BC Justice Review Task Force

Exploring Fundamental Change

A Compendium of Potential Justice System Reforms

July 2002

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1. Introduction

The Justice Review Task Force has recently been convened. The Task Force consists of the following senior representatives:

- BC Supreme Court – Chief Justice Donald Brenner
- BC Provincial Court – Chief Judge Carol Baird Ellan
- Law Society of BC – Richard Margetts QC
- Canadian Bar Association – Peter Leask QC
- Ministry of Attorney General – Gillian Wallace QC
- Ministry of Attorney General – Jerry McHale QC

The objective of the Task Force is to identify a wide range of reform ideas and initiatives that may help us make the justice system more responsive, accessible and cost-effective. To this end, the Task Force provides a forum for its participants to exchange information, engage in mutual consultation respecting proposed administrative, procedural or program changes, and coordinate initiatives where appropriate.

As a first step, the Task Force has developed a list of potential justice system reforms that may be worthy of further exploration. The list is drawn from numerous reports and studies published from around the world over the last 5 or 10 years respecting problems in the civil and criminal justice systems.[1] Many of these reports are similar to one another. The same problems tend to be identified in various common law jurisdictions, and there is considerable overlap in the solutions offered and the recommendations made. The list presented here also includes reform ideas that are presently being explored or are being undertaken by one or more of the participants on the Task Force.

It is important to note that the presence of any particular initiative or topic on this list does not mean that it is endorsed by any one or all of the participants on the Task Force. In fact, some of the ideas raised in the paper have been considered and rejected in the past by one or more of the Task Force participants. However, for the purposes of these preliminary discussions, the Task Force members wish to ensure that all possible options are at least identified and available for

[1] The main reports are: Access to Justice: The Report of the Justice Reform Committee, B.C., 1988; Civil Justice Review, Ontario, 1996; Systems of Civil Justice Task Force Report, Canadian Bar Association, 1996; Lord Woolf's Report on Access to Justice, England, 1996 (http://www.lcd.gov.uk/civil/finalfr.htm); Managing Justice: A Review of the Federal Civil Justice System, Australian Law Reform Commission, 1999 (http://www.austlii.edu.au/au/other/alrc/publications/reports/89/index.html).

discussion. The list might be thought of as an “issues list” where no commitment or intention to proceed is implied. Rather, the objective is to create a vehicle for a comprehensive dialogue about improvements in the justice system.

In circulating the document, the Task Force hopes to generate a discussion among people with an interest in the justice system about the reforms on the list. The feedback we receive from the public and the profession will help us to select and priorize reforms for further exploration. As a result of the responses to the paper, certain items may come off the list. And, of course, the list is not exhaustive and we hope that individuals and organizations will suggest additions.

As it proceeds to explore certain reforms in more detail, the Task Force will be mindful of the importance of benefiting from the expertise and gaining the support of all those who participate in the justice system, not just those represented on the committee. To that end, the following principles will guide our work:

- Those with a significant interest in the issue being explored should be involved in the process.
- Involvement should be meaningful. Those who are interested in being involved in the discussions should have access to relevant information and the opportunity to participate effectively throughout the further development and implementation of any reform initiative.
- The process for development of the reforms should be flexible. How a plan is developed may vary with each initiative.
- The people involved in designing the plan may be as important as the design itself. Plans for the development of a particular reform idea should be designed with, not for, those who use or are affected by them.

The Committee notes that the Provincial Court is in the midst of a Judiciary Planning process, which was the subject of a judicial conference in May 2002, and which encompasses many of the current issues facing the Court in its delivery of justice. This consultative planning process is expected to be completed later in the year, including recommendations for Provincial Court reform, and recommendations relating to some of the areas mentioned below.

We welcome your thoughts and suggestions.

Please forward written comments to:

Justice Review Task Force

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OR e-mail comments to:
info@bcjusticereview.org

Please see the Justice Review Task Force website at:
WWW.BCJUSTICEREVIEW.ORG

2. Mediation

2.1. Mediation and Other Dispute Resolution Processes

Many reports have concluded that early, consensual resolution of disputes holds the greatest promise for increasing access to justice. For example the first recommendation in the CBA's Task Force Report is that every jurisdiction 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 the completion of examinations for discovery; (p.33)

Mediation models range from purely voluntary to fully mandatory, with varying degrees of compulsion to participate in between. Under a voluntary mediation system, parties are under no coercion to participate in the mediation process. Studies have shown that often voluntary mediation programs do not generate sufficient case volumes to have any real impact. There are many reasons cited for this including users' unfamiliarity with the process and lawyers' reluctance to refer clients to untraditional processes.

Many jurisdictions have responded to low voluntary uptake rates by requiring some parties to participate in a mediation session. The term "mandatory mediation" is used to describe a diverse range of programs and processes. All however have the following in common:

- exposure to the process, not settlement, is mandated;
- only one meeting is mandatory; and
- certain cases are exempted from even the most stringent obligation to mediate.

Mandatory mediation models exist on a continuum from the highest to the lowest level of compulsion:

Mandatory Mediation with opt out provisions - In models with the highest level of compulsion, parties may opt out only with leave of the court. Grounds for exemption can be specifically enumerated, or it can be left for the parties to satisfy a judge or administrator of "compelling reasons" or "good cause" for exemption. The "opt out model" has been adopted in Ontario, Quebec and Saskatchewan.[2] Its main advantage is that it results in the highest take up rate and

[2] Although it should be noted that mediation session in Saskatchewan is often more like an information session.

so has the greatest impact. Its main disadvantage is that it can, depending on the bar's familiarity with mediation, attract the most resistance from judges and lawyers. After completing a two year pilot project in Ottawa and Toronto, Ontario has expanded this model to Superior Courts across the province. Mediation in Ontario occurs within 90 days of the close of pleadings and settlement rates are 59%.

The only mandatory model of this nature in B.C. is in the *Court Mediation Program* presently operating in four Small Claims Court registries, where construction cases as well as a specified number of other cases are referred to out-of-court mediation on a mandatory basis. Settlement rates are 50-56% depending on the type of case.[3] The program complements the Court's program of judicial dispute resolution through mandatory mediation for all small claims cases except non-injury motor vehicle liability claims, which has similar settlement rates.

Presumptively mandatory mediation - At the next level of compulsion, parties are obliged to mediate but liberal opting out provisions apply. For example, parties may opt-out by joint agreement. The CBA's *Systems of Civil Justice Task Force* recommendations are consistent with this model. The Task Force recommended establishing a requirement that litigants certify "as a pre-condition for using the court system" that:

- they have actually attempted ADR, or
- the circumstances of the case are such that participation is not warranted, or
- participation in such a process has been considered and rejected for sound reasons.

This model attempts to reverse the traditional approach where cases are managed as if they will be litigated. Instead, the starting point is an attempt to resolve the dispute collaboratively, with litigation as the backup. The "referral model" is seen by some as the one which best balances concerns related to coercion to settle, procedural fairness, and service quality with the desire to improve access to justice and achieve efficiencies in the court system. It does not attract as many cases to mediation because it is relatively easy for parties to avoid mediation.

