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Access to Justice: Report on Selected Reform Initiatives in Canada

Canadian Judicial Council

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Prepared by the Sub-committee on Access to Justice (Trial Courts)
of the Administration of Justice Committee

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Introduction

When the Sub-committee on Access to Justice (Trial Courts) first met we confirmed that we are concerned with access to justice, and in particular with mounting costs in the justice system. While Subcommittee members are aware of important initiatives designed to respond to the issue of costs at the trial level, it was felt that it would be helpful to know more about what is happening across the country so that we can identify promising practices to reduce costs. To that end we agreed that the starting point for the work of the Subcommittee is to develop a focused inventory of reforms which are designed to promote effective and affordable justice.

The Subcommittee requested that the Canadian Forum on Civil Justice (the Forum) conduct research to develop an inventory of Canadian civil justice reform initiatives in selected subject areas. These areas were selected by the Subcommittee members, who considered an outline of procedures that are promising in promoting effective and affordable justice.[1] Each member submitted his or her choices from this list of possible options. Substantial agreement was found on five areas which have formed the focus of the research and are now captured in the inventory:

- proportionality
- experts
- point-of-entry assistance
- discovery
- caseflow management

Once the five areas of focus were selected, research was conducted on the current and proposed rules of civil procedure in each Canadian province and territory, as well as the Federal Court and Tax Court. The 1996 *Report of the Canadian Bar Association Task Force on Systems of Civil Justice*[2] and the Forum's 2006 *Into the Future Report*[3] were used as a reference points in identifying proposed directions for reform on a national basis. Research involved analysis of court rules, reform proposals and evaluation reports, as well as contact with individuals in the justice system.

The research was conducted over the summer of 2007 and yielded a collection of 60 reforms, many of which relate to a number of the five identified areas of

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[1] See Appendix A for the outline of promising practices that were considered by the Subcommittee. This outline followed the approach and organization used by the CBA in their 1996 report (*infra* note 2), which was used as a framework for the *Into the Future* report of the Canadian Forum on Civil Justice (*infra* note 3), and in turn for discussions of the Subcommittee at our meeting in Victoria in January 2007.

[2] Task Force on Systems of Civil Justice*, Report of the Canadian Bar Association Task Force on Systems of Civil Justice* (Ottawa: CBA, 1996). [*CBA Task Force Report*]

[3] Margaret A. Shone, QC, *Into the Future: Civil Justice Reform in Canada*, 1996 to 2006 and Beyond (Edmonton: Canadian Forum on Civil Justice, 2006) online: <Hhttp://cfcj-fcjc.org/docs/2006/shone-final-en.pdfH>.

priority. The data has been captured in an *Inventory of Reforms* which is an online, publicly accessible database hosted by the Canadian Forum on Civil Justice (http://cfcj-fcjc.org/inventory).[4] The reforms are searchable by a word or phrase from the title of the reform, the province or territory of the reform, the year that the reform was first implemented (or first proposed if it has not yet been implemented), and the subject area(s) that the reform falls under.

Summary information about each reform is set out in individual records in the Inventory, which follow a standard format to capture:

- **Status** — Describes the current status of the reform initiative (permanently implemented, pilot project, proposed, declined, etc.)
- **Jurisdiction** — The province or territory in which the reform is being considered or has been implemented.
- **Court** — The level and type of court to which the reform applies. For example, "Court of Appeal", "Provincial Court - Civil Division ", "Unified Family Court". "All" indicates that the reform applies to all courts in a jurisdiction. "N/A" indicates the reform is not directly associated with the courts.
- **Authority** — Information on the agency through which the reform has been implemented or proposed, such as the provincial government department, law society, legal aid organization, consumer group, or other body. Where appropriate, includes the citation for the primary rule or statutory authority by which the reform has been implemented.
- **Subjects** — The general subject areas under which the reform falls.
- **Timeline** — Lists the major events in the development and implementation of the reform. Includes, where relevant, the release of the initial proposal, the commencement of any pilot projects and the date of formal implementation.
- **Publications** — Identifies publications relevant to the reform including proposals, evaluations and any other significant sources of information.
- **Development of the reform** — Describes the process of development for the reform proposal and steps involved in its approval and implementation.
- **Purpose** — Describes the general situation or problem that the reform seeks to improve.

[4] The Forum has undertaken the creation of this online *Inventory of Reforms* which will become a comprehensive resource aggregating information on current practices and recent reforms from across the country. The Inventory is a work-in-progress which will be expanded through the assistance of justice system stakeholders from throughout the country. It is hoped that the Inventory will serve to both raise awareness about current reforms and to facilitate knowledge-sharing between jurisdictions. The intention is to expand the content of the Inventory to capture current practices and recent reforms undertaken in a number of subject areas relating to the civil justice systems in Canada. The Inventory emphasises the development and evaluation of these reforms, with the intention that it will be a resource that provides models for other jurisdictions to consider.

- **Description of the reform** — Describes the specific changes that the reform involves; the actual content of the reform itself.
- **Criteria and methods of evaluation** — Describes the criteria developed to evaluate the success of the reform and the methods in place to determine whether the reform meets those criteria.
- **Results** — When the reform has been studied and evaluated according to criteria as above, describes the results of that analysis and whether the reform has been successful in achieving its stated purposes.
- **Related reforms** — Identifies any related reforms, including reforms that served as models, reforms for which this reform served as a model, associated reforms in a broader package of reforms, and reforms that this reform reversed.

General themes of the research

Many reforms initially identified under one subject heading also fell under additional subject headings. In particular, reforms implementing simplified litigation tracks often touched to some degree upon a number of the selected areas of focus. These simplified proceedings include provisions to manage litigation in a way that is proportional to the amount in issue, and often principally affect procedures relating to discovery and expert evidence, thus touching on caseflow management, proportionality, discovery and experts.

