

The Prospects for Civil Justice Reform

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I. THE CALL FOR CIVIL JUSTICE REFORM

In recent years a substantial volume of work on civil justice reform issues has been undertaken in Canada, England, the United States and Australia. These efforts have produced a number of important studies in which new or expanded visions and designs for civil justice have been identified. The Final Report of the Canadian Bar Association's National Task Force on Systems of Civil Justice (the "CBA Task Force Report"), the 1996 Report to the Lord Chancellor on the Civil Justice System in England and Wales : *Access to Justice : The Way Forward* by the Right Honourable The Lord Woolf (the "Woolf Report"), and the Report of the Independent Working Party of the General Council of the Bar and the Law Society in England, entitled *Civil Justice on Trial – The Case for Change* (the "Heilbron Report"), are included among these studies. In addition, in this country, a number of major reviews have now been completed at the provincial level. The *Ontario Civil Justice Review Reports* (1995 and 1996) in Ontario, and the 1996 *Report of the Manitoba Civil Justice Review Task Force*, figure prominently, among other studies, in recently completed provincial evaluations of the civil justice system.

Underlining all of these works is one dominant common theme : that serious problems of escalating costs, increasing delays, and barriers to access to justice have come to characterize modern civil justice systems in western countries. While most of the leading studies acknowledge that these problems are more pronounced in highly populated, litigation-intensive centres, they also recognize that the same problems, to varying degrees, exist in all areas served by state-run civil justice systems. Viewed broadly, the fundamental theme of many of the recent studies on civil justice reform concerns the provision of access to civil justice and the need to address barriers to access in the form of costs, delays and procedural and legal complexities.

A. The Lord Woolf Report

In 1994, the Lord Chancellor of England requested Lord Woolf to report on the then current rules and procedures of the civil courts in England and Wales. In 1995 and early 1996, Lord Woolf's study group produced interim and final reports in which, ultimately, 303 recommendations for changes to the civil justice system in England and Wales were urged. Many of the recommendations are far-reaching and some have proven to be very controversial.

Following publication of Lord Woolf's Interim Report in 1995, a number of immediate steps were taken by the Lord Chancellor's Department to implement some of the recommendations. These included the appointment of a Vice-Chancellor of England and Wales as the "Head of Civil Justice" in those jurisdictions, the increase of the monetary jurisdiction of small claims court facilities to £3000 save in personal injury cases, the approval of alternative dispute resolution pilot projects in two county courts, and the publication and distribution (in English and Welsh) of a booklet for court users on alternative methods of dispute resolution.

Subsequently, in October 1996, the Lord Chancellor's Department released a written strategy document concerning implementation of the recommendations in the Woolf Report. This strategy, entitled *Access to Justice : The Way Forward*, endorsed the recommendations in the Woolf Report and set October 1998 as a target date for full implementation. The strategy identified the following five major reform elements upon which implementation efforts initially were to focus : (a) introduction of new unified civil procedure rules; (b) creation of a system of case flow management providing for a three tier or three track management system for the allocation of cases according to complexity and the number of involved parties with emphasis initially on development of a "fast" track (c) and a "multi" track;¹ (d) introduction of various proposals for fixed costs; and, (e) increased and expanded judicial training.²

It is difficult to summarize succinctly the content of the five major elements identified in the Lord Chancellor's implementation strategy. In general, however, they involve the following :

1. New and Unified Civil Procedure Rules

Lord Woolf produced, at the request of the Lord Chancellor, a new proposed set of procedural rules for application to both the High Court and the County Courts in England and Wales. Introduction and implementation of the rules required legislation. The *Civil Procedure Bill*, introduced in the fall of 1996, sought to provide for a unified rule-making authority, the merger of existing rules committees into a single, expanded rules committee with a specific mandate to achieve simplification of procedures, and the expanded use of practice directions, as an adjunct to the rules of court, to specify the details of procedural requirements and to enable development of case management;

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1. Under the Woolf proposals, "fast track" cases are to involve a 20-30 week timetable, fixed date trials, fixed costs, limited discovery and a maximum of three hours for trial. In contrast, "multi track" cases are to involve two interlocutory management hearings, fixed trial dates and management by teams of assigned judges. In addition, in the multi track, the parties to litigation are to be required to indicate whether alternative dispute resolution opportunities have been considered, and if not, to explain why.
 2. The Woolf Report calls, in particular, for the training and monitoring of judges involved in case management.

2. Introduction of the "Fast Track"

Lord Woolf proposed that the majority of cases having a value above the small claims limit (that is, above the increased small claims limit of £3000 save in personal injury claims) and involving up to £10,000 should be allocated to a "fast track". Under his proposals, accepted by the Lord Chancellor of the day, the progress of "fast tracked cases" is to follow a fixed timetable and be subject to limited procedures and fixed levels of recoverable costs;

3. Introduction of the "Multi Track"

Under the Lord Chancellor's strategy document, direct judicial case management is called for in cases involving an amount in issue above the "fast track" limit. This "direct judicial case management" is intended to be "proportionate to the substance and the complexity of the case". The multi track is designed to cover a wide range of cases, including multi-party actions and medical negligence claims;

4. Proposals for Fixed Costs

The Woolf Report calls for the introduction of a fixed costs regime for "fast tracked" cases. The Lord Chancellor of the day, in adopting these proposals, established further study groups to develop the details of a fast track costs regime and to consider the implications for the Legal Aid Fund, among other matters, of proposed changes to existing costs regimes;³ and

5. Judicial Training

Lord Woolf proposed expanded and comprehensive judicial training measures to assist judges in England and Wales to adapt to the new case management system called for in the Woolf Report, and to the new design of the civil justice system envisaged by the Woolf recommendations. The Lord Chancellor's Department recognized that judicial training was of vital importance to the success of the Woolf reforms. Accordingly, the "Judicial Studies Board" in England was charged to develop a programme of new training courses to provide, during 1997, training on the general principles of the Woolf recommendations and, during 1997 and 1998, more detailed training on specific areas of the reforms. In addition, joint training of judges, practitioners, and court staff is envisaged before the new procedural code of rules is fully implemented.

3. The Woolf proposals suggested that it should be a professional obligation for lawyers, before their retainer is confirmed in connection with litigation, to explain prospective charges to clients and, further, to outline the anticipated overall costs of litigation. In addition, his recommendations call for the adoption of fixed fees wherever practical.

In addition to these five principal elements of the Woolf Report as endorsed in the fall of 1996 by the Lord Chancellor's Department, the Woolf recommendations contain a host of other significant reform measures. These include :

- a recommendation that a Civil Justice Council be established to contribute to the development of the proposed reforms. The Council is to be comprised of lay and professional representatives and is to be led by a "Head of Civil Justice" having overall responsibility for the civil justice system in England and Wales. As noted, the Lord Chancellor appointed a Vice-Chancellor as "Head of Civil Justice" almost immediately following release by Lord Woolf of his Interim Report in 1995;
- broad recommendations concerning creation of "a new ethos of cooperation" on the part of litigants and their legal representatives before court proceedings are initiated. Lord Woolf recommended that regulators of the legal profession in England and Wales prepare guidelines for "pre-proceedings conduct" and that "pre-action protocols" be established for certain kinds of litigation as, for example, personal injury and medical negligence claims;
- detailed recommendations concerning improved information technology for the civil court system in England and Wales. These recommendations include proposals for personal computers for all judges, wider use of litigation support systems, introduction of video and telephone conferencing facilities for judges on a priority basis, use of information technology to inform and assist the public, and introduction of a pilot project to address ways in which court administration systems can be extended for the use of judges, lawyers and clients concerning such matters as scheduling of judges' workloads, the listing of cases for trial, the electronic diarizing of cases and the allocation of resources;
- numerous recommendations for changes to practice and procedure including, in particular, regarding the use of experts. Lord Woolf's recommendations concerning expert evidence are among the most controversial in his Report. They suggest that the calling of expert evidence should be subject to the complete control of the court; that the courts should enjoy an expanded discretion to appoint experts for the assistance of the court; that the courts can require experts to meet in advance of trial to attempt to reach agreement or consensus on issues in controversy; that instructions to experts by parties to litigation should be disclosed; that experts where possible should conduct joint investigations and produce a single report; and, finally, that experts should be told explicitly that their first responsibility is to the courts, and not to their clients;

The Woolf Report also calls for a number of other significant procedural changes including an enlarged jurisdiction to grant summary judgment, greater control over the documentary discovery process, the mandatory exchange of witness statements after scheduled case management conferences are completed, and cross-examination on witness statements thereafter only with leave of the court;

- on the subject of alternative dispute resolution, the Woolf recommendations call for encouragement of such mechanisms and for active measures by the Court Service and the Lord Chancellor's Department to make the public aware of the possibilities of alternative dispute resolution instead of traditional litigation measures.

In his strategy document, the Lord Chancellor suggested that :

*Implementation of the reforms should be regarded not as a single event, but as the initiation of a new direction in the culture of civil litigation.*⁴

He also recognized that the commitment of adequate resources to effect the Woolf proposals is essential to meaningful implementation. In this regard, he stated :

*There will be transitional costs in implementing these reforms. The main additional costs will fall to the Court Service and the Judicial Studies Board and will relate to the costs of supporting more effective case management through improved IT [information technology] and training. Because we are engaged in reform of an intricate system, the precise scope of the transitional costs have not yet been quantified, nor can they be at this stage. However, the resources needed will be made available from within my budget. I shall consider, in consultation with the Court Service, what redistribution of resources and other adjustments would assist in covering this transitional phase. It will also be important to ensure that the transition phase is managed in a way that has regard to the pressure of resources.*⁵

B. The CBA Task Force Report

In the spring of 1995, prior to release by Lord Woolf of his Interim Report, the Canadian Bar Association (the "CBA") created the Systems of Civil Justice Task Force for the express purpose of "inquiring into the state of the civil justice system on a national basis and to develop strategies and mechanisms to facilitate modernization of the justice system so that it is better able to meet the current and future needs of Canadians".⁶ The terms of reference of the Task Force required it to report to the governing Council of the CBA by August of 1996 with those recommendations it considered appropriate and practical for nationally-consistent reforms at the provincial and territorial level.

