from a speech given by law professor Kim Economides to the New Zealand Centre for Public Law in 2002:

¹²⁸ *Reference re Secession of Quebec*, [1998] 2 SCR 217, para 70.

¹²⁹ *Reference re Secession of Quebec*, [1998] 2 SCR 217, para 71, citing the *Manitoba Language Rights Reference* [1992] 1 S.C.R. 212, at pp. 747–52.

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...dispute resolution is not necessarily to be equated with access to justice. The danger I wish to draw attention to is the fact that citizens may be offered peaceful solutions, possibly even solutions with which they are extremely happy and content, but such solutions could result in something less than they would receive were they to enforce their formal rights through the official legal system. In such circumstances there is a very real danger with this fashionable and ubiquitous trend toward legal informalism, namely that we end up negating many of the values, importance and historical significance of legal formalism.¹³⁰

We are of the view that these are valid concerns, but that they fail to take six key points into account:

- The problem-solving approach does not replace a rights-based approach; it supplements it.
- We adjudicate less than 3% of all filed civil cases.
- The problem-solving approach supports the rule of law.
- The problem-solving approach will not dilute the pool of available precedent.
- As long as access to the courts is maintained, the rule of law is protected, because a person can always decide to forego settlement and proceed to adjudication.¹³¹
- An adjudicated resolution is less than perfect.

Each of these points is addressed below.

Supplementing the rights-based approach

The problem-solving approach and the other recommendations in this report that seek to achieve the early and cost-effective resolution of disputes do not mean that a client's rights are discarded or that the rule of law will be placed on the back burner. Thorough consideration of a client's rights is an essential aspect of the problem-solving approach—it is just not the only aspect. The problem-solving approach does not necessarily mean that alternative dispute resolution will be employed.

The problem-solving approach looks at the overall interests, goals and objectives of the client. One of those needs may be the enforcement of the client's rights, and that may be the best course for the client. But such

¹³⁰ Kim Economides, "2002: A Justice Odyssey" (Occasional Paper No. 10, Faculty of Law, Victoria University of Wellington, New Zealand), <http://www.vms.vuw.ac.nz/vuw/fca/law/files/occasionalpaper10.pdf> (also published in *Victoria University of Wellington Law Review*, 33:3), 10.

¹³¹ The system must, however, be affordable or it is no longer accessible.

enforcement may not be the best or most appropriate solution to every client’s problem. (For a comparison of how a given fact pattern would be handled by the traditional approach, the problem-solving approach and a trial, see Appendix E: An Expanded Role for Lawyers.)

How many cases do we adjudicate?

Any discussion of preserving the rights-based approach and the rule of law must take into account the reality that we settle, abandon or otherwise dispose of over 97% of all filed civil cases. (See Appendix L: The Trial Rate.) The problem-solving approach recognizes that few problems will advance to a full trial and that there are more efficient and cost-effective processes available to help litigants move towards solutions. These processes can be carefully selected to meet the needs of the particular case. In some situations, the most appropriate process may be a trial and, for those matters, we hope that our suggested reforms will streamline the pre-trial process and the trial itself. This may indeed result in an increased number of trials. None of our recommendations are asking lawyers to settle more cases—they already are settling most of their cases. The goal, however, is not just the settlement of cases—the goal is the fair, early and cost-effective resolution of cases, whether by court adjudication or otherwise.

Supporting the rule of law

As stated above, we firmly believe that having an effective court system in place to administer the rule of law is essential to any well-functioning democracy. But we must face the reality that the court system is a scarce resource and must be preserved for those cases that truly need it:

Recognizing and building on the fact that we have a dispute resolution system will not only resolve the bulk of disputes faster and at less cost, it will allow more resources to be devoted to those cases that require adjudication by trial. Society needs a strong court system to promote social order and public confidence. The courts perform numerous important public functions, including deciding the tough cases, establishing legal precedent, and protecting the vulnerable. When every case is litigated under the presumption that it is going to trial, however, valuable court time is tied up in the unnecessary adjudication of the procedural issues that flow from litigation.¹³²

If we know that only a very small percentage of cases reach trial, we are doing the public a great disservice by treating all cases as if they were going to trial.

¹³² Civil Justice Reform Working Group, “Green Paper,” (note 88), 11.

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This is because treating cases as if they were going to trial fails to match the vast majority of cases and clients with the most reasonable and cost-effective processes to solve their legal problems.

This approach also results in a disservice to those cases that truly do need a trial. The cases that do need a trial are lumped in with all other cases and proceed on a long and costly track. Ideally, those cases should be identified early so that they can get to trial as quickly and cost-effectively as possible.

What is required is an effective method of identifying as early as possible those matters that require a trial and those that can be resolved through other means, and then to stream them accordingly. Given the dynamic nature of most court disputes, this is a lofty and potentially expensive approach. We see the problem-solving approach as supporting this goal by providing a thoughtful filter to ensure that the courts do not become overcrowded with cases that do not really need to be there. We cannot possibly preserve the rule of law by putting every case through the trial process.

We are also mindful of the fact that the rule of law, to a large extent, enables the problem-solving approach. One of the reasons that parties are willing to participate in a problem-solving approach to dispute resolution is that they know that there is an ultimate backstop—the court system. Collaborative dispute resolution is not at all blind to legal rights; negotiations take place with the alternatives to a negotiated resolution, including trial, very much in mind.

Diminishing precedents

Some have argued that the common law will be in jeopardy if we advocate for the voluntary resolution of disputes, because we will stagnate the development of the body of legal precedent. As the Honourable Geoffrey Davies, A.O., recently retired from the Queensland Court of Appeal, has stated, however, if there is no legal precedent available to inform the parties to a dispute in their settlement negotiations, it is more likely that such parties will require adjudication by the court.¹³³

Further, can we honestly say that we should discourage clients from voluntarily resolving their cases for the greater good of humanity? Would any clients who have come to a mutually acceptable solution to their legal problem continue to pay legal fees so that additional precedents can be set? We do not believe that users of the justice system should be responsible for funding the

¹³³ Honourable Geoffrey L. Davies, A.O., “Civil Justice Reform: Why We Need to Question Some Basic Assumptions” (paper delivered at the “Restructuring Justice” conference, June 9–10, 2005, Vancouver, BC). (Available online with subscription, <http://www.cle.bc.ca/cle/default.htm>.)

setting of legal precedents. As Justice Davies has stated, the setting of legal precedents occurs naturally as necessary to fill existing gaps.

Adjudicated resolution vs. voluntary resolution

Many who argue against the problem-solving approach or against the use of alternative dispute resolution claim that we will sacrifice justice in order to obtain peace. This assumes that the result obtained through court adjudication is always a better or a more accurate reflection of the truth than one could reach through a voluntary settlement. There is no evidence, however, that this is so. We only know that a different process was used to obtain the result.

The adversarial system is the best method we have to resolve disputes when they cannot be resolved by consent. But it is not by any means a perfect system where the lawyers are equally proficient, witnesses always tell the truth, and judges always find the truth:

Witnesses of fact and opinion whom a party intends to call are usually chosen...not because it is thought that they are truthful or that their recollections are accurate or because their opinions are objective and correct, but rather because their evidence supports the party's case. In the process of engaging and calling witnesses objective ones are discarded in favour of partisan ones. All of those engaged then feel the subtle psychological pressure to join the team; to emphasize or even enhance favourable aspects of their evidence and to downplay or even omit unfavourable ones. There is now a substantial body of empirical evidence demonstrating the malleability of memory and how it may be distorted by contact with others during the retention and retrieval phases....[M]uch documentary evidence is chosen and tendered for the same reason.

The result is that a court may never receive evidence of the true facts of a matter or the opinion which is most clearly right. Rather it is more likely to receive evidence which, on one or, more usually, both sides, is distorted by adversarial bias. The truth may lie somewhere between these competing versions, but the court will never know this.¹³⁴

¹³⁴ Davies, "Civil Justice Reform."

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In addition to the hard reality that our system does not necessarily find the truth, we also must consider that “justice” includes more than the final outcome. The time, cost and aggravation spent to obtain the result must be considered in determining whether justice was done.

Appendix G: The Gap Between Our Vision and the Current System

While there is a gap between British Columbia's current civil justice system and our vision, we must first acknowledge (and not take for granted) how lucky we are to live in a place where the rule of law is valued and preserved. We also wish to acknowledge the excellent civil justice reform initiatives that have preceded this report. These include:

- the Summary Trial (Rule 18A)
- the Notice to Mediate
- the Fast Track Litigation Rule (Rule 66)
- the Expedited Litigation Project Rule (Rule 68)
- the increase in the small claims jurisdiction
- the reforms to the family justice system, such as the judicial case conference.

We have an opportunity to build on the strengths of the existing system and to refine and streamline processes to keep pace with a quickly changing world. BC citizens want a civil justice system in which they can place their trust. The reality is, however, that the pursuit of civil claims has become so complex, time-consuming and expensive that many citizens cannot contemplate litigation in the Supreme Court. There are several troubling indicators of serious problems in the system:

- a substantial decrease in civil filings
- a decrease in trials
- a dramatic increase in the length of trials
- high levels of dissatisfaction with the civil justice system indicated by empirical research and anecdotal evidence
- similar trends experienced by other Canadian jurisdictions and common law jurisdictions around the globe.

Indicators of the gap

Decreasing civil filings

The number of Supreme Court general civil filings in the province has been dropping over many years. Supreme Court new civil filings fell from 68,574 in 1999/2000 to 60,905 in 2004/05, a decrease of more than 11%. Members of the public are clearly choosing other means to resolve their legal problems.