Several jurisdictions were very active in the selected subject areas, with multiple pilot projects evaluating different approaches to reduce the cost of justice. Ontario, for example, has evaluated two different caseflow management pilot projects in the Toronto region. Likewise, BC has experimented with the issue of expedited litigation in recent years with their Rule 66 and Rule 68 pilot projects.[5] BC has also recently released a draft rewrite of its *Rules of Civil Procedure*[6] proposing further reforms.

Perhaps the most significant concept to come to the fore while compiling the Inventory is the extent to which many recent reform pilot projects across the country are being developed with provisions for formal evaluation programs. These evaluations will prove invaluable to those who are considering similar approaches in their respective jurisdictions.

> Implementation plans must provide for a formal and comprehensive evaluation process. Without keeping track of key data, meaningful improvement is impossible.…

[5] BC is undertaking a review of its Expedited Litigation Project (Rule 68) as the pilot phase reaches its conclusion.

[6] BC Justice Review Task Force Civil Justice Reform Working Group, *Concept Draft: Proposed New Rules of Civil Procedure* (Vancouver: BC Justice Review Task Force, 2007) online: <Hhttp://bcjusticereviewforum.ca/civilrules/H>. [*BC Draft Rules*]

> 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. … [T]he key to evaluation is comparative data and a set of standards against which performance can be measured. Early steps must be taken to develop systems and processes that will capture the baseline data required to support meaningful evaluation.[7]

Scope of the Inventory and a Summary of our Findings

The following discussion describes the scope of the five areas of focus in the Inventory. Highlights and general trends of the Inventory records are identified where possible.[8]

Proportionality

Scope

Due to its nature as an overarching principle, identifying reforms which deal with "proportionality" is somewhat problematic. In terms of this research, the scope of the subject was defined as procedural rules which:

a) explicitly impose an obligation on the parties or the judge that proceedings be restricted to what is proportional to the monetary amount being claimed or the importance of a non-monetary claim, (eg. Québec art. 4.2) or
b) mandate expedited litigation procedures based on the amount of money at issue (eg. BC's Rule 68).

Trends Relating to Proportionality

While rules of civil procedure often state an intention of providing for cost effective proceedings, recent amendments have begun to more clearly delineate the requirement that procedure be closely tied to the importance and complexity of the issue. For example, art. 4.1 and 4.2 of Québec's *Code of Civil Procedure* state:

> 4.1 Subject to the rules of procedure and the time limits prescribed by this Code, the parties to a proceeding have control of their case and must refrain from acting with the intent of causing prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith.
>
> The court sees to the orderly progress of the proceeding and intervenes to ensure proper management of the case.

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[7] BC Justice Review Task Force, *Effective and Affordable Civil Justice* (Vancouver: BC Justice Review Task Force, 2006) online: <Hhttp://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdfH> at 46.

[8] For each of the five areas discussed in this report, related recommendations from the 1996 *CBA Task Force Report* (*supra*, note 2) are set out in Appendix B.

> 4.2 In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.[9]

The Draft Rules put forward in July 2007 by the BC Justice Review Task Force Civil Justice Reform Working Group state:

> (1) The object of these rules is to ensure that
> (a) each proceeding is dealt with justly, and
> (b) the amount of time and process involved in resolving the proceeding, and the expense incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of
> (i) the amount involved in the proceeding,
> (ii) the importance of the issues in dispute to the jurisprudence of British Columbia and to the public interest, and
> (iii) the complexity of the proceeding.[10]

The Ontario Civil Justice Reform Project report referred to proportionality as a key consideration in various recommended rule changes and suggested it be explicitly added to the *Rules of Civil Procedure* as an overarching principle.[11]

In terms of more specific mechanisms to ensure proportionality, several jurisdictions have in recent years adopted automatic expedited tracks for cases under a monetary threshold ranging from $25 000 to $100 000, including:

- Alberta's Simplified Procedure ($75 000),
- BC's Rule 68 Expedited Litigation ($100 000),
- the Federal Court's Simplified Action ($50 000),
- Manitoba's Expedited Action ($50 000),
- Ontario's Simplified Procedure ($50 000),
- Prince Edward Island's Simplified Procedure ($25 000),
- Québec's art. 396.1. ($25 000), and
- Saskatchewan's Simplified Procedure ($50 000).

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[9] A 2006 report recommended revising art. 4.2 to clarify that it applies not only to pleadings, but to the entire judicial process, including evidence. See *Rapport d'évaluation de la Loi portant réforme du Code de procedure civile* (Québec: Ministère de la Justice, 2006) online: <Hhttp://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/crpc/crcp-rap4.pdfH> at 63-4. [*Code of Civil Procedure Evaluation*]

[10] *BC Draft Rules*, *supra* note 6.

[11] Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ontario Attorney General, 2007) online: <Hhttp://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdfH> at 135. [*Civil Justice Reform Project*]

Other expedited tracks, such as the Fast Process available in Halifax and BC's Rule 66 Fast Track, depend instead upon the time the case is expected to require.

The recently proposed rules in Alberta and BC both recommend moving away from the automatic dollar-based triggers. The Alberta Law Reform Institute's Draft Rules[12] would require the parties to select a track based on the number of issues, parties, documents and witnesses involved, while the BC Draft Rules remove discrete tracks entirely. This was based on feedback indicating that valuing a case with respect to a threshold was problematic and that limits on procedural steps should be set on a case-by-case basis according to the full criteria of proportionality.