The CBA Task Force Report was tabled with the Council of the CBA at its August 1996 Annual Meeting, for debate and adoption, if thought appropriate, at the CBA Mid-Winter Meeting in February 1997. At the latter Meeting, the 53 recommendations contained

4. Lord Chancellor's Department, *Access to Justice: The Way Forward*, October 1996, para. 7, visit its website at <http://www.law.warwick.ac.uk/woolf/wayfwd.html>.

5. *Ibid.*, para. 29.

6. Terms of reference of the CBA Task Force.

in the Report were adopted with minor amendments to two recommendations.⁷ A copy of the recommendations of the CBA Task Force is attached as Appendix "A". These recommendations are now CBA policy.

As noted, the mandate of the CBA Task Force was to make recommendations at the national level. In its Report, the Task Force recognized that both the need for reform of the civil justice system,⁸ and the scope of potential reforms, vary from jurisdiction to jurisdiction within Canada. For example, a problem identified in one province or territory might well not be an actual, or perceived, problem in another province or territory. Similarly, a suggested procedural or system-wide reform in one part of the country might have little relevance or applicability in another part of the country. Finally, what in one province or territory might be regarded as an essential reform, could well reflect current practice in another.

In the result, the Task Force focussed its efforts on developing proposed reform measures to address problems which are shared, although to varying degrees, in the civil justice system across Canada. In doing so, the Task Force specifically recognized that implementation of its recommendations would require adaptation of the recommendations to province-specific circumstances. Where possible, the Task Force also sought to identify strategies which might be undertaken at the national level to facilitate implementation of proposed reform measures.

The CBA Task Force Report outlines concerns about lack of accessibility in the current civil justice system. The Task Force identified five factors, described by it as "systemic", which contribute to access problems :

1. Lack of a Sufficient User-Orientation

The Task Force noted that the civil justice system in Canada, traditionally, has been peer-oriented where operations are organized for the convenience of professional participants and litigants. The absence of a "user-orientation" was identified as a leading cause of erosion of public confidence in the civil justice system and as a significant contributor to delays, costs and lack of public understanding of the system as a whole.

7. Recommendation 39(a) of the Task Force was amended at the Mid-Winter Meeting to include "conflict management" and Recommendation 49 was amended to include reference to and involvement of the Canadian Association of Law Teachers and the Federation of Law Societies.

8. The CBA Task Force recognized that two very different civil justice systems exist in Canada : that afforded by the common law, applicable in all jurisdictions except Quebec, and that derived from the civil law, applicable in Quebec. In the CBA Task Force Report, and in this paper, unless otherwise indicated, the term "civil justice system" is used to embrace both systems.

2. Complexity and Lack of Flexibility in Procedural and Substantive Law

The Task Force observed that existing rules of procedure and practice, in virtually every jurisdiction in Canada, have been constructed on the trial model, that is, on a model which presumes that ultimate resolution of disputes will be achieved through the trial mechanism. In addition, in the view of the Task Force, existing rules contain too many required or optional steps which are available in every action, although often not necessary or applicable, which have the effect of creating too many opportunities for extensions of time, the re-opening of earlier decisions and litigation of minor points. In summary, the Task Force concluded that, too often, existing rules of procedure and practice have been inadequately tailored to the specific nature of disputes and, for the most part, have been devised without regard to achieving a proportionate balance between the procedures necessary to achieve a resolution and the nature of the matter and the number of parties involved in the dispute.

3. The Impact of Traditional Approaches to Litigation

The Task Force emphasized in its Report that traditional approaches to litigation, historically, have been deeply rooted in adversarialism which frequently creates resistance to the speedy progress of cases or the promotion of settlement efforts. These concerns, in the view of the Task Force, encompassed the attitudes and approaches of judges and practitioners alike, as well as litigants.

4. Inadequate Management Tools and Resources

One of the strongest sets of recommendations made by the Task Force concerns measures to address a lack of statistical data on the existing system and its efficiencies or deficiencies. These recommendations are related to technological capacity, the administrative and management structure of the courts, and approaches to resourcing.

5. Concerns Regarding the Accountability and Openness of the Current System

The Task Force concluded that for many Canadians, it is unclear who is "in charge" of the system. The Task Force expressed concerns about a lack of publicly available information regarding the system and reform efforts. This is due, in part, to a lack of openness in court administration, inadequate information systems and deficient or inadequate communication strategies for disseminating information to the public about the civil justice system. These conclusions were linked to problems related to lack of resources and management tools. In essence, the Task Force urged that genuine accessibility to the civil justice system must include making the system understandable by, and more open to, potential users.

The Task Force urged adoption of a "multi-option" Canadian civil justice system. As envisaged by the Task Force, this involves a fundamental re-orientation away from the traditional adversarial approach to dispute resolution, towards a broader "problem-solving" orientation. Under this approach, the use of trials will remain an essential but "last-resort"

component of a civil justice system which provides many options for the resolution of disputes.

The outcome urged by the CBA Task Force is a civil justice system for the 21st century that :

- is **responsive** to the needs of users and encourages and values public involvement;
- provides **many options** to litigants for dispute resolution;
- rests within a **framework managed by the courts**; and
- provides an **incentive structure** that rewards early settlement or resolution and results in trials being a valued mechanism, but one of last resort, for the determination of disputes.

In the view of the Task Force, the achievement of a "multi-option Canadian civil justice system" requires :

- a) early integration of dispute resolution techniques, some mandatory in nature, with a focus on early settlement;
- b) greater court supervision over the progress of cases but retention of counsels' right to determine the conduct of cases;
- c) increased flexibility and proportionality in procedures through the creation of multiple tracks for the resolution of disputes;
- d) increased access through improved small claims procedures (by, for example, uniformly increasing the monetary jurisdiction in small claims courts to \$10,000) and the establishment of mandatory expedited and simplified proceedings for cases in which \$50,000 or less is in issue, to be optionally available in other cases;⁹
- e) specific, and in some cases dramatic, procedural reforms including, for example, the adoption on a pilot project basis of mandatory "will-say" disclosure of anticipated evidence; the mandatory early exchange of expert reports; provision for the exchange of expert critique reports; limiting the scope and number of oral examinations for discovery and contracting the time available for oral discovery;

9. In Ontario, expedited and simplified proceedings currently exist for cases involving \$25,000 or less. In Manitoba, Rule 20A recently introduced an expedited process for less complex actions involving up to \$50,000. In Quebec, a similar strategy was adopted, again for cases involving \$50,000 or less. In Saskatchewan, the goal of the court is to reduce the cost and time involved in litigating minor matters by implementing a simplified procedure for cases involving, at least initially, up to \$25,000. As noted elsewhere in this paper, the Woolf Report recommends a fast track system with dramatically limited procedures and costs proportionate to the amount in issue for relatively straightforward cases involving up to £10,000.

strictly limiting appeals from non-dispositive interlocutory matters; and promoting the use of summary trial procedures;

- f) changes in the incentive structure in litigation to encourage settlement and prudent use of court time, involving a reassessment of current indemnity principles;
- g) reforms at the appellate level of all courts including, for example, provision for providing courts with greater control over their civil dockets; the development of guidelines for the production of appeal books; the encouraging of appellate courts to take a more active role in supervising the progress of appeals; and, importantly, the development and promotion of time goals for the time between notice of appeal and judgment;
- h) the adoption of a 12-month calendar sitting session for all courts save the Supreme Court of Canada; and
- i) the adoption, wherever possible, of fixed trial dates.

The Task Force emphasized that achieving civil justice reform in Canada involves recognition and acceptance of complementary responsibilities by all participants in the system. Thus, the recommendations of the Task Force are focused on obligations and responsibilities of each of the public, the courts and governments, practitioners, legal educators, legal regulators, and the CBA as the national organization for the legal profession. Specific recommendations were made by the Task Force concerning the obligations and responsibilities of each group. While a full review of these recommendations is beyond the scope of this paper, a general overview is set out below.

i) The Public

The Task Force concluded that the public must become a more active participant in the civil justice system. Further, there is a strong need, in the view of the Task Force, for greater public awareness and more information about the civil justice system in particular, and dispute resolution in general.

Among the specific recommendations made by the Task Force are those which call for the provision by every court of "point of entry advice" to members of the public on their options within the civil justice system and concerning available community services outside the system; the undertaking by every court of initiatives to assist unrepresented litigants, including the adoption of simplified procedures and forms; and the facilitation of the teaching of dispute resolution skills at appropriate levels in elementary and secondary schools across Canada.

The Task Force also attempted to recognize the obligations of litigants who seek to use the civil justice system. These obligations include, under the Task Force's recommendations, the responsibility to consider prior to commencement of litigation, and at early multiple stages during the progress of a case, available dispute resolution options which do not involve the traditional trial mechanism. To reinforce this responsibility, and to provide a concrete mechanism for its implementation, the Task Force recommended that litigants and their counsel be required to certify, as a pre-condition to the obtaining of a trial date, that they

are aware of and have considered dispute resolution mechanisms and have either availed themselves of the opportunity to pursue such options or have made a considered judgment that they are not appropriate or applicable to their case.

ii) The Courts and Governments

In the view of the Task Force, governments need to commit themselves to adequately resourcing the courts and civil justice reform efforts. This responsibility of governments, as the greatest user of the civil court system in Canada and as the elected provider of state services and systems, was emphasized by the Task Force. In addition, the Task Force expressed concern that legislators consider, prior to the introduction of legislative change, the impact of new legislation on access to and the use of the civil courts.