Fewer but longer trials

In 1996, the Vancouver Law Courts heard just over 800 civil trials, and the average length of a trial was 12.9 hours. Six years later, in 2002, the Supreme Court heard 393 civil trials in the Vancouver Law Courts and the average length of trial was 25.7 hours.¹³⁵ In other words, over a period of six years, trial volume decreased by half and trial length doubled. This trend is consistent with developments in other jurisdictions and is reflected in a mounting body of academic commentary across North America on the subject of “the vanishing trial.”¹³⁶

A dissatisfied public

The Canadian Forum on Civil Justice, based on a four-year national empirical research project, “The Civil Justice System and the Public,” in which more than 300 individuals were interviewed, reported that the public “finds the civil justice system alienating, intimidating and something very removed from their lives.”¹³⁷

At the “Restructuring Justice” conference held in Vancouver in June 2005, a panel of clients presented their experiences with the justice system and what they would recommend. The panel was composed of representatives of both small and large business. Regardless of the size of the business or the size of the legal budget, all of the panellists reported that the cost of the system was too high and that cases take too long to get resolved. The former senior counsel of one of Canada’s largest oil companies, who had held that position for over 27 years, told the assembly, “If you keep doing business the way you are doing you will lose all credibility.”

The Ministry of Attorney General Dispute Resolution office conducted interviews with 33 randomly selected Supreme Court litigants in Vancouver, Victoria, Prince George and Nelson. In answer to the question, “How satisfied were you with the overall court process?” the participants from all four registries indicated that they were less than “somewhat satisfied.” In answer to

¹³⁵ Supreme Court of British Columbia, *Annual Report 2005* (Vancouver, BC: Author, 2005), <http://www.courts.gov.bc.ca/sc/>.

¹³⁶ Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts” (prepared as a working paper for the ABA Section of Litigation Symposium on the Vanishing Trial, December 12–14, 2003, San Francisco), *Journal of Empirical Studies* 1 (November 2004), <http://www.abanet.org/litigation/vanishingtrial/vanishingtrial.pdf>. Marc Galanter states that while the legal world has been growing vigorously, many (or perhaps most) forums have experienced a sharp decline in the number of trials. The theories he proposes to explain this include more cases using alternative dispute resolution; judges taking on a greater role in encouraging settlements; trials becoming more technical, complex and expensive; and corporations putting more cost controls on litigation.

¹³⁷ Diana Lowe, “What Does the Public Really Want from Their Lawyers and from the Justice System?” (paper presented at the “Restructuring Justice” conference, June 9–10, 2005 and reprinted in *News & Views*, issue 9 [October 2005], [http://www.cfcj-fcjc.org/issue_9/CFCJ%20\(eng\)%20spring%202006-What.pdf](http://www.cfcj-fcjc.org/issue_9/CFCJ%20(eng)%20spring%202006-What.pdf)).

the open question, “What processes went well?”, while there were some positive experiences, about half of the participants stated that nothing went well.

Consistency of reports

The reports of problems in civil justice systems are remarkably consistent, regardless of location, the size of the jurisdiction, or the type or sophistication of the client.

The experience of other provinces in Canada

British Columbia is not the only province experiencing these issues. It has been 10 years since the Canadian Bar Association published the *Report of the Task Force on Systems of Civil Justice*.¹³⁸ That report called for sweeping changes to the civil justice systems of all Canadian jurisdictions, in order to address critical problems of delay, cost and complexity; in 53 recommendations, it set forth a vision of a civil justice system for the 21st century.

The need for change in justice systems has also been eloquently expressed in numerous studies across the country. A number of Ontario studies conducted in the early 1990s demonstrated that litigants with low-end claims retain little of their award after paying legal fees. When factoring in the legal costs of both parties, the Ontario Civil Justice Review concluded that “the inference is strong that the combined legal costs of the parties to a lawsuit are, on average, about 3/4 of the judgment obtained; and on a median basis, are perhaps more than the judgment obtained.”¹³⁹

The experience of other nations

The problems of excessive cost, complexity and delay in civil justice systems exist throughout the common law world. In 1997, Lord Woolf defined it in the following terms:

As in most other common law jurisdictions, civil litigation in England and Wales is being suffocated by its expense. The majority of members of the public cannot afford to fund litigation themselves. Those who can afford to do so frequently find that the cost of doing so is disproportionate to the issues

¹³⁸ Canadian Bar Association, *Report of the Task Force on Systems of Civil Justice* (note 59).

¹³⁹ Ontario Civil Justice Review, *First Report* (note 51), ch. 11.4.

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involved. The problem of cost is the most serious problem besetting our litigation.¹⁴⁰

A 1999 report of the Australian Law Reform Commission states, “The issues of cost, timeliness, efficiency and accessibility have been analyzed and considered by a growing number of law reform bodies here and overseas. Judging from this literature these are problems which bedevil civil justice systems around the world.”¹⁴¹

Conclusion

Given the decrease in filings and trials, the increasing length of trials, the uniformly negative results of surveys, and the consistency of civil justice reports around the world, it is not surprising that the British Columbia civil justice system is in some peril. We firmly believe, however, that we can build upon the strengths of the system and improve it greatly.

Such improvements begin with empowering people to solve problems before they develop into disputes.

¹⁴⁰ Lord Woolf, “Looking at Law and Practice: Civil Litigation—Who Can Afford It?” *The Commonwealth Lawyer*, 7/8 (February 1997).

¹⁴¹ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No. 89), (Sydney, NSW: Author, 2000), <http://www.austlii.edu.au/au/other/alrc/publications/reports/89/>, ch. 1, s. 1.72.

Appendix H: Pre-action Issues

Dispute prevention and planning

With proper planning, many legal problems can either be avoided altogether or resolved through specially designed resolution mechanisms. Although the literature assigns creative titles to this approach, such as “preventive law,” “private ordering” or “conflict management systems,” it really involves common-sense planning. There are a number of ways to encourage this approach, including the following.

Plain language

People must be able to understand the legal framework that applies to their lives. We should continue to simplify language in legislation (and explanatory materials). We note that some progress has been made in BC in this regard since the Hughes Report in 1988.

Education

The more that people know about potential legal problems, the better able they will be to avoid such problems or to deal with them effectively. Adults tend to learn on a “need-to-know basis” and they need easy access to information to help them deal with their problems.

There is a need for early education about dispute resolution process options and the legal system. The BC public school system is an effective avenue for teaching young people about the legal system and the various dispute resolution options. ESL programs created for adult learners who primarily use languages other than English could also offer this information.

There are opportunities for the Ministry of Education to work collaboratively with the Ministry of Attorney General, the legal profession and existing public legal education organizations to design and implement these educational programs.

Preventive law

In areas involving recurring problems, careful analysis can identify common causes, and policies and processes can be developed to avoid or decrease the development of these types of problems. Individuals use this approach when

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they engage in estate planning or prepare a simple will. Corporations conduct “legal audits” to identify frequently occurring legal problems so they can develop plans to prevent such problems in the future.¹⁴²

Systems design and planning

If recurring legal problems cannot be entirely prevented, special dispute resolution mechanisms can be designed to deal with those problems quickly and effectively. For example, parties to contracts may include a dispute resolution clause to describe the process they have chosen to resolve any future problems. Some industries have developed their own dispute resolution processes, including the British Columbia International Commercial Arbitration Centre–based resolution rules for disputes in the securities industry¹⁴³ and the “C2C” (company-to-company) process for dealing with disputes arising between companies involved in the Canadian oil industry.¹⁴⁴

Existing services

Significant work has already been done in BC and elsewhere with respect to legal information services required by litigants. In BC, the Supreme Court Self-Help Information Centre (SHIC) was initiated as a pilot project through a collaborative process involving many justice stakeholders, funders and the Minister of Attorney General. The SHIC opened its doors at the Vancouver Law Courts in April 2005. Research conducted prior to its opening highlighted the litigant’s need for:

- continuity of service
- an understanding of the big picture
- control over decisions of utmost importance to his or her life
- personal contact
- procedural assistance (including basic information about the court process)
- strategically placed legal advice and representation
- a variety of ways to access this assistance
- effective referrals to legal and non-legal assistance, and
- coordination of services.¹⁴⁵

¹⁴² This is not new. It has been said that “clients want a fence at the top of the cliff, not an ambulance at the bottom.”

¹⁴³ British Columbia International Commercial Arbitration Centre, *Securities Dispute Resolution Program*, http://www.bcicac.com/bcicac_dap_securities.php.

¹⁴⁴ Company2Company ADR Council, *The Canadian Oil and Gas Dispute Resolution Website*, <http://www.c2cadr.org/>.

¹⁴⁵ Reid et al., “Developing Models for Coordinated Services for Self-Representing Litigants” (note 75).

The SHIC has provided useful information for service providers and self-represented litigants. A final evaluation report should be completed at or near the time this report is released.¹⁴⁶

Some initial coordination efforts have been made by the British Columbia Public Legal Education and Information Working Group. The group is composed of organizations with a provincial mandate to coordinate efforts of member organizations in providing effective and efficiently delivered legal education and information programs.¹⁴⁷

These resources confirm that while information and services exist, they are still not sufficiently accessible because:

- there is a need for overall **coordination** of existing services
- **promotion** of these types of services (to the public and to the legal community and judiciary) could be improved, and
- many people also need effective **links** from this service to legal advice and representation.