Reforms Relating to Proportionality

2007	ALRI Draft Rules — Managing Litigation	Alberta
1998	Alberta Streamlined Procedure (Part 48)	Alberta
2007	BC Justice Review Task Force — Case Plan Orders	British Columbia
2005	BC Expedited Litigation Project (Rule 68)	British Columbia
1998	BC Fast Track Litigation (Rule 66)	British Columbia
1998	Federal Simplified Actions (Rules 292 – 299)	Federal
1996	Manitoba Expedited Actions (Rule 20A)	Manitoba
2005	Nova Scotia Civil Rules Revision Project — Smaller Claims Working Group	Nova Scotia
2001	Halifax Case Management	Nova Scotia
1996	Ontario Simplified Procedure (Rule 76)	Ontario
1998	Prince Edward Island Simplified Procedure (Rule 75.1)	Prince Edward Island
1997	Prince Edward Island Case Management	Prince Edward Island
2003	Québec Civil Procedure Revision — Management of Litigation	Québec
2003	Québec Civil Procedure Revision — Discovery	Québec
1998	Saskatchewan Simplified Procedure (Part 40)	Saskatchewan

Experts

Scope

In identifying reforms in the area of expert evidence, this research was limited to examining rules of civil procedure which attempt to reduce cost and delay by means such as:

a) Imposing an obligation on judges to play a more active role in assisting parties to limit the costs and delay associated with the use of experts.
b) Limiting the number of experts which can be called.
c) Requiring agreement on a shared expert.

[12] Alberta Rules of Court Project, *Alberta Rules of Court — Test Draft 3* (Edmonton: ALRI, 2007) online: <Hhttp://www.law.ualberta.ca/alri/docs/ALRIdraft%20Rules%20of%20Court%20TD3.pdfH>. [*ALRI Draft Rules*]

d) Mandating full disclosure of expert reports within a reasonable time-frame and imposing a continuous obligation to disclose reports that become available at a later time.
e) Removing any requirements for an expert to attend trial if a full report is submitted.
f) Imposing costs on a party that requires the other party's expert to testify at trial unnecessarily, or unreasonably refuses to accept certain experts.

Trends Relating to Experts

Canadian jurisdictions appear to be undertaking a variety of approaches in the realm of expert evidence reforms. These reforms may be made through the introduction of an expedited litigation track, changes to the standard litigation track, or both.

A commonly adopted expert evidence reform is the stipulation of time limits for the submission of expert reports. The purpose of such reforms is to give parties sufficient time before trial to examine and respond to expert evidence. Furthermore, to increase efficiency, many jurisdictions have standardized the format of expert reports. Reports are also increasingly acceptable at trial in lieu of oral testimony, such as in Québec's art. 294.1.

A limitation on the number of experts is growing in popularity across Canadian jurisdictions, although this has not always been found to be effective. Expert limits have been adopted in Ontario,[13] Saskatchewan,[14] and British Columbia,[15] and proposed in Alberta.[16] Saskatchewan case law has interpreted their limit as applying on a per issue basis, while Ontario has adopted a per trial interpretation.[17] Ontario's Civil Justice Reform Project has also recommended that leave to obtain more than three experts be obtained prior to trial (i.e. at or before the pre-trial).[18] Furthermore, the Draft Rules in British Columbia appear to be moving away from the idea of a strict numerical limit. Instead, the proposed approach will be to decide the number of experts to be allowed for each case individually, and prior to trial.

BC,[19] Alberta[20] and Québec[21] have either implemented or recommended provisions allowing for court appointed experts or joint experts. Court appointed experts are selected by the court, preferably with the agreement of the parties, and costs are usually shared by both parties. The purpose of court appointed experts is to limit a 'battle of the experts' scenario. Although most rules do not

[13] *Evidence Act*, R.S.O. 1990, c. E.23, s.12.
[14] *The Evidence Act*, S.S. 2006,c. E-11.2, s.21.
[15] British Columbia, *Supreme Court Rules*, r. 68.
[16] *ALRI Draft Rules*, *supra* note 12, r. 8.13.
[17] See *Bank of America Canada v. Mutual Trust* (1998), 39 O.R. (3d) 134 at 137-138.
[18] *Civil Justice Reform Project*, *supra* note 11 at 82.
[19] British Columbia, *Supreme Court Rules*, r. 68(43).
[20] *ALRI Draft Rules*, *supra* note 12, r. 6.42.
[21] *Code of Civil Procedure Evaluation*, *supra* note 9 at 42.

preclude parties from bringing in their own experts, sharing a court appointed expert is viewed as a way of resolving matters more efficiently and reducing costs in certain cases. The trend has been to not automatically mandate joint experts, but instead, grant the parties or the court discretion to use a joint expert if desired. The Ontario Discovery Task Force recommended the early consideration of the use of a joint expert by the parties as a best practice.[22]

Provisions allowing the court to order conflicting experts to meet and attempt to reconcile their differences have been implemented in Québec, Alberta[23] and New Brunswick,[24] and recommended in BC and Ontario.[25] Québec's art. 413.1[26] came into effect in 2003:

> 413.1 Where the parties have each communicated an expert's report and the reports are contradictory, the court may, at any stage of the proceeding, even on its own initiative, order the experts concerned to meet, in the presence of the parties and attorneys who wish to attend, and reconcile their opinions, identify the points which divide them and report to the court and to the parties within the time determined by the court.

The provision from the BC Draft Rules states:

> 8-3(3) Unless the court otherwise orders, if 2 or more reports are delivered… in relation to the same issue, the experts who prepared those reports must confer and must, at least 35 days before the date scheduled for trial, produce and sign a statement setting out the points of difference between or among them.
> (4) Unless the court otherwise orders, the experts must confer and produce their statement under subrule (3) without participation of the parties or their lawyers.[27]

In BC, the proposed rule expressly precludes lawyers from being present at this meeting. This is not the case with Québec's art. 413.1, however court orders often provide that lawyers will not be present.

