Managing the Mega-Case

The Honourable Mr. Justice James M. FARLEY[*],
Ms. Sheila R. BLOCK[**] and Mr. Gérald R. TREMBLAY[***]

(James Spence)

I will start this session with a personal apology for the term "mega-case", en français, "méga-causes". It is a new word, un nouveau mot mais peut-être ce n'est pas le mot juste. I thought it was a great term to describe the phenomenon of the cases which we see in court with seemingly increasing frequency which take up vast amounts of time for both counsel and for the court. However, I now understand that our highly qualified panel are somewhat bashful about this phenomenon and they may insist on speaking not about mega-cases, but only about cases that are merely very big. En tous cas, nous ne pourrions pas avoir un meilleur président pour ce groupe d'avocats experts que Monsieur le juge James Farley de la Cour de Justice de l'Ontario. Depuis la fondation de la liste commerciale à notre cour, il a, pour la plupart du temps, été responsable de la liste. De plus, il connait très bien les méga-causes.

(James Farley)

We decided that we weren't going to adhere to Jim's direction to talk about the mega-case because we thought that the mega-case was something akin to the hundred-year storm. Most of us aren't going to live one hundred years. The mega-case is the case that comes along once every ten years and wrecks everybody's life but we will concentrate more on the big case which may come along, unfortunately, with greater regularity than every ten years. What do you think is a big case?

(Sheila Block)

When we had our discussions among ourselves, we talked about big cases being ones where there is a volume of complex facts, a volume of complex issues, a number of parties, extensive production and discovery; that would all amount to a big case. A recent case, that should be called a big case in this jurisdiction, of long duration, is the *Marchand Litigation Guardian of* v. *Public General Hospital of Chatham*[1] case that Mr. Justice Granger presided over. For those of you that got to page 726 of his reasons, you will have learned that the trial lasted 165 days. It went over 20 months, another 15 months during which His Honour reviewed and read all of the evidence and read 1,100 pages of counsel's submissions. The case, he says, and this is the section of his judgment which I

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1. *Marchand Litigation Guardian* v. *Public General Hospital of Chatham* (1997), 33 O.R. (3d) 570 (Gen. Div.) [hereinafter *Marchand*].

commend to all of you, although it lasted 165 days and spanned 20 months, it should never have been that long a case. As he said, not only can the litigants not afford the financial costs associated with a trial of this length, the civil justice system cannot afford to allocate this much time to the litigants. It is unfair to other litigants. That was a case that was long because the issues were not narrowed, the facts to be proven were not determined, the method of proof was not sorted out in advance and his recommendation is that cases of that nature should have the judiciary, prior to the commencement of trial, become involved in all of those things; determining the issues and narrowing them.

(James Farley)

I think that we can probably all agree on that as being a fair definition of a big case. One thing that I should add is that you will have varying experiences across the country from locality to locality, jurisdiction to jurisdiction. Part of the views that we will be expressing and some of the suggestions we have may be appropriate for consideration in your jurisdiction or it may be completely inappropriate for consideration. That will also depend upon what is the local culture and what might the local culture develop into with some suitable education.

We have talked about managing the mega-case, that also indicates perhaps managing the case from start to finish. It may or may not, I take it, involve a mega-trial.

(Gérald Tremblay)

I would like to remind you that in Québec we have a different culture and tell a little story to help you understand how different we can be. In the good old days, Judge A. Labelle was a judge in Québec and he was, before being appointed a judge, a candidate under Premier Duplessis for the Union Nationale. He lost his election; therefore, Premier Duplessis, to be nice to him, appointed him a judge. He was a nice judge in the Hull area and at one point he was invited to attend a judges' conference in the United States. He was talking to an American judge and said, "Are you telling me that you have to go through the election process to become a judge? Well, in Québec, you have to be defeated."