Task Force recommendations concerning the courts and governments include proposals that every court establish access to justice committees for the purpose of providing ongoing dialogue between users of the system and those responsible for its day-to-day management; the development and implementation by every court of a charter, specifying standards of service to be provided to members of the public; the establishment by every jurisdiction of a structure for courts' administration which embodies certain base principles set out in the Task Force Report; and, the development by every jurisdiction of criteria and a system for the training, monitoring and regulation of individuals who provide court-annexed dispute resolution services.

iii) The Legal Profession

The Task Force made numerous recommendations concerning the obligations and responsibilities of various groups within the legal profession, namely, practitioners, legal educators and legal regulators. Central to these recommendations is the proposal that lawyers must become more attuned, and responsive, to the needs of clients and more focused on early settlement and the use of a variety of dispute resolution techniques. The Task Force called for a broadened professional responsibility to explore settlement so that it encompasses full exploration of dispute resolution options. In addition, the Task Force proposed that law schools, bar admission courses and continuing legal education providers provide education and training on dispute resolution options and their integration to the lawyering process. The Task Force recommended that these courses be mandatory at the law school and bar admission course levels across the country.

The Task Force also recommended that practitioners increase their client service focus by developing and implementing a statement of client rights and responsibilities; developing quality assurance mechanisms; making written disclosure of fees in most circumstances; and, providing a variety of billing methods with an emphasis on results rather than time-oriented systems.

In addition, the Task Force recommended that the CBA develop a program to promote, monitor and publicize the level of *pro bono* work carried out by lawyers. Law societies, the Task Force suggested, should place greater emphasis on the vigorous enforcement of competency, in concert with the disciplining of professional misconduct, and that they should seek legislative change where necessary to achieve this mandate. Importantly,

the Task Force also called for a comprehensive review of all phases of legal education to be undertaken in Canada. The development of a "comprehensive legal education plan", in the view of the Task Force, is long overdue in Canada.

iv) The Role of the CBA

The Task Force recommended that the CBA take the lead responsibility for implementing 14 specific recommendations. These include such matters as adoption of national time guidelines for the progress of cases; introduction of a "will-say" disclosure pilot project; formulation of guidelines for appeal books; introduction where necessary and expansion elsewhere of civil justice education in Canadian schools; the investigation of the cost effectiveness of civil courts on the basis of one or more initial pilot projects; the development of standards for court operations; identification of principles for the training, monitoring and supervising of dispute resolution providers; development of a model statement of client rights and responsibilities for consideration by lawyers across the country; development of guidelines for improved communications between lawyers and clients regarding fees and expenses associated with litigation; the provision of information to the profession across the country on alternative billing methods and on integration of new technologies in legal practices; initiation and oversight of development of a comprehensive legal education plan; and, creation of a national institute on civil justice reform.

v) Collective Responsibilities

The Task Force also specifically addressed issues which it felt required collective action. As mentioned, the Task Force recommended a process to establish a national institute on civil justice reform. It suggested that the mandate of the institute should be to : collect in a systematic way information concerning the civil justice system; carry out research on matters affecting the operation of the system; promote the sharing of information about the use of best practices in the civil justice system; function as a storehouse of information for the benefit of all involved persons concerning civil justice reform; develop liaisons with similar institutes in other countries to foster exchanges of information across jurisdictions; and, assume a leadership role on information provision concerning civil justice reform initiatives.

The Task Force emphasized throughout its Report the profound current weakness in the system emanating from a lack of reliable and consistent information concerning the efficiencies and deficiencies, scope and costs of the current civil justice system. Recommendations made by the Task Force to overcome this obstacle include proposals for the collection and generation of more information on the need for court resources. These are to be developed, initially, through a demonstration project studying the cost effectiveness of operations of one or more designated courts, the cost of proposed reform measures and the value of outcomes of the reform process. In addition, the Task Force recommended that every jurisdiction establish, on a priority basis, computer-assisted information systems to assist proper management of the work of the courts, resourcing decisions and assessment of the impact of reforms. The Task Force also recommended the creation of a system and collection of comparable national data on the management and performance of all civil courts with a view to identifying best management practices.

II. MOMENTUM FOR REFORM : DOES IT EXIST?

A. The Woolf Report

As appears from the outline in Part I of this paper concerning the Woolf Report, the reforms suggested by Lord Woolf are sweeping in nature. Most, but not all, of the reforms were endorsed by the Lord Chancellor and his Department in the Lord Chancellor's written implementation strategy. This strategy document makes it clear that considerable consultation with the Bar, regulators of the legal profession, judges and court administrators has yet to occur before the detail of the implementation measures can be settled and acted upon.

What is not so clear to this outside observer, however, is the extent to which the Woolf recommendations enjoy current support in England. Of interest, in the summer of 1996 shortly after release by the Lord Chancellor's Department of the implementation strategy, some leaders of the commercial litigation Bar in England indicated significant reservations about the collective will to fully implement the Woolf recommendations. Over the course of the next year, with the change in government in England, it was announced that Lord Woolf's blueprint for reform was to be considered by a new committee before full implementation measures were carried out. By August 1997, although some implementation measures were proceeding and Lord Woolf and representatives of the Lord Chancellor's Department continued to speak of work on implementation, there seemed to some observers to be doubt about the new government's commitment to full implementation of the reform package. For this author, by the summer of 1997, available information suggested that implementation of the Woolf recommendations, at best, was stalled and, at worst, was under serious reconsideration.

B. The CBA Task Force Report

Following the tabling of the CBA Task Force Report with the Council of the CBA in August 1996, the Council created an Implementation Committee under the chairmanship of Brian Crane, Queen's Counsel of Ottawa, to put the national agenda for change into action. The goal of the Implementation Committee is to encourage broad review and consideration of the CBA Task Force Report and to ensure that appropriate follow-up steps are taken. In addition, having regard to the fact that the Task Force recommended that the CBA assume chief responsibility for implementing 14 specific recommendations, one of the objects of the Implementation Committee is to ensure that the CBA fulfills its responsibilities in relation to these recommendations.

To date, the Implementation Committee has generally adopted the following as priority tasks :

- establishing the formation of implementation committees in each province and territory;
- bringing the CBA Task Force Report to the attention of governments, the judiciary, legal organizations, law societies, legal educators, community educators, the media and the general public;

- working towards the establishment of the national institute on civil justice reform, now known as the "Forum on Civil Justice";
- establishing working groups to develop plans and preliminary budgets for implementation of specific recommendations in the Report directed at the CBA itself; and
- monitoring implementation and reporting to the Council of the CBA at the 1997 Annual Meeting and 1998 Mid-Winter and Annual Meetings.

In this context, the Implementation Committee developed a detailed written Action Plan tabled with the Council of the CBA at its Annual Meeting in August 1997. The Action Plan emphasizes the following conclusion of the Task Force :

*Achieving the vision for the twenty-first century recommended in this Report requires the involvement of representatives of all of the constituent sectors of the civil justice system : users, practising lawyers, judges, legal educators, court administrators, government agencies, and those who establish public policy in the area of civil justice. Virtually every recommendation in this Report involves overlapping areas of institutional competence or jurisdiction. No one group can accomplish reform on its own. Each group of participants have complementary responsibilities in the reform process.*¹⁰

The Implementation Committee has reported elsewhere in detail on the status of its efforts to date. It is fair to say, however, that considerable study of the Task Force Report and debate concerning its recommendations is occurring across the country. The extent to which the recommendations have been endorsed, and the level of effort being devoted to implementation, vary from province to province. For its part, the Implementation Committee over the course of the last year has undertaken the following.

Meetings have been held with the Canadian Judges Conference, the Canadian Judicial Council, the Canadian Association of Provincial Court Judges, most Chief or Associate Chief Justices across the country, the Deputy Ministers of Justice for each province and territory, and representatives of the Federal Department of Justice concerning recommendations focused on the management and resourcing of the courts, the role of the judiciary and the creation of the Forum on Civil Justice. In addition, the Implementation Committee has asked the Federal Court Liaison Committee to consider the Task Force Report in light of the reforms and case management that are now underway in the federal and tax courts.

The Canadian Judicial Council has welcomed the Task Force recommendations and, in communications with the Implementation Committee indicated :

It is clear that members of the Council are very supportive of the Task Force report and the recommendations contained therein. At the Appeal Courts meeting the members reviewed the section of the report dealing specifically with appellate courts, and approved recommendations 22, 24 and 25, and while not

10. CBA Task Force Report at 53.

approving recommendation 23 specifically, nonetheless supported the idea of working with the CBA where appropriate to develop guidelines for the production of appeal books (a number of courts having specific rules concerning the issue).

The Trial Courts Committee encouraged all trial courts to consider and adopt the recommendations in the report which are applicable to trial courts. Its sub-committee on delays was renamed the Sub-Committee on Systems of Civil Justice, and obtained the authority to liaise with the CBA with respect to the report, with a view to encouraging the implementation of as many recommendations as possible.

In addition, the Administration of Justice Committee has commenced some exploratory work on court charters. As a result [it is anticipated] that next year's seminar will concentrate on the themes raised in Section 3.2 of the Task Force Report on "A Service Focus for the Courts".

In some provinces, chief justices have responded promptly and directly to the reforms suggested in the CBA Task Force Report. In Nova Scotia, for example, Chief Justice Clarke arranged for preparation of a detailed response to the recommendations. This Nova Scotia "report card" has been widely circulated by the Implementation Committee.

Implementation of the recommendations of the Task Force necessarily involves the commitment of court administrators. For example, recommendation 32 of the Task Force calls for a demonstration project to study cost effectiveness of court operations. The recommendation is directed specifically at the Association of Canadian Court Administrators. Recommendation 35, in turn, recommends the establishment of a working group to develop national standards with respect to the use of electronic forms, filing and document storage. The Implementation Committee has commenced discussions with the Association of Canadian Court Administrators concerning these recommendations.