Mandatory by Order of the Court - In this model, mediation is mandatory when ordered by a judge. This is the model in place in a number of U.S. jurisdictions. This includes Los Angeles and

[3] Voluntary cases in the program settle at a rate of 65%. 91.1% of all participants (voluntary and mandatory combined) say they would want to mediate again. Numbers based on >2000 cases.

Florida, where hundreds of thousands of cases are ordered to mediation each year. The weakness of this approach is said to be its lack of predictability and consistency.

Notice to mediate – A "party-driven" quasi-mandatory model by which any party to an action can compel the other parties to attend a mediation session. The Notice to Mediate is unique to B.C. and was implemented as part of a more gradual, less dramatic approach to introducing mediation than more fully mandatory models. Some of the arguments for using that approach were:

- It increases the use of mediation considerably faster than a voluntary model, but at a more moderate pace than a fully mandatory model;
- It is simpler and less expensive to implement and to administer than a fully mandatory system because the mediated cases self-select and need not be tracked in any way by the registry unless a problem arises;
- Consultations with the bar suggested that it would be used most by lawyers already familiar with the mediation process, which should result in more productive sessions and higher settlement rates;
- A slower, steadier growth in mediation would allow the mediator community to grow more gradually and rationally, which might in turn reduce the likelihood of unskilled mediators rushing in to meet a surge in demand.

After more than three years of experience with the Notice to Mediate we can make a number of observations. First, its rate of use varies significantly with case type. For example, the legal community was quite accustomed to insurance mediation, particularly personal injury mediation, before the Notice to Mediate came along. The Notice in that area built on the existing foundation and has been used in personal injury matters more than 4600 times (currently about 170 times each month) and the rate of use is climbing steadily. We also know that many additional personal injury mediations are conducted each month without serving a Notice to Mediate. On the other hand, the Notice is used significantly less often in general litigation (about 35 times per month). The general litigation rate of use is climbing, but not rapidly. Settlement rates for personal injury mediation using the Notice are between 75% and 85%

In this province, there are a number of mediation programs in place reflecting the range of models mentioned above. The Provincial Court has forms of judicial dispute resolution on either a mandatory or court-referred basis in all subject areas. These have proven successful in early resolution of all types of cases, including family, child protection and small claims. The Supreme Court has the Notice to Mediate Process, and a new family case conferencing process for family

matters was implemented on July 1, 2002. However, arguably more could be done to expand the use of out-of-court mediation in Provincial Court cases and to explore other forms of dispute resolution processes in the Supreme Court, for example:

2.1.1. Mandatory mediation pilot in Supreme Court

Voluntary models, and even the general Notice to Mediate, have not produced high volumes of mediated cases. Every Canadian jurisdiction that has tried a mandatory model in a superior court has stayed with it. A plan could be developed to pilot such a model for commercial cases in a moderately sized registry like Victoria.

2.1.2. Move the Notice to Mediate process from regulations to the Supreme Court Rules

One of the reasons for the slow uptake on the Notice to Mediate (General) may be a lack of knowledge about the process within the Bar. Perhaps establishing the Notice to Mediate in the Supreme Court Rules would help the process gain wider exposure and acceptance.

2.1.3. Expand the Notice to Mediate to family law

Many family practitioners have called for the expansion of the party-driven Notice to the family area in the Supreme Court. While the issues of power and violence in family cases would have to be addressed, this option is worth exploring. In fact the Ministry is moving in this direction.

2.1.4. Increase non-judicial child protection mediation

The Dispute Resolution Office of the Ministry of Attorney General and Ministry of Children and Family Development are piloting a mediated meeting between parents and social workers, referred to as a “facilitated planning meeting”, in Surrey. All indications are that the program is very successful and could be very effective in other locations. A formal evaluation will be completed later this year and will be available on the Ministry website.

2.1.5. Increase non-judicial Small Claims mediation

The Provincial Court Mediation Program ("CMP") mentioned above provides an opportunity for trained but inexperienced mediators to practice mediation skills in a high quality practicum environment. Participants in the program take part in 10 Small Claims Court mediations of approximately 2 hours each. Practicum mediations are scheduled in the Robson Square, Surrey, Delta and Nanaimo registries. These mediations are supervised by mentors who assist the mediators to prepare for and conduct each mediation, and provide feedback following each mediation. Mediators who have completed the practicum can apply to be on the Provincial Court (Civil) Mediators Roster. Mediators from the Roster are paid $50 to conduct court based mediations in the Robson Square, Surrey, Delta and Nanaimo registries. The Ministry of Attorney

General fully funds the CMP, which is run by an independent society. The CMP currently exists in 4 registries. The cost per case of expanding this program to other registries would be very low. The Ministry is considering a proposal to expand the Program to other registries and other types of small claims cases.

2.1.6. Create a duty to canvass ADR options

The Law Society could adopt and insert into the Conduct Handbook the National 1999 CBA Resolution: “Legal counsel has a continuing obligation to canvass with each client, in a fully informed manner, all available dispute resolution processes.” Further, and more generally, the Law Society could insert in the Rules and Handbook language that expands their application to dispute resolution processes generally, and to mediation specifically. The Handbook and Rules could endorse collaborative approaches to dispute resolution as an element of good advocacy. Given the increasing numbers of self represented litigants, particularly in Provincial Court, this option would be at best complementary to other means of encouraging early resolution.

2.1.7. Institute Settlement Days

Some jurisdictions make senior counsel available to meet on a without prejudice basis with counsel to family (and sometimes civil non-family) disputes with the purpose of facilitating settlement. In some jurisdictions this service is regularly and continuously available. In other jurisdictions, a period of days or weeks will be set aside with a major focus to steering unresolved cases into a forum where cases are resolved by peers who offer their services on a pro bono basis.

2.2. Appellate Mediation

Mediation has been introduced in all of the U.S. federal appellate courts and in more than a dozen state appellate courts. The focus of many appellate court ADR programs is to encourage or require counsel for the parties to discuss settlement at a conference facilitated by non-judicial court employee or other third party neutral.

Although these lawyer neutrals have different titles, their role is primarily that of a mediator. Appellate courts vary in their approach to mediation. A conference is usually held before the filing of appellate briefs and, in nearly all cases, before oral argument. Local court rules or procedures identify the criteria each court uses to determine whether a case is eligible for the program and whether a conference should be scheduled.

A report on a two year pilot program in the California Court of Appeals concluded that mediated cases are less costly, significantly reduce resolution time, and lead to a high degree of use/ satisfaction. The report found that 43% of the appellate mediations resulted in settlements.

Lawyers participating in the pilot estimated a net savings of $6.2 million for their clients. The report also noted that the process was much faster, with time to resolution going from 14 months for all appeals, to 3.9 months for mediations. Over 80% of the parties and their counsel said they would participate in the process again.