What I would like to say about mega-cases is that lawyers have a great role to play and are greatly responsible in moving a normal size case to a mega-case. We have the tendency when we are over-prudent or under-focussed not to leave any stone unturned. For instance, Judge Halperin and I worked together for four years in the *Krueger*[2] case. There were seventeen interlocutory appeals and a couple of trips to the Supreme Court of Canada. As it was a shareholders' fight, the animosity was extremely high and we had to go through the drill, it was impossible to do it and it was only after four years that we were able to settle. The parties had decided to put before the court 40 years of corporate life, so you had every decision made in the 40 years, every minute of every meeting of the board, every major investment reviewed, It was endless. I am sure that we lawyers, were responsible for it all. We had to do it because we didn't have the nerve, the guts, or the strength to tell our clients, "enough is enough", If we had done so, they would no longuer have been our clients. This is a very important fact and determines sometimes what the lawyers decide to do with their cases. When we speak about case management, this is first

2. *Kruco Inc.* v *Kruger Inc.*, [1987] R.J.Q. 1071, aff'd (1987) 8 Q.A.C. 228, R.D.J. 622 (Que. C.A.).

done in the law firms themselves. If you do your homework correctly your mega-case will shrink to manageable size. Another example of a mega-case is the *Mulroney*[3] case. The *Mulroney* case could have been a trial of very long duration so why did we arrive at settlement? We arrived at settlement because, with the assistance of the court, it was managed properly. After a year the whole matter was resolved.

(James Farley)

We have discussed managing the case and managing the trial, but perhaps we should take a look at some of the other factors that might be alluded to. I think that you were talking about managing and focussing on the issues, managing counsel and, dare I say it, heretic that I am, managing the judge. In that respect, we all need to cooperate. What about focussing on issues?

(Sheila Block)

This is the single most important element in taking a case and keeping it within reasonable bounds, the case analysis that has to go on and that has to be done by the lawyers. They have to analyze the legal and factual basis of the claim and choose an appropriate theory. This is often done very poorly and is based on clients' instructions. Clients have skewed views of reality. It is done without sufficient review of the documents and the evidence and most importantly, there is no consequence if it is only done superficially; it is very often done superficially. Shaping the case through case analysis is critical because you narrow the issues and the scope of the evidence which should result in more effective pleading, more focussed production and shorter examinations for discovery. This often doesn't happen. Unfortunately, there is no need to do it at the beginning of the case because there is rarely a consequence. You have seventeen motions so you can amend your pleading and it all gets fixed. There is no accountability and query whether there is a way of having some better focussing of the issues early on with some court intervention. I don't know Jim if you think it is possible to insert another procedure which will require counsel to make the choices that will effectively limit the case and make the trial a trial of the real issues in the case?

(James Farley)

I am somewhat reluctant to add more and more rules. I think that we already have too many rules that are too detailed. Talking in terms of the big case, the case that will take up, from the court's point of view, a large amount of time at trial, it is a good cost-benefit situation to devote some time and attention to that case, perhaps very early on. You can't do that for every case, there just isn't enough judge power to give that sort of detailed care and case management to the case, but it strikes me that where you do have a large case and either both counsel, all counsel or one counsel feels that it would benefit from a case conference with a judge, that should be an open avenue to apply for. Counsel could then come in and discuss their particular theories of the case and see whether or not there could be a consensual boil-down of the issues in the case so that you could truly get focussed in the case.

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3. *Mulroney* v. *Canada (A.G.)* (1996), J.E. 97-35 (Que. S.C.) (1996), J.E. 97-226 (Que. S.C.).

(Gérald Tremblay)

In Québec, my experience has been that if you have two good lawyers, you will get rapidly to the real issues and it will work. If you have one good lawyer and one lousy lawyer then you are in trouble from the beginning of the case until the end. I believe very strongly in pre-trial conferences, and, if at all possible if the case calls for it, a judge who will take the case (as we do in oppression remedies or commercial matters) from its inception until the end. I hesitate to use the term "judge shopping", but I think the chief justice or the co-ordinator has to appoint a judge whose particular talents fit the occasion because if you have one good lawyer, one lousy lawyer and one lousy judge, then you are in deep, deep trouble.

