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# CIVIL PROCEDURE REFORM— WHAT NEW BRUNSWICK DID

By LEVI E. CLAIN\*

## I. INTRODUCTION

All too often in the practice of law today practitioners are obliged to tell a client that, although he has a perfectly good case, having his dispute adjudicated by a court is just not economically feasible; the cost and delay inherent in taking the matter to trial is either beyond the client's means, or just not worthwhile. The client so advised receives a poor impression of "justice." But he is better off than the client not so advised, for that client may well go all the way through the lengthy trial process and end up with at best a moral win but an economic loss.

The two culprits—cost and delay—are, for the most part, created by inefficient civil procedures. Indeed, it can be said that the scales of justice pivot about the Rules of Court. To allow the scales to tip quickly and fairly, the Rules of Court must provide procedures by which disputes can be adjudicated with as little delay and expense as fairness will allow. Rules which are ineffective, time-consuming, costly or difficult to understand contribute to injustice at the expense of the public.

In New Brunswick, the Rules of Court were copied from the English Rules of 1873<sup>1</sup> and were enacted in 1909.<sup>2</sup> Although major amendments<sup>3</sup> have been made through the years, New Brunswick's Rules remained essentially those written in the language and customs of another country well over a century ago when efficiency was not in demand as it is today. Also, New Brunswick's Rules were only available in the English language whereas over one-third of the province's citizens have French as their mother tongue.

In early 1979, New Brunswick joined the "revision movement" which

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<sup>1</sup> Rules of Court made pursuant to the *Supreme Court of Judicature Act, 1873*, 36 & 37 Vict., c. 66; see Wilson, *Wilson's Judicature Acts of 1873 and 1875 Rules and Schedules of Forms and Other Rules and Orders* (London: Stevens and Sons, 1875).

<sup>2</sup> Rules of Court made pursuant to the *Judicature Act, 1909*, S.N.B. 109 (2d Sess.), 9 Edw. 7, c. 5; see *The Judicature Act of New Brunswick and Rules of Court* (St. John: King's Printer, 1909).

<sup>3</sup> Particularly in the areas of discovery, third party proceedings, and Crown rules. The most notable amendments came about as a result of the *Report of the Committee on Administration of Justice in New Brunswick* (Fredericton: Queen's Printer, 1959) (*Nicholson Report of 1959*).

England initiated in 1965.<sup>4</sup> The Barristers' Society of New Brunswick selected a Committee of ten and charged it with the task of revising the Rules of Court,<sup>5</sup> with the following aims:

- (a) more open disclosure of a party's case before trial;
- (b) simplification and modernization of procedure and language;
- (c) more convenient, expedient, and less expensive procedures where fairness allowed; and
- (d) ease of translation into the French language.<sup>6</sup>

Crucial funding for the project was provided by the New Brunswick Law Foundation, and the Minister of Justice of New Brunswick arranged for the translation to be done concurrently.

The Committee at once recognized the fortuitous timing of the project and decided to make use of the tremendous work produced by those jurisdictions that had recently revised their Rules. Rather than draft a completely new set of Rules, the Committee chose to adopt the Ontario draft Rules<sup>7</sup> as the model to be followed in the revision, for several reasons:

- (a) the Ontario draft Rules were in a format and language which even at first glance made them easy to understand, and they appeared to be well researched and co-ordinated;
- (b) the Ontario draft Rules were the product of a five year intensive study, maximum input from the Bar and Bench, and a large budget;
- (c) Ontario had drawn from the experience of its predecessors, in particular Nova Scotia and British Columbia, and New Brunswick now had the opportunity to "stand on the shoulders" of Ontario; and
- (d) Ontario offered New Brunswick access to a large body of precedent to assist in the interpretation of New Brunswick's Revised Rules.

The Williston Revision Committee of Ontario gave the New Brunswick Committee its full co-operation. Not only did the New Brunswick Committee receive the latest drafts and working papers from Ontario, but it was able to add as one of its members Professor Garry D. Watson of Osgoode Hall Law School, who had served as counsel to the Williston Committee.

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<sup>4</sup> Following England in rules revision were Alberta in 1969, the Federal Court of Canada in 1971, Nova Scotia in 1972, British Columbia in 1976, Prince Edward Island in 1977, and Ontario in 1980.