In Canada, appellate mediation has been in place in the Quebec Court of Appeal since 1997. When an appeal is filed in a civil, commercial or family dispute, the Court offers the parties an opportunity to meet with the judge for a mediation session. The session lasts an average of 3-5 hours and if the parties settle, they draft an agreement which they then present to a panel of the three judges of the Court who confirm the settlement by judgment. According to court statistics, the rate of success in cases in which there is a mediation is around 95% and civil matters and 80% in family matters.

3. Pre-Court Options

3.1. Point of Entry Information for Civil Cases

Many reports argue we need to increase the public's access to information about the justice system, and the dispute resolution options available to them within that system. That information needs to be available before or at the time a person initiates an action. Many jurisdictions are looking to technology to help them to achieve their goals in this area. The Ministry of Attorney General's Family Justice Website is an example of the way in which the internet can be used to disseminate legal information widely.[4]

A variety of justice system participants have provided legal information and summary advice services over the years. These have included print materials produced by the Ministry, web-based material produced by the Ministry and the Legal Services Society (for example, the recently launched Family Justice Website), the referral service provided by the CBA, summary advice provided by the Legal Services Society or from the program workers delivering the information and education programs of the People's Law School or the Law Courts Education Society. These resources have historically been highly valued by both users and those who assess such programs. BC justice information and education resources have been innovative in responding to emerging needs and identifiable gaps in service.

In respect of civil matters, other jurisdictions, particularly in the United States have been developing and piloting new responses to ensure that the users of the civil justice system are better informed about what the courts can, or cannot, do for their disputes. Other jurisdictions, for

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[4] http://www.ag.gov.bc.ca/family-justice/index.htm

varying reasons, have promoted new ways to maximize the levels to which civil justice system users are informed and educated. Partnerships with other players in the justice system (professional associations, educational institutions, public/private/non-profit groups) are encouraged, coupled with a new emphasis on the user finding his or her own way. What has been missing in B.C. is a comprehensive and integrated strategy for information delivery that involves all justice system participants.

Some examples of information initiatives undertaken in other jurisdictions are:

3.1.1. Court-based assistance centres

This includes self-help brochures, use of computers and one-on-one assistance from both staff and volunteers. Such innovations are sometimes termed "Court Concierge Desks" or "Court Triage Units". In some U.S. jurisdictions, this role is performed by volunteers. There is a model for a similar type of volunteerism in BC. Under the *Provincial Court Act*, municipalities can appoint family court committees with a statutory role to provide assistance to litigants in individual cases.

3.1.2. Enhanced on-line self help

This can be achieved through court websites which not only have information screens but which are interactive in collecting client information and capable of performing calculations or customizing legal documents. Documents can be downloaded and printed and after signing they can be filed with the court.

3.1.3. Redesigned court houses and court process

The layout of the building, information on walls and computer monitors themselves create the learning environment for the self directed civil justice system user.

3.1.4. Simplified forms and procedures

Simplified forms appear to benefit everyone. Clear information about the court process and its alternatives are essential, especially if unrepresented court users are expected to determine their options and pursue them on their own.

In deciding future directions in this area, it may be helpful to monitor a current initiative of the Canadian Forum on Civil Justice,[5] the organization set up by the CBA and the University of Alberta Law Faculty to follow up on the 1996 report. A research project is getting underway at the

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[5] The Canadian Forum on Civil Justice was established by the Canadian Bar Association at the University of Alberta Law Faculty to implement a wide range of recommendations flowing from the 1996 Systems of Civil Justice Task Force Report. See their Web site at: http://www.cfcj-fcjc.org/

forum to explore how the public most effectively learns about, and can have a voice in, the civil justice system.

There has been some work in BC both to develop self-help material and to simplify forms and procedural rules, particularly in Provincial Court. Plain language forms and pamphlets are available at court to assist Small Claims litigants. Many Provincial Court family forms have been simplified as well. Until a few years ago, Family Court Counsellors were available at court as well to assist unrepresented parties through the process. These have been replaced with Family Justice Counsellors, who are available to assist family litigants at 30 sites in the province. There is a continuing need for some form of on-site information for increasing numbers of unrepresented persons in the family and criminal spheres. There is currently an ongoing initiative supported by the Law Foundation and Law Courts Education Society to provide written plain language information sheets for unrepresented defendants when they attend Provincial Court. These information sheets are currently available on the Provincial Court website[6], and steps are being taken to make them available at court appearances.

Increasingly, the internet is being used to disseminate legal information. Many websites in other jurisdictions, Nova Scotia for example, provide extensive information to court users and participants in the justice system. The BC Provincial Court website provides useful links and general information about the court experience in all subjects. The Provincial Court judiciary is in the process of considering its role in facilitating access to justice by providing information to self-represented litigants in its Judiciary Planning process, the results of which are anticipated later in the year.

3.2. Supporting Early Resolution Initiatives in the Private Sector

In recent years we have seen a number of developments that support the use of mediation and other early resolution approaches in the private sector. These initiatives should be supported and other avenues should be explored. This might include:

3.2.1. Expanding the scope of BC Mediator Roster

The Mediator Roster is a list of qualified mediators who have agreed to follow a code of conduct. The purpose of the Mediator Roster is to organize and distribute information about mediators who have met minimum training and experience criteria. By defining this minimum level, the Roster provides a measure of protection to the public. At the same time, the Roster provides guidance for mediators about acceptable levels of training and, by defining standards of conduct, ensures a

[6] www.provinicalcourt.ca

common understanding of standards for ethical practice. The Ministry of Attorney General provides core funding to the Roster Society. The Roster currently provides access to mediators for commercial disputes. The Roster has expanded its service to provide mediators for family law disputes as of June, 2002.

3.2.2. Supporting the expanded use of Collaborative Law

Collaborative law is a process, used mainly in family disputes, where the parties and their lawyers make a formal commitment to resolve the dispute outside the litigation process in an atmosphere of trust and collaboration. Lawyers, sometimes working with psychologists or counsellors, are hired to reach a settlement and if the process breaks down, the lawyer must withdraw from the case. In Medicine Hat, Alberta, where a significant number of the community's family law lawyers practice collaboratively, the introduction of collaborative law has had a dramatic impact on the court system. A twelve month study showed a 38% decrease in the number of applications filed in family matters and a 51% decrease in the number of cases that went before a judge after collaborative law was adopted by the community. Collaborative law is growing in BC and a website lists practitioners who have adopted this approach.[7]

3.2.3. Supporting the growth of Preventative Law

The premise of preventative law is that the legal profession can better serve clients by investing resources in consultation and planning rather than relying on litigation as the primary means of addressing legal problems. This approach encourages lawyers to systematically apply planning and foresight with the objective of limiting the frequency and scope of future legal problems. The idea is not new, but organizations like the CBA have been giving it some added profile of late (refer to website)

3.2.4. Ministry of AG – Mediation and Dispute Avoidance Policy

By this proposal the Ministry would establish and implement a policy causing every civil case to be reviewed at an early stage, and on an ongoing basis, to assess its suitability for alternative dispute resolution. Ideally this could be linked to an internal case management process and protocols would detail the progress of cases to ensure that ADR is considered at every appropriate stage. Additionally the Ministry would explore with client Ministries methods and systems to promote dispute avoidance. In taking these steps the Ministry would lead by example, while promoting parallel approaches in the private sector.