The other question is, why are we having so many big cases right now? It is because people cannot afford to bring small cases before the courts. In Montréal the statistics are just terrible. I think there are 40% fewer actions before the court, because the cost of litigation is horrendous. The only ones left are those that have the means to be before the court and if they have the means to be before the court, they might as well go all the way and spend all of their money with each fighting the other. If you have a good judge, the judge will help you to focus and you could save a lot of trial time if you have two or three good pre-trial conferences. The habit that we have in Montréal, at least to force the lawyers to respect what has taken place in pre-trial conferences, is to prepare minutes drafted of the pre-trial conferences and sign it. "I will admit this, one, two, three and four" and that is done forever. Your signature is there and it is permanent. I have a case right now where that has been done, we have had three pre-trial conferences and when we go for the trial it will be four days rather than three weeks. It takes intelligence, devotion and a will to do it. If you have a lawyer whose instructions are to drag the case forever, he might, unfortunately, succeed.

(James Farley)

In regard to commercial matters, quite frequently we find that those are what we call real-time litigation. This is where what the judge decides will heavily impact upon the business future, if there is a future to the business or not, and then we compare that with the topsy litigation. I believe that we have had reasonable success on the commercial list here in Toronto with having cases that are real-time litigation dealt with from start to finish via one particular judge. Unfortunately, we have bogged down with what we call a "Rule 37 situation"[4] because there are a lot of large cases. Rule 37, in Ontario, provides that counsel can apply to the Chief Justice or the Chief Justice's designate for one judge to hear all matters in a case. Of course, if that is a topsy litigation, those cases can go on and on forever because it is only dividing up the spilt milk. We find that in Toronto we have an inventory of about 1,000 of those Rule 37 cases and they are just unmanageable to divide up amongst the judge power to get the cases heard. Counsel are far better off to go into weekly court.

I should share with you an anecdote with respect to my first Rule 37 case that involved Sheila. I was not a litigator, I came from the corporate side of practice and there was a scheduling situation. We dealt with the scheduling of examinations and ever helpful

4. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, amended to O.Reg. 442/97 [hereinafter *Ontario Rules*].

that I am, I think that I said, "What do we do next," and "Why can't we settle this case." Sheila very politely said, "Please butt out. I don't waste time, I am not going to waste your time, and I am not going to waste time on this case." I think that we had one more session and the case settled within a year. Sheila was right on her word, good counsel is always very helpful.

(Sheila Block)

There is one element of large cases which I don't really know if there is a solution to. Cases become larger because of the information dump; there is a ton of documentation that really has very little to do with what happens in the end at the trial. Yet that is what we spend, at the bar, most of our time doing, cataloguing, computerizing, and organizing a ton of documents. The legal fees for just managing the paper in a big case are hundreds of thousands of dollars. When you get to trial you may have a binder of fifty documents out of these thousands of documents. You will have had weeks and weeks of discovery on the huge volume and query whether there is a way to have more intelligent production in cases. This gets back to the case analysis point that actually focusses on the issues that will ultimately be there. Our requirement is to produce all documents touching the issues in the action. That is interpreted extremely broadly so counsel have reacted or overreacted by just bringing the dump truck and depositing it on their opposition. There is a great amount of tangential or relevant material that gets catalogued, compiled and copied, discovered on and categorized and the temptation is to run trials on this pre-trial process. You should be going from the top of the funnel to narrowing the issues. There is no way to stop the information dump because you will never know whether the one gem has been produced to you unless you get to see everything. You have to theory test on discovery so you are still going to have long discoveries. There should be a way, at some point, to require the compiling of those 50 documents, out of all of the thousand, and then focus the trial on that instead of all the rest. I know Jim has had some success in focussing cases once counsel have done what seems to be the inevitable, which is to go through all of this material.

(James Farley)

A large trial of 25 or 30 years ago might have stretched over several weeks. Today, that is considered to be a little larger than average. The average trial now lasts five days. There is a functional problem as we have been blessed with the photocopier machine. The original sin does not start with counsel, it starts with the company that now is able to generate a lot more paper and save a lot more paper. The company has various departments reporting to various people and you get a multitude of paper. When we look at the hourly rates for counsel that are involved, it is far easier for them to say "photocopy everything" than to go through it all. We have to take a look at what is the true production requirement, which is that it has to be relevant material. Sheila struck it on the head when she said it has been given too liberal an interpretation. I think that the bench should show some leadership with respect to this matter. If we don't think that what is happening at the present time is a good resolution, or if an objective observer came along and said, "What is this madness that we are all involved in?" the judges have to stand up and be accountable. We have the doctrine of, not only relevance, but of semblance of relevance which people have interpreted as being less than relevant. We have to do something with respect to this matter. The judges have to take a stand with respect to admissibility of evidence in civil cases. Who knows the rules of evidence now? If we know them, do we regard them or do we have that awful situation where you hear : "I won't make my ruling