Reforms Relating to Experts

2007	ALRI Draft Rules — Expert Evidence	Alberta
2007	BC Justice Review Task Force — Experts	British Columbia
2005	BC Expedited Litigation Project (Rule 68)	British Columbia
2006	2006 Amendments to the Federal Court Rules — Expert Evidence	Federal
2005	Nova Scotia Civil Rules Revision Project — Evidence Working Group	Nova Scotia
2007	Summary of Ontario Expert Evidence Rules — Cost of Justice	Ontario
2003	Québec Civil Procedure Revision — Experts	Québec

[22] *Discovery Best Practices: General Guidelines for the Discovery Process in Ontario* (Ontario Bar Association: 2005) online:<Hhttp://oba.org/en/pdf_newsletter/DTFGeneralDiscoverybest.pdfH> at 16.
[23] *Alberta Rules of Court*, r. 218.9(1).
[24] New Brunswick, *Rules of Court*, r. 50.09(g).
[25] *Civil Justice Reform Project*, *supra* note 11 at 83.
[26] This provision has been endorsed in a recent report of the *Sous-comité sur les expertises en matière civile* of the *Comité tripartite*.
[27] *Supra*, note 6.

2007	Summary of Saskatchewan Expert Evidence Rules — Cost of Justice	Saskatchewan
1998	Saskatchewan Simplified Procedure (Part 40)	Saskatchewan

Point of Entry Assistance

Scope

The research into point of entry assistance identified programs with a physical presence in or near a courthouse which are designed for and available to persons entering the civil justice system. These programs offer:

a) information about dispute resolution options in a multi-option justice system, such as community mediation and court-annexed mediation, and
b) referrals to available resources for obtaining legal advice and information, taken from a well-developed inventory of resources. (These resources could include public legal education and information programs, legal aid, duty counsel, legal clinics, *pro bono* services, and the private Bar.)

Trends Relating to Point of Entry Assistance

Assisting unrepresented family litigants has been a common concern for several years, with several provinces providing counselling through intake services. More recently, Family Law Information Centres (FLICs) have been created to provide information, mediation services and referrals to people involved in family law matters.[28] Recently, work has been done to expand the scope and availability of these sorts of services, and extend them to both civil and family matters.

In 2003, British Columbia launched a mapping study to determine "services, gaps, issues and needs" for self represented litigants in the province. Based on this needs assessment, a Self Help Information Centre was opened as a pilot project in the Vancouver Court House in 2005. A mapping project modelled on the BC study was undertaken in Alberta, and used as the foundation for the creation of Law Information Centres located in three locations to serve "as a centralized place for information that can coordinate referrals to existing services which are currently 'disconnected and fragmented.'"[29]

A further extension of this concept was proposed by the BC Justice Review Task Force (Family Justice Working Group), which recommended the creation of an information and referral resource to serve as a single point of entry for the family justice system with the same sort of public visibility and awareness as 411

[28] The Yukon Department of Justice recently opened a Family Law Information Centre in the Whitehorse Courthouse on November 30, 2007.

[29] Mary Stratton, *Alberta Self-Represented Litigants Access to Justice Mapping Project: Final Report* (Edmonton, Canadian Forum on Civil Justice, 2007) online:<Hhttp://cfcj-fcjc.org/publications/srl-en.phpH> at 46.

information services.[30] A similar resource was recommended by the Civil Justice Reform Working Group, for civil matters. The functions of this resource will be 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;[31]

The Nanaimo Family Justice Services Centre has been established pursuant to the Family Justice Working Group recommendation[32] and plans exist to broaden its mandate to cover all civil matters. Similar plans exist to expand the Vancouver Self-Help Information Centre into this broader mandate not only providing parties with legal information, but also helping them to decide whether or not to commence a legal action and to access non-legal community resources. Plans are also being developed to provide remote access to these services to litigants in rural and remote communities in BC.

The Ontario Civil Justice Reform Project recommended the establishment of self-help centres, and gave particular support to Pro Bono Law Ontario's pilot Law Help Ontario centre which opened in December 2007 in Toronto.[33] This model relies on pro bono services to provide:

- Clear-language information and instruction on various Superior Court procedures.
- Referral information to existing programs and services.
- Assistance with completion of forms through the use of lawyer volunteers, online document assembly software or a combination of both.
- Summary advice and duty counsel services by volunteer lawyers, focusing on identification of legal issues and assessment of legal merits.
- Representation at hearings and settlement conferences by volunteer lawyers.[34]

Reforms Relating to Point of Entry Assistance

2007	Alberta Law Information Centres (LInCs)	Alberta
2001	Alberta Intake and Caseflow Management	Alberta
1997	Alberta Family Law Information Centres	Alberta
1950	Alberta Family Court Counsellors	Alberta
2007	Nanaimo Family Justice Services Centre	British Columbia

[30] Family Justice Reform Working Group, *A New Justice System for Families and Children* (Vancouver: Justice Review Task Force, 2005) online:<httpH://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdfH> at 23.
[31] *Effective and Affordable Civil Justice, supra* note 7 at 1.
[32] See Irene Robertson, "British Columbia Family Justice Information 'Hub'" *News & Views on Civil Justice Reform* 10 (Fall 2007) 10 online: <Hhttp://cfcj-fcjc.org/docs/2007/newsviews10-en.pdfH>.
[33] See Hhttp://www.lawhelpontario.org/H.
[34] *Civil Justice Reform Project*, *supra* note 11 at 49.

2006	BC Justice Review Task Force — Information/Assistance Hubs	British Columbia
2005	BC Supreme Court Self-Help Information Centre	British Columbia
1984	Manitoba Justice Child and Family Services Division: Family Conciliation	Manitoba
2007	Newfoundland Unified Family Court Services — Intake Services	Newfoundland and Labrador
2004	Nova Scotia Self-Represented Litigants Project	Nova Scotia
2002	Nova Scotia Family Court Services — Counter Services	Nova Scotia
2007	Law Help Ontario	Ontario
1999	Ontario Family Law Information Centres	Ontario
2002	Saskatchewan Family Law Information Centre and Support Variation Project	Saskatchewan
2007	Yukon Family Law Information Centre	Yukon

Discovery

Scope

The research into discovery reforms identified rules of civil procedure which attempt to reduce cost and delay by means such as:

a) Limiting the time frame in which discovery takes place.
b) Narrowing the scope and standard of relevance in both oral and document discovery.
c) Capping the number of discovery events that can be undertaken by the parties.
d) Expediting the scheduling of discovery.
e) Eliminating oral discovery in expedited or simplified procedure rules.
f) Penalizing duplicative or cumulative discovery.
g) Introducing a mandatory discovery conference between counsel and/or before a judge.
h) Creating a more effective process for resolving conflicts as they arise in the discovery process, through case management and other civil procedural rule reform.