Hub examples

There are numerous examples from around the world of effective websites (and clinic models) for legal and other information, including:

- the California Courts Self-Help Centre—<http://www.courtinfo.ca.gov/selfhelp/>
- California Courts Programs (Equal Access Project)—<http://www.courtinfo.ca.gov/programs/equalaccess/>
- UK “Directgov” (for all types of problems)—<http://www.direct.gov.uk/Homepage/fs/en> (on the “Crime, Justice and the Law” page there is a link to the Community Legal Service Direct, which provides legal information—<http://www.clsdirect.org.uk/index.jsp>)
- UK “Citizens Advice Bureau”—<http://www.citizensadvice.org.uk/winn6/>—“The Citizens Advice service helps people resolve their legal, money and other problems by providing free, independent and confidential advice, and by influencing policymakers.” CAB provides advice face-to-face, by telephone, via e-mail or through home visits. It uses 21,000 volunteers in nearly 3,400 locations.

¹⁴⁶ The final and interim evaluation reports of the SHIC are also available: John Malcolmson and Gayla Reid, “Initial Evaluation Report” (October 2005), and John Malcolmson and Gayla Reid, “BC Supreme Court Self-Help Information Centre: Final Evaluation Report” (August 2006), http://www.lawcourtsed.ca/self_help_information_research/

¹⁴⁷ See Lindsay Cader, “Evaluation of Public Legal Education and Information: An Annotated Bibliography” (Ottawa, ON: Justice Canada, November 2002), <http://canada.justice.gc.ca/en/ps/rs/rep/2002/rr2002-2.pdf>.

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- Law Help California (helping low-income Californians solve legal problems)—<http://www.lawhelpcalifornia.org/CA/index.cfm>
- Community Legal Education in Ontario site, aimed at increasing access to Ontario-based PLEI resources—<http://www.cleonet.ca/>

In addition, some law firms are now changing their websites into legal information sites. An interesting local example is JP Boyd's BC Family Law Resource website (<http://www.bcfamilylawresource.com/>).

Appendix I: Cultural Issues

In exploring the potential barriers to achieving our vision for BC’s civil justice system, we identified several “cultural” obstacles, including the following:

- Most judges:
 - believe that the adversarial system requires them to take a passive rather than an interventionist approach, and therefore
 - leave the conduct of the litigation to the parties and their counsel.
- Most lawyers:
 - are trained to take a “no stone unturned” approach to preparation
 - are trained to withhold key information as long as possible in order to obtain a perceived tactical advantage, and
 - are typically deadline-driven, which means that they work backwards from the trial date or the next date on their calendar, even if it means sometimes leaving preparation until the last moment.
- Some clients manipulate the system to their advantage by using increased cost and delay to drive another party to capitulate. In some cases it may simply be in a client’s best interest to delay.

For these reasons, the present system tends to operate in a general culture of delay. We believe that the case planning conference will assist in changing this culture by increasing the parties’ knowledge of the system, streamlining the process and providing early access to judicial guidance. (See discussion of the case planning conference, on pages 10–17).

Appendix J: Setting a Trial Date at the CPC

Many people believe that a trial date determined early will spur early action (and therefore encourage early resolution) and will reassure the parties that, if all else fails, their dispute has a known end-point. Others believe that setting a trial date shifts the focus of the parties from resolution to preparation for trial, which creates a different (adversarial) mindset that may interfere with a clear focus on resolution. We struggled to balance these two perspectives in designing the case planning conference (CPC) process.

The CPC employs the dual discipline of an early trial date and the proactive attention of a CPC judge. As part of the proposed process, parties will not be eligible to request a trial date until the CPC. Trial dates will not be discussed during the CPC until *after* the possibility of resolution has been fully canvassed, but a trial date will normally be set at the CPC.

The CPC judge will have the discretion to refuse to assign a trial date at the CPC in circumstances where, for example, there is a good chance that the parties will be able to resolve the matter through other means and the CPC judge believes that the setting of the trial date might hinder the settlement process. If a trial date is not set during the CPC, the CPC judge will direct when a trial date may be requisitioned (for example, after the completion of all milestone events included in the CPC Order). At that time, upon requisition, a trial date will be assigned to commence within three months.

Once a trial date is set there will be no adjournments of trials except in very exceptional circumstances. A trial date will be changed only by order of a judge, who must be satisfied that the change is unavoidable and that injustice to a party will result if the trial proceeds. Further, the party applying for the change must pay a fee for resetting the trial date unless the application is made at least 30 days before the original trial date.¹⁴⁸

¹⁴⁸ This is similar to Small Claims Rule 17(5)–(5.4).

Appendix K: Supreme Court Rules

The first known general civil court rules in British Columbia were the Rules and Manner of Proceedings of the Supreme Court of Civil Justice for Vancouver Island, 1857.¹⁴⁹ The next set of rules was the Supreme Court Rules, 1880, which were essentially a copy of the English rules.¹⁵⁰ England revised the language and order of its rules in 1883 and BC followed suit, creating the new Supreme Court Rules, 1890.¹⁵¹ Since 1890, the Supreme Court Rules have been revised six times, in the years 1906, 1925, 1943, 1961, 1976 and 1990. We can, however, go as far back as the Rules of 1890 and still find numerous similarities to the rules of 2006. For example:

Rules of 1890	Current Rules
Order II, s. 1: Every action in the Court shall be commenced by a writ of summons, which shall be indorsed with a statement of the nature of the claim made or of the relief or remedy required in the action.	Rule 8: 1) Except where otherwise authorized by an enactment or these rules, every proceeding in the court shall be commenced by filing a writ of summons.
Order VIII, s. 1: No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to a Judge for leave to renew the writ.	(2) A writ of summons shall be endorsed either with a statement of claim or with a concise statement of the nature of the claim made and the relief required in the action. Rule 9: (1) No original writ of summons shall be in force for more than 12 months, but where a defendant named in the writ has not been served, the court, on the application of the plaintiff made before or after the expiration of the 12 months, may order that the original writ of summons be renewed for a period of not more than 12 months which, unless otherwise ordered, shall commence on the date of the order.

There are numerous other comparable sections. While there are also many important differences in language, organization and substance, the number of similarities, given the span of 116 years, is remarkable.

¹⁴⁹ British Columbia Courthouse Library Society, “Court Rules Research Guide,” http://www.bccls.bc.ca/cms/index.cfm?group_ID=2653.

¹⁵⁰ British Columbia Courthouse Library Society, “Court Rules Research Guide.”

¹⁵¹ British Columbia Courthouse Library Society, “Court Rules Research Guide.”

Appendix L: The Trial Rate

When considering issues of justice reform, it is important to keep in mind that very few cases ever reach the trial stage. The Canadian Bar Association (CBA) Systems of Civil Justice Task Force 1996 report states, “[C]ontrary to public perception, the vast majority (95 to 97%) of cases commenced in our civil justice system do not proceed to trial.”¹⁵² The 1995 Ontario Civil Justice Review First Report states, “This seems to be the experience in Anglo-Canadian-American court systems wherever located and regardless of the structure which is in place to process the flow of cases through the system.”¹⁵³

In a paper submitted to the CBA Task Force on Civil Justice, the trial rate in BC in the early 1990s was estimated to be about 3.3%.¹⁵⁴ The number of traditional trials, however, has been decreasing since the early 1990s.¹⁵⁵ In the Vancouver Law Courts, the number of full civil trials declined from 810 in 1995 to 393 in 2002.¹⁵⁶ In that same time period, new civil filings were relatively constant from 1995 to 2002, the highest being 30,699 in 1996 and the lowest being 26,460 in 1998.¹⁵⁷ If we can assume that the cases that went to trial between 1995 and 2002 were initiated in years that had about the same range of filings, then the general civil trial rate for the Vancouver Law Courts ranged in those years from about 1.3 to 3%.

The BC Supreme Court Scheduling System (SCSS) shows the number of trials held between August 1, 2004 and July 31, 2005 in the following registries:¹⁵⁸

¹⁵² Canadian Bar Association, *Systems of Civil Justice Task Force Report* (note 59), 11 (citing Ontario Civil Justice Review).

¹⁵³ Ontario Civil Justice Review, *First Report* (note 51), ch. 13, s. 13.1.

¹⁵⁴ Owen Lippert, Stephen Easton, and Craig Yurish, “Trends in Canadian Civil Justice” (as revised after submission to the CBA Task Force on Civil Justice), in John Robson and Owen Lippert, eds., *Law and Markets: Is Canada Inheriting America’s Litigious Legacy?* (Vancouver, BC: The Fraser Institute, 1997), 10.

¹⁵⁵ This may be in part due to the increased use of Rule 18A on summary trials.

¹⁵⁶ Brenner and Seckel, “Are We Listening?” (note 20).

¹⁵⁷ Brenner and Seckel, “Are We Listening?”

¹⁵⁸ Dr. Shihong Mu, Information Analyst, BC Superior Courts Judiciary, e-mail, December 15, 2005. Data were not available from the Prince Rupert, Dawson Creek, Fort Nelson, Golden, Port Alberni, Powell River, Quesnel, Revelstoke, Rossland, Salmon Arm, Terrace, and Williams Lake registries. As these registries are quite small, we can safely assume that the number of trials that took place in these registries was very low.

Court Locations	Total	Civil	Family
Campbell River	10	8	2
Chilliwack	25	11	14
Courtenay	7	6	1
Cranbrook	1	1	0
Duncan	1	1	0
Fort St. John	1	0	1
Kamloops	36	24	12
Kelowna	49	29	20
Nanaimo	35	20	15
Nelson	1	1	0
New Westminster	156	66	90
New Westminster Family	0	0	0
Penticton	2	2	0
Prince George	25	7	18
Smithers	1	0	1
Vancouver	441	263	178
Vernon	7	6	1
Victoria	112	81	31
Total	910	526	384

The table shows that 526 civil (non-family) trials were held in a one-year period. In 2004, there were about 49,000 civil, non-family cases filed province-wide.¹⁵⁹ If we use that figure, the trial rate for civil (non-family) cases in 2004/05 was just over 1%.