<sup>5</sup> The Committee's work culminated in the drafting of the following report: Barrister's Society of New Brunswick, *Civil Procedure Rules Revision Committee Final Report* (May, 1981).

<sup>6</sup> The following facts concerning the role and experience of the Revision Committee are provided by Mr. Clain's knowledge and experience as Chairman of this Committee. This information can also be obtained by referring to the Committee's final *Report*, *id.*

<sup>7</sup> See Civil Procedure Revision Committee of the Ontario Ministry of the Attorney General, *Report of the Civil Procedure Revision Committee* (Toronto: Queen's Printer, 1980).

In using the Ontario model the New Brunswick Committee quickly learned that although Ontario's draft Rules were by far the best to follow in revising New Brunswick's Rules, the needs of New Brunswick do not always correspond to those of Ontario. Indeed, the two jurisdictions are vastly different in physical size, population, numbers in the Bar and Bench, court structure, practices, and tradition. Ontario's statute law differs as well, requiring care in selecting that which New Brunswick could follow.

For the most part therefore, the Ontario Rules were "adapted" to New Brunswick's way of doing things. Where it could, the New Brunswick Committee preserved the format and numbering to enable ready access to Ontario precedent. Some rules, however, were just not applicable or acceptable. In those cases, the Committee drafted its own rules *ab initio* by drawing from other jurisdictions as well as from then existing New Brunswick Rules; in certain areas the Committee struck out on its own to develop procedures unique in the common law world.

The New Brunswick Committee had an advantage which its Ontario counterpart did not enjoy: it was able to take a completely fresh approach to Ontario's draft Rules. The Committee improved on grammar and drafting style to make New Brunswick's Revised Rules even easier to read and to understand. It further simplified and streamlined to cut delay and cost. It clarified the Rules where confusion could arise. But these changes did not change the Rules' identity; New Brunswick's Revised Rules are still the offspring of Ontario.

## II. REVISION PROCEDURE

The New Brunswick Revision Committee selected from its members a draftsman and a smaller, five man Working Committee. Under the policy guidance of the two committees, the draftsman prepared the initial draft of each Revised Rule and presented it to the Working Committee. The draft would there undergo intensive research and review and usually many redrafts before it was referred to the Revision Committee.

To ensure maximum input from the Bar and Bench in the making of the Revised Rules, thirty-seven judges, lawyers and court officials agreed to serve on an Advisory Committee. They received each draft completed by the Working Committee and were asked to forward their comments to the draftsman. The Revision Committee met each month and reviewed the draft Rules prepared by the Working Committee together with the comments of the Advisory Committee. Again, changes were made and new drafts prepared. When the Revision Committee finally approved the draft it was then sent to the translation team.

The translation team's thorough review of the English version caught many grammatical and technical errors which were referred back to the Working Committee for correction. As well, some English terms, although proper, had to be changed to ensure uniformity with the French version.

In addition to these reviews, the draftsman did a complete review of the

Revised Rules to standardize drafting style and to correct grammatical and technical errors. Finally, at the end of the project, the Working Committee prepared a Concordance with the then existing Rules which ensured that nothing worthwhile was omitted. After each review the draft was returned to either the Working Committee or Revision Committee to be finalized and sent again to translation.

The *ab initio* Rules were first thoroughly researched, and policy discussions were held at the Working Committee stage. Either the draftsman or another member of the Working Committee was then delegated to transpose the policy into a draft Rule. After a number of redrafts at the Working Committee level, the draft Rule was referred to recognized experts in New Brunswick and elsewhere for review and comment. Again further redrafts of the Rule were likely before each was finally referred to the Advisory and Revision Committees.

The *ab initio* Rules are:

- Rule 40.03 — Mareva Injunction;
- Rule 41 — Appointment and Confirmation of Receivers;
- Rule 47 — Procedure on Setting Down for Trial;
- Rule 56 — References;
- Rule 57 — Accounts;
- Rule 59 — Costs of Proceedings Between Parties;
- Rule 62 — Civil Appeals;
- Rule 63 — Criminal Appeals;
- Rule 64 — Summary Conviction Appeals;
- Rule 66 — Vendors and Purchasers;
- Rule 76 — Contempt Proceedings;
- Rule 77 — Quick Ruling.