Trends Relating to Discovery

The most common trend in discovery reforms is the adoption of rules which place time limits on discovery and even prohibit discovery outright for simplified procedure cases. Québec has prohibited discovery examinations in claims under $25 000,[35] and Ontario for claims under $50 000 as part of their Simplified Procedure.[36] Nova Scotia,[37] Alberta[38] and Manitoba[39] have placed limitations on

[35] Art. 396.1 C.C.P.
[36] However, in Ontario, both The Advocates' Society Policy Forum and the *Civil Justice Reform Project* report (*supra*, note 11) have recommended allowing time-limited discovery for simplified procedure cases. See *Streamlining the Ontario Civil Justice System: Final Report* (Toronto: The Advocates' Society, 2006.
[37] Nova Scotia, *Civil Procedure Rules*, r. 68.03.
[38] *Alberta Rules of Court*, r. 662.
[39] Manitoba, *Court of Queen's Bench Rules*, r. 20A(16).

discovery in their expedited track rules. Some jurisdictions are considering expanding these limitations to general procedure. The BC Draft Rules, for example, have expanded the application of discovery limitations from their Expedited Actions rules to the general procedure. Ontario's *Family Law Rules* require consent or a court order to question another party.[40]

Another trend involves the statement of a principle encouraging judges to intervene with discovery if it appears to be "abusive, vexatious or futile." Québec,[41] Alberta,[42] Nova Scotia[43] and Manitoba[44] have all adopted provisions which explicitly state this principle.

A requirement for the exchange of witness lists has been implemented in several expedited litigation procedures, such rules as Alberta's Streamlined Procedure and Ontario's Simplified Procedure. The exchange of "will say" statements setting out expected testimony is less common, but has been implemented in BC's Rule 68 and recommended in the BC Draft Rules, and also implemented in Rule 326 of the Northwest Territories.

Following a recommendation of the Discovery Task Force, Ontario has adopted a requirement that, prior to hearing motions relating to unanswered undertakings and refusals, a form must be completed by both parties setting out the basis of the refusal and why the information is relevant to the issues in the action.[45]

Limiting interrogatories is a measure that has been adopted by some jurisdictions. In the proposed BC Draft Rules, interrogatories are not allowed. Similarly, the Nova Scotia Simplified Procedure prohibits interrogatories. In Alberta, an alternate approach of placing word limits was adopted instead.[46]

Narrowing the scope of discovery and standard of document disclosure has recently received increased attention in several jurisdictions. The Tax Court of Canada, which has found full document disclosure to be costly, unnecessary, and inefficient,[47] has a default requirement of partial disclosure, requiring only documents that the party might introduce into evidence. The court modelled the rule on a similar provision from Québec.[48] Alberta altered its rules to change the standard from "touching the matters in question" to "relevant and material".[49] Ontario's Discovery Task Force recommended narrowing the "semblance of relevance" test to simple "relevance". Although Ontario did not adopt this reform,

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[40] Ontario, *Family Law Rules*, r. 20(4).
[41] Art. 396.4 C.C.P.
[42] Alberta, *Rules of Court*, r. 200(2).
[43] Nova Scotia, *Civil Procedure Rules*, r. 18.01(2).
[44] Manitoba, *Court of Queen's Bench Rules*, 31.03(11).
[45] Ontario, *Rules of Civil Procedure*, r. 37.10(10).
[46] Alberta, *Rules of Court*, 662(1).
[47] Based on conversations with key contacts in the Court.
[48] Art. 331.1 C.C.P.
[49] Alberta, *Rules of Court*, 200(1.2).

it has again been recommended in the recent report of the Ontario Civil Justice Reform Project.[50] The issue was also considered by Nova Scotia's Civil Rules Revision Project Discovery Working Group.

Ontario's Discovery Task Force concluded in its 2003 report that discovery reform could not be accomplished entirely through changes to the *Rules of Civil Procedure*, and subsequently released a best practices manual to serve as guidelines for conducting discovery efficiently.[51]

No discussion of Discovery rules can be complete without reference to the Sedona Canada Working Group, which has been created to consider the phenomenon of electronic discovery and which released a set of national e-discovery guidelines in January 2008: "The Sedona Canada Principles – Addressing Electronic Discovery."[52]

Reforms Relating to Discovery

1999	Alberta Discovery Amendments — Cost of Justice	Alberta
1998	Alberta Streamlined Procedure (Part 48)	Alberta
2007	BC Justice Review Task Force — Limiting Discovery	British Columbia
2005	BC Expedited Litigation Project (Rule 68)	British Columbia
1996	Manitoba Expedited Actions (Rule 20A)	Manitoba
2008	Sedona Canada Principles	National
2005	Nova Scotia Civil Rules Revision Project — Discovery and Disclosure Working Group	Nova Scotia
2005	Nova Scotia Civil Rules Revision Project — Evidence Working Group	Nova Scotia
2005	Nova Scotia Civil Rules Revision Project — Smaller Claims Working Group	Nova Scotia
2003	Ontario Discovery Task Force	Ontario
1996	Ontario Simplified Procedure (Rule 76)	Ontario
2003	Québec Civil Procedure Revision — Discovery	Québec

Caseflow management

Scope

The terminology used in relation to the management of litigation varies between jurisdictions and even between authors, and as a result can cause confusion unless clearly defined. The *Inventory of Reforms* will use the term "Litigation management" to refer to all practices relating to the management of cases, regardless of where they fall along the continuum of case and caseflow

[50] *Civil Justice Reform Project*, *supra* note 11 at 65-66.
[51] *Discovery Best Practices: General Guidelines for the Discovery Process in Ontario* (Ontario Bar Association: 2005) online: Ontario Bar Association <Hhttp://oba.org/en/pdf_newsletter/DTFGeneralDiscoverybest.pdfH> at 1.
[52] Sedona Canada, The *Sedona Canada Principles: Addressing Electronic Discovery* (The Sedona Conference, 2008) online: <Hhttp://www.lexum.umontreal.ca/e-discovery/SedonaCanadaPrinciples01-08.pdfH>.

management practices.[53] The focus of this research and report however, was specifically on "caseflow management", so it is necessary to both define what is intended by this term and to acknowledge the differences which exist in use and understanding of the various and closely related terms.