now but I will hear it, then I will reserve on it, and then it may just go to weight." The matter is either admissible, in which case it can be weighed, or it is inadmissable, in which case there is no weighing. Unfortunately, in a trial, when one counsel regards relevance as important, the other one doesn't, and there is no discipline from the trial judge. You are in the awful situation that good counsel are forced to try and counteract that by putting in all sorts of irrelevant evidence themselves. How can we combat that?

(Gérald Tremblay)

This is extremely difficult because in Québec, our Court of Appeal has encouraged trial judges to take more and more evidence under reserve and the result is a bit difficult with respect to the management of the case. As was stated, if there is a whole segment of the evidence in chief which is under reserve, you have no other choice but to put your defence under the same reserve, you have another two or three days under something which the judge will ultimately say is irrelevant. Our problem in Québec has been interlocutory appeals which have stalled the proceedings. The Court of Appeal encourages you to take as much under reserve as you can. With respect to good case management this is not good. I would rather know where I am going in the middle of the trial. You have judges that will take 75 objections under reserve and never render any judgment on them. They will take the global approach and say "case dismissed". There is a judgment of an old judge of Québec (he is now dead so we can speak of him), in which he said, "Whereas the evidence has been adduced, whereas I have weighed it, whereas the law is clear on the subject, action dismissed." I personally prefer to know why I lost. I don't know how the majority feel but there is a debate which is ongoing on this matter. It is true that interlocutory appeals delay the process but it is also true that it is very difficult to manage a Superior Court trial or a trial at the Trial Division if you don't know what is in and what is not in by way of evidence. (James Farley)

Do we have to go to trial or can a big case be managed in such a way to have a resolution before trial?

(Sheila Block)

Yes, it clearly can. In a commercial case the important elements are that after you have allowed people to review the other side's production and facts and have had access to their witnesses, and vice versa, and both parties have focussed their case, case management at this stage can be very helpful. You have to have a strong judge. It is a disaster in the hands of a mediocre judge or an erratic judge. If you put your best judges forward and empower them to force counsel to focus their cases, allow them to conduct mini-trials, to provide candid, thoughtful, private assessments to each side of what they think their chances are on the various issues, insist on high-level client involvement (because often there is a whole bulwark of counsel, outside counsel, in-house counsel between the decision maker and what is happening in the case) and have the client participate in this process, I think you will settle 99% of the cases. In a commercial setting most people want to get a resolution, they don't like these cases that go on forever. They don't like spending millions of dollars, because that is what it is in this day and age, on unproductive activity on a "gambler's choice" which is what many cases involve because you can't predict the outcome. I think that if you involve good judges with high-level clients, the decision makers in the companies, there is a great impetus to try and settle the cases.

(James Farley)

Under those circumstances, it would be a good idea if a judge were involved in a settlement conference. The judge must verify in advance that the parties who will be available at the settlement conference will have the authority to settle and also that the person who can settle is someone who, hopefully, will be independent of the alleged bad guy at that particular client; the one that may have their head in a sling if they lose the case.

(Sheila Block)

That is often a very important factor.