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[7] http://www.collaborativedivorcebc.org/

3.2.5. Review Motor Vehicle Litigation Patterns

This would involve a review of the research on Motor Vehicle litigation recently completed by the University of BC, as well as a consideration of other data on the nature and role of motor vehicle litigation and mediation in the courts, in order to determine if and how the costs of motor vehicle litigation to the court system and litigants could be reduced.

3.3. Pre-Action Protocols

Pre-action protocols are codes of best practices to be followed by lawyers when litigation is being considered. Their objective is to facilitate settlement of disputes prior to litigation by encouraging the early exchange of full information about a prospective legal claim. They set timetables for the exchange of information relevant to the nature of the dispute, and set standards for the content of correspondence between claimants and prospective defendants. Where pre-action settlements cannot be achieved, the objective of the protocols is to provide a foundation for the efficient conduct of the litigation.

In accordance with Lord Woolf's Report, pre-action protocols have recently been implemented in the UK. The protocols are developed by lawyers and other professionals involved in specific categories of litigation and deal with typical problems that arise in that type of litigation. In the UK, the protocols are set out in practice directions. If the court determines that a party's failure to comply with a protocol has led to the commencement of proceedings which might otherwise have been unnecessary, or has led to unnecessary costs being incurred, the court may make orders as to costs, and orders denying interest or awarding additional interest on monies payable. The court will exercise its powers with the object of placing the innocent party in no worse a position than he or she would have been in if there had been compliance with the protocol.

Areas for which pre-action protocols have been developed in the United Kingdom include personal injury, negligence, construction and engineering disputes, defamation, and professional negligence.

According to an early evaluation of Lord Woolf's reforms, the pre-action protocols are working well to promote pre-action settlement and to reduce the number of ill founded actions. A survey of their members by the Association of Personal Injury Lawyers showed that 48% of respondents felt that earlier settlements had been reached and that 33% of cases avoided litigation. A comprehensive report on the effect of the protocols is expected soon.

3.4. Delivery of Legal Services

Many justice system participants have examined innovative methods for delivering legal services that meet access, quality, and efficiency goals. Some of the ideas being discussed are:

3.4.1. Unbundling of legal services

The development of the unbundling concept is a response to the inability of many citizens to afford a full range of legal services. Traditionally lawyers representing a client take on the responsibility for handling a whole file, which includes responsibility for taking each step along way. When legal services are "unbundled", the lawyer does not take responsibility for the complete file. Instead the client retains overall control and the lawyer takes on discrete tasks.

Clients benefit from the unbundling of legal services. Since the lawyer is taking on less responsibility and performing fewer tasks, the client pays less. This means that more people are able to afford some legal service in circumstances where they would otherwise not have been able to have any legal services. It is suggested that benefits flow to lawyers in giving them an opportunity to tap into new legal markets.

Concerns exist with unbundling, particularly around the risk of client's operating on the basis of incomplete advice or information. Lawyers also raise concerns about liability, ethics and professional responsibility.

The CBA has recently released a paper on unbundling.[8]

3.4.2. Greater Use of Paralegals

For a number of years the Law Society has been examining the role of paralegals and other non-lawyers in the delivery of legal services. A survey commissioned by the Law Society suggested that there is demand for the provision of such services. Not surprisingly, the demand is most often driven by expense. Issues of access and affordability, however, need to be balanced against the need to ensure that consumers of legal services are protected.

In BC, unlike in some other jurisdictions, paralegals work under the supervision of a lawyer or risk being engaged in the unauthorized practice of law. An Ontario court decision permits paralegals in that province to act as agents, without lawyer supervision, under a number of provincial statutes. In BC such appearances are not permitted. A proposal recently adopted by the Law Society of Upper Canada would see paralegals accredited, licensed and disciplined by the Law Society of

[8] www.cba.org/EPIIgram/March_2002/default.asp

Upper Canada. This would be accomplished essentially by including the work of paralegals within the statutory definition of "practice of law". [9]

In BC, about a year ago, the Paralegal Working Group of the Law Society submitted a report to the Benchers on the issue of paralegals in BC. The Report examined a range of options from continuing with the status quo to the establishment of an independent, accredited and regulated paralegal profession. The Benchers have struck a task force to consider three of the five options:

- Maintenance of the status quo, with expansion of legal assistant functions
- Certified legal assistants, regulated through their supervising lawyer
- Certified legal assistants, individually regulated.

The Task Force is expected to report back to the Benchers before the end of this year.

4. The Courts

4.1. Court Supervision of Litigation

Court supervision of litigation takes two forms: early and active judicial management of issues within individual cases to promote the resolution of disputes and bring matters to trial in a more timely manner (**case management**) and the judicial supervision of the management of the pace of *all cases* through the court system (**caseflow management**). These reforms reflect a new theory of civil procedure based on the fair allocation of court resources; equal treatment of litigants by the court, and proportionality. The objectives of the processes invariably include:

- earlier resolution of disputes;
- reducing backlogs;
- more effective use of court resources; and
- reducing the cost of litigation.

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[9] In addition to the above consideration, a 1989 Subcommittee of the Law Society recommended against the establishment of an independent paralegal profession because it could not "achieve the diagnostic competency required of an independent practitioner," and because the cost of regulation was so high.

Increased court control over the litigation process is a universal trend. Various forms of case and caseflow management have been in place in most U.S. jurisdictions for the last 15 years and were among the principal reforms implemented recently in the UK on the basis of the recommendations in the Lord Woolf report. In Australia, case management reforms are said to have brought about "substantial procedural, operational and cultural changes in the judicial systems". [10]

Both case management and caseflow management were key recommendations of the CBA Task Force and many Canadian jurisdictions have implemented or are exploring caseflow and case management concepts. In BC, the Provincial Court has forms of judicial case and caseflow management in all subject areas, through case conferencing and settlement conferences in the family and civil arenas, as well as formalized Criminal Caseflow Management Rules which mandate court supervision of cases and caseflow in the criminal forum. These Rules are the subject of a recent Report[11] reviewing their efficacy in the first two years following enactment, and it is anticipated that a Committee will consider whether reform is required.

The Canadian superior court which has gone the furthest is Ontario where, as of July 1, 2001, a caseflow and case management process was implemented province wide[12].