If we exclude probate, adoption, bankruptcy, and foreclosure, the number of remaining general civil filings in 2004 was about 33,000,¹⁶⁰ which would give us a trial rate of 1.6%.¹⁶¹

If we exclude cases that are not contested, which we estimate to be as high as 30%,¹⁶² the number of contested general civil filings drops to about 23,300, which gives a trial rate of about 2.3 % of contested cases.

¹⁵⁹ British Columbia Civil Electronic Information System.

¹⁶⁰ British Columbia Civil Electronic Information System.

¹⁶¹ This calculation uses 2004 filings as an approximation of the total population of cases. As filings in previous years were higher, using previous year filings would show an even lower trial rate.

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Current data on cases adjudicated by summary trials under rule 18A show that 126 summary trial documents were filed in BC in 2005. While we don't know how many cases those documents relate to, even if we assume that all of them represent a summary trial, the rate of trial (summary or full) and of contested cases would only be 2.8%. Therefore, no matter how the number is calculated, even if we include summary trials and include only general civil contested cases in the pool, it becomes clear that the civil trial rate in British Columbia is no more than 3% and probably less.¹⁶³

The BC results are not unique. The Canadian Centre for Justice Statistics compiled the following statistics on trial rates in the early 1990s for Ottawa, Calgary and Edmonton:

- Ottawa—For all civil cases initiated in 1994, 4.8% made it to the “trial-ready” list (certificate of readiness filed) and 1.1% were tried.
- Calgary—For all civil cases initiated in 1991, 6% made it to the trial-ready stage and 1.8% went to trial.
- Edmonton—For all civil cases initiated in 1991, 4.9% reached trial-readiness, and 1.6% went to trial.
- When looking only at cases commenced by a Statement of Claim, both Calgary and Edmonton recorded a 2.2% trial rate.¹⁶⁴

In the paper submitted to the CBA Task Force on Civil Justice mentioned above, the authors state that in the provinces of Alberta, Saskatchewan, and New Brunswick, from 1990 to 1994 (1992 to 1994 in BC), “In each province it is clear there is a ratio of 2 to 4% of all actions that end in trial.”¹⁶⁵ The Ontario Court Services 2002/03 annual report states that for civil cases in Ontario, “The trial rate has remained stable at 2% since 1998/99...”¹⁶⁶

In the United States, the US Justice Department reports that in the nation's 75 largest counties in 2001, for all tort, property and contract cases, approximately 3% were disposed of by trial.¹⁶⁷ In the Federal Court, the Justice Department reports that in the fiscal years 2002 and 2003,

¹⁶² This figure is based on a calculation of average numbers of statements of defence filed in general civil cases, including motor vehicle cases. Most of the undefended cases are in the Civic Electronic Information System (CEIS) category “Legislated Statutes,” which includes many enforcement actions, such as enforcing a residential tenancy order.

¹⁶³ Given that about 13,000 family cases are filed in Supreme Court each year, and the SCSS data shows 384 family trials, the trial rate for family proceedings in BC Supreme Court would be about 3%.

¹⁶⁴ Statistics Canada, Canadian Centre for Justice Statistics, *Civil Courts Study Report*, Catalogue no. 85-549-XIE (Ottawa, ON: Author, 1999), <http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/85-549-XIE/85-549-XIE.html>.

¹⁶⁵ Lippert, Easton and Yurish, “Trends in Canadian Civil Justice” (note 154), 10.

¹⁶⁶ Government of Ontario, Ministry of the Attorney General, Court Services Division, *Annual Report 2002/03* (Toronto, ON: Ministry of the Attorney General, 2003), http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_03.asp, 12.

¹⁶⁷ US Department of Justice, Bureau of Justice Statistics, *Civil Trial Cases and Verdicts in Large Counties, 2001*, <http://www.ojp.usdoj.gov/bjs/abstract/ctcvlc01.htm>.

approximately 2% of all tort cases were decided by trial, a decline from 10% in the early 1970s.¹⁶⁸

So although there is some variability in the data, it is clear that trial rates are extremely low. It is imperative, therefore, that we structure civil justice reform with this in mind. The low trial rate tells us that:

- the high cost of litigation is driven by pre-trial procedures, not the cost of trial itself;
- the problem we are trying to address is not that parties fail to seek alternatives to adjudication by a court; the problem is that the resolution of the case comes very late, after extensive amounts of time, effort, and expense have been incurred;
- civil justice reform, therefore, should focus on early, fair and cost-effective dispute resolution, whether by court adjudication, negotiated settlement or other form of resolution.

¹⁶⁸ US Department of Justice, Bureau of Justice Statistics, *Federal Tort Trials and Verdicts, 2002/03*, <http://www.ojp.usdoj.gov/bjs/abstract/ftv03.htm>.

Appendix M: Pleadings

The current pleadings

In British Columbia, the pleadings consist of the following documents:

- initiating documents:
 - Writ
 - Statement of Claim
 - Petition;
- defending documents:
 - Appearance
 - Statement of Defence;
- supplementary documents:
 - Reply (to a Statement of Defence)
 - Counterclaim
 - Third Party Notice.

The initiating documents

A proceeding in the Supreme Court of British Columbia may be commenced in one of three ways:

- a Writ of Summons, endorsed with a summary of the claim¹⁶⁹
- a Writ of Summons filed with a separate Statement of Claim,¹⁷⁰ and
- an originating application by Petition.¹⁷¹

The Writ

In old English practice, an original Writ was the process formerly used for the commencement of personal actions.¹⁷² It was a mandatory letter from the king, issuing out of chancery,¹⁷³ sealed and directed to the sheriff of the county wherein the injury was alleged to have been committed, requiring him to command the accused party either to do justice to the plaintiff or else to

¹⁶⁹ BC, *Supreme Court Rules*, Rule 8(1) and (2).

¹⁷⁰ BC, *Supreme Court Rules*, Rules 8 and 20. The Statement of Claim may be filed after the Writ is filed.

¹⁷¹ BC, *Supreme Court Rules*, Rule 10.

¹⁷² *Black's Law Dictionary*, 5th ed.

¹⁷³ One of the five divisions of the High Court of Justice of Great Britain, presided over by the Lord High Chancellor.

appear in court and answer the accusations against him.¹⁷⁴ A “Summons” is the requirement that a person appear in court.

Our Writ of Summons derives from this practice. It is the document that initiates the claim being filed. The Writ may be “endorsed” with a summary of the facts of the case, or it may be filed with or supplemented later by a Statement of Claim (described below). Once the Writ is filed, the plaintiff has one year in which to either serve it or obtain an extension of time from the court.¹⁷⁵ The filing of the Writ preserves the limitation period.¹⁷⁶

The Statement of Claim

The Statement of Claim is the document that sets forth the chronology of facts alleged by the plaintiff and the relief claimed in the action. There are two aspects of the facts of a claim:

- the material facts, meaning the facts that must be proved to establish a cause of action, and
- the particulars, meaning the more detailed statement of facts added to enable the other side to know the case he or she has to meet.

The claim “shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.”¹⁷⁷ The “material facts” are “those facts necessary for the purpose of formulating a complete cause of action.”¹⁷⁸ The essential elements in formulating a complete cause of action are “the right, the wrongful act and the damage.”¹⁷⁹ “[T]he facts constituting the cause of action should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action.”¹⁸⁰

Note that the “material facts” are not the same as the “particulars” of a case and that both are distinguished from the “evidence” that a party intends to submit:

¹⁷⁴ The requirement to appear in court and answer the complaint is called the “Summons,” and the Writ combined with the Notice to Appear is called the “Writ of Summons.”

¹⁷⁵ BC, *Supreme Court Rules*, Rule 9(1).

¹⁷⁶ The limitation period is the timeframe within which one must file the claim. The limitation period runs from the time the cause of action arises.

¹⁷⁷ BC, *Supreme Court Rules*, Rule 19(1).

¹⁷⁸ *Homalco Indian Band v. British Columbia* (note 45).

¹⁷⁹ *Homalco Indian Band v. British Columbia* (note 45), citing J. H. Koffler and A. Reppy, *Handbook of Common Law Pleading* (St. Paul, MN: West Publishing, 1969) 85; *Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc. et al.*, 2005 B.C.S.C 371.

¹⁸⁰ *Homalco Indian Band v. British Columbia* (note 45), citing J. H. Koffler and A. Reppy, *Handbook of Common Law Pleading* (St. Paul, MN: West Publishing, 1969) 85; *Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc. et al.*, 2005 B.C.S.C 371.

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If a material fact is omitted, a cause of action is not effectively pleaded. Particulars, on the other hand, are intended to provide the defendant with sufficient detail to inform him or her of the case he or she has to meet. Particulars are provided to disclose what the pleader intends to prove. How that party intends to prove the material facts and particulars is a matter of evidence. The pleading party is not required to, and indeed, is not entitled to set out in the pleadings the evidence that he or she intends to adduce at trial to prove the facts that have been pleaded.¹⁸¹

The Petition

A Petition is a formal, written application to a court requesting judicial action on a certain matter.¹⁸² Examples are applications to the court, without the other party present (*ex parte*):

- requesting the exercise of the judicial powers of the court in relation to a matter that is not the subject of an action, or
- requesting authority to do some act that requires the sanction of the court, such as the appointment of a guardian, leave to sell trust property, and so on.