Two of the most commonly used terms are "caseflow management" and "case management", which are usually used as distinct terms, but are sometimes used interchangeably. In much of the literature case management refers to the management of an individual case through the justice system, where caseflow management provides for early intervention and monitoring of all cases in a systematic way.[54] It is important to note however, that this distinction is not drawn in Ontario. And in Québec, "General Case management" refers to the timelines required for all cases, while "Special Case Management" refers to a file that has been assigned to a judge.

The focus of this portion of the research and report was on caseflow management, which is defined for this purpose as the systematic management process by which a court supervises the progress of its cases from beginning to end. This may include early court intervention in the definition of issues, fixing deadlines and assessing the complexity and value of a case. Types of caseflow management systems include:

- Differential Caseflow Management, where each case is assigned a track (usually standard, simple and complex), and the court supervises case progress according to pre-established deadlines.
- Individual Case Management, where each case is assigned to a judge to monitor its pace.
- Master List, where deadlines are monitored by court staff, with a judge becoming involved when deadlines are missed.

Trends Relating to Caseflow Management

Several jurisdictions have recently implemented or are considering approaches to litigation management that leave the responsibility for caseflow management in the hands of the parties, but impose certain restrictions on them, such as the creation of a schedule of deadlines and agreement on a litigation management plan:

- Following the end of the pilot phase of Nova Scotia's *Halifax Caseflow Management Project*, the full caseflow management scheme was reviewed and ultimately replaced with their present Rule 68, which allows the parties to select either a normal or fast process track, and to proceed according to set deadlines.

[53] See the discussion of this continuum in Doris I. Wilson, QC, "Managing Litigation in Canada" *News & Views on Civil Justice Reform* 5 (Fall 2002) 4 online: Canadian Forum on Civil Justice <http://cfcj-fcjc.org/publications/newsviews-05/n5-dwilson.php>.

[54] *Ibid* for more on litigation management systems in Canada.

- Québec's 2002 *Code of Civil Procedure* revisions introduced art. 4.2, which gives the parties responsibility for managing the litigation, while art. 110.1 sets out a peremptory time limit of 180 days for cases to be scheduled for proof and hearing. The parties are required under art. 151.1 to negotiate a case management timetable:

> Before the date indicated in the notice to the defendant for presentation of the action or application, the parties, except impleaded parties, must negotiate an agreement as to the conduct of the proceeding, specifying the arrangements between them and the timetable with which they are to comply within the 180-day or, in family matters, the one-year peremptory time limit….
> The agreement must cover, among other things, the preliminary exceptions and safeguard measures, the procedure and time limit for the communication of exhibits, written statements in lieu of testimony and detailed affidavits, the number and length of and other conditions relating to examinations on discovery before the filing of the defence, expert appraisals, any planned or foreseeable incidental proceedings, the oral or written form of the defence and, in the case of a written defence, the time limit for its filing as well as the time limit for filing an answer, if one is to be filed. The agreement must be filed without delay at the office of the court, no later than the date fixed for presentation of the action or application.

- Ontario's Rule 77, which implemented court management of every case in Toronto, Ottawa and Windsor, was suspended in Toronto and replaced with Rule 78 which applies case management only to select cases.[55] Toronto has adopted the motto "Case management if necessary, but not necessarily case management."[56] A 2005 practice direction reiterated the provisions available for judicial management of proceedings in Ontario not falling under Rule 77.[57]
- The BC Justice Review Task Force Civil Justice Working Group initially recommended a Case Planning Conference for every case, but this has been revised with the release of their Draft Rules to allow for the parties to agree on a Case Plan Order without the need for a judicial conference.
- The Alberta Law Reform Institute's Draft Rules would require the parties to complete a litigation management plan.

Particular focus in the research was given to whether there exist special case management streams for cases with self-represented litigants. In its 2006

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[55] The Toronto Region Practice Direction regarding case management has been extended to December 31, 2010. It may be found at: http://www.ontariocourts.on.ca/scj/en/notices/regional/renewalcasemgt.htm.
[56] *Civil Justice Reform Project*, *supra* note 11 at 91.
[57] Chief Justice Heather J Smith, *Practice Direction: Judicial Management of All Civil Proceedings Not Governed by Rule 77 of the Rules of Civil Procedure* (2005) online: <Hhttp://www.ontariocourts.on.ca/scj/en/notices/pd/august2005.htmH>.

Statement of Principles on Self-represented Litigants and Accused Persons, the Canadian Judicial Council stated that:

> The court process should, to the extent possible, be supplemented by processes that enhance accessibility, informality, and timeliness of case resolution. These processes may include case management, alternative dispute resolution (ADR) procedures, and informal settlement conferences presided over by a judge.[58]

The BC Civil Justice Reform Working Group suggested that proposed Case Planning Conferences "should help self-represented litigants resolve cases early or plan for the events necessary to achieve early resolution."[59] Ontario's Civil Justice Reform Project recommended that any proceeding in which a party is self-represented should be case managed to the extent required.[60] Mandatory case management for cases involving SRLs was considered by the Alberta Law Reform Institute's Management of Litigation Committee for their Draft Rules, but ultimately rejected as unwarranted, although case management would still be an available option where required.[61]

Saskatchewan introduced case management conferences in its Small Claims Court in 2006, with the goal of settling the case where possible, and where not possible, using the conference to narrow issues, deal with procedural matters and familiarize SRLs with the trial process.