(Gérald Tremblay)

With respect to pre-trial attempts to settle, the involvement of the judge is almost judicial mediation. It depends on your own client and on the judges. Some judges are very very forceful, they will shove settlement down your throat whether you like it or not and they do it in funny ways. You remember Judge Masson, who is also dead, he would call you *ex parte*. He would say, "Listen, I spoke to your friend and I am sure I can't talk him down." You start a trial with a draft judgment and you might as well settle. Henry Steinberg (he is also dead), was also very good at trying to convince people to settle. One of his techniques was quite unique because he would have two lawyers in front of him and he would tell the plaintiff's attorney, "Well, I read your statement of claim, you don't have much of a case." He would then look at the defence attorney and say, "By the way, I read your defence and you don't have much of a defence either." That was one of his favourite lines. There was also a case where, with the consent of the parties, Henry just descended from the bench, sat in the middle of the place, tried to mediate for a couple of days (two or three days late in the evening) and went back on the bench to make a couple of rulings, back on mediation and finally the parties settled. If we want to go that route, we have an experience that probably you were told about, the experience of Gontran Rouleau. Mediation was successful to a reasonable degree, however, sometimes it is difficult because the reason you are there is that it cannot be settled. You must have the intervention of the judge in the presence of the parties in order that the message not get distorted.

When the clients hear from the judge the value of their position they think twice, and often, the following morning they come back with different instructions for their lawyers. Whatever the courts can do to help to settle, so much the better. The problem is that if the courts get too involved in the quasi-mediation process it is difficult for the parties to believe that when the judge goes back on the bench he will have a totally neutral mind. There is a line to be drawn there which is difficult sometimes.

(James Farley)

In Ontario the general practice is that it is inappropriate for a judge to get involved in settlement discussions in the middle of a trial, absent very unusual circumstances. We do have, in the larger centres such as Toronto, the great benefit, when we conduct trials, of having other judges available who could be called in to do a mid-trial conference.

I want to discuss the impact with respect to the clients themselves. There are two areas that I would like your views on. Firstly, does the use of inflammatory language in pleadings and affidavits really prove the point against the "bad person" on the other side and secondly, do you have any experience with respect to settlement conferences at which the clients are there and able to talk "client-to-client" in open session?

(Sheila Block)

There is a tendency to use pleadings for purposes other than just informing the court. Lord Templeman in the *Ashmore*[5] case says that pleadings should be chronological, brief, consistent, should define the issues and leave the judge to draw his own conclusions. We rarely plead like that. We are pleading for the board of directors and we are pleading for the newspaper. In a big corporate case you are pleading in a way that is going to try and influence people other than the judge. To overstate your pleading is a short term strategy because it gives counsel on the other side the ability to prove the highly inflammatory level of pleading that they have asserted in discovery. I think that pleadings are rarely done the way Lord Templeman advises us to do them and they are more often done for an audience other than the court.

(Gérald Tremblay)

There is nothing worse than having libelous proceedings. If you insult the other side and make statements which go against the character of the other side and which are not necessary, you may be sure that you are escalating the war. The other side will want a judgment just to show that those statements were not true, to disprove them. The bar should play a role and the judge also because they have the power to strike libelous, useless allegations. One day I was before the Court of Appeal and Mel Rothman was presiding on the bench. There was a lawyer pleading a case and he said that the trial judge was wrong in his judgment, but the language used was "on that particular afternoon, that judge was off the wall". Mel is a very polite judge and he said : *Mr. Counsel, I don't think that you are advancing your case by telling this court that the trial judge was off the wall. You probably mean, you undoubtedly mean, that you respectfully disagree with his finding. Is that what you mean counselor*? The tone went back to normal. If this happens, it is up to counsel to try and play that role of "tone down the vocabulary please, tone down the language". Name calling will never advance your case.

(Sheila Block)

On your second question whether we have had experience with clients meeting directly with the opposite party in one of these conferences and whether that has an effect, it very often does. There is a lot of demonization and fiction that surrounds each side of the case and when the parties actually sit down with each other it often is a gesture of apology or empathy that makes all the difference. This should be done by counsel, and responsible counsel will do it. Where the court is required is when you have one side that is willing to do it and the other side that is reluctant or is represented by someone with a different motive other than finding a resolution to the case. That is not to say that there aren't cases that have to go to trial; there obviously are. In the vast majority of commercial cases however, you don't need a judgment, you need some sense brought to the issue, some connection between the two combatants, and not through a battery of lawyers. The

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5. *Ashmore* v. *Corporation of Lloyd's*, [1992] 1 W.L.R. 446. H.L.J. No. 16 (QL).

court can be very helpful in a pre-trial conference or in a case management conference by requiring the parties to be there.