As well, Rule 8 on Partnerships, Rule 72 on Divorce Proceedings, Rule 73 on Family Division and Rule 74 on Marital Property applications underwent extensive recasting.

Throughout the entire revision project, the Committee maintained a close liaison with the Bar and Bench of New Brunswick, keeping them informed with respect to the conceptual changes in the Revised Rules. As well, the Committee stayed in contact with the Revision Committees of other jurisdictions; especially those of Ontario, Nova Scotia and British Columbia.

New Brunswick's revision project was completed on schedule in May, 1981. The project received a minimum of 7,200 man-hours contributed by senior and well-respected members of the Bar and Bench of New Brunswick and cost a total of \$175,000.

### III. MAJOR CONCEPTS CONTAINED IN THE REVISED RULES

The Revised Rules consist of seventy-seven individual Rules. Although these Rules are completely new to New Brunswick, the general structure of civil procedure remains the same. Oral discovery continues to exist, although

its scope has been widened; evidence *de bene esse* and by way of commission remain but they have been simplified and different terms are used; pleadings, service out of the jurisdiction, pre-trial conferences and Motions Days continue to exist but in an improved form. Converting to the Revised Rules should be easy and, in view of the time-saving changes, enjoyable.

A detailed summary of the concepts embodied in the Revised Rules appears in the Committee's final report.<sup>8</sup> The philosophy behind some of these concepts will be discussed here. To achieve its aims the Committee used four operations:

- (a) simplification of language, format, and procedures;
- (b) streamlining of present procedures;
- (c) adoption of new procedures; and
- (d) development of innovative concepts.

#### A. Simplification

Language, both English and French, was greatly simplified in the Revised Rules. Without sacrificing precision, the Committee was able to use common, everyday language in explaining each procedure. It replaced archaic and Latin terms wherever possible with expressions easier to understand: "*ex parte*" became "without notice," "writ of *feri facias*" became "order for seizure and sale," "subpoena" became "summons to witness," "replevin" became "an Order for the Recovery of Personal Property." Bulky titles were shortened: for example, "Respondent-Petitioner by Counter-Petition" became "Respondent."

The Committee's drafting style did away with redundant phrases and concentrated on using "action" words in each sentence. The long sentences that were common to the old Rules (some running more than 20 lines) were considerably shortened. Long paragraphs were broken into sub-rules and subparagraphs.

The Revision Committee simplified necessary procedures and did away with unnecessary ones. Instead of having five ways to start proceedings, the Revised Rules provide only two—by Notice of Action or Notice of Application<sup>9</sup>—and if the wrong procedure is used a simple amendment will rectify the mistake. As well, the Revision Committee standardized the commencement of proceedings so that essentially the same procedure is used to start an action, a divorce or an appeal.

The foreclosure procedure in the old Rules was understood by few practitioners in New Brunswick, which is probably why this procedure had fallen into complete disuse in the last thirty years. After a lengthy study of the

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<sup>8</sup> *Supra* note 5, at 52-66.

<sup>9</sup> To remain consistent with the *Divorce Act*, R.S.C. 1970, c. D-8, the *Infirm Persons Act*, R.S.N.B. 1973, c. I-8, the *Quieting of Titles Act*, R.S.N.B. 1973, c. Q-4, Rules 70, 71 and 72 provide that these procedures must be started by petition.

merits of foreclosure, the Revision Committee elected not to resurrect it in New Brunswick; accordingly, the procedure was omitted from the Revised Rules.

Many procedures had been developed in New Brunswick by common usage and were not found in the Rules; practitioners learned them through experience. To ensure that all practitioners, junior as well as senior, are familiar with these procedures, the Committee codified them in the Revised Rules wherever possible. The *St. Pierre v. Harrison*<sup>10</sup> procedure for introducing discovery by a defendant has been set out, the order of presentation at a trial has been specified as well as the procedure governing a motion for non-suit, the better directions contained in a receivership order have been "flagged," and the common law requirements of an application under the *Infirm Persons Act*<sup>11</sup> were codified.

Again, to simplify the practice as well as to provide standardization, forms were drafted for each procedure contained in the Revised Rules.<sup>12</sup> Although they are grouped separately instead of immediately following the rules they refer to, the forms are easily identified and should prove to be a considerable time-saving device for the lawyer and his secretary.