Efforts have also been undertaken by the Implementation Committee to meet with responsible Ministry of Justice officials across the country, including representatives of the Federal Department of Justice. The Federal Department has given significant financial support to the establishment of the Forum on Civil Justice. In addition, the Department has encouraged all federal lawyers to become actively involved in local implementation committees and in mediation initiatives. Meetings have been held with the Deputy Minister of Justice at the federal level and with Deputy Ministers of Justice across the country. The Federal/Provincial Committee of Deputy Ministers has established a special committee to review the recommendations of the Task Force and to liaise with the Implementation Committee. In addition, provincial governments have been asked to provide financial support to the creation and establishment of the Forum on Civil Justice. To date, some provinces have committed funds; requests of others are outstanding.

The Implementation Committee has also met with and is in continuing contact with the Canadian Centre for Justice Statistics in relation to civil litigation. Three members of the Implementation Committee serve on an Advisory Committee created to develop the Centre's capacity for collecting and analyzing data on the civil justice system. This project will be a major research focus of the Forum on Civil Justice. The Centre has established, to date, pilot data-gathering projects in the superior courts in Ottawa and Halifax.

Representatives of the Implementation Committee have also met with the Federation of Law Societies and with certain of the Treasurers/Presidents of law societies across the country. Several of the recommendations made by the Task Force deal specifically with changing professional standards among the profession and proposed amendments to provincial codes of professional conduct. As noted, law societies across the country are urged by the Task Force's recommendations to more vigorously enforce competency within the profession. The Federation of Law Societies, and many provincial law societies, have undertaken detailed reviews of the recommendations of the Task Force and, at its June 1997 meeting, the Federation of Law Societies formally agreed to work with the Implementation Committee in connection with improvements to legal education and changes in rules of professional conduct across the country.

Revisions to the curriculum of law schools and bar admission programmes with respect to dispute resolution options and mediation training are central to a number of the recommendations made by the CBA Task Force. Recommendation 26 specifically proposes that the CBA enter into discussions with provincial and territorial Ministers of Education to facilitate the teaching in elementary and secondary schools of dispute resolution skills, as well as the operation of the civil justice system. This recommendation, in the view of the Task Force and the Implementation Committee, has long-term ramifications for public understanding of the civil justice system. It is also seen as a measure by which to facilitate access to justice by the poor and disadvantaged in society. For this reason, the Past President of the CBA wrote to all provincial and territorial Attorneys General and Ministers of Education to draw their attention to the recommendations of the Task Force relating to education in elementary and secondary schools. A large number of detailed responses have been received from Ministers of Education across the country, many of which have suggested ongoing consultation at the provincial and territorial levels in conjunction with curriculum review. The provincial and territorial implementation committees have been charged with responsibility to follow-up on these proposals with Ministers of Education.

In an effort to more generally distribute information concerning the recommendations of the Task Force to the public at large, several meetings have taken place since tabling of the Report with the editorial boards of major newspapers across the country to brief them on the Report and the state of the civil justice system.

At the provincial and territorial levels, implementation of the recommendations of the CBA Task Force must be viewed in context with various provincial reform initiatives which were undertaken either before, during, or after the work of the CBA Task Force. As a result of these combined efforts there is, in the view of this writer, a continuing state of unevenness across the country in the extent to which reforms to the civil justice process have been recognized or implemented. Having regard to varying local circumstances, however, this divergent level of response is neither unexpected or unproductive. What is essential, it is suggested, is a common understanding of the extent to which civil justice reform measures are needed and the manner in which various provinces and territories have sought, or are now seeking, to improve their local systems.

Finally, creation of the Forum on Civil Justice is well underway. To date, the CBA Implementation Committee has raised \$90,000 of the \$100,000 needed for Year 1 of the Forum's operations and \$55,000 for each of Years 2 and 3 of the Forum's operations. The Administration of Canadian Court Administrators, the Law for the Future Foundation, the

Federal Department of Justice, the law foundations of two provinces and various private corporations have contributed funds to this effort to date. At the Annual Meeting of the CBA in August 1997, the working group responsible for the establishment of the Forum on Civil Justice submitted a detailed status report, accompanying budget and action plan. It is expected that the Forum will be established within the year.

All of these efforts suggest that there is, at the present, considerable momentum for reform of the civil justice system in Canada.

C. The Voice of the Public

No discussion of the "momentum for reform" would be complete without reference to the input of members of the public.

As has been detailed elsewhere, part of the work of the CBA Task Force involved what it regarded as a broad consultation process. This included communications and consultations not only with members of the profession, the judiciary and governments but, as well, with various public interest groups, individuals and business leaders in Canada. Representatives of these groups participated in a National Conference on Civil Justice Reform organized by the Task Force and held in Toronto in early February 1996. In addition, they received for comment a consultation document prepared by the Task Force in advance of completion of its Report. These efforts to obtain input from the public, and to engage it in the process of the Task Force's work, were complemented by a series of meetings held with small and large business groups and advisory groups and individuals across the country.

In addition, a number of surveys were undertaken by the Task Force, including a survey of members of the public regarding issues related to changes in the civil justice system. The priorities for reform differed among respondents to the surveys and the consultation document. Responses were uniform, however, in their call for urgent improvement to access to civil justice. Moreover, although the ranking of priorities differed, the nature of the identified priorities was consistent among respondents. For members of the public, the three chief priorities for civil justice reform concerned the **speed** with which disputes are resolved in the civil courts, the **affordability** of dispute resolution in the civil courts and, improved public **understanding** of the courts and the system as a whole. These were the same priorities identified by other respondents, including members of the profession and court administrators, although the ranking of each factor was different depending upon the category of respondent.

The Task Force also received written submissions from members of the public, in addition to other interested parties. The submissions, for the most part, were insightful and instructive. One member of the public, who also participated in the Task Force's National Conference, described the "central issue" regarding civil justice reform in this language :

The fact that the majority of Canadians cannot afford to seek justice through the current system is a problem which far outstrips in magnitude concerns about maximizing procedural and due process protections for those litigants who are presently able to access the system.

This suggestion of the Canadian "middle class" effectively being disenfranchised, in practical terms, from access to the civil justice system was a recurring theme pressed upon

the Task Force in its work. The proposition, simply stated, is that the poor in Canadian society can access the civil justice system through state-run or state-supported legal assistance programmes, while the wealthy in our society can do so in reliance on their own resources. This leaves, however, a significant number of Canadians, who are neither poor nor very rich, who cannot access the current civil justice system because it is neither affordable nor speedy.

The frustrations of business leaders with the current system, including, specifically, of those who are frequently involved in the management of litigation cases through the civil court process, were reflected in the following observation offered by a senior Canadian business leader who participated in the National Conference. His words, in my view, carried with them a warning :

Business has had it with a process that costs the earth, takes years to come to any kind of conclusion, and where they feel that equity is not always served. If you don't change, they'll eventually set up a competing system within the conflict resolution model that all of the business schools are teaching these days.

On the need to collect and study reliable data on the efficiency and productivity of the civil courts, the views of a group of business leaders were summarized as follows to the Task Force :

You need to start now to assemble a comparative database from which to make better decisions about where in the system money is to be spent. While this sounds pretty basic, there will be a lot of debate over spending money to do this, but the case can be made that there is real value in sharing information in this way. This is part of the budgeting exercise, and will involve investing capital, but there has got to be somewhere else that money is being wasted that can be identified. Business has been at this "capital for labour substitution" for some time and, while not every investment has been perfect, there is no question that a lot of the "jobless recovery" talk that you hear about is a result of such spending.

These comments, perhaps, speak for themselves.

D. The Case for Change

There are many contemporary factors which support the call for change. In combination, I suggest, they have converged at the present time to create and drive the momentum for reform. I invite you to consider the following :

1. The Particular Problem of Costs

All those experienced with the current civil justice system know that delays in the progressing of cases lead to increased costs. It is now thought by many, certainly by many litigants, that the costs of contemporary litigation have become so high that they are the source of injustice. It is suggested in the Woolf Report, for example, that the costs sustained on final disposition are often higher than the amount realized. Lord Woolf indicated in his Report that in one half the lowest value cases reviewed by his study team, the costs on one side alone were close to, or exceeded, the total value of the claim. In Ontario, the work of the Civil Justice Review suggested that in a typical uncomplicated case, the costs could exceed \$38,000 based on an hourly rate of \$200 and an investment of 190 hours in the case. As one commentator has put it : *The full blown adversarial process as it exists under our rules provides many opportunities for monied might to wear out the right;*

2. Canada's Competitive Position

Many prominent Canadian leaders, in government and elsewhere, have reinforced within the last two or three years the importance to Canada's competitive position in the global market of the effectiveness of our civil justice system. In essence, the message is that the civil justice system in Canada is of fundamental importance to the commercial and financial life of the country. The fairness, accessibility and predictability of our civil justice system forms an important underpinning of our competitive position and of our ability to be globally competitive in the 21st century;

3. Competing Demands for Reducing Dollars

As emphasized in the CBA Task Force Report and elsewhere, the allocation of state resources increasingly involves not only the traditional balancing of competing interests but, as well, the consistent reality of shrinking dollars and limited budgets. In essence, the civil justice system and the administration of justice generally are now involved in a competition for scarce dollars. This, of necessity, means that the case must be built for the receipt by the administration of justice of increasingly scarce resources. Modernization and improvement of our civil justice system will maintain and enhance the ability of the system to demand and attract at the budget table sufficient resources to permit its proper functioning;

4. Allocation of Court and Judicial Resources

Reform of the civil justice system is also necessary, I suggest, to facilitate in the future the effective and informed allocation of court and judicial resources. One might ask rhetorically, "How can we demand of our court managers modern and timely administration, yet deny them the tools with which to accomplish this?" The tools, as identified in many of the recent reform studies including the CBA Task Force Report, include modern equipment, training in contemporary management techniques, the availability of information systems on which to base management decisions, and the availability of sufficient premises and judicial resources to conduct case resolution and trials;

5. The Need to Provide Justice

Available information suggests that 95 to 97% of commenced cases are resolved in Canada, and elsewhere, prior to trial. The important feature of this statistic, I suggest, is exploration of when the case is resolved, and why. Current data indicates that many of these cases settle on the eve of trial and that too many are resolved because the resources of the parties do not permit them to continue. For many, that is not the equivalent of justice; rather, that results in resolving cases by the absence of justice.