(James Farley)

I suspect that not only is it difficult in a lot of major commercial litigation, even for large companies, to accept the fact that the litigation may involve legal and expert's fees totaling in the millions of dollars but also that the longer the case goes on, the longer there is business uncertainty. It may be that the corporation is prevented from entering into a particular field of business while the matter winds up through the trial process and the appeal process. There is a side benefit to coming to a consensual resolution as early as possible. If we don't go to a consensual resolution, is a summary judgment motion effective in a large case?

(Sheila Block)

Usually not, because it is usually unsuccessful. We are all conditioned, both the bench and the bar, not to make those decisions at the early stage. Even if you have a summary judgment motion after a lot of production, discovery and focussing of the issues and you really could narrow the issues at that stage, we are all conditioned to say it is too early, who knows what will happen at trial. Query whether there is a way, after you have been through the wide part of the funnel, to at least narrow the issues through some kind of procedure and maybe as a fallout of a failed summary judgment you can focus the issues that should go to trial.

(Gérald Tremblay)

In Québec, we don't have exactly the same type of proceeding but one thing that could be done is a motion to adjudicate on a question of law during the trial. Suppose you have a statute of limitation question, or something that could be decided now and which will tell you how to conduct your case afterward, but the problem is that it takes the consent of both parties. A judge at the pre-trial conference could convince lawyers to do it, he could say, "listen, let's decide that issue". Right now in Québec, the only thing we can do (it is a recent amendment to the Code) is to split liability and determination of the damages. Before, this was totally impossible, you had to render one judgment. The motion to adjudicate on a question of law was always present in our *Code of Civil Procedure*[6] but both parties have to agree on a certain set of facts and submit it to the court and then say, "If those facts were true, what would be the judgment?" If you have two or three legal issues that you can get out of the way, that will be very helpful. The motion is not used that frequently but a judge could persuade the lawyers that it is a good thing to do during the pre-trial process.

(James Farley)

A lot of commercial litigation involves experts. What is the role of the expert and can that role be improved?

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6. Art. 448 C.C.P.

(Sheila Block)

The expert ends up being part of your team. Those of you who have watched experts on each side earnestly assert the positions of their parties may find them of little use in helping you decide the case. The way we use experts is probably a misuse of their role because they end up being more advocates. In the *Marchand* case Justice Granger decried the practice of unsigned reports being given to counsel, discussions occurring, and the report being finalized. This happens all the time. In fact, that is the only way it happens, as far as I know. His suggestion was to make them sign a report and then resubmit further reports. If, when you get the report, you say that you have misunderstood the facts, then you have them send in another report with the correct facts, if there is another opinion, alteration or change, then you have five or six different reports from the experts but *you*, as counsel, wouldn't have been involved in preparing those reports. This is not going to happen unless the jurisprudence changes a great deal. Often we are not getting the "bang for the buck" and often it is very serious dollars that you are throwing to the expert's side of the case. You are not getting the benefit because judges are very jaded about hired evidence, and this is how they look at it. It is a big issue that we should perhaps address a little more creatively than we have until now.

(James Farley)

Sometimes, in cases, I find that the experts come in and they appear to have completely diametrically opposed views on the matter. As an example, one expert comes in saying that the loss is one thousand dollars, and the other one comes in saying the loss is ten million dollars. When it gets distilled down, eventually, what you find is that there is probably a difference of opinion or a difference of approach on three of the ten assumptions being used. What about the possibility of the judge requiring that the experts meet before the case, discuss where they are apart and where they are together, and report on those differences in a single chart?

(Gérald Tremblay)

It would be very helpful, and although it is not done very often, it should be done more often. I have a case now where Chief Justice Deslongchamps is doing the pre-trial conferences and he has ordered precisely that. He told the expert : *This is ridiculous. You seem to be on two different planets. Sit down together and try and find some common ground*. With respect to experts we have all had very bad experiences. It is, in fact, an additional lawyer that pleads the case for you. An American judge has said that : *experts produce junk science for court consumption. They advance all sorts of theories that they would never ever dare put into one of their scientific magazines because it would not pass the peer review test.* Unfortunately, it is a business where I think the terms "lack of integrity", or let's say "lack of objectivity" apply. I don't know what should be done about it, I don't know if there should be an association like the bar to try and improve the standards, but it is very, very disappointing to have members of the same profession advancing theories that are totally opposite in the same science. They are paid to do that.