The format of the Revised Rules was carefully designed to quickly orient the reader and to allow easy reference. The Rules were placed in logical sequence and were grouped in general areas: Parties and Joinder, Discovery, Preparation for Trial, Appeals. Each procedure forms a rule which is clearly headed; sub-headings describe each sub-rule.

Again, for the ease of the lawyer and the judge, rules governing all of the procedures in the Court of Queen's Bench and Court of Appeal are contained in one book. Divorce, summary conviction appeal and criminal appeal procedures have been included in the Revised Rules together with the rules which control practice in the Family Division and Small Claims Courts.

#### B. *Streamlining Present Procedures*

Procedures that were in common use, but contained steps that served no useful purpose, were streamlined to reduce time and cost. The Writ of Summons is an example. The only practical purpose it served was to inform its recipient that an action had been started against him, and its archaic language inhibited that advantage. Its disadvantage lay in the requirement of a court order before it could be served outside the jurisdiction. The Revision Committee abolished both the Writ and the Appearance which responded to it. Under the Revised Rules an action is started by the filing of a Notice of Action which is designed to clearly inform the recipient that legal proceedings have been commenced against him. The Notice of Action can only

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<sup>10</sup> (1976), 71 D.L.R. (3d) 573, 13 N.B.R. (2d) 527 (C.A.).

<sup>11</sup> R.S.N.B. 1973, c. I-8.

<sup>12</sup> *Supra* note 5, at 389-558 (Appendix of Forms).

be served with a Statement of Claim, and it can be served anywhere without an order of the Court. The response to it is a Statement of Defence.

Similarly, the Third Party Notice was abolished, and other Notices and Orders to do things were eliminated by making the doing of those things mandatory, unless waived by consent. For example, a Notice Requiring an Affidavit of Documents, a Notice to Produce for discovery or for trial, an Order for Discovery, an Order giving leave to issue a Third Party Notice, and an Order for Directions in Third Party actions are all unnecessary under the Revised Rules.

The procedure to set actions down for trial was streamlined to do away with the very expensive but time-honoured tradition of counsel appearing before the Court on opening day, fully gowned, for the sole practical purpose of having dates set for the cases to be heard during that sitting. Under the Revised Rules, the concept of Motions Day was retained but the dates for the cases are fixed beforehand by the clerk and only those counsel who require different dates need appear before the Court.

The setting down of appeals was also time-consuming. The delay in securing transcripts often resulted in an application to the Court of Appeal for an order setting the appeal over to the next session pending completion of the transcript. In the Revised Rules, appeals are not "perfected" (entered for hearing) until the Registrar has received all of the necessary documents, including the transcript. Also, to promote increased efficiency, the Court of Appeal will sit monthly (except July, August and December) instead of the present five sittings a year, and a single judge of that Court will have the power to make many orders which only the full Court can now make; additionally, he will be able to give such directions as are necessary to maximize the efficiency of any appeal.

Other examples of streamlining are:

(a) one procedure entitled Proceeding for a Judicial Review replaces the present procedures for *Certiorari*, *Mandamus*, Prohibition, *Quo Warranto* and motions to set aside awards (the Committee did not abolish the terms, it just unified the procedure);

(b) applications under the *Marital Property Act*<sup>13</sup> can be joined in divorce petitions;

(c) the Court is authorized in any proceeding to determine the same questions that it may in an application under the *Quieting of Titles Act*;<sup>14</sup>

(d) pre-trial examinations, whether by way of discovery, commission or *de bene esse*, are all to be done using one simplified procedure.

### C. Adopting New Procedures

To meet outstanding needs in practice today in New Brunswick, and again to reduce cost and delay, the Committee adopted new procedures in

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<sup>13</sup> S.N.B. 1980, c. M-1.1.

<sup>14</sup> R.S.N.B. 1973, c. Q-4.



many areas. Some of these were taken from other jurisdictions. Some are unique to New Brunswick. All, the Committee is confident, will be welcome.

Substantial reduction in the cost of litigation should result from the broadening of the discovery procedure. Enabling each party to learn early in the proceeding the evidence upon which his opponent relies will encourage settlement and thus avoid the time and expense of a trial. Accordingly, the Committee widened the scope of discovery to permit cross-examination and the disclosure of the names of witnesses, insurance policies, evidence as well as facts, and expert opinions.