All of these factors shape and substantiate the case for change.

III. PROSPECTS FOR REFORM IN COMMERCIAL DISPUTES

I have also been asked to comment in this paper, particularly, on the prospects for civil justice reform in relation to commercial disputes.

As those familiar with the CBA Task Force Report will be aware, the recommendations of the Task Force did not focus on particular forms of litigation but rather on system-wide issues generic to disputes generally. Nonetheless, some of the recommendations may be seen as having particular application to complex disputes, of a commercial or other nature.

For example, to assist it in its identification of appropriate reforms, the Task Force considered issues particularly relevant to long trials which often, but not necessarily, involve commercial disputes. To assist in this analysis, a group of experienced commercial litigators across Canada were asked to prepare a case study of complex litigation identifying the various "pressure points" in the progress of a complex case, which result in or materially contribute to delay and increased costs. The case study overview is attached to this paper as Appendix "B". Many of the "pressure points" in complex litigation identified in the case study formed the basis for specific recommendations in the CBA Task Force Report. I urge those interested in the views of experienced commercial litigators to review the case study and the insights it offers, from the perspective of practitioners, to the difficulties inherent in achieving speedy and affordable resolution of commercial disputes within the current construct of our rules of practice and procedure.

Many of the fundamental themes of the CBA Task Force have particular application to commercial disputes. As noted above in this paper, it is a fundamental premise of the Task Force's concept of a "multi-option" Canadian civil justice system that there be a marked re-orientation away from the traditional adversarial approach to dispute resolution, towards a broader "problem-solving" orientation. This approach needs no converts in the business community. Business leaders, from small and large enterprises, have long urged the adoption of procedures which emphasize practical, speedy and workable results.

The experience in Ontario's "commercial court" affords some useful insights. Many seasoned commercial litigators in Ontario believe that the commercial list in this province works where involved participants (litigators, litigants and judges alike) adopt the following approach : "(1) we have a problem; (2) we need it solved; and (3) we need a quick, workable and affordable solution". Conversely, the same practitioners privately express the view, not

infrequently, that the concept of a dedicated commercial list does not work if participants say : "(1) we have a problem; (2) we have a litigation process; and, (3) these are the rules, now follow them". These divergent approaches emphasize the difference between a traditional, adversarial approach to the resolution of commercial disputes, as opposed to a problem-solving orientation.

It is perceived by many in this context that a specialized court, or the availability of judges with specialized expertise, holds many advantages for commercial litigants. These include the implicit or explicit promise of speed in the progressing of cases; some assurance to litigants that they will have made available to them a judge who has some knowledge of commercial or business matters; and heightened likelihood of consistency of results. There are also perceived advantages for the administration of justice. To the extent that a dedicated commercial list, or designated group of judges with an understanding of commercial matters, is available to commercial litigants, the process works more efficiently.

I suggest that the concept of a commercial list, however constructed, works best in the following circumstances :

- where the parties to the litigation have a transaction pending;
- where it is detrimental to the involved parties to have the issues remain outstanding; and
- where the system provides for a relatively quick hearing date and some assurance of a decision-maker who has some knowledge of business matters.

Commercial disputes have a number of characteristics which, in my view, make them particularly well suited in contemporary circumstances for the profitable use of a reformed civil justice system. First, many commercial cases, unlike other disputes, can be dealt with in the form of applications as opposed to actions. In essence, many of these cases do not require lengthy *viva voce* evidence. Secondly, many commercial disputes increasingly involve issues of interpretation or valuation. Issues of credibility, generally (but not always) are limited. These factors, when present, lend themselves particularly to creative procedural measures and solution-seeking counsel and decision-makers. In my experience, however, there is one important caveat. From the perspective of commercial litigants, to fashion creative solutions to business problems it is necessary to have the involvement of an independent decision-maker who understands business issues. This does not mean that the involved counsel or judge must be corporate lawyers or trained in business. It does mean that addressing the particular, and often extraordinarily complex needs of the business community in commercial cases, requires some base level understanding of business realities and commercial transactions.

There are other, more compelling reasons, for regarding the need for civil justice reforms as pressing and immediate. In another context earlier this year, I advanced the following reasons in support of the need to embrace civil justice reform generally. They are no less applicable, I suggest, in commercial matters :

- first, and most significantly, if we fail to reform the system so that it more readily permits the fashioning of creative and timely solutions, we will **distance ourselves** from the citizens it is designed to serve. For those interested in maintaining the role of the civil justice system, and of civil courts, in our democratic society, this threat must be avoided by all reasonable measures. Expressed differently, if disputants cannot look to the system for timely and affordable justice, it will cease to have any contemporary relevance;
- secondly, without reform, **market-created diversion** will increasingly occur. The growth of independent dispute resolution agencies and corporations has not occurred by accident. They flow from well-established and increasingly publicized business models. They contemplate resolution of disputes outside of, and independent from, the court system. Unless the civil justice system adapts to accommodate an increasing diversity of disputes and commercial needs, the market will cause wholesale diversion of commercial disputes out of the court system. In this event, in the context of commercial matters, the courts will be left on the sidelines, irrelevant to most and virtually the exclusive preserve of the rich;
- thirdly, **legislated diversion** is a constant threat. It is not so long ago, at least in this province, that a former Attorney General suggested that all commercial disputes might be resolved outside of the traditional court system in a mandatory, binding, user-funded alternative dispute resolution process. The time had not arrived for the idea, when advanced. The result today might be entirely different; and
- Fourthly, a failure to reform the civil justice system, given both the call for reform and the momentum for change, will result in the **diminished authority and reduced social contribution** of judges and lawyers alike. It is trite to recall that both judges and lawyers in Canadian society occupy positions of privilege and trust. Entitlement to, and eligibility for, such positions is fundamentally premised on the good faith, integrous and efficient discharge of the responsibilities that come with such positions in society.

Apart from complicated cases, however, there remains the issue of how properly to manage in the future the hundreds of commercial matters which involve small businesses or individual business people. These fall generally into the category of disputes which the "middle class" in society now have difficulty advancing in the civil court system because of costs and delays. The CBA Task Force attempted in its recommendations to specifically address these kinds of disputes. It was for this reason, for example, that the Task Force urged the adoption across the country of expedited and simplified proceedings for disputes involving amounts in issue of less than \$50,000. There were many who urged a ceiling of \$100,000. It was for this reason, as well, that the Task Force urged the adoption of mandatory non-binding alternative dispute resolution techniques, to be utilized by litigants and their counsel, as a pre-condition to obtaining a trial date. To the extent that the system can compel early consideration of settlement or resolution of minor commercial disputes, the system affords to participants a real prospect for meaningful justice.

I offer these personal observations in conclusion : the civil justice system does not need to be popular. It does need, however, to be relevant, responsive and available to Canadians. Perfect justice that is unavailable and unaffordable is "fool's gold".

Appendix "A"

Summary of task force recommendations

As detailed in this Report, the Task Force recommends that

1. Every jurisdiction
 - (a) make available as part of the civil justice system opportunities for litigants to use non-binding dispute resolution processes as early as possible in the litigation process and, at a minimum, at or shortly after the close of pleadings and again following completion of examinations for discovery;
 - (b) establish, as a pre-condition for using the court system after the close of pleadings, and later as a pre-condition for entitlement to a trial or hearing date, a requirement that litigants certify either that they have availed themselves of the opportunity to participate in a non-binding dispute resolution process or that the circumstances of the case are such that participation is not warranted or has been considered and rejected for sound reasons; and
 - (c) ensure that individuals involved in helping litigants in non-binding dispute resolution processes have suitable training and support to carry out this function.
2. Each jurisdiction through its rules of procedure impose on all litigants a positive, early and continuing obligation to canvass settlement possibilities and to consider opportunities available to them to participate in non-binding dispute resolution processes.
3. Every court undertakes studies or pilot projects to determine best practices concerning the integration of non-binding dispute resolution processes in the post-discovery stages of litigation.
4. Every court has a caseflow management system to provide for early court intervention the definition of issues and for the supervision of the progress of cases.
5. 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 time lines;
 - (c) the screening of cases for appropriate use of non-binding dispute resolution processes; and
 - (d) reliable and realistic fixed trial dates.

6. Every court that does not currently provide for fixed trial dates develop practices and procedures to ensure greater certainty and reliability in the fixing of trial dates.
7. Every jurisdiction provide for case management in all cases where there is a need for judicial supervision or intervention on an ongoing basis.
8. Every jurisdiction provide a multi-track system for the resolution of civil disputes.
9. Every court set time lines for the overall determination of civil cases and develop suitable means by which to enforce such time lines.
10. Every jurisdiction provide by its rules of procedure for the automatic dismissal of cases where they have not been determined within a specified period, subject to the discretion of the court to order otherwise in compelling circumstances.
11. Every trial court
 - (a) requires that judgements be rendered promptly and by no later than six months after completion of the trial, and
 - (b) develops procedures for monitoring compliance with this standard.
12. The CBA adopts national time guidelines as a model for Canadian courts and for the legal profession.
13. Every jurisdiction that has not already done so gives serious consideration to providing for small claims courts with a monetary jurisdiction of up to \$10,000. Procedures should include options for use of non-binding dispute resolution processes.
14. Every jurisdiction establishes expedited and simplified proceedings that are
 - (a) mandatory, save as the court may otherwise direct, for all cases where \$50,000 or less is at issue; and
 - (b) 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.
15. The CBA works with selected jurisdictions to establish pilot projects using 'will-say' procedures, so as to determine whether it is useful and fair to require will-say documents in civil cases to compel early disclosure of anticipated evidence, and to assess the impact of such a requirement on delay, costs and discovery.
16. Every jurisdiction
 - (a) amends its rules of procedure to limit the scope and number of oral examinations for discovery and the time available for discovery, and
 - (b) devises means to assist parties in scheduling discoveries and in resolving discovery disputes in an efficient manner.
17. Every jurisdiction amends 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.
18. In every jurisdiction, judges play a more active role in assisting parties to limit the costs and delay associated with the use of experts.
19. Every jurisdiction
 - (a) strictly limits appeals from non-dispositive interlocutory orders,