Caseflow management systems are in place in a significant number of other common law jurisdictions. A seminal US monograph identifies nine fundamental features that a caseflow management system must incorporate[13]. Assuming judicial commitment and leadership, and consultation with the Bar, such systems typically include:

1. *Court supervision of case progress*: This involves a shift from lawyer management of the progress of a case to court supervision of the pace of litigation and has two components. First, the establishment of regularly scheduled case events and second, judicial monitoring of those events. The movement from a case driven through the system at a pace determined by the individual lawyer to one propelled by firm deadlines for each

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[10] Australian Law Reform Commission – Adversarial Background Paper 3, Judicial and case management, December 1996

[11] www.provincialcourt.bc.ca/aboutthecourt/criminalandyouthmatters/reporttochiefjudgeonCCFM/index.html

[12] In Ontario, the process is referred to as "case management", although it clearly encompasses caseflow management.

[13] Maureen Solomon and Douglas K. Somerlot, *Caseflow Management in the Trial Court: Now and for the Future*, American Bar Association, 1987.

stage of the litigation is one of the most dramatic changes flowing from the introduction of caseflow management.

2. *Standards and goals*: The monograph identifies three types of standards and goals for a caseflow management system:

   - overall time standards govern disposition for each major case type or track;
   - intermediate standards for elapsed time between major case events; and
   - system management standards such as disposition and adjournment rates.

   Overall time standards can be expressed in a number of ways including: specified acceptable median age of cases at disposition, a maximum time interval between filing and disposition or a specified number of cases concluded within a stated interval after filing. Intermediate event standards allow the court supervision of case progress to become a reality.

   The CBA Task Force Report recommends that every court set timelines for the disposition of civil cases, along with means to enforce the timelines. It adopts the performance standards of the Canadian Judicial Council as a model for all Canadian trial courts.

3. Monitoring and information systems: The literature strongly suggests the need for a monitoring and information system to help the court track individual case progress and measure performance standards and goals.

4. Scheduling for credible trial dates: The CBA Task Force Report refers to reliable and fixed trial dates as "one of the most important mechanisms for avoiding delay, reducing costs, enhancing predictability, and improving the likelihood of efficient operation of a caseflow management system". The Report further argues that overbooked courtrooms and the resulting trial cancellations greatly harm public perceptions of the justice systems. If lawyers know that trials and other case events will be held as scheduled, and that delays and adjournments will be resisted in most cases, they will be more fully prepared to move the case forward.

5. Court control of adjournments: This feature is directly related to the previous one. If deadlines are not enforced, they have no meaning and little effect on the accessibility or efficiency of the system.

There is often a close link between case and caseflow management and the use of DR processes in the court. Case management systems often incorporate a process for early assessment of the potential for non-binding DR processes and opportunities for voluntary or mandatory referral to those processes. And, DR systems are often designed to be integrated with case and caseflow management systems. That is, many jurisdictions use both to enhance access to justice and to respond to concerns about the cost of administering the civil justice system.

In BC, Supreme Court cases with an anticipated trial length of 20 days or more are eligible for case management. The case management practice direction originally applied to cases of 11 days or more. The process was popular with the bar, but the original process may have been a victim of its own success as the scope of the practice direction was reduced to 20 days to control volume. The original proposal for case management (drafted by Mr. Justice Shaw in 1997) reflected more fully the components of caseflow management discussed above, including firm trial dates and strict adherence to specified timeframes.

The Supreme Court has devised a case management process for family cases that will be in place as of July 1, 2002.

4.2. Differential Case Management (DCM) / Multi-track

Often recommended along with case management, these terms refer to the differential treatment of cases based on their resource and management needs. This approach flows from the recognition that not all cases require the same level of judicial management and that not all cases should be dealt with on a single standard timeline. Under a DCM system, a number of tracks are established along which cases can proceed. Each track includes set case events, usually accompanied by fixed timeframes. Tracks often include a standard track, a fast track and an economical litigation track. Each track includes set case events, usually accompanied by fixed timeframes. Defining factors are often identified in order for cases to be streamed to the appropriate track and each track has unique procedures and/or time frames that are appropriate and proportionate to the magnitude and complexity of the claim.

In both Ontario and the UK there are three tracks: a standard track (the “multi-track” in the UK); a fast track; and an economical litigation track (called “simplified procedure” in Ontario). There are a number of mechanisms that are used to allocate a case to a specific track. In Ontario the standard track is for cases that raise complex issues of fact or law while the fast track is for simpler and urgent cases. The simplified procedure applies to cases with a value of less than $50,000. The plaintiff selects the track. In the UK, the fast track is for cases where the value of the claim is between £5,000 and £15,000 and the trial is not expected to last more than one day. Smaller claims go to a small claims track and any other claims go on the multi-track.

Mechanisms for the selection of the track include:

- lawyer-based voluntary self-selection of a track;
- rule based criteria for track selection;
- track selection at the discretion or direction of a judge or judicial officer;
- requiring parties to consider track options and formally choose a track, or elect out;
- requiring parties to consider a particular option, (such as mediation) and certify that the process either was attempted, or is not warranted;
- mandatory or presumptive direction to a particular track (example “presumptive mediation”);or
- party - instigated direction into a track (e.g.: notice to mediate process).

Developing multiple tracks for cases has been a subject of discussion at the BC Supreme Court’s Litigation Management Committee. The development of Supreme Court Rule 66 grew out of this discussion (a form of simplified procedure discussed below). The Supreme Court is developing a case management process in family cases that will be introduced later this year.

4.3. Calendar Systems

The method in which cases are assigned to judges is one facet of effective caseflow management. In an **individual calendar system** each case is randomly assigned to a specific judge at the time of filing. That judge remains responsible for the progress of the case and for all hearings – motions, conferences and disposition.

In a **master calendar system** all cases go into a pool of cases and judges are assigned to preside over particular court events. At the conclusion of a particular event a case is returned to the pool until further judicial intervention is scheduled. When the time for trial arrives, cases are assigned to judges on the basis of their availability. Other than cases over 20 days, the B.C. Supreme Court operates on a master calendar system. Most lengthy cases in the Provincial Court, those over about three days, are assigned to individual judges and scheduled for pre-trial conferences early in the process, following which there is continued judicial supervision by the assigned judge, as required, until trial.

Strengths of the individual calendar system are said to include:

- Each judge takes individual responsibility for his/her caseload and may be more easily motivated to exercise management control and conclude cases as expeditiously as the particulars of individual cases allow.

- As familiarity with individual cases increases, judges require less preparation time for particular hearings, the use of motions as a dilatory tactic is diminished, and rulings are more consistent.

- Familiarity with cases makes it easier to assess the likelihood of trial, length of trial, and other factors which determine use of judicial time.

- As cases are randomly assigned at the time of filing; counsel cannot ‘judge shop’.

However, critics of the individual calendar system suggest that while familiarity with cases may improve judges’ effectiveness in settlement conferences, it may not be appropriate to have the judge who will try the case engaging in settlement negotiations. They also claim that larger staff numbers per judge are required for scheduling and case monitoring, resulting in higher, possibly much higher, personnel, equipment and facilities costs. Finally, considering that the vast number of cases settle before trial, critics say individual case management can waste scarce judicial resources.