While many of the Supreme Court Rules apply to proceedings commenced by both the Writ and the Petition, there are important differences with respect to the presentation of evidence, the right of discovery and the examination of witnesses. The Petition procedure tends to be a faster and simpler process than the extensive procedure involved in matters commenced by statements of claim, because it is focused on written materials and evidence is given primarily in affidavit form.

The defending documents

The Appearance

After a claim is initiated, the defending party must file an “Appearance” within seven days of being served with the Writ.¹⁸³ The Appearance is the formal submission by a party to the jurisdiction of the court. A party may file an Appearance, but nevertheless contest the jurisdiction of the court over the party or over the matter.¹⁸⁴

The Statement of Defence

The necessary elements of the Statement of Defence are:

¹⁸¹ *Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc. et al.*

¹⁸² *Black’s Law Dictionary*, 5th ed.

¹⁸³ BC, *Supreme Court Rules*, Rule 14(3).

¹⁸⁴ BC, *Supreme Court Rules*, Rule 14(6.4).

- an admission or denial of each fact listed by the plaintiff
- if the defendant denies any of the facts listed by the plaintiff, a clear and concise statement of the facts as claimed by the defendant,¹⁸⁵ and
- any affirmative defences.¹⁸⁶

The rules also require that “If a party in a pleading denies an allegation of fact in the previous pleading of the opposite party, the party shall not do so evasively but shall answer the point of substance.”¹⁸⁷ In addition, “The defendant, upon seeing the case to be met, must then respond to the plaintiff’s allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide.”¹⁸⁸

Supplementary documents

The Reply

If the Statement of Defence raises certain issues or facts to which the plaintiff wishes to respond, the plaintiff may file a Reply.¹⁸⁹ When no reply to the Statement of Defence (or to the Statement of Defence to a counterclaim or subsequent pleading) is filed within the time limits, the pleadings are closed.¹⁹⁰

The Counterclaim

The counterclaim is the same as a Statement of Claim, except it is the defendant who is also alleging a claim against the plaintiff.

The Third Party Notice

A Third Party Notice is filed when the defendant asserts that a third party may be liable for all or part of the damages that the plaintiff alleges were caused by the defendant.

¹⁸⁵ BC, *Supreme Court Rules*, Rule 19(20).

¹⁸⁶ A defence that exists notwithstanding that the allegations in the claim are true.

¹⁸⁷ BC, *Supreme Court Rules*, Rule 19(21).

¹⁸⁸ *Homalco Indian Band v. British Columbia* (note 45).

¹⁸⁹ BC, *Supreme Court Rules*, Rule 23.

¹⁹⁰ BC, *Supreme Court Rules*, Rule 23(5).

The civil justice reform issues

There are three primary issues associated with current rules and culture around pleadings:

- While the rules on pleadings are theoretically sound, the pleadings typically do not function as the blueprint of a case because they do not clearly set forth the nature of the claim and the factual disputes.
- Current pleadings will not be adequate to inform the proposed CPC process.
- The current process under the rules for initiating a claim is too complex.

As the above descriptions of the pleadings reveal, the court rules on pleadings already require clear and concise pleadings. What then is the culture that results in a lack of compliance? As with investigating crime, we need to look at motive and opportunity. The motive for non-compliance with the rules of pleadings, as far as we can surmise, is that our adversarial system requires lawyers, as advocates, to push the boundaries of the rules in order to advance the interests of their client. In the case of pleadings, the interest being advanced is the preservation of as many lines of attack or defence as possible.

This stems from our history of pleadings under old English law. Until the late 15th or early 16th century, pleadings were delivered orally to the court:

After the plaintiff set out the facts of his complaint the defendant would respond. His plea would consist of one of four responses; (1) a general traverse which denied all of the facts alleged and put them in issue; (2) a special traverse which was a denial of a single material fact which was then put in issue; (3) a demurrer which admitted the facts alleged but denied that they amounted to a case in law; or (4) confession and avoidance in which the defendant admitted the facts but then proceeded to introduce new facts to explain them and establish a defence. This latter process then required a response from the plaintiff until the issue was joined.

The importance of this early pleading process is apparent from the end goal of the oral pleadings. Once this process was complete they were put into the “record” which was the parchment scroll kept by the court. Once so inscribed they could not be amended and were binding on the parties. This was a strict rule which prevented the judge or the jury from considering issues not raised in the pleadings.¹⁹¹

¹⁹¹ *Keene v. British Columbia* (Ministry of Children and Families), [2003] B.C.J. No. 2338, paras 17–18 (Q.L.) (S.C.).

Present practice is much more flexible. Nevertheless, there is little incentive to file concise pleadings and then risk being required to file a motion to amend the pleadings, if one can simply list all theoretical possibilities at the outset and leave all lines of attack or defence open. It is also easier to keep key or controversial parts of the case protected from scrutiny if they are buried in layers of irrelevancies. Such a practice contributes to a “trial by ambush” approach.

So we need to consider why lawyers are able to frustrate the intent of the court rules in this way. We believe the opportunity arises because:

- pleadings are provided on wide-open written forms, leaving much room for lawyers or self-represented litigants to structure them as they see fit;
- there is no requirement that parties certify their belief in the truth of the facts asserted; and
- filing a motion to strike pleadings¹⁹² is limited to those pleadings which:
 - disclose no reasonable claim or defence
 - are unnecessary, scandalous, frivolous or vexatious
 - may hinder a fair trial, or
 - are otherwise an abuse of process.

Simplifying the process

Eliminate the Writ

We believe that the current case initiation practice (as described above) is unnecessarily complex. The practice of filing a Writ dates back to old English law and procedure and is no longer required. We have therefore recommended (Recommendation 3.2) that the Writ be abolished and that the Dispute Summary and Resolution Plan (DSRP) be the only initiating document filed, other than the Petition.

Eliminate the Appearance

Historically, the Appearance was the formal submission of a party to the jurisdiction of the court, and the parties were able to file “limited Appearances” to contest the jurisdiction of the court. There is, however, no reason why the defendant’s DSRP could not achieve the same objective.¹⁹³ We have therefore recommended (Recommendation 3.2) that the Appearance be eliminated.

¹⁹² BC, *Supreme Court Rules*, Rule 19(24).

¹⁹³ The new rules would have to either specifically allow the DSRP to be used to contest the jurisdiction of the court without being considered to be an attornment or create another mechanism to do so. Time limits for filing the defendant’s DSRP will have to be considered.

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Retain the Petition

We did not identify any serious problems associated with the process used for Petitions. We are told that Petitions are generally processed through the system efficiently. Therefore, no recommendations are made regarding Petitions.

Appendix N: UK and Australian Approaches to Expert Witnesses

Two leading reforms on the use of experts have been implemented in the UK and in Australia.

The United Kingdom

In the UK, the rules allow the court to direct that the evidence on a particular issue be given by one expert only.¹⁹⁴ If the parties cannot agree on who that expert should be, the court may select the expert from a list prepared by the parties or select the expert in whatever manner the court sees fit.

Where the court orders a single joint expert, the parties may each give instructions to the expert, a copy of which must be sent to the other parties.¹⁹⁵ The court may give directions about the payment of the expert's fees and any inspection, examination or experiments that the expert wishes to carry out. Unless the court otherwise directs, the instructing parties are jointly and severally liable for the payment of the expert's fees and expenses.

The first UK evaluation report, *Emerging Findings*, was released in March 2001 and relied primarily on anecdotal evidence. It suggested that most stakeholders believed that the reform in this area helped to promote early settlement and a less adversarial approach to litigation.¹⁹⁶

The evaluation, however, was inconclusive about whether the reforms resulted in reduced costs. A survey of British Orthopaedic Association members reported that half of all members said they were submitting the same number of expert reports as before (while a further quarter reported more such work than before the reforms).¹⁹⁷ Furthermore, there was some evidence that the requirement of a single joint expert caused some parties to hire their own “shadow expert,” resulting in greater costs to parties.¹⁹⁸

¹⁹⁴ UK, *Civil Procedure Rules*, 35.7.

¹⁹⁵ UK, *Civil Procedure Rules*, 35.8.

¹⁹⁶ UK, Department for Constitutional Affairs, *Emerging Findings: An Early Evaluation of the Civil Justice Reforms* (March 2001), <http://www.dca.gov.uk/civil/emerger/emerger.htm>, at paras 4.21–4.22, 4.25–4.26.

¹⁹⁷ UK, Department for Constitutional Affairs, *Emerging Findings*, para. 4.24.

¹⁹⁸ UK, Department for Constitutional Affairs, *Emerging Findings*, para. 4.23.

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The subsequent *Further Findings* report was released in August 2002 and confirmed many of these findings. The *Further Findings* report had access to a survey of the Law Society’s “Woolf Network.” This survey reported a high level of satisfaction with the quality of appointed experts (91%), but a majority of respondents (56%) also expressed some concerns about the use of single joint experts, with increased costs being frequently mentioned.¹⁹⁹ Furthermore, the same survey indicated that while most lawyers (82%) felt that single joint experts were appropriate in fast-track cases, a slimmer majority (54%) thought they were appropriate in the more complex multi-track cases.²⁰⁰ We have not found any more recent evaluations of these rules.