A non-party witness may be discovered, but to prevent abuse and to provide a measure of control, an order of the Court must be obtained. Even an expert witness whose evidence up to now has been privileged can be questioned on discovery, unless the party who has retained him undertakes not to call him as a witness at the trial. Discovery of experts is unique to New Brunswick but the Committee reasoned that it would serve either to encourage settlement or to ensure more effective cross-examination at trial.

The scope of the Affidavit of Documents has been widened to require disclosure of relevant documents that, to the knowledge of the deponent, are in the possession of another person. The Affidavit has been given teeth by requiring the party's counsel to certify that he has explained to the deponent the necessity of making a full and fair disclosure, and also that he (the counsel) is not aware of any other documents not disclosed. Strong sanctions are provided. As well, the deponent may be cross-examined on his affidavit. Finally, the Revised Rules deem a discovery to be continuing, thereby requiring disclosure of any documents and evidence acquired after the discovery has been held.

Another feature which should greatly reduce costs as well as improve justice, is the "split-trial" concept providing for the trial of an issue in an action as soon as it is ready. A clear example is the personal injury action where a number of years may elapse before the medical issues are ready for trial. By that time the witnesses on the liability issue may be stale. Under the Revised Rules the liability issue can be tried immediately; the medical issue may be tried when ready if, indeed, that issue is not settled as a result.

To encourage counsel to try their actions as soon as they are ready, parties and their counsel are given notice fourteen months after the close of pleadings to appear and explain to the Court why the action has not been set down for trial. The Court can then give directions to expedite the matter. Nova Scotia has had a similar rule in place since 1967, and it has had excellent results, cleaning up actions that were as much as six years old.<sup>15</sup>

Another time-saver is a rule permitting motions to be heard by conference telephone, thus eliminating instances in which a lawyer has to travel a

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<sup>15</sup> Cowan, *Civil Litigation at the Trial Level (1977-78)*, 1 *Advocates' Q.* 259.

long distance to another city, just to present an oral argument to the court that may take only minutes. Now that same argument can be given from the convenience of his office, at substantial savings to his client.

Trial procedures were reworked to provide for:

- (a) a party calling as a witness an adverse party and cross-examining him;
- (b) the asking of leading questions of witnesses who are evasive;
- (c) excluding a witness from the courtroom until he testifies;
- (d) the adducing of evidence by affidavit, particularly in undefended actions (including divorces); and
- (e) the appointment by the Court of an independent expert to make an inquiry, as well as an adviser to assist in the inquiry.

In order to reduce the delay and cost involved in appeals from interlocutory decisions, particularly where the appeal is being used as a tactic by a rich litigant to discourage his impecunious opponent, the Revision Committee recommended that leave to appeal be required. Such leave must be applied for by motion to an appellate judge within seven days of the decision, and if granted, directions can be given for its expeditious hearing. The power of the Court to punish for contempt has been codified to make this procedure well-known and thereby encourage greater obedience to the Court's authority (Rule 76-form 76A).

The Committee was well aware of the most unsatisfactory state in which New Brunswick's execution procedures were mired, and of the excellent procedures that have been successfully used in Nova Scotia since 1972;<sup>16</sup> however, most of New Brunswick's execution procedures are scattered among a host of statutes as well as in the Rules of Court, and the Committee's mandate did not extend to changes in the former. The Committee adopted some of the new Ontario execution procedures, including discovery in aid of execution,<sup>17</sup> and it added corrective measures to curb some of the problems in New Brunswick. The Committee recommended, however, a thorough review and a complete revision of execution law and procedures to be contained under one "umbrella," whether in a statute or in the Rules of Court.<sup>18</sup>

Other areas where the Committee adopted new procedures to meet the needs of New Brunswick include:

- (a) preliminary motions, which can be made before proceedings are commenced, to obtain discovery of a potential defendant (the questions are restricted to identifying potential parties), or to apply for an injunction where time is short;

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<sup>16</sup> Civil Procedure Rules made pursuant to the *Judicature Act*, S.N.S. 1972, c. 2; See *Nova Scotia Civil Procedure Rules* (Halifax: Queen's Printer, 1971) Rule 53.