(James Farley)

Experts in theory, according to the jurisprudence, are supposed to be objective and neutral and in theory, the judge should be able to close his eyes and not be able to tell which expert is on for which side. In advance of the case, that is a helpful reminder, more so than during the case. Let's assume that notwithstanding all of the best efforts and management in the world a case does go on for trial. Cases do have to be tried, it is

senseless to think that all cases can be managed to a resolution without a trial, many do have to be tried. How can we develop mechanical aspects that will make the trial go along a little better? One of the things that I am constantly amazed at is that counsel start into a trial and assume that the judge knows everything about the case. If you have read the pleadings sometimes you might get an idea about what the case is about but more often than not, you won't. They start talking about Tom, Dick and Harry and assume that the judge knows who Tom, Dick and Harry are. Of course, counsel who have been living with Tom, Dick and Harry for the last five years know everything about Tom, Dick and Harry including their hat size but the judge doesn't know who they are. The object of the exercise at trial is to persuade the judge that your side has the better case. The easier that counsel can make the persuasion of the judge, the better. We have devised in the commercial list, and somewhat adopted in the general list here in Toronto, a trial requirements memorandum or trial management form that has to be filled out by counsel. That involves setting out such things adapted for the case, such as a chronology. Events usually happen one after the other. They may not happen because something happened in the past but it is a lot easier to understand matters and put them into relation if you have a general chronology. Even if the parties disagree on that chronology you can have a common chronology so long as it is indicated that there is disagreement on matters and they should be neutrally put, it is not supposed to be persuasive, although subtly it can be. There should be a cast of characters reference with some indication as to what particular role or function "Jack" had. Jack is the chief executive officer of the plaintiff. Then a compendium. I refer you to the case called *Saskatchewan Egg Producers*[7] in which the last couple of pages indicated what I thought a compendium should be. When you look down at counsel and see those mammoth piles of paper with ten yellow stickies marking the pages that they will refer to, why not photocopy those ten pages, identify them and highlight what it is out of those pages that is going to be relied upon? The only thing that the case is going to be decided on is those ten pages.

Similarly, with respect to case law, why put in 400 pages from the Supreme Court of Canada making it difficult to find the page that is being referred to and it is too heavy to carry around? It is very persuasive for me to get a ratio out of a case that is highlighted. Sometimes, it is a little difficult trying to find the ratio but it is very helpful to have a ratio that you can rely on. These are some of the features that go into a compendium. The trial requirements memo is very helpful and also a list of the witnesses and the estimate of times that they are going to take in direct examinations and cross-examinations. They are estimates only, but they are pretty good milestones so that you see whether or not the trial is proceeding along appropriately. It also eliminates the situation where counsel come in and they say to the trial co-ordinator or to the signing judge, "This will be a two-week trial Justice Spence." All of a sudden, Justice Spence is re-arranging his summer vacations for the next three years to squeeze in the rest of this case because it suddenly mushrooms into a very long case.

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7. *Saskatchewan Egg Producers Marketing Board* v. *Ontario Minister of Agriculture and Food* (1993), O.J. 434 (Ont. Gen. Div.).

Now, how do we deal with the problem that you can't prepare a case too far in advance, you can't be stale, you can't prepare the case and then put it on the shelf and say, "Okay judge, we are ready now" and the judge says, "We can squeeze you in in six months?" How do you have a happy coincidence of meeting so that you are fresh in the case, you haven't over-prepared, you haven't wasted time and you can still get a trial date?