Australia

In Australia, the Queensland courts have taken a more radical approach. In late 2004, Queensland adopted new rules for the use of joint experts.²⁰¹ These new rules contain several key principles that address some of the typical criticisms of joint expert rules. Most importantly, an expert may not only be appointed during litigation, but may be appointed before the commencement of litigation. This is an essential feature of the new rules, as it addresses the criticism that by the time the court appoints an expert the parties have already hired their own experts.

Whether the expert is appointed before or after the commencement of litigation, the same rules apply: the parties can either agree upon the expert or, if they are unable to do so, one of the parties may apply to have the court appoint the expert. Unless the court otherwise orders, the expert so appointed will be the only expert who may give evidence on an issue.

Another essential feature of the new rules is that the court may appoint a second expert if satisfied that there is additional expert opinion that commands peer acceptance and that may be material to deciding the issue. A second expert may also be appointed where the second expert knows of matters not known by the first expert or under other special circumstances. This addresses the criticism that single experts prevent genuine differences of opinion amongst experts. We do not yet have any evaluation of the Queensland Rules on Experts.

¹⁹⁹ UK, Department of Constitutional Affairs, *Further Findings: A Continuing Evaluation of the Civil Justice Reforms* (August 2002), <http://www.dca.gov.uk/civil/reform/ffreform.htm>, para 4.27.

²⁰⁰ The UK uses a case-allocation system, where all cases are separated into small claims, fast-track, or multi-track streams. Cases where the amount in controversy is less than 5,000 GBP (about \$10,000 Canadian) are small claims. Cases where the amount in controversy is less than 15,000 GBP (about \$30,000 Canadian) are fast-track cases. Cases involving more than 15,000 GBP are put on the “multi-track” stream. Multi-track cases are case-managed by procedural judges working in teams with other judges.

²⁰¹ Queensland, Australia, Uniform Civil Procedure Amendment Rule (No. 1) 2004, section 7, Part 5—Expert Evidence. <http://www.legislation.qld.gov.au/LEGISLTN/SLS/2004/04SL115.pdf>.

Appendix O: *Resolution of Impasse Issues and Interlocutory Appeals*

Current processes

There are a variety of processes currently available to resolve impasse issues both pre-litigation and during a court action.

Pre-litigation

In the absence of a binding contractual term requiring the parties to use a particular dispute resolution process, there are many options for parties to consider if they need to resolve an issue that is blocking resolution of the dispute. The challenges are that the parties must be able to agree on what the issue is and which process should be used.

Assuming the parties can reach a consensus on issue definition, and assuming that an adjudication process is preferred, then there are a variety of flexible mechanisms that can be employed to obtain a decision, including:

- **Neutral evaluation**—The parties jointly select a neutral third party (or panel) to review the facts and submissions of the parties, if any, and to make a decision. The third party could be a trusted friend, a subject matter expert, a lawyer, a current or retired judge, and so on, depending on the nature of the dispute. The process is flexible but is usually fairly informal and is designed by the parties, with the assistance of the decision-maker, to suit the situation. In a construction matter, for example, the process may involve a site visit. In a dispute involving interpretation of the terms of a lease, the decision may be based solely on written materials. Finally, the parties may agree that the decision is either binding or non-binding.
- **Arbitration**—This process is similar to neutral evaluation but is usually more formal, and the decision is most often agreed on as binding on the parties. Many arbitrations currently involve in-person hearings and, in the most complex cases, may resemble a trial. Some commentators have questioned whether such a process achieves any savings over the cost and time involved in a court action.

Such a step may be helpful at any stage, including during a mediation, if a legal issue that is preventing the parties from meaningful negotiation arises.

During a court action

While the mechanisms noted above are still available with the agreement of the parties, once a court action is commenced the parties may also employ the tools provided in the Supreme Court Rules in order to obtain a decision on a discrete issue in the case. The relevant Supreme Court Rules include:²⁰²

- Summary Trial (Rule 18A)
- Summary Judgment (Rule 18)
- applications to strike pleadings (Rules 19(9.1) and 19(24))
- determination of questions of law arising from the pleadings (Rule 34) or arising generally (Rule 39(29))
- determination of issues of fact or mixed fact and laws (Rule 33, Special Case)
- judgment in whole or part of the claim based on admissions (Rule 31(6))
- a proceeding to be tried before other issues in a proceeding (Rules 26(15), 39(29), 33(2)).

A common example of an impasse issue in tort cases involves attempts to have the issue of liability tried separately from the damages assessment. The courts are concerned that, if the result on the liability issue does not result in an end to the case, then:

- certain evidence might have to be duplicated and witnesses called twice to testify
- there will be more delay in resolving the matter than if both issues had been determined at the same time
- separate decisions by different judges on various issues in the case may result in inconsistency or duplication of effort, and
- an appeal of the liability issue will further delay the matter.

However, there are also potential savings in cost and time in many cases through obtaining a decision on liability first, thereby saving the significant costs associated with preparing the evidence necessary to prosecute or defend the damages portion of the case. As recently noted by the BC Court of Appeal in *Radke v. M.S.*:

There are practical advantages to split trials. If the defendant is not liable, there is no need to try damages. That will save the parties time and expense. If liability is found, the parties may be able to resolve the damage issues without a trial. If the plaintiff's injuries have not resolved to the point where damages can fairly be tried, the parties may still try the liability

²⁰² This summary is taken largely from Peter C. P. Behie, "Determination of an Issue Before Trial," *The Advocate*, 63, Part 1 (January 2005).

issues while the events are fresh in the witnesses' memories. A right of appeal from a decision on liability alone will facilitate all of these practical goals.²⁰³

Rule 18A

Rule 18A was introduced in the early 1980s and has gained popularity since the seminal decision of McEachern C.J.B.C. in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*²⁰⁴ Rule 18A permits judgment on specific issues or generally in cases where there is an issue on the merits. The merits are determined upon affidavit evidence. Although it is used frequently in situations where a party seeks a determination on the entire action, its use for determining one of many issues has decreased significantly since the decision of the BC Court of Appeal in *Bacchus Agents (1981) Ltd. v. Phillippe Danderand Wines Limited*,²⁰⁵ in which Madam Justice Southin dismissed an application under Rule 18A:

[6] This is a useful rule intended to shorten litigation, thereby lessening its cost to the parties and to the public treasury and reducing delays in the process, it being an axiom, at least since Bacon's time, that justice delayed is justice denied.

[7] When, however, as in this case, the rule is invoked to try "an issue" rather than the whole case—what I have often characterized as "litigating in slices"—it may become a hindrance to the "just, speedy and inexpensive determination" of the dispute "on its merits".

Madam Justice Southin's admonition against "litigating in slices" has been quoted in many subsequent decisions and has diminished the effectiveness of Rule 18A as a viable alternative for achieving determination of an issue before trial.

Other tools in the rules

In addition to the options specified above, there are several other tools that may be used to resolve impasse issues, including the following:

- **Summary judgment**—A party may apply under Rule 18 for judgment by affidavit setting out the facts verifying the claim (or defence) and stating that there is no fact that would support the defence (or the claim). The judge does not determine any issue of fact or law under rule 18; the test is whether there is a *bona fide* triable issue.

²⁰³ *Radke v. M.S. et al.*, 2006 BCCA 12.

²⁰⁴ (1989), 36 B.C.L.R. (2d) 202 (C.A.).

²⁰⁵ (2002) B.C.C.A. 138.

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- **Applications to strike pleadings**—These are based on the following test: assuming the facts as pleaded are true, is it plain and obvious that the impugned pleadings disclose no reasonable cause of action? This is a very high bar, particularly in cases involving complex or novel claims, and courts are reluctant to refuse amendments that would support a cause of action. Rule 19(24) attacks rarely result in the dismissal of an action but are used more commonly to expunge legally offensive material from a pleading.²⁰⁶
- **Rule 34**—This rule permits an application to be made to decide a point of law arising from the pleadings and is used where one party admits the facts pleaded by the other party.
- **Rule 39(29)**—Under this rule, the court may order the determination before other issues of a point of law raised in the pleadings or otherwise.
- **Rule 33**—Rule 33 allows the parties to jointly prepare and submit a question of law or fact (or mixed law and fact) for determination by the court by submitting an agreed set of facts. This requires a significant level of co-operation between the parties and it is only by consent of the parties that the court may grant relief or enter judgment.
- **Admissions**—If there are “judicial” admissions made in a proceeding (in a pleading, during examination for discovery or in response to a Notice to Admit) a party may apply for determination of an issue based on those admissions. Subrule 31(6) specifically notes that “the court may, without waiting for the determination of any other question between the parties, make any order it thinks just.”

Various other Supreme Court Rules empower the court to make a determination on any issue or question in dispute in the action, separately from the other issues. In practice, however, none of these rules are frequently employed. Peter Behie identifies some of the reasons for this under-utilization:

First, the process defaults into the well-worn path from pleadings to discovery and then on to trial. It takes active reflection to consider whether the pleadings might be successfully impugned, whether a point of law might dispose of the claim or whether an issue of fact might be determinative of the claim. Another explanation for the failure of many to make use of these summary disposition rules is that they run against the grain of the entire system. One overarching principle behind the Rules of Court is that justice is best served when all issues between the parties are tried together in a single trial and disposed of on the merits in a single judgment. These rules interrupt the normal litigation process. The fact is that

²⁰⁶ Behie, “Determination of an Issue Before Trial” (note 202), 92.

most counsel are not naturally disposed to fracture the process by forcing an issue of law to hearing as a means of disposing of the entire matter. Furthermore, reluctance to determine proceedings on preliminary points of law or fact is sometimes shared by the judiciary. This judicial attitude can only have a chilling effect on the willingness of counsel to resort to these rules. [footnotes deleted]²⁰⁷

Our present rules and case law provide a barrier to the timely and cost-effective resolution of many of these kinds of disputes. Significant changes are required to the litigation framework and the legal and judicial culture in order to encourage the early resolution of disputes through the early resolution of impasse issues.