<sup>17</sup> *Supra* note 7, at Rule 61.10.

<sup>18</sup> *Supra* note 5, at 38-39.

(b) a summary judgment procedure for the defendant as well as for the plaintiff;

(c) an "offer to settle" procedure available to both plaintiff and defendant pending trial, as well as on appeal;

(d) a summary procedure to have questions arising in vendor-purchaser transactions determined quickly;

(e) a provision for video-taping pre-trial examinations; and

(f) the exclusion of judges who are involved in pre-trial conferences where settlements are discussed from conducting the trial.

#### D. *Developing Innovative Concepts*

The most difficult and yet the most rewarding part of the project was to develop completely new concepts to improve justice in New Brunswick and to strike at the problems of delay and cost. The late Walter Williston, Q.C., described how his Ontario Committee grappled with this problem.<sup>19</sup> He found it difficult to conceive of fundamental changes in the basic structure of the procedural system that would be both useful and acceptable to the profession and the public. The Committee agreed that the basic structure of New Brunswick's civil procedures need not and could not be changed for the better. Indeed, the structure has been painstakingly established over the centuries by the endeavours of our predecessors and can be found in every common law jurisdiction. The structure, however, is always open to modification in order to fit the particular needs of an ever-changing society.

Today a person involved in a dispute may not be as interested in a much-refined procedural system to adjudicate it, as he may be in a quick and inexpensive method of resolving it. His argument has merit: justice delayed or justice beyond his means may not to him be justice at all.

To fit this particular need of present-day society, the Committee developed a procedure which it termed the Quick Ruling concept. Unique to New Brunswick, it is designed to provide a non-compulsory and non-binding adjudication of a dispute by a judge early in the proceeding at minimum cost. If the parties can agree on the facts involved in the dispute, or at least agree to have the facts determined, the dispute can be referred to a judge designated for this special procedure. If the judge agrees that the dispute is one upon which a Quick Ruling can be made, he will have the parties and their counsel attend before him. The judge may conduct the hearing in whatever manner he deems just, and then make a Quick Ruling. If the ruling is acceptable to all, it can become a judgment of the court. If any party does not accept it and insists upon proceeding to trial, he may be penalized by the award of costs if at the trial he is unable to improve his position under the Quick Ruling.

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<sup>19</sup> Williston, *Revising the Ontario Rules of Practice—The Work of The Civil Procedure Revision Committee (1977-78)*, 1 *Advocates' Q.* 18.

The Quick Ruling concept was first introduced by the Committee at the C.I.A.J. Conference on the Cost of Justice<sup>20</sup> and received considerable comment. At the final dinner of the conference, the guest speaker, The Right Honourable Sir Robert Megarry, Vice-Chancellor of England, described the concept in these words:

Let me now turn from possible improvements in the existing system to my second main head, that of the alternative systems that ought to be considered. There are four possible systems, which might be labelled the Tuxedo System, the Business Suit System, the Jeans System and the Naked System. Of these, I need say nothing about the first, the Tuxedo System, or, if you will, the Rolls-Royce System. This is the present system, with everything done in full from beginning to end, according to the rules. Plainly there are some cases which will always need this; but there are others.

Then there is the Business Suit System. This name may be given to an ordinary action in the ordinary courts according to the ordinary law, but with a simplified procedure. There are many cases for which the Tuxedo System may be too expensive and too elaborate, and for which a more simple procedure would be perfectly adequate. So ought not such a procedure to be made available? If it is, there would at once be the question who would decide whether or not a case is suitable for that procedure. My guess is that it should be open to either party to require it to be adopted unless the court ruled otherwise. The plaintiff should be able to commence his action by that procedure; and if he does not, the defendant should be entitled to require it to be applied. In each case the action would thereupon be conducted according to that procedure unless the other party persuaded the court that it ought not to be applied.

Such a process would of course bring a number of cases before a judge at a pre-pre-trial stage, shortly after the issue of the writ, and so consume some judicial time; but I do not think that it would be wasted. In addition to deciding whether the case was suitable for the simplified procedure, the judge would often be able to frustrate some of the Micawberisms to be found among lawyers. They will not admit anything, they will not agree to anything; they simply want to wait for something to turn up. The judge would be able to mould the procedure to the needs of the case, helping to have issues framed, giving directions whether there is to be discovery, and if so on what scale, deciding whether points of claim and points of defence could take the place of formal pleadings, and so on.