In a master calendar system, it is argued that judicial resources are pooled to maximize the use of judge time to deal with cases which are ready for hearings and that parties are treated in a more nearly equal fashion as their hearings are started by the next available judge, rather than depending upon the schedule and style of a specifically assigned judge. Also, judges may become more specialized in activities for which they may be more suited – judges who are effective in promoting settlements can devote more time to pretrial settlement conferences, and judges who are more suited to trying cases can try more cases. Similarly, judges who are expert in particular types of litigation can be assigned to try cases of those types.

On the other hand, in a master calendar system judges have no ‘ownership’ of individual cases, so may have less incentive to promptly dispose of particular events within a particular case. Other concerns are that: the amount of motion practice is said to be greater as judges’ familiarity with individual cases is less, judges require more preparation time for particular hearings; it is easier for motions to be used as a delay tactic; and over-scheduling may result in uncertainty of trial dates.

Good organization and management are critical to realization of the benefits of both the individual and master calendar systems. To realize the benefits of the individual calendar system, appropriate monitoring systems and statistical reports should be available to provide a basis for holding judges accountable for the timely advancement and disposition of the cases for which they are responsible. Also, this assumes that there will be someone who can and will hold them accountable. Similarly, to realize the benefits of the master calendar system, responsibility for the disposition of cases rests with the judge in charge of the system and he or she must have the necessary interest, skill and authority to make the system work.

4.4. Specialized Courts

The theory underlying specialized courts is that both process and outcome quality will be enhanced if judges have specialized training and extensive experience in a single area of litigation. On the other hand, some are concerned that putting specialized lawyers in front of specialized judges will unduly narrow the focus of certain areas of law and render them unintelligible to the outside observer.

A background paper prepared for the CBA Task Force neatly summarizes the arguments for and against specialized courts:

> Proponents of entrusting certain judicial tasks to a specialized judiciary often refer to the speed, efficiency and predictability which is said to result when judges hearing disputes have a particular familiarity with the law to be applied. First, knowledgeable judges, it is said, would not need to be educated about how a particular dispute fits in to the broader corpus of the law. As a consequence, specialist judges could resolve questions more quickly and perhaps more "correctly" without the need to learn or be taught the relevant law. Second, specialist judges could devote more time to individual matters than is presently possible, as they would have smaller dockets, unencumbered by other business which must take priority. Finally, limiting certain kinds of litigation to a single specialized judiciary would assure uniformity and predictability; a feature which would encourage the settlement of disputes without resort to the court system.
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> Opponents of a specialized judiciary, on the other hand, urge that the generalist judge prevents an area of the law from becoming the exclusive preserve or the specialist and offers insights drawn from other fields of law which a specialist might not perceive. As Justice Scalia has noted, "I understand that all we common law lawyers have for the specialist judge; even in a matter as specialized as tax, the disadvantage of inexperience is often more than made up

> for by the advantage of a fresh outlook and broad viewpoint." Moreover, forcing specialized advocates to argue before generalist judges is said to ensure that the law will remain intelligible, if not to the common man, at least to the average lawyer. Basic assumptions will not be taken for granted, and questions will be seen in a context broader than that of the specialist's narrow concerns. Finally, it is argued that courts which exercise less than the widest jurisdiction have historically been viewed by the bar and the public as "inferior", regardless of their place on the judicial hierarchy. As a result, it may be harder to attract talented members of the bar to a specialized bench.[14]

Typically, specialized courts focus on commercial and complex litigation or operate in high volume urban settings. In some courts certain types of cases are automatically streamed to the commercial court unless the parties object or the judge rules that the case should be excluded. For example, a California pilot project includes the following types of cases:

- anti-trust and trade regulations
- construction defect
- securities
- investment losses
- environmental and toxic torts
- mass torts
- class action cases
- insurance coverage claims.

Factors for streaming a case to a specialized court might include: multiple parties, multiple claims, large volumes of evidence, extensive motions, or new or difficult legal issues.

In the US there are at least 10 states that have such courts and a commercial court has operated successfully in Toronto for a number of years. In addition to providing commercial litigation with

[14] Walker, Ronald F. and Andrea Horton, *Specialized Courts*, CBA Systems of Civil Justice Task Force Issue Paper, undated. The footnotes from this excerpt are not reproduced.

the focused attention of experienced judges, specialized courts free other judges from the burdens of commercial cases.

The CBA Task Force found strong support for the idea of specialized courts for certain case types. Currently, there is little specialization in the Provincial Court except in some high volume locations where court sittings are more readily set by subject matter. In Vancouver, adult criminal matters are conducted in a separate building from civil and family matters, however judges rotate between buildings and a majority of judges sit in all subject areas. The Court is considering the issue of specialization in its Judiciary Planning process, the results of which are anticipated later in the year.

The BC Supreme Court's Litigation Management Committee also considered this issue in the 1990's. While there appeared to be some support for the concept, the Committee determined that there was too much change occurring within the court process at that time to justify introducing further reform. More recent discussions at the Committee have included the observation that B.C. courts are losing business to Ontario because of the existence of a specialized commercial court there. There is support in the bar for specialized courts.

4.5. Assisting Self-represented Litigants

While there is little actual empirical data available to support the claim that their numbers are growing, many jurisdictions are very concerned about a perceived increase in the number of self-represented litigants in the courts, and it is certainly the perception of those within the system that there are increasing numbers of self-represented litigants.[15] The concerns relate to both the plight of the self-represented litigant in navigating the complex waters of the civil justice system alone, as well as the inefficiencies for the system itself and the frustrations for justice system professionals created by the presence of self-represented parties in the courtroom.

Many in the legal community see the increase in self-represented litigants as an unhealthy development, resulting, in part, from inadequate legal aid plans. While they consider developing consensual dispute resolution mechanisms as a partial solution to the problem, many believe parties that remain on the litigation track need representation by qualified professionals.

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[15] While the Ministry of Attorney General does not track changes in the number of lay litigants, a "snapshot" of two week periods in 1999-2001 shows that the number of lay litigants in BC Supreme Court varies from 5.5% to 14.2%. Lay litigants are much more common in family matters where, in the same periods, they represented between 11.5 and 24.6%.

Other Canadian jurisdictions are addressing the problem through various means. In Ontario, the Chief Justice of the Superior Court appointed a committee in 1999 to prepare a guide for judges dealing with self-represented litigants. The guide has been adopted for use and is available on the Ontario Ministry of Attorney General web site.

In Nova Scotia, the Justice Department has recently established a Self-Represented Litigants Project, the objective of which is "to provide coordinated and accessible services for self-represented litigants." While the project goals focus on improving services and tools for self-represented litigants, the project will also "address the challenges being brought to the administration of justice by the increased number of self-represented litigants". Representatives from the judiciary, the legal profession, court staff and others are involved in the project. The project team is also working with the Association of Court Administrators of Canada to develop guidelines for court staff that will help them to determine what to do in specific situations involving self-represented litigants.