Reforms Relating to Caseflow Management

2007	ALRI Draft Rules — Managing Litigation	Alberta
2001	Alberta Intake and Caseflow Management	Alberta
1998	Alberta Streamlined Procedure (Part 48)	Alberta
2007	BC Justice Review Task Force — Case Plan Orders	British Columbia
2005	BC Expedited Litigation Project (Rule 68)	British Columbia
2002	BC Family Law Judicial Case Conferences (Rule 60E)	British Columbia
1998	BC Fast Track Litigation (Rule 66)	British Columbia
1998	Federal Case Management and Dispute Resolution Services (Part 9)	Federal
1998	Federal Simplified Actions (Rules 292 – 299)	Federal
1993	Tax Court Status Hearings	Federal
1996	Manitoba Case Management of Family Matters (Rule 70)	Manitoba
1996	Manitoba Expedited Actions (Rule 20A)	Manitoba
2006	Canadian Judicial Council Statement of Principles on Self-represented Litigants and Accused Persons	National

[58] Canadian Judicial Council, *Statement on Self-represented Litigants and Accused Persons* (CJC, 2006) at 2.
[59] *BC Draft Rules*, *supra* note 6 at 43.
[60] *Civil Justice Reform Project*, *supra* note 11 at 93
[61] Alberta Law Reform Institute, *Self-Represented Litigants - Consultation Memorandum No. 12.18* (Edmonton: ALRI, 2005) at 69 online: <Hhttp://www.law.ualberta.ca/alri/docs/cm12-18.pdfH>.

2005	Newfoundland and Labrador Case Management (Rule 18A)	Newfoundland and Labrador
1996	Northwest Territories Case Management (Part 19)	Northwest Territories
2005	Nova Scotia Civil Rules Revision Project — Management of Litigation Working Group	Nova Scotia
2001	Halifax Case Management	Nova Scotia
2005	Toronto Case Management (Rule 78)	Ontario
1997	Ontario Case Management (Rule 77)	Ontario
1997	Prince Edward Island Case Management	Prince Edward Island
2003	Québec Civil Procedure Revision — Management of Litigation	Québec
2005	Saskatchewan Small Claims Court – Case Management Conference	Saskatchewan

Conclusion

This report highlights trends in current practices and recent reforms in five key areas chosen as being central to the issue of cost of litigation: proportionality, experts, point-of-entry assistance, discovery and caseflow management. Our hope is that the discussion in this Report and the summaries compiled in the online *Inventory of Reforms* will stimulate discussion in each Canadian jurisdiction and bring focus to the many possible ways of addressing cost of access to justice issues.

The Sub-Committee has concluded that while the report identifies many promising practices, it is not possible to recommend the adoption of specific practices. To do so would require evidence that these practices have been proven to be effective at improving access to justice through a process which both measures costs and allows a comparative or cost-benefit analysis. Such an approach to justice system evaluation does not yet exist however, and so before specific recommendations can be made, work must first be undertaken to ensure that new evaluation methodologies are developed for our justice system. This will require innovative methodologies designed to both address the complex issues that will arise when trying to measure costs, and to ensure collaborative approaches which will provide access to the needed evidence.[62] The Sub-Committee recommends that the development of these kinds of comparative evaluations be given priority, and once developed, that such evaluations be applied to assess new reform proposals and inform policy decisions in the justice systems in Canada.

Related to this increased awareness of the need for formal evaluation, the Sub-Committee stresses the importance of ensuring that once a localized pilot project is proven to be a beneficial practice, it should be expanded in order to benefit the entire jurisdiction. This must be balanced, however, with an acute awareness that a practice which provides a benefit in one centre may not be helpful (and in fact might be detrimental) in another. All proposals for implementation and evaluations must therefore consider the wide diversity of needs found within and among jurisdictions, and reforms must be designed and evaluated for the local context in which they are to operate.

[62] For example, the Canadian Forum on Civil Justice is currently seeking funding to allow them to move forward with designing program of research on the cost of litigation. This research will be undertaken in collaboration with partners in the justice community, and will begin with developing the innovative new methodology required in order to evaluate comparative costs in different litigation regimes. The overall goal of the research will be to develop solutions for reducing cost and improving access to justice.

Appendix A - Outline of Promising Practices

A. Improving the Public Understanding

• public legal information materials (pamphlets, websites)
• public legal education programs (workshops, training programs)
• point of entry assistance
• self-help centres

B. Advice & Representation

• legal advice lines
• unbundled legal services
• paralegals
• legal clinics
• legal aid - improved access to legal aid for civil and family matters
• duty counsel for civil and family matters
• *pro bono* assistance
• lawyers' fee arrangements including contingency fees

C. Changes to the system/procedure to improve public access

• simplifying the rules of court
• creating plain language rules and plain language forms
• a case management stream for cases involving unrepresented litigants
• a focus on proportionality (as proposed in the recent BC Civil Justice Reform Report[63])
• the move from an adversarial toward an inquisitorial system. (This may be seen on a continuum in which judges take on a more interventionist role. There have been recent discussions in Canada and other jurisdictions about piloting an inquisitorial - or less adversarial - model for certain types of cases. See for example the description about the "less adversarial trials" program in the Australian Family Court[64])

D. Creating a multi-option justice system

• early and post-discovery, non-binding dispute resolution
• obligation to consider settlement
• post-discovery dispute resolution processes

These recommendations from the CBA Task Force have been implemented with many variations

→ *timing in the litigation process*
→ *types of matters*
→ *mandatory/voluntary*
→ *JDR, private mediators, gov't sector mediators*
→ *cost/funding by gov't? By litigants?*

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[63] *Effective and Affordable Civil Justice*, H*supraH* note 7.
[64] Online at: <Hhttp://www.familycourt.gov.au/presence/connect/www/home/H>.