- (b) provides for costs awards in suitable cases, payable immediately, in interlocutory matters, and
 - (c) introduce strict financial sanctions, payable immediately, for clear cases of abuse.
20. Every jurisdiction provides for, and promotes the use of, summary trial procedures.
21. Every jurisdiction
- (a) develops a system of incentives and sanctions to encourage settlement and the prudent use of court time, and
 - (b) as an essential component of such a system, undertakes a reassessment of current indemnity principles.
22. Every appellate court
- (a) develops and promotes the attainment of the following goals:
 - (i) the initiation of appeals within 30 days after the filing and service of the trial judgement;
 - (ii) the hearing of appeals within 9 to 12 months after the filing of a notice of appeal; and
 - (iii) the rendering of judgements promptly and, save in complex cases or where new questions of law are being developed, by no later than 6 months from completion of the appeal; and
 - (b) develops procedures to monitor performance against these goals.
23. The CBA, in consultation with members of the judiciary and lawyers, develops guidelines for the production of appeal books.
24. Every appellate court takes a more active role in supervising the progress of appeals.
25. Every jurisdiction considers measures to give appellate courts, including the Supreme Court of Canada, greater control over their civil dockets.
26. (a) the CBA enters into discussions with provincial and territorial ministries of education or their equivalents to facilitate the teaching of dispute resolution skills and the operation of the civil justice system in Canadian elementary and secondary schools; and
- (b) these efforts are undertaken in consultation with law societies, law schools, members of the judiciary, and governments.
27. Every court provides point-of-entry advice to members of the public on dispute resolution options in the civil justice system and available community services.
28. Every court undertakes initiatives to assist unrepresented litigants, including simplifying procedures and forms and using plain language.
29. Every court establishes an advisory committee composed of members of the public and others involved in the civil justice system for the purpose of obtaining advice on
- (a) ways to improve the administration of civil justice,
 - (b) reducing or removing barriers to access, and
 - (c) implementing, evaluating and monitoring reform measures.
30. Every court develops and implements a charter specifying standards of service to be provided to members of the public coming into contact with the court.

31. Every jurisdiction establishes a suitable model for management and administration of the courts that embodies the following:
- (a) preservation and enhancement of judicial independence in both individual and institutional elements,
 - (b) preservation and enhancement of the independence of the Bar,
 - (c) strong community input and public involvement,
 - (d) recognition by governments of the need for autonomy in the management and administration of the courts while ensuring accountability for the expenditure of public funds,
 - (e) within the model chosen, clear lines of responsibility and accountability for administrative and operational matters,
 - (f) a commitment by governments to provide adequate funding and administrative infrastructure,
 - (g) recognition by governments in budgeting processes of the revenue-producing aspects of the court system and of cost recovery achieved through court fees, and
 - (h) provision for enhanced training and development to create additional well-trained and efficient court administrators and managers.
32. The Association of Canadian Court Administrators, in conjunction with the CBA and representatives of the judiciary, develops a proposal and budget for a demonstration project in one or more trial courts to study the cost-effectiveness of operations, the cost of proposed changes, and the value of results of reform.
33. The CBA creates a working group to devise a plan for the development of standards for court operations and to recommend how the plan should be implemented. The working group should deliver a preliminary report to the annual meeting of the CBA in 1997.
34. Every jurisdiction establishes, on a priority basis and to the extent that it has not already done so, enhanced computer-assisted management information systems to enable proper management of the work of the courts and assessment of the impact of reforms.
35. The Association of Canadian Court Administrators establishes a working group to develop national standards and to recommend procedures for the use of electronic forms, filing, and document storage for legal purposes.
36. (a) Every jurisdiction develops criteria and a system for the training, monitoring and supervising of all individuals who provide court-supported dispute resolution services, and
(b) the CBA develops a set of model principles and criteria to assist courts in this process.
37. Every jurisdiction in which this has not yet occurred gives immediate consideration to the merits of adopting a twelve-month court calendar.
38. Every jurisdiction specifies in its rules of professional conduct and obligation on lawyers to explore fully the prospects of settlement with their clients and an obligation to explain available dispute resolution options to clients in relation to litigation matters.

39. (a) Law Schools, Bar admission course educators and continuing legal education providers offer education and training on dispute resolution options and on the means by which they can be integrated into legal practice, and
- (b) such courses be mandatory in Canadian law schools and Bar admission course programs.
40. (a) All lawyers develop and implement a statement of client rights and responsibilities that identifies, in clear and concise language, the essential features of the service commitments made to clients, and
- (b) such statements be made available in writing to clients;
41. All lawyers develop quality assurance programs and standards, specific to their practice circumstances, that identify for clients, clearly and concisely, the standards by which they can evaluate the legal services provided by their lawyers.
42. The CBA develops and promotes a model statement of client rights and responsibilities, provides analysis and information for the establishment of quality assurance programs and standards, and develops model quality assurance programs and standards for the legal profession.
43. Lawyers, as a matter of standard practice and save only in unusual circumstances, make written disclosure to clients at or shortly after the outset of a retainer regarding
- (a) the basis upon which the client will be billed,
- (b) the billing methods to be used,
- (c) where time and circumstances permit, the nature of the services to be provided,
- (d) the estimated costs of such services, and
- (e) the estimated time within which such services will be provided.
44. The CBA develops and promotes guidelines for
- (a) discussions by lawyers with clients concerning fees, and
- (b) improved communication regarding fees.
45. Lawyers use a variety of billing methods in determining fees for legal services, with an emphasis on the value and timeliness of the results achieved, rather than time spent.
46. The CBA provides information to the profession on alternative billing methods for legal services.
47. The CBA takes a leadership role in disseminating information to the profession about the integration of new technologies in legal practices.
48. The CBA develops a program to monitor, promote and publicize *pro bono* work carried out by lawyers and notaries.
49. (a) The CBA and the Canadian Council of Law Deans form a joint multi-disciplinary committee to consider and propose a comprehensive legal education plan to assist in civil justice reform for the twenty-first century, and
- (b) the plan addresses the whole spectrum of service providers and the full range of educational opportunities.
50. (a) Law societies place greater emphasis in the future on the enforcement of competency standards, and
- (b) in jurisdictions where legislative amendments are required to permit the vigorous enforcement of competency standards, such amendments be sought.

51. The Canadian Centre for Justice Statistics designs a system and collects comparable national data on the management and performance of all civil courts with a view to identifying best practices.
52. An independent national organization on civil justice reform be created for the purposes of
 - (a) collecting in a systematic way information relating to the system for administering civil justice;
 - (b) carrying out in-depth research on matters affecting the operation of the civil justice system;
 - (c) promoting the sharing of information about the use of best practices;
 - (d) functioning as a clearinghouse and library of information for the benefit of all persons in Canada concerned with civil justice reform;
 - (e) developing liaison with similar organizations in other countries to foster exchanges of information across national borders; and
 - (f) taking a leadership role on information provision concerning civil justice reform initiatives and developing effective means of exchanging this information.
53. The CBA takes concrete steps to implement the national agenda for change set out in this Report and work in concert with others outside the Association to achieve civil justice reform.

Appendix "B"

STEP	WORK EFFORT & PURPOSE	TIME	COST	PROBLEMS & COMPLICATIONS	VALUE TO CLIENT	POTENTIAL REFORMS
1. Initiation of Proceedings	Investigation, legal research, interview of witnesses, review of documents, #sometimes the hiring and use of experts, generally leading to the rendering of a preliminary legal opinion as to probable outcome, risks, benefits, costs and time. Client deliberation and delivery of instructions required.	No time limit other than the limitation of actions. Substantial amount of time can be required in a complicated case measured at least in months.	High	<p>Access to justice problem: only parties with significant resources can undertake the costs and burdens associated with complex litigation.</p> <p>Facts and information under the control of adverse parties generally not available. This creates and added degree of uncertainty in the opinions and predictions rendered.</p> <p>Investigators will endeavour to identify and interview all potential witnesses, employees and former employees, many of whom may be adverse in interest and may be approached without the knowledge or consent of the other side. No real guidelines as to who may be approached and under what conditions except no witness is obliged to co-operate.</p> <p>Very few guidelines as to the extent to which adverse parties need to disclose the results of their investigation including information to be privileged and part of the solicitor's brief.</p> <p>Pleadings are sometimes not very helpful in disclosing the essence of a case to be advanced or the material facts to be relied</p>	High value in preparation; pleadings not as valuable as they would be because of limited disclosure and ability later to modify.	<p>Major Reform Options:</p> <ol style="list-style-type: none"> 1. Ration the large cases out of the court system unless important legal issues are involved. 2. Impose time limits, standards or guidelines which (in combination with case flow management) would be aimed at reducing significantly the time required to take a complex case through the entire litigation system. 3. Maximize range of choices with the elimination of as many technical rules as possible within overall time limits and effective case flow management. 4. Increased emphasis on early and effective ADR.