In the US, where a "pro-se litigants" movement has been growing for some time, rather than viewing the development with alarm, the focus is on assisting people to represent themselves. A recent national conference in the US studied the issue and reported on a variety of responses including:

Court based assistance centres - Such centers offer brochures, self-help packets with forms and instructions, use of computers, one-on-one assistance, court concierges, and self-represented litigant workshops.

Standardization and simplification of court forms – for example – BC's Small Claims rules and forms were developed for use by self-represented litigants.

Defining the role of the judge - defining the role of the judge in relation to self-represented litigants through the use of detailed guidelines on self-represented litigants in the courtroom.

Designing "self-help centered" courts – the court room, and even the court house, are designed to provide self-represented litigants effective access to the justice system.

Initiatives discussed in other sections of the paper, such as point of entry information and unbundling of legal services, could also assist self-represented litigants.

4.6. Unified Family Court

One of the consistent themes of family law reform over the last two decades has been the development of a Unified Family Court (UFC). In 1998, the federal government provided funding

for UFCs in four provinces by appointing new superior court judges. The provinces used the money they saved on judges' salaries to provide family justice services associated with the UFC. UFCs are now established in all Canadian provinces except B.C., Quebec and Alberta, and Alberta is currently developing a UFC proposal.

From 1974-77, a project ran in Surrey, Richmond and Delta that was referred to as a "unified family court." However, rather than being a true UFC, it was an administratively integrated court, with both superior and provincial court judges available through a common registry.

The arguments against a true UFC in BC often involve accessibility as their main concern. Critics are concerned that a UFC at the Supreme Court level could reduce access to family court because:

- Supreme Court is not easy to access in many areas of the province, particularly in rural and isolated areas;
- the complicated procedures and the formality of Supreme Court would be barriers to self-represented litigants; and
- the expense of Supreme Court proceedings would be a barrier to many litigants.

The existence of UFCs in other provinces suggests that these concerns might not be insurmountable obstacles, although some of these are still being assessed. The following recommendations of the Alberta task force[16] on UFCs highlight that a UFC must be more than simply a Supreme Court for family matters, and that family justice services must be available.

Geographic accessibility - The services of the UFC should be available to all within a reasonable time and distance. The UFC should have video-hearing and videoconferencing capability to reduce time and travel costs.

Economic and procedural accessibility - Economic and procedural barriers should be kept as low as possible by adopting efficient court structures and simplified procedures. Simplifying and reducing the formality of court practices and procedures should be a principal objective of a UFC.

[16] The full report of the task force can be found on the internet at: www.gov.ab.ca/just/pub/Family_Court/index.htm

Specialized judges - Criteria to consider appointing judges to the UFC should include interest in family law and desire to serve in a UFC: common sense, patience and problem solving skills; an understanding of human nature and motivations; and community involvement.

Staff - Staff should be adequately trained to facilitate the objectives of the UFC.

Service - Services that families need should be available to them as early as possible in the process.

Resources - The government should not establish a UFC unless it is prepared to commit the financial and administrative resources needed and unless the federal government is prepared to commit the necessary judicial resources. It is unknown whether the federal government is still willing to fund the superior court judges needed to establish a UFC.

As mentioned above, in other provinces, the federal government has funded Superior Court judges appointed to UFCs, freeing up provincial resources previously dedicated to provincial court judge salaries for the provision of family justice services. BC would be in a unique starting position if it were to pursue the UFC option since it already has a good foundation of judicial and non-judicial services.

4.7. Unified Courts – General

While its evolution has been responsive to the emerging needs of a modern society, Canada's dual trial court system has evolved in the absence of any coherent strategy or well developed plan. While attempts to put the unification of criminal court on the national reform agenda in the 1980s were met with considerable opposition, a single level trial court was quietly introduced in Nunavut in the 1990s. And, in the US, trial court unification has been accomplished in about a dozen states.

Supporters of the concept cite both practical and legal justifications for moving in this direction. In practical terms, they suggest that dual trial courts create all kinds of inefficiencies. Legal concerns are based on the argument that with the expansion of its jurisdiction, competency and public importance, Provincial Courts have outgrown their 1867 status as local and inferior courts and question the legitimacy of provincial government appointments to those courts.[17]

[17] See, for example, Seniuk and Lyon, The Supreme Court of Canada and the Provincial Court in Canada, 79, Can. Bar Rev. (2000).

The idea was the subject of debate at recent conference on the future of trial courts[18]and some jurisdictions showed interest in exploring it further.

5. Rules and Procedures

5.1. Expert Evidence Rules

Description

Often identified as one of the major generators of unnecessary costs in civil litigation, various reports have recommended changes to the rules around the use of expert evidence. In his interim report Lord Woolf described the large litigation support industry that has developed among a number of professional groups as contrary to the principles of proportionality and access. In his final report, Lord Woolf makes numerous recommendations to address the issue. The recommendations are based on the premise that the expert's function is to assist the court. Many of Lord Woolf's recommendations are incorporated into the UK's new civil rules.

The CBA Task Force Report articulates similar concerns, although not expressed as strongly. The Report states that experts are being used more frequently in the litigation process, leading to increased cost and delays. The Report recommends that rules of procedure be amended to:

- require early disclosure of expert reports;
- provide for the exchange of expert critique reports in a timely fashion before trial or hearing; and
- impose a continuing obligation to disclose expert reports as they become available.

All of these recommendations are reflected in current B.C. rules. Recent articles in the Vancouver Sun, however, reflect a growing perception of experts as "hired guns", particularly in motor vehicle litigation cases. The litigation reforms implemented in the UK attempt to address this issue in a fundamental manner. The new civil rules expressly provide that it is the duty of experts to help the court on the matters within their expertise, and that this duty overrides any obligation to the person from whom they have received instructions or by whom they are paid. They further provide:

- No party may call an expert or put in evidence an expert's report without the court's permission and where permission is granted, it is limited to the expert named.

[18] Trial Courts of the Future Conference, Saskatoon, May, 2002

- The court may limit the amount of the expert's fees and expenses that the party who wishes to rely upon the expert may recover from any other party.

- Expert evidence is to be given in a written report, unless the court directs otherwise. In fast track actions, the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice. Parties may, however, put written questions to experts who have been instructed by another party or to single joint experts and answers to those questions are treated as part of the experts' reports.

- Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only. Where the parties cannot agree upon a single expert, the court may select the expert from a list prepared by the parties, or direct that the expert be selected in another way. The court may limit the amount that can be paid by way of fees and expenses to the expert, and direct that the instructing parties pay that amount into court.

- At the end of experts' reports there must be a statement that the expert understands their duty to the court and that they have complied with that duty. Also, reports must state the substance of all material instructions, whether written or oral, on the basis of which the reports were written.

- Where permission has been given for more than one expert to give evidence on a matter the court may, at any stage, direct that a discussion take place between experts for the purpose of identifying the issues in the proceeding and, where possible, reaching agreement on the issues. The court may specify the issues which the experts must discuss. The court may also direct that following their discussion the experts must prepare a statement for the court identifying the issues on which they agree and those on which they disagree, and a summary of their reasons for disagreeing. The content of the discussion between the experts cannot be referred to at the trial unless the parties agree.