It is to be hoped that it would be possible to encourage, or require, the clients to be present at these pre-pre-trial hearings. This would expose them not only to the presence of each other but also to the presence of the situation. Each would realise more fully that he is getting into something serious. He would see the fangs of the lawyer on the other side, and he would see and hear the judge and his questions, some of them ominous and dangerous. These pressures, at an early stage, before heavy costs have been incurred, might well induce a settlement that otherwise would prove impossible. The clients would also encounter the moral force of the judge. A judicial intimation that the claim seemed thoroughly unmeritorious or that the defence was shabby might well bring second thoughts to a litigant. In short, the amount of judicial time that would have to be spent on these pre-pre-trial hearings (and it would be considerable) might well be more than balanced by the time that would be saved in cases that are settled instead of being fought. There are, of course, cases that it would be wrong to settle on any terms short of unconditional surrender by the other side; but most cases are less heroic than that.<sup>21</sup>

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<sup>20</sup> Canadian Institute for the Administration of Justice Conference on the Cost of Justice (held at Toronto, November, 1980).

<sup>21</sup> Megarry, "A Free Fantasia of a Visiting Englishman on the Theme of the Cost of Justice," *Cost of Justice* (Toronto: Carswell, 1980) 147 at 152-53.

The Committee was privileged to have Sir Robert Megarry review and comment on the draft it had prepared of the Quick Ruling procedure. He offered these general comments:

I think that your experiment in quick rulings is well worth trying, if I may say so. Only experience will tell whether much use will be made of it, and what revisions are needed. All that anyone can do is set up the system, and wait and see.<sup>22</sup>

Peter Fraser<sup>23</sup> of the British Columbia Rules Committee also reviewed the draft. He stated: "you may begin to anticipate your footnote in the tiny corner of history reserved to civil procedure. The idea is good."<sup>24</sup>

Although part of the Rules, the Quick Ruling procedure will not be operative until the Chief Justice of the Queen's Bench designates "Special Judges" (such as supernumerary judges) to receive applications under the Rule.

The second of the Committee's innovations was the abolition of "Taxation." Apart from causing expense and delay, the procedure was annoying to the practitioner, difficult to explain to a client, and made little sense, at least in New Brunswick. The procedure required counsel for the successful party at a trial to prepare a Bill of Costs, with affidavits supporting every item claimed, and then all counsel had to attend before an officer of the Court (who knew nothing about the action), to determine the amount of costs one party should pay to the other. The time involved for counsel in this procedure was long, boring and expensive for the client.

The Committee believes that the trial judge, who is very familiar with the action, is the person most qualified to determine the amount of costs that one party should receive at the expense of the other. Accordingly, it designed the rule on costs (Rule 59) to require the trial judge (or the Court of Appeal if the matter is an appeal) to select from a tariff the amount of costs that should be paid and include that amount as part of his judgment, obviating the necessity for any further applications to the court. Disbursements will probably be determined by agreement; if not, they will have to be assessed, as will costs in any matter that is settled before judgment.

In addition to the advantages noted, this concept will further allow the trial judge to "fine tune" justice by adjusting the amount to fit the merits of the particular case. Also, the amount of costs will be reported with the reasons for judgment, which may give some measure of standardization.

The third of the Committee's innovations involved the concept of "Receivership." Provision for a court-appointed receiver is part of the old Rules. The application was usually made at the instance of the major creditor who

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<sup>22</sup> Letter to Levi E. Clain from Sir Robert Megarry.

<sup>23</sup> Co-author of Fraser and Horn, *The Conduct of Civil Litigation in British Columbia* (Vancouver: Butterworths, 1979).

<sup>24</sup> Report to Civil Procedure Rules Revision Committee of N.B., dated April 14, 1981, by Peter Fraser.

holds a security document providing for the appointment. The receiver so appointed was an officer of the Court and had to act under its supervision to protect the interests of all in satisfying the debt from the assets subject to the receivership.

Much more common, however, is the privately-appointed receiver who does not have to answer to the Court. These receivers are considerably less restricted in their actions and although reputable receivers cause little problem, some privately-appointed receivers are concerned only with the interests of the creditor who has appointed them and deal with the assets to the prejudice of the debtor and the other creditors.