STEP	WORK EFFORT & PURPOSE	TIME	COST	PROBLEMS & COMPLICATIONS	VALUE TO CLIENT	POTENTIAL REFORMS
				Evidence is not pleaded or disclosed. It is accordingly difficult to assess the strength of the case to be met.		<p>5. Optional fast track available with reduced discovery and special treatment of expert evidence where requested and fairness tests satisfied.</p> <p>6. Mandatory expedited procedures with reduced discovery and expert evidence and strict time limits for pre-trial and conduct of trial.</p> <p>7. Evidentiary disclosure with pleadings or at close of pleadings ("will say" disclosure of evidence of witnesses, documents and expert evidence).</p> <p>8. Higher user fees; court costs awarded to successful party on indemnity basis; costs in any event of the cause awarded on all contested applications and appeals but with low or no costs for facilitated steps such as ADR and case management.</p>

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						<p>9. Early setting of a fixed trial date with restricted rights of adjournment for any court hearing.</p> <p>10. Adequate training, resources and time required for judges and court officials to provide effective case management and ADR services.</p>
2. Service		1 year to serve		Service ex juris; substitutional service multi-parties.		
3. Subsequent Pleadings	All pleadings are intended to disclose to the other parties and to the Court the material particulars and theory of the case being advanced.			Defendants are put under catch up burden with a great deal of investigation, research, expert retention, etc. required. As a result by custom defendants are given a substantial period to respond and file formal pleadings.	High	<p>Early dispute resolution - mandatory or voluntary? Role of judges, judicial support staff, outside resources?</p> <p>Case flow management - on judge assigned early to manage all matters relating to a given case. Role of court administrator? Mandatory or voluntary?</p>

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Defence & Counterclaim		15 days from service but seldom enforced and in a complex case impossible generally to meet		Pleadings in reality are seldom closed. Amendments involving substantive new causes of action are allowed unless prejudice can be demonstrated.		
Third Party Notice		6 months from service and with leave thereafter				

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4. Documents	<p>To disclose to the other side relevant documentary evidence on a pre-discovery basis.</p> <p>Critical information of an historical nature may often be contained in the documents and can only be</p>	<p>In complex cases can take up to a year or more</p> <p>Often new documents continue to emerge through</p>	High	<p>There can be boxes to roomfuls to truckloads of theoretically relevant (touching on issues in question) documents.</p> <p>Huge costs and time can be expended in each party individually reviewing, indexing, inputting into computer systems, summarizing and copying documents.</p> <p>Work generally done by paralegals or junior lawyers. Responsible lawyers may not see or judge documents until much later in the proceedings.</p> <p>Technology for imaging and effectively using documents expensive and evolving rapidly.</p>	<p>The nuggets are important but the uncovering of those nuggets is inefficient. (How do you find told without mining?)</p>	<p>Adverse documents admissible at trial without further or formal proof.</p> <p>Reduced test of disclosure to "relevancy" from "touching upon a point in issue" in conjunction "will say" disclosure with pleadings.</p> <p>Case management assistance in reducing and controlling burden of discovery.</p> <p>In particularly complex cases, use of a third party document reviewer.</p> <p>Obligation on lawyers to certify disclosure of all potentially adverse documents in client's possession.</p> <p>Common computer assisted electronic document system.</p>

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	discovered through careful review.	the discovery process.		<p>Documents that do not appear to be relevant at an early stage of the proceedings may turn out to be highly relevant as the case develops. Many (often most) of the documents disclosed will not be referred to again (at discovery or trial).</p> <p>The admissibility at trial without further formal proof is not assured. This gives rise to the need to try and elicit admissions on discoveries about documents.</p>		
5. Further Investigation and Preparation	<p>With pleadings theoretically closed and documents now produced a further phase of investigation, research and preparation generally takes place.</p> <p>Predictions of court outcome can be somewhat but not significantly refined, because of absence of knowledge of evidence of adverse parties, witnesses and experts.</p>					

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6. Expert	Retention of experts where obvious technical questions are involved to assist in the development of a theory of the case and obtaining preliminary opinions for guidance.	Can be time consuming in the preparation phase. The preparation of written report usually is not required until a	High	Expert shopping occurs (i.e. talking to a number of experts until one who will render a favourable opinion is found). Experts suffer from partisan bias (often unconsciously). Opposing experts will often proceed on differing fact assumptions. For		Treat experts as officers of the court rather than adversarial participants (lawyers obliged to disclose all efforts to retain experts and all opinions obtained, adverse as well as

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	<p>Parties will need to be prepared later to provide expert reports and call expert evidence at trial.</p>	<p>stipulated time prior to the start of the trial (90 days).</p> <p>The time and cost in preparing expert reports is extensive especially in those cases where direct evidence of an expert will be limited or denied so that the report must say everything.</p>		<p>these reasons, and no doubt others, it is amazing how often reputable experts on opposing sides will disagree at trial on a wide range of opinions.</p> <p>Lawyers are required to work closely with experts in providing them with sufficient and accurate information and then in working with them in the preparation of reports that will be useful and understandable in the courtroom. Whose evidence results (the expert's or is it influenced by the lawyer, or at least by the adversary process)?</p> <p>Expert reports are not produced prior to discoveries with the result that discoveries do not explore the facts and information that are relevant to adverse expert opinions.</p> <p>Inhouse (employee) experts may or may not fall within expert rules and may or may not be required to express opinions on disco varies.</p> <p>Without disclosure of what the other side's experts are likely to say until late in the proceedings, parties will err on the side of hiring more experts rather than less in order to have all areas of potential expert evidence covered.</p>		<p>favourable, experts required to disclose all relevant opinions, not just favourable).</p> <p>Use of case management judge to facilitate simplification of issues and areas of potential agreement and disagreement amongst opposing experts with resulting control and limitation of range of expert testimony at trial.</p> <p>Early, pre-discovery disclosure of expert reports.</p> <p>Strict limits on experts by number and area of testimony (Direct? Cross? Rebuttal?).</p> <p>Use of written reports in lieu of oral evidence in chief.</p>

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				<p>When initial reports are exchanged there is then a rush to rebuttal reports and surrebuttal reports all in a mad dash up to and through the early part of the trial.</p> <p>Once an expert may wish to give rebuttal evidence there is a concern about splitting evidence so that the evidence in chief at the start of the case tends to expand beyond original intent.</p> <p>Number of experts restricted in Alberta to three but that is interpreted to mean three per issue. In a complex, technical case there can be numerous fields in which expert evidence may become important.</p>		
7. Interrogatories:	Can be used as a means of exchanging in written form questions and answers as part of the discovery proves.			No rule in Alberta and seldom utilized.		Case management judge could facilitate and encourage the use of meaningful interrogatories in combination with meaningful responses to notices to admit.

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<p>8. Examinations for Discovery.</p> <p>Individual parties and an officer of each corporation named as a party maybe orally examined.</p>	<p>Twofold purpose:</p> <ol style="list-style-type: none"> 1. Learn about the other side's case; 2. Obtain admissions that might be utilized at trial. <p>Credibility issues can be tested. Oral discoveries permit lawyers to predict more accurately the</p>	Lengthy	High	<p>The corporate officer seldom has direct admissible evidence on important matters in issue. The officer may supply "information" but is not required to admit or adopt that information. Accordingly, the second purpose of discoveries (obtaining admissions) is easily avoided where corporations are involved.</p>		<p>Any information obtained from an adverse party on discovery is admissible at trial without further or formal proof.</p> <p>Use of "will say" statements may reduce significantly the need for extensive discovery.</p>
<p>Employees and former employees of corporations are discoverable in Alberta but not in some other jurisdictions (no real limit on numbers).</p>	<p>probable outcome of a trial. Without them significant surprises could be expected at trial.</p> <p>Direct access to the witness permits the obtaining of that witness unfiltered testimony.</p>			<p>Without direct access to the employee or witness the evidence through the officer will be filtered and indirect.</p> <p>Obtaining an admission that can be read in at trial presents a cumbersome problem in Alberta and perhaps an impossible problem in Ontario.</p>		<p>Impose strict time limits for discovery or restrict rules of relevancy and the rights to object to questions.</p>

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<p>Independent Witnesses - no right to discover these in most provinces except Nova Scotia. Common in the United States.</p> <p>Experts - generally not available in Canada except in Nova Scotia but again common in the United States (where however, it is not common to exchange in advance.</p> <p>Advanced written reports of experts)</p>				<p>In complex litigation there can be literally hundreds of employees who might theoretically have relevant evidence which can then compound and expand tremendously the discovery process.</p> <p>Without the ability to read in at trial clear submissions obtained from discovery a parties put to the high risk of having to call the adverse witness at trial. The discovery process was intended to avoid this risk.</p>		<p>Adopting a general "fairness" jurisdiction for rules of procedure, discovery, documents and so on with the elimination of the more technical Rules of Court.</p>
<p>9. Interlocutory Motions</p>	<p>Procedural Steps in Lawsuits Governed by Complex Rules of Court.</p>					<p>Impose costs payable forthwith on a solicitor and client basis in any event of the outcome in favour of the successful party.</p>

STEP	WORK EFFORT & PURPOSE	TIME	COST	PROBLEMS & COMPLICATIONS	VALUE TO CLIENT	POTENTIAL REFORMS
a) Non-dispositive	Disputes over what is procedurally fair or required give rise to the need for court intervention. Some of these motions can involve the most minor matters, but some can be highly important and may directly or indirectly control the outcome of the case.	3 to 6 months		25% of these, according to the Blair Report (p. 234) are discovery related. Many applications involve interpretation of the Rules of Court with which the judges and lawyers struggle and which are incomprehensible to average citizens.		More efficient scheduling of chamber's applications to meet the convenience of counsel and the parties; no adjournments except under special circumstances and adequate notice. Enhanced jurisdiction of the court on summary disposition of cases.
b) Special and Dispositive Motions (such as summary judgment, striking out, extraordinary remedies etc.)	Notice of Motions, Affidavits, Written Submissions and half a day or more of oral argument with a potential for reserved written reasons for judgment.	6 to 12 months		Adjournments not uncommon. Scheduling of applications on Chambers Day can be inefficient for lawyers.		Reduce or eliminate oral argument; convert application to written material only.
10. Appeals from interlocutory motions		6 to 12 months		Appeals on minor matters can add substantially to time and cost of litigation without offsetting benefits.		Eliminate appeals as of right from non-dispositive motions.
Granted as of right in all cases in Alberta; allowed with leave only in Quebec except for dispositive motions						

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11. Settlement Negotiations - pre-trial conferences	<p>Settlement is the outcome of 95-97% of all lawsuits. Lawyers are in many cases responsible for effecting those settlements but are not often given the praise they deserve for those results.</p> <p>Clients are essential participants in the settlement process and increasingly take active roles and are sometimes instrumental in effecting settlement.</p> <p>A reasonable settlement voluntarily negotiated is for most cases a legitimate and desired result.</p> <p>Substantial preparation and adequate information are usually thought to be important to conduct an effective settlement negotiation. Many lawyers will be reluctant to entertain serious settlement negotiations except on the most favourable terms early on in the process because of their lack of information and inability to predict as accurately as possible the probable outcome of a trial.</p>			<p>Settlements generally occur later in the process after much of the time and cost have been expended.</p> <p>Reasonable disclosure early on not easily achieved under existing rules of procedure.</p>		Late ADR mandatory in complex cases.