Appeals of interlocutory orders

If early adjudication of impasse issues is to be encouraged, then the number of potential appeals from orders made on these issues will increase. According to *Radke v. M.S.*,²⁰⁸ whether a determination on an impasse issue is “final” rather than interlocutory—and therefore subject to appeal without leave—depends upon an analysis of whether it would have formed a substantive part of a final comprehensive trial on all issues. This flexible but complex test leaves uncertainty as to whether leave is required on an unbundled issue or whether an appeal may be taken as of right. In *Radke*, the BC Court of Appeal confirmed that a judgment determining liability but not damages is a final order (rather than an interlocutory order) for which leave to appeal is not required.

There is a need to balance the benefits of encouraging early resolution with the risk that the efficient administration of the court system may be hindered through delay and fragmentary and piecemeal appeal of multiple rulings in the course of an action.²⁰⁹

In the US state court system, leave to appeal interlocutory orders is granted only in exceptional circumstances. We support restrictions on the right to appeal interlocutory orders (see Recommendation 3.8).

²⁰⁷ Behie, “Determination of an Issue Before Trial,” 81–82.

²⁰⁸ *Radke v. M.S. et al.* (note 203).

²⁰⁹ A related concern is that “allowing interlocutory appeals before a final judgment on the merits erodes the deference appellate courts owe to the district Judge’s decision on the many questions of law and fact that arise before judgment.” *Abrams v. Cades*, 966 P.2d 631 (1998).

Appendix P: Topics Needing Further Consideration

There are many topics that have not been dealt with specifically in this report but deserve more detailed consideration and recommendations. We realize that not all of these topics can be reviewed immediately, and have therefore listed them in rough order of priority. Topics to be examined in the short term include:

- a single justice window
- court filing fees
- judicial specialization
- costs
- the use of technology.

Topics to be examined in the longer term include:

- individual calendaring
- alternative trial formats
- alternative legal billing arrangements.

We have noted some of the concerns and main issues involving these topics and we will discuss them briefly here. (The intention is only to bring out some of the key issues involved in these topics for facilitation of future research and discussion.)

In the short term

A single justice window

Depending on the type of dispute, the appropriate location to initiate a proceeding may be one of the registries of the Provincial Court or the Supreme Court, or possibly an office of one of BC's many administrative tribunals.²¹⁰

If people wish to initiate a legal proceeding in a court or tribunal, ideally they should be able to complete and file a single form at any registry rather than

²¹⁰ Rough calculations indicate that in the 2004/05 fiscal year, more than 17,000 matters were filed with BC tribunals dealing with disputes in areas such as human rights, worker compensation and labour relations. (This number does not include approximately 18,000 adjudications dealt with by the Residential Tenancy Office.)

having to sort out which level of court, registry location or administrative body is appropriate.²¹¹ A unified registry model would simplify the system for the user and reduce the confusion caused by multiple specialized registries. It could also provide centralized filing and administration, rationalize the effective use of hearing space, and reduce duplication of services.

Court filing fees

We are aware of several issues that need to be addressed with respect to the matter of court filing fees. While we are not able to address these matters in this round of reform, we suggest that, in conjunction with the development of the new Supreme Court Rules, the Ministry of Attorney General review the current court fee model and consider the possibility of developing a new model. The following issues should be addressed in the course of the review:

- **Simplicity**—The current fee structure described in Appendix C to the Supreme Court Rules sets out well over 50 different fee amounts for various filings. Can these be condensed into fewer categories in order to simplify the fee structure and reduce transaction costs? (Could the payment of a single fee allow for several filings?)
- **Fairness**—Are the fees in line with what other jurisdictions charge for filing fees? Is the section on indigency status sufficient to allow indigent parties access to the courts? Should fees be charged on a sliding scale, depending on income? Rather than periodically reviewing the amount of fees, should we automatically adjust fees each year based on inflation indexes?
- **Proportionality**—Can fees be restructured to account for proportionality? For example, shouldn't we charge more for filing a multi-million-dollar lawsuit than we charge for filing a \$30,000 lawsuit?
- **Motivation of behaviour**—Should filing fees be used as incentives or disincentives to file certain documents? For example, if we want to encourage parties to notify the court that a matter has been discontinued, should we not waive the fee for this filing or even offer a small rebate?
- **Cost recovery**—Does the current fee structure pay for the cost of the court system? *Should* the current fee structure pay for the cost of the court system? Should we charge additional fees to pay for or to partially fund suggested additional services, such as the hub proposed in this report?

The review of court fees will require an analysis of the current court filing fee model, as well as a review of filing fee models in other jurisdictions and perhaps a general review of fee models in other disciplines.

²¹¹ The e-filing project in the Supreme Court is a first step in that direction. It will provide a single registry with 44 front doors. Front Counter BC—a single-window service for clients of provincial natural resource ministries and agencies—is another model of interest (<http://www.frontcounterbc.gov.bc.ca/>).

Judicial specialization²¹²

There is general support for at least some degree of specialization within the civil justice system. In 1996, the CBA's *Report of the Task Force on Systems of Civil Justice* found that there is generally strong support for specialized divisions in larger jurisdictions.²¹³ The following is a brief summary of the advantages, disadvantages and implementation issues that will need to be considered when this topic is reviewed further.

Advantages of a specialized judiciary

Efficiency

By developing legal and subject matter expertise, specialist judges are able to adjudicate disputes more efficiently, in terms of both time and cost. In theory, this would also increase the efficiency of the remaining generalist judges, as they would no longer have to work with or remain current on issues in the specialized fields.

Supporters of specialization claim that lawyers appearing before generalist judges typically convey a great deal of information to educate the judges and lay the groundwork for possible appeals. The costs to the litigants and the system—and the impact on access to the courts—can be significant.

Specialized judges, in contrast, do not need to be educated by the bar and are more capable of reducing the scope of the legal framework to the vital issues, decreasing the lawyer's need to establish such a comprehensive, time and resource-consuming record.²¹⁴

Improved case management

A specialized judge is in a better position to effectively impose and monitor case management controls, including supervising disclosure, ruling on motions, conducting trials, instructing juries, and so on. The specialized judge requires less time to research and reflect and, to that extent, can provide direction and guidance earlier than a generalist judge.²¹⁵

Consistency

Uniform judicial decision-making reduces conflicts in the interpretation and application of the law, which leads to greater predictability and encourages settlement. Resolving conflicts in law between generalist courts in different geographical regions at the appellate level is costly in time and expense to the litigants and the system. Specialist judges, with their expertise, familiarity

²¹² We would like to acknowledge University of Victoria Faculty of Law student Meagan Lang for writing, ideas and support provided for the Ministry of Attorney General in this section of the report.

²¹³ Canadian Bar Association, *Report of the Task Force on Systems of Civil Justice* (note 59), 50.

²¹⁴ American Bar Association, Central European and Eurasian Law Initiative, "Concept Paper on Specialized Courts" (June 1996), <http://www.abanet.org/ceeli/publications/conceptpapers/speccourts/spe1.html>, 11.

²¹⁵ American Bar Association, "Concept Paper," 12.

with the subject matter and fewer numbers, will likely produce decisions that are much more uniform than will generalist judges.²¹⁶

Specialization can also increase uniform procedural management of litigation. In isolated subject matters, procedural rules and requirements can be specifically tailored and uniformly applied to facilitate the efficient disposition of cases. For example, special practices and procedures were developed for the commercial list in Toronto in consultation with representatives of the bar, judges and interested bar organizations.²¹⁷

Disadvantages of a specialized judiciary

Inefficiency

While specialization increases efficiency in the ways outlined above, it might also introduce certain inefficiencies, including:

- the transitional training costs of having judges who have specialized for a great length of time undertake duties in a different subject matter, and
- the inefficiency of having specialist judges travel in circuits while only hearing a certain type of case.²¹⁸

Forum shopping

There are concerns that lawyers might, if they believe it is to their advantage, restructure the legal issues of a case to fall outside the specialized jurisdiction. This forum shopping and adjudication on peripheral issues can lead to the creation of “boundary law.”²¹⁹

Isolation

The isolation of specialist judges can lead to concerns that, because they are not exposed to broader legal issues, they are less capable of fostering and improving new ideas and novel approaches in interpreting and applying the law. It is feared that having specialized lawyers argue before specialized judges will lead to narrow perspectives and make the law increasingly unintelligible for the average observer.²²⁰

Several suggestions have been made to constrain the potential isolation of specialist judges. These include judicial rotation between specialties, or

²¹⁶ American Bar Association, “Concept Paper,” 11–13.

²¹⁷ American Bar Association, “Concept Paper,” 12. See also Canadian Bar Association, *Report of the Task Force on Systems of Civil Justice* (note 59), 50.

²¹⁸ Provincial Court of British Columbia, Judicial Planning Committee, *Report of the 2001/02 Judiciary Planning Committee and Three-Year Strategic Plan 2003–2005*, www.provincialcourt.bc.ca/downloads/pdf/Judicialplanningcommiteereport2001_2002.pdf, 22.

²¹⁹ American Bar Association, “Concept Paper,” 14.

²²⁰ Wayne Renke, “A Single Trial Court for Alberta: Consultation Paper” (July 2003), <http://www.justice.gov.ab.ca/courts/default.aspx?id=3269>, 28.