(Sheila Block)

The trial date I will leave to you. I can tell you that on a big case you are going to be focussed on it almost full time with a big team of people for some months before the trial date. Presumably you can get a trial date which someone will actually stick to. I am all for active trial management. I think that counsel should be required to exchange a written summary of their case and it should be page limited, even with a huge case. If you require each side to set out, in 50 pages, the essence of their case and do that two months before the trial then a month later they can put in a reply, which would be much shorter such as ten pages, answering so the trial judge would have the context and would know who Tom, Dick and Harry are. The judge would also have the chronology, the dramatis personae and the written argument. A month before the trial I would require counsel to exchange written evidence of what their witnesses are going to say. On the expert side, to exchange their written expert reports and have an opportunity for reply not ten days before the trial as our Ontario Rules require, but a month or two. When you get to the trial, I wouldn't eliminate examination in chief because I think it is unfair to a witness to throw them in and just have them lacerated right from the starting gate. I think you should allow counsel, in an hour or two, to bring out the high points of their evidence. Not days and days of it, but just in a relatively short period of time, acclimatize the witness and get the story out. Then have cross-examination which should not be long, meandering, unfocussed and taking forever. I am dealing here with a tension between justice and efficiency, but I would encourage judges to require obscure points on cross-examination to be justified in the absence of the witness so that hours and hours are not wasted. I would also encourage appellate court judges to be realistic about the challenges facing trial judges sitting there for days on end with nothing really happening in substance in relation to the issues. Counsel and the court should work together to devise strategies for each particular case to make it efficient. I would always have someone standing by to do mid-trial settlements in a big case because there are often points at which the parties tire of it but can't get out of it and they need some help. I have tried cases like this and it works. It doesn't take that long, perhaps a couple of months instead of six months on a big case. If counsel and the courts work together it can be a very effective way of managing a big case.

(Gérald Tremblay)

I will be extremely honest, to manage a big case, you need a good junior. The second thing is that you have to allocate or to manage the time in your week so that you are not dead after three weeks. Pleading to the judges, on behalf of my profession, you have to give us some breathing space and also, you have to be ready to bend the rules. For trials of long duration perhaps four days a week rather than five. In other jurisdictions you finish at 1:00 or from 9:00 a.m. to 1:30 p.m. and then continue the next day. If the judges give some breathing space it helps because counsel can speak and try to work on admissions, at one point they can even start talking settlement. If you have them in front of you from 9:00 in the morning until 9:00 in the evening, you are not doing anybody any service. So, I think that the co-operation between the court and counsel is necessary. You

have to bend the rules especially with respect to witnesses. Nothing makes us feel more ill-at-ease than to see somebody sitting there hour after hour, for days, just because you want them there so that, should there be 5 minutes left after a witness is finished at 4:30 p.m. or 5:00 p.m., the judge will not be upset because no other witness is available. At one point you have to bend the rules a bit and say, "Listen, we may lose 15 minutes but that poor lady has been waiting for 5 hours," or something similar. Generally speaking, you are all doing it. Do things off sequence. Even if the case in chief is not over, you regroup the experts together and you do it in one week. This way, everything gets done, even if it is off sequence. All of these things have to be worked out. You have to have some patience with lawyers and counsel because you know, from your own past practice, how tough it is in the office to continue to manage a big case, manage some sort of a life and also some presence with your partners in your firm.

Sheila used the word "mediocre" about certain judges and I will add this to their defence. One morning, Spiro Agnew was being questioned on ABC Television about the appointment of Abe Fortas, who was supposed to become Chief Justice. I heard the anchorman ask him, "Mr. Vice-President, don't you agree that Abe Fortas is a very mediocre judge?" Spiro said, "Listen, we are in a democracy here, a lot of Americans are mediocre and they are entitled to a representative on the bench."

(James Farley)

The one thing I would like to say to counsel and judges is that there is too great a reluctance to use the power that exists through inherent jurisdiction. I would highly commend to you the case of *Montreal Trust Co.* v. *Churchill Forest Industries (Man.) Ltd.*[8] which sets out the scope very succinctly and refers you to several other papers. I think that you do have inherent jurisdiction and you shouldn't be hidebound by the rules. Secondly, when you do get a big case, we shouldn't think that the big case has to fit within the rules, *per se*, you can use your inherent jurisdiction. It is probably much better to manage big cases that way than to try to adjust the rules to accommodate the big cases.

8. *Montreal Trust Co.* v. *Churchill Forest Industries (Man.) Ltd.*, [1971] 4 W.W.R. 542, 21 D.L.R. (3d) 75 (Man. C.A.).