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12. Preparation for trial	There is usually an intense trial preparation phase where lawyers prepare witnesses to testify, documents are organized and scrutinized, cross-examinations are prepared,		High	Adjournments, when they occur without sufficient notice, can reduced significantly the benefit of trial preparation and require a substantial repetition of that at a later time.		No adjournments except under special circumstances and with adequate notice.
	opening and closing arguments are drafted.					
13. Notice to Admit	This is a rule intended to facilitate agreement as to matters in issue.			Since a party can simply say "No" to a request to admit facts and be subjected only to a cost penalty (seldom employed) for failing to admit facts, notices to admit infrequently go beyond the most elemental matters. Trying to get other lawyers to agree to matters is often seen as more of a waste of time than leading the evidence at trial without the hassle.		Case management judge given power to impose cost burden in any event of the cause on party failing to act reasonably in negotiating agreed facts and admissions.
14. Pre-trial Conferences	This is where the court (usually not the trial judge) endeavours to assist the parties in clarifying issues, agreeing as to facts, arranging for a trial date, length of trial date, numbers of proposed witnesses and so on. It is under this general heading that settlement conferences, mini trials and other ADR steps can occur.			Without the active cooperation of all parties, the Court has a limited ability to influence the parties towards settlement. Since the trial judge is generally not the pre-trial conference judge pre-trial conferences can be relatively perfunctory, and directions on scheduling, elimination of certain aspects of proof, the handling of experts and so on may not be carried through consistently when the matter proceeds to trial, since the trial judge may not have had the benefit of the discussions at the pre-trial conferences.		Encouragement to the utilization of both early and late ADR will cost incentives. Merge pre-trial conferences into case management system.

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15. Trial date selection	In the absence of a special order, the trial date is selected after a Certificate of Readiness has been filed (after Discoveries have been completed).	For long cases, a 1 to 2 year wait for a trial date will be required after the filing of a Certificate of Readiness.		Overlooking occurs which will lead to trials being adjourned on their trial date (with little or no advance warning) occasionally (in Alberta) and more frequently in other jurisdictions (for example, British Columbia).		Early setting of a fixed and certain trial date to force parties to conduct all required pre-trial steps to meet that ultimate deadline.

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16. Exchange of Expert Reports		<p>Alberta: 90 days before trial for substance of opinion; 45 days for rebuttal; formal report, if to be tendered in evidence, 10 days before trial.</p> <p>For long trials (Alberta)</p> <ul style="list-style-type: none"> - Not more than one expert per subject without leave (with solicitor and client penalty costs); - Expert documents and reply exchanged as directed by Case Management Judge; - Leave to disclose experts may be granted on terms; - Experts may be directed to meet to reach agreement. 		<p>Drafting an expert report becomes part of the adversarial process and will usually involve substantial involvement of lawyers with a resulting risk that the report will be influenced by the lawyer. The trial judge will not be able easily to assess the extent to which the resulting report is truly the expert's opinion and whether the influence of the lawyer is to be considered reasonable or improper.</p>		

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17. Pre-Trial ADR	This is done in general in the context of pre-trial conferences and generally fairly late in the proceedings and can be done either with the assistance of judges (where available) or by non-judicial ADR specialists.					

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<p>18. The Trial</p> <p>(In Canada, jury trials in complex civil matters are virtually unheard of.)</p>	<p>For the 3% to 5% of the cases which do not settle, this is the culmination of the litigation system. It is expected that the trial will be conducted fairly both in terms of procedure and results.</p>	<p>One month to 24 months.</p>	<p>High</p>	<p>The identify of the trial judge will in many cases be a complete surprise to the lawyers which gives rise to the question of whether and in what circumstances specialist or pre-assigned judge would be fairer.</p> <p>Many judges, even in complicated cases, may not have had pre-trial conferences or significant introduction into the particular facts and issues inherent in the case to be tried.</p> <p>The scheduling and order of witnesses, time estimates and so on, may have been determined by another judge (the pre-conference judge).</p> <p>Strict time limits are rarely enforced on parties to adhere to their time estimates for evidence, cross-examination and argument.</p> <p>Arguments over the admissibility of evidence often result in rulings permitting questionable evidence to be led.</p> <p>Cross-examinations of experts extend beyond challenging the expert's own evidence to laying a foundation for the evidence of other experts and exploring matters not covered by any expert report.</p> <p>Concerns about splitting one's case and not being allowed to call rebuttal or surrebuttal evidenced can add to the</p>		<p>Pre-trial briefing of the trial judge with opening statements, disclosure of material documents, expert reports and related matters as worked out with the case management judge.</p> <p>Schedule of witnesses, time estimates for direct and cross and other scheduling arrangements as negotiated through case management provided to the trial judge and reviewed and confirmed.</p> <p>Trial judge enforces adherence to time estimates and schedule except in unusual circumstances.</p> <p>With limited or no power of a court of appeal to challenge those directions.</p> <p>Completion of discrete portions of a case per subject matter or issue.</p> <p>Adequate resources for judges required in</p>

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				<p>Trial judges, fearing the Court of Appeal, often find it difficult to exclude questionable testimony or hold parties to time estimates or make other difficult procedural rulings.</p> <p>Opening and Closing Arguments can be either helpful or unhelpful and are sometimes voluminous and repetitive.</p> <p>Judgments can be reserved for significant periods of time.</p> <p>Long trials, involving huge volumes of material and technical and complex issues place severe demands on the powers, abilities and resources of trial judges to absorb and comprehend the sheer mass of data introduced and to render fair and meaningful decisions.</p> <p>The decision, when rendered, may not always be reasonably predictable, may turn on points not raised by the parties or addressed squarely in argument.</p>		<p>computer and stenographic assistance and time to review and digest the evidence and render reasons.</p> <p>Time standards should be established for the rendering of timely reasons for judgment.</p>

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19. Settling Minuts of Judgment and Dealing with Costs	In order to perfect the reasons for judgment, a Judgment Roll needs to be agreed on or settled and filed and the issue of costs is usually left outstanding to be resolved.			<p>In complex cases both of these steps will often end up in front of a judge for final determination.</p> <p>Costs awarded to the successful party will generally be a portion only of the legal fees incurred by the successful party. Costs in Alberta are set according to a tariff which is generally to represent 1/4 or less of legal fees in complex cases. In British</p>		Full indemnity recovery for the successful party in term of costs and interest rules.
				<p>Columbia, Costs are set at roughly 50% of solicitor and client fees.</p> <p>Interest awarded is not at commercial compounded rates. Interest generally is not additional to liability insurance policy limits. Results: full indemnity to successful party rarely occurs.</p>		
20. Execution	To collect the benefits of successfull litigation.			In all litigation there is the problem of the defendant having limited or no resources to satisfy a judgment for damages, interest and costs. There may be insurance limits or the party may be uninsured. The party may be insolvent. There is no right in the normal case to conduct discovery on collectability at least in some jurisdictions unless the mareva test can be met.		Disclosure of insurance and assets required as part of the discovery process.

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21. Appeals	<p>Appeal Books reflecting all the oral and documentary evidence need to be prepared, bound and filed. In Alberta counsel are supposed to ensure only dispositive materials that will be included in Appeal Book. The Appeal Books are then reviewed carefully in order to prepare a factum (which is the written argument on appeal) which then must be filed and exchanged. Oral argument on appeal is not formally restricted.</p>	<p>6 to 24 months (Alberta)</p> <p>Alberta: Notice to Appeal must be filed within 20 days of the serving of the Judgment Roll; Agreement as to Contents of Appeal Books served by Appel-lant within 15 days of Notice to Appeal;</p>		<p>An appeal can delay payment or execution on the judgment on behalf of the successful party. In Alberta, an appeal does not ope-rate as a stay and generally parties are required to file some of security in order to suspend execution on the judgment pending appeal.</p> <p>Post judgment interest is at a statutory (low) rate.</p> <p>Appeal Books often include huge volumes of evidence that will seldom be referred to.</p>		<p>No stay of execution pending appeal with interest payable at indemnity levels unless full security posted.</p>

STEP	WORK EFFORT & PURPOSE	TIME	COST	PROBLEMS & COMPLICATIONS	VALUE TO CLIENT	POTENTIAL REFORMS
		<p>Appeal Books to be filed within 6 months, Appellant's Factum to be filed 42 days before hearing; Respondent's Factum 15 days thereafter.</p>		<p>Court of Appeal Chambers Applications are required for procedural disputes which can be a significant waste of both the court's and counsel's time and convenience.</p> <p>On the hearing of the appeal, new points are on occasion raised by the Court which have not been covered by the parties and which can lead to further delay.</p> <p>The Court of Appeal has the power to order a retrial which can in complicated cases add very significantly to the cost and delay factors.</p> <p>When Courts of Appeal reserve their decision a substantial further delay can occur pending their reasons for judgment.</p>		<p>Evidence at trial, electronically recorded, may be reviewed by the parties or the court without the necessity of preparing appeal books in the traditional sense. Arguments on appeal should be accompanied by the evidence intended to be referred to and no more. Citation and photocopying of authorities could be similarly restricted.</p> <p>Chambers applications on non-dispositive appeals restricted with no right to oral argument except with leave.</p>

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22. Supreme Court of Canada - leave to appeal required		1 to 3 years		Relatively few civil cases not involving constitutional or charter issues are granted leave to appeal to the Supreme Court of Canada (10 - 15%?).		