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between specialized and generalist courts, and broadening of the specialized jurisdiction to include two or three narrow but related fields.²²¹

Bias/due process

Specialization raises concerns that the court is biased or has been captured by interest groups. With a narrow jurisdiction, the appeal to an interest group in having interest-friendly candidates appointed to the court is greater. Moreover, where interest groups appear before the judges repeatedly, they gain an advantage over litigants who appear less frequently. This is compounded when the lawyers who appear frequently are personally acquainted with the judges and the court's policies and rules.²²²

In response to these concerns, it has been argued that nominations to specialist courts are no more marred than generalist courts by the self-interested participation of various groups, and that these groups often counteract each other when operating in the field of public appointments.

Access

Access to specialized courts is an issue when the court sits only in one geographic location. If the court functions essentially as a traveling tribunal, the administrative efficiency and quality of court operations may suffer. On the other hand, if the court does not travel, the expense and burden of traveling on non-local litigants may create a system that favours wealthier and/or local litigants.²²³

Technology, such as video-conferencing, can improve access to a non-travelling specialist court. It is also worth noting that geographic decentralization may be unnecessary and wasteful for courts whose subject matter involves parties who can more easily afford travel expenses (for example, commercial courts).

Jurisdiction of specialized courts

Defining the jurisdiction of the specialized court is difficult, as real-life disputes often spread over many fields of law. If courts are specialized, this can lead to fragmented judicial consideration of related issues. To alleviate this, the specialized court should, when a case involves additional issues, be given case-wide jurisdiction to adjudicate all the issues raised, including those that normally fall outside of its jurisdiction.²²⁴

The subject matter of a specialist court should be one:

²²¹ American Bar Association, "Concept Paper," 19.

²²² American Bar Association, "Concept Paper," 15.

²²³ American Bar Association, "Concept Paper," 15.

²²⁴ American Bar Association, "Concept Paper," 17. See also Renke, "A Single Trial Court for Alberta" (note 220), 28–89.

- in which generalists are unlikely to achieve sufficient expertise and efficiency because of legal or factual complexity
- that imposes the greatest burden on the generalist courts relative to its importance
- that can be technically and substantively separated, and
- that fosters sufficient litigation.²²⁵

Within the non-family, non-small claims, civil law context, over the past 15 years the momentum in Canada and the US seems to have favoured the specialization of business/commercial law and complex litigation. In Canada, the commercial list was established in Toronto in 1991 for the hearing of certain actions involving issues of commercial law in the Toronto region. The court is staffed by judges from the Ontario Court of Justice (General Division), who rotate in and out of the commercial court according to assignments fixed by the Chief Justice.²²⁶ The special procedures adopted expedite the hearing and determination of these matters, and they have met with considerable approval.²²⁷

Again, as can be seen from the above discussion, there are numerous complex issues that need research and analysis before any recommendations can be made. We suggest that the issue of judicial specialization (or specialized courts) be reviewed and considered for British Columbia.

Costs

The issue of costs is one that is frequently cited for reform. We were aware, however, that the issue was within the mandate of the Rules Revision Committee. The Rules Revision Committee did recommend changes to the BC cost tariff; these changes have been approved and will take effect on January 1, 2007.²²⁸ The changes primarily increase the amounts of recoverable costs to the successful litigant.

We suggest that the issue of costs be further reviewed, including the assessment of costs for the failure of the parties to consider whether some form of alternative dispute resolution process would have been more suitable than litigation.²²⁹

²²⁵ American Bar Association, “Concept Paper,” 16.

²²⁶ American Bar Association, “Concept Paper,” 50.

²²⁷ Canadian Bar Association, *Report of the Task Force on Systems of Civil Justice* (note 59), 50.

See also Ontario Courts, Superior Court of Justice, Toronto Region, “Practice Direction Concerning the Commercial List” (2002), http://www.Ontariocourts.on.ca/superior_court_justice/notices/commercial.htm. While this site indicates that a continuous reevaluation process by the court and the Commercial List Users’ Committee is in place, no evaluation information was found.

²²⁸ Order in Council No. 314, May 4, 2006.

²²⁹ See the discussion on the new approach in the UK, in Appendix E: An Expanded Role for Lawyers (65), and Thomas S. Woods, *Costs Sanctions for Unreasonable Refusal to Mediate: Coming to*

Technology

While we strongly advocate the use of technology to improve access to justice and the overall efficiency of the justice system, we are not able to recommend any specific technologies. We do suggest that the issue be explored further to maximize its potential.

In the longer term

Individual calendaring

There are two types of judicial calendaring (or docket) systems: Individual and Master. In an individual docket system:

- each case is assigned to an individual judge at filing
- each judge manages a defined group of cases from the beginning of the process to the end, and
- the same judge hears a given case at each stage of the litigation process.

The advantages of an individual docket system include:

- judges having greater familiarity with the parties and details of their cases so that they are better able to anticipate problems and manage cases accordingly
- less overall delay
- reliable and certain trial dates, with fewer adjournments.

The disadvantages of an individual docket system include:

- higher system costs
- possible difficulties in ensuring that the assigned judges are available when cases need attention, particularly when judges sit in different locations and travel to various circuits
- potential conflict when judges presiding over the settlement conferences will also conduct the trial.

a Courthouse Near You? (Vancouver, BC: Lawson Lundell, 2006), <http://www.lawsonlundell.com/news/index.asp?AOP=18>.

In a master calendar system:

- the assignment of all cases is controlled by the court registry or trial coordinator
- cases are assigned to different judges at different times for different purposes, depending on which judge is available, and
- after an event occurs, the case goes back into a pool until the next event occurs, at which point it is reassigned, likely to a different judge.

The advantages of a master calendar system are that:

- it efficiently distributes work amongst the judiciary, and
- it requires fewer judicial resources, as monitoring is done by court staff.

The disadvantages of a master calendar system are that:

- court resources may not be available for monitoring cases
- judges are not familiar with the cases before them
- there is potential for delay, if there is a lack of judicial resources when cases need attention, and
- it results in greater complexity in the administration of the court system.²³⁰

A hybrid of the master and individual calendaring systems is a system that defaults to a master calendar, but allows for an individual calendar when merited. In BC, all cases that are estimated to require 20 or more days of trial are assigned to a trial judge for individual case management.²³¹ Also, the CPC judge in our proposed model would be able to order individual case management when warranted.

In Quebec, the chief judge (or chief justice) may, on his or her own initiative or on request, order “special case management.” In special case management a judge is appointed to see to the conduct of the proceeding. The designated judge convenes a case management conference, disposes of all applications, holds a pre-trial conference, and presides over the trial.²³² The Hong Kong report on civil justice reform²³³ recommends that an individual docket system be used for special cases, including commercial, personal injury, construction, and constitutional and administrative. The Australian Law Reform Commission recommended an individual docket system for federal cases only.

²³⁰ General sources for this section include Australian Law Reform Commission, “Review of the Adversarial System of Litigation” (note 82) and Doris I. Wilson, “Managing Litigation in Canada,” *News and Views*, 5 (Fall 2002), http://www.cfcj-fcj.org/issue_5/n5-dwilson.htm#dw.

²³¹ BC, Supreme Court Practice Direction 21 (November 20, 1998).

²³² Quebec Code of Civil Procedure, Rules 151.11–151.13.

²³³ Hong Kong Special Administrative Region, Judiciary, Civil Justice Reform, *Final Report on Civil Justice Reform* (Hong Kong: Author, 2004), <http://www.civiljustice.gov.hk/>.

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As the above demonstrates, this is a complex issue that needs more detailed research and discussion to determine which system would work best in the BC environment, considering our geography, demographics, the mix of rural and urban settings, and so on.

Alternative trial formats

Under our system of justice, the civil trial is a single event in which there is a long-established orderly progression of opening statements, direct oral examination of witnesses, cross-examination of witnesses and closing statements. There is also an established courtroom setting, where the judge sits above the lawyers and litigants, who sit at their respective tables in the courtroom.

There are, however, potential alternative methods of conducting a trial. For example:

- The parties could be sworn in together and could sit around a table with their lawyers and a judge, with each party telling their story. Witnesses could be called in one at a time to participate in the process.
- In cases involving conflicting expert opinions, a panel of experts could be sworn in together and participate in a question and answer session with the lawyers, parties and the judge.
- The trial process could be structured to deal with one key issue at a time. In these “issue-based trials”, the parties present all of their evidence about the first issue before moving to the next issue.
- Unique alternative trial formats could be designed by the parties to meet the specific needs of certain types of cases (the “designer trial”).

We believe that the concept of alternative trial formats merits further study.

Alternative billing arrangements

For several decades, the vast majority of lawyers have charged for their services based on an hourly billing model.²³⁴ This method, however, has been increasingly criticized as a primary cause of escalating legal costs, decreasing practitioner efficiency, reduced career satisfaction, unhealthy work-life balance, loss of respect for the legal system, and decreased access to justice. Hourly billing was initially adopted as a means of providing clients with cost certainty while facilitating the management of law office budgets. However, the problems with that approach appear to be overtaking its benefits.

²³⁴ There are some notable exceptions in BC, including the use of contingent fees in personal injury claims and the use of flat fees in some more routine transactional work.

Although the current predominance of the hourly billing system is recognized as a problem, a solution remains elusive. Alternative billing schemes exist, but it is unclear whether these would in fact address the root problems that plague the current model. Lawyers are reluctant to adopt untested systems that they fear will result in less flexibility, lower profits, and more complicated management. We suggest that the issue be studied further.

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