To meet these situations the Committee developed a procedure whereby the debtor or another creditor, in situations where they can demonstrate that their interests are in jeopardy, can apply to have the private appointment of the receiver confirmed by the Court. The effect of the confirmation would be to bring the receiver under the supervision of the Court and thus provide the applicant with its inherent protection.

The last of the Committee's innovations considered here is that of the "Mareva Injunction." Not uncommon is the defendant who delays the inevitable conclusion of an action while he divests himself of his assets or moves them "offshore" to become judgment proof. Lacking a statute that provides for the "freezing" of the debtor's assets during the conduct of the action, the courts in England under the leadership of Lord Denning have developed a remedy through the interpretation of section 33 of the *Judicature Act*.<sup>25</sup> The remedy has become known as the "Mareva Injunction" and is available without notice where the Court is satisfied that there is a risk of the defendant disposing of or removing his assets from the jurisdiction. Drawing upon the many English decisions<sup>26</sup> as well as a book<sup>27</sup> authored by Lord Denning describing the parameters within which a Mareva Injunction will be granted, the Committee codified the common law in the Revised Rules. This codification was contributed to and approved by Lord Denning.

#### IV. CONCLUSION

The Final Report of the Revision Committee was presented in May, 1981 to the Council of the Barristers' Society which, in turn, presented it to the Minister of Justice. From there it was referred to the Statutory Rules

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<sup>25</sup> R.S.N.B. 1973, c. J-2.

<sup>26</sup> *E.g.*, *Mareva Compagnia Naviera S.A. v. International Bulkcarriers S.A.*, [1980] 1 All E.R. 213, [1975] 2 Lloyd's Rep. 509, 119 Sol. Jo. 660 (C.A.); *Third Chandris Shipping Corp. v. Unimarine S.A.*, *The Pythia*, *The Angelic Wings*, *The Genie*, [1979] Q.B. 645, [1979] 2 All E.R. 972, [1979] 3 W.L.R. 122 (C.A.); *Siskina (Cargo Owners) v. Distros Compagnia Naviera S.A.*, *The Siskina*, [1979] A.C. 210, [1977] 3 All E.R. 803, [1977] 3 W.L.R. 818 (H.L.); *Barclay-Johnson v. Yuill*, [1980] 3 All E.R. 190, [1980] 1 W.L.R. 1259, 124 Sol. Jo. 594 (Ch.). For information concerning an injunction restraining disposition of property, see 24 Halsbury, Laws (4th) para. 1018 and for more cases on the subject, see 28(2) Eng. & Emp. D. (Reissue) para. 918-60.

<sup>27</sup> Denning, *The Due Process of Law* (London: Butterworth's, 1980) at 134 *et seq.*

Committee which reviewed the Revised Rules and recommended to the Minister of Justice their adoption. The French version of the Revised Rules was completed by July, 1981. By the time this article is published, the Revised Rules are expected to have become law by Lieutenant-Governor's Order-in-Council pursuant to its powers under the *Judicature Act*.<sup>28</sup> The Rules are not expected to come into force until April, 1982 to allow the profession to become familiar with the new procedures.

The Revised Rules are designed to provide a set of procedures by which civil disputes can be fairly presented to the courts more quickly and with less cost than is the case today. Their success in practice, however, will depend upon the spirit in which they are received and the manner in which they are used; the way has been provided but the legal profession must supply the will.

As a beacon to light the way, the Committee adopted from British Columbia and Ontario the key interpretive rule:

These rules shall be liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits.<sup>29</sup>

This rule reflects the hope of the Revision Committee, that together with these Revised Rules will come a change of attitude amongst members of the legal profession to one which the public demands, and indeed deserves: fairness yes, but at minimum cost and delay.

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<sup>28</sup> R.S.N.B 1973, c. J-2, s. 73.

<sup>29</sup> *Supra* note 7, Rule 1.03(2); *Rules of Court* (MR 1041a(5); ER 1/1) (Victoria: Queen's Printer, 1980) Rule 1(5); see also, McLachlin and Taylor, *British Columbia Practice* (2d ed.) (Vancouver: Butterworth's, 1979) Rule 1(5) and annotation.