E. Reducing Delay Through Court Supervision of the Progress of Cases

• caseflow management
• individual case management
• fixed trial dates
• multiple tracks
    → simplified/expedited proceedings
    → by monetary value
    → by anticipated length of trial
• time standards for overall determination of civil cases
• automatic dismissal of cases
• standards for rendering judgment

F. Reducing Costs & Increasing Access

• Small Claims Court - recommendations suggest increase in monetary jurisdiction
• Expedited and simplified proceedings
• Early disclosure - referred to as “will say” process in the CBA Task Force Report (Recommendation 15)
• Discovery - recommendations suggest limiting scope, number of examinations and time available for discovery
• Experts - recommendations suggest limitation on the number of experts, testimony limited to issues in the expert report, timelines for exchange of expert reports, use of a “common expert”
• Interlocutory proceedings - recommendations suggest limiting appeals from these orders, immediate sanctions for clear cases of abuse and cost awards
• Summary trials - widely used in some Canadian jurisdictions (eg. Yukon & BC)
• Changing the incentive structure to encourage settlement and prudent use of court time

G. Technology & Management Information Systems

• e-filing, e-registry & e-appeals
• centralized case management information system
• court-generated orders
• digital recording equipment in courtrooms
• video-conferencing and tele-conferencing

Appendix B:
Related CBA Task Force Recommendations and Discussion

Proportionality

8. *The Task Force recommends that every jurisdiction provide a multi-track system for the resolution of civil disputes.*[65]

14. *The Task Force recommends that every jurisdiction establish expedited and simplified proceedings that are*
    - *b) mandatory, save as the court may otherwise direct, for all cases where $50,000 or less is at issue; and*
    - c) *available at the option of the parties and with leave of the court in other cases where more than $50,000 is at issue and where the subject-matter of the case warrants.*[66]

- Proportionality is described as one of the 13 objectives for the civil justice system: "It should provide procedures that are proportional to the matters in issue."[67]
- "The basic concept is that the procedures, costs and time involvement of the parties should be proportionate to the needs of each individual case."[68]
- "Tracks are a salient means of achieving greater flexibility and proportionality in procedures. The goal is to have a continuum of tracks tailored to the requirements of the case."[69]
- "It is… uneconomical to litigate cases where less than $50,000 is at issue if all the procedural steps generally required for actions apply. Yet such cases can be very important to the parties. The civil justice system of the future should therefore provide procedures to assist the parties in such cases to keep costs proportional to the amount at issue."[70]

Experts

17. *The Task Force recommends that every jurisdiction amend its rules of procedure concerning experts to:*
    - *a) Require early disclosure of expert reports*
    - *b) Provide for the exchange of expert critique reports in a timely fashion before trial or hearing, and*
    - *c) Impose a continuing obligation to disclose expert reports as they become available.*

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[65] *CBA Task Force Report*, *supra* note 2.
[66] *Ibid.* at 41.
[67] *Ibid.* at 28.
[68] *Ibid.* at 55.
[69] *Ibid.* at 38.
[70] *Ibid.* at 41.

18. *The Task Force recommends that in every jurisdiction judges play a more active role in assisting parties to limit the costs and delay associated with the use of experts.*[71]

- "Experts are being used more frequently in the litigation process. This leads to increased costs and delays at both the discovery and the trial stage."[72]

Point of Entry Assistance

27. *Every court provide point-of-entry advice to members of the public on dispute resolution options within the civil justice system and available community services.*[73]

- "Better ways should be developed for people to obtain information about their options when facing a legal situation and to obtain referrals to appropriate resources."[74]
- Point of entry assistance should be widely publicized and readily available at the courthouse, as well as by phone or by computer connection in a variety of locations including courthouses, public libraries, shopping malls, and on the internet.[75]
- The earlier and more complete the initial analysis of the problem, the more cost effective and productive the referrals will be. "The objective is to acquaint people who have legal needs with options and choices that may be appropriate to their situation."[76]

Discovery

16. *Every jurisdiction*
    a) *amend its rules of procedure to limit the scope and number of oral examinations for discovery and the time available for discovery, and*
    b) *devise means to assist parties in scheduling discoveries and in resolving discovery disputes in an efficient manner.*[77]

- "The discovery process, and particularly oral examinations for discovery, lengthen the litigation process and add considerably to costs. In our consultations, litigation and business lawyers from across the country ranked the complexity and number of discoveries and scheduling problems in the discovery process as key factors contributing to procedural delay."[78]

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[71] *Ibid.* at 44.
[72] *Ibid.*
[73] *Ibid.* at 55.
[74] *Ibid.* at 54.
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.* at 43.
[78] *Ibid.*

Caseflow Management

4. *Every court should have a caseflow management system to provide for early court intervention in the definition of issues and for the supervision of the progress of cases.*
5. *The Task Force recommends that, while the design of a caseflow management system should be at the discretion of each court, at a minimum systems should provide for*
    a. *Early court intervention by designated and trained individuals in all cases*
    b. *The establishment, monitoring and enforcement of timelines*
    c. *The screening of cases for appropriate use of non-binding dispute resolution processes*
    d. *Reliable and realistic fixed trial dates*

    Implementation Points:
    i. *The commitment and co-operation of all anticipated participants*
    ii. *Articulation of guidelines for judicial supervision*
    iii. *Appropriate technical support*
    iv. *Introduction and subsequent monitoring of clear time standards.*[79]
7. *The Task Force recommends that every jurisdiction provide for case management in all cases where there is a need for judicial supervision or intervention on an ongoing basis.*[80]

- "Case management, in contrast to caseflow management, refers to management of the steps in individual cases.… A judge or judicial support officer assigned early in the proceeding could assist parties in simplifying issues and attempting to reach solutions, thereby avoiding procedural wrangling and speeding up the process." [81]

[79] *Ibid.* at 36.
[80] *Ibid.* at 37.
[81] *Ibid.*