Although the reforms are very recent, early commentary suggests they are already having an impact:

> The most obvious and immediate effect of the Civil Procedure Rules has been on expert evidence. Many experts have reported that their workload has decreased by 50 per cent, and there is no doubt that both increased caution and co-

> operation of litigants and court management has led to a decrease in the number of experts being called at trial. [19]
>
> and:
>
> The use of single joint experts appears to have worked well. It is likely that their use has contributed to a less adversarial culture, earlier settlement and may have cut costs.[20]

5.2. Discovery Process

Discovery is an important tool in preparing a case for trial or settlement. But there is growing concern that discovery has become a significant cost-driver in litigation that needs to be checked. As stated in the CBA Task Force Report:

> There are different rules governing discovery across Canada, but there is nearly universal dissatisfaction with most of them. The discovery process, and particularly oral examinations for discovery, lengthen the litigation process and add considerably to costs. In our consultations, litigation and business lawyers from across the country ranked the complexity and number of discoveries and scheduling problems in the discovery process as key factors in contributing to procedural delay. *(p. 43)*

Similar observations were made in Australian, UK, and Ontario reports. Generally, the reports conclude that civil rules of procedure should impose greater limits on the discovery process. Reform suggestions include:

- limiting the time frame in which discovery takes place;
- narrowing the scope of relevance;
- capping the number discovery event that can be undertaken by the parties;
- eliminating oral discovery in cases to be dealt with through expedited and simplified proceedings;

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[19] Gordon, Exall, Solicitors Journal, “Civil litigation brief”, October 29, 1999, p. 1010

[20] *Civil Justice Reform Evaluation, Emerging Findings, March 2001*

- using sanctions to penalize duplicative or cumulative discovery;
- mandatory discovery conferences between counsel and/or before a judge;
- more effective processes for resolving conflicts as they arise in the discovery process; and
- initial disclosure of only those documents of which the party is aware at the time the obligation to disclose arises.

The government of Ontario and Superior Court of Justice have recently appointed a Task Force to review all aspects of the discovery process in that province, to identify problems with the existing process and to make recommendations for reform. In carrying out its mandate, the Task Force will consult with the bench and bar, conduct empirical research and consider discovery processes in other jurisdictions. The Task Force will submit a final report to the Attorney General and Chief Justice late in 2002. In Alberta a similar process is underway.

While problems with the discovery process have been studied by various court committees in BC, the rules have not been reformed to circumscribe its scope. Arguably, the few amendments enacted have been for the purpose of extending the reach and broadening the scope of discovery.[21] There appears to have been no consensus at the Supreme Court's Litigation Management Committee about whether or not there are problems with the discovery process that ought to be addressed by that Committee. Submissions from the Bar to the Litigation Management Committee on this issue were overwhelmingly opposed to restricting the duration of the discovery, although some members of the Committee have been supportive of impositions of deadlines for completion of discoveries. Any future consideration of discovery processes would need to take into account the type of process that would be desirable for Small Claims Court if its monetary jurisdiction were to be increased (see below).

5.3. Offers to Settle

A number of reforms have been recommended to the offer to settle process. These generally involve incentives for accepting offers, provided that incentives are balanced against undue pressure to settle. Reforms tend to focus on superior court processes.

One example is found in Lord Woolf's report. He recommended that the system of payments into court be replaced by a system of offers, and incentives to make offers. For claimants, he

[21] BC Regulations 55/93, 95/96, 161/98 and 101/2001.

recommended additional interest of 25% above that which would ordinarily be payable on damages on awards up to ₤10,000, 15% from ₤10,000 to ₤50,000 and then an additional 5%.

A more radical suggestion has been advanced in the US.[22] The proposal being debated is that a defendant (insurer) may, at its option, offer within a pre-determined period (e.g. within 120 days of a personal injury claim) a settlement of periodic payments sufficient to cover a claimant's economic losses, including wage loss, medical expenses, and rehabilitation expenses, plus a claimant's reasonable legal fees. Legislation establishing such a scheme may provide that payments from other sources (e.g. any other compensation scheme) are deducted in calculating the amount of the offer. The legislation may also include a minimum offer (e.g. $100,000) in cases of serious injury where actual net economic losses are relatively small.

The defendant (insurer) is under no obligation to make an early offer, and if an offer is not made normal tort principles apply. However, if an offer is made certain consequences are triggered:

- If the offer is accepted, that ends the matter.
- If the claimant elects not to accept the offer, the claimant will face a higher burden of proof at trial (e.g. clear and convincing or beyond a reasonable doubt, depending upon the legislation), and the defendant will be held to a lower standard of care (e.g. wanton or intentional misconduct).

While the proposal is subject to serious objections it illustrates the creative thinking that is going on in relation to this issue.

6. Simplified Procedures

6.1. Economical Litigation

One of the options in a "multi-track" court system that has been discussed in B.C. for many years is the "economical litigation" track. The concept is based on the reality that there is a range of claims that are simply uneconomical to litigate - where the cost of hiring a lawyer is disproportionate the amount of the claim. The range is usually seen to be somewhere between the upper limits of the Small Claims Program ($10,000) and $75,000. A number of reports, including the CBA Task Force, the Lord Woolf Report and Ontario's Civil Justice Review, have called for a special track – sometimes also called "simplified litigation" - to deal with cases with a

[22] For example, see "The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah", Connecticut Law Review.

value in the $25-50,000 range. The underlying principle of these recommendations is proportionality: the costs of litigation should be proportionate to the amount of the claim.

Many Canadian jurisdictions have adopted some form of economical litigation process. Although the procedures vary, there is a core of key features to be considered in developing such rules:

Application - The application of the rules in most cases relates to the value of the claim. The monetary limit varies from $15,000 to $75,000. In Nova Scotia, the application of the rules depends on complexity of the case.

Pre-trial procedures - Strategies to expedite pre-trial proceedings vary widely. Every jurisdiction puts limits on examination for discovery using approaches from prohibiting discovery altogether to imposing time limits. Most jurisdictions also employ judge-imposed deadlines on pre-trial procedures.

Trial - Most jurisdictions provide for summary trial procedures. These include such features as the use of affidavit evidence, lower thresholds for granting summary judgment, time limits on cross examination, and timelines for the delivery of judgments.

Costs and other sanctions - Two jurisdictions use costs to enforce the simplified procedural rules. Under the Nova Scotia provisions, there is also the potential for dismissal of a claim or defence for failure to comply with time limits.

The 1988 Report of the Justice Reform Committee, “Access to Justice” recommended the implementation of an economical litigation program in County Court. As a result, in 1990 the ministry developed drafted rules and forms to support such a reform and the *Court Rules Act* was amended to allow the Lieutenant Governor in Council to make special rules to implement an economical litigation program for cases under $20,000. The new rules were scheduled for implementation in 1991 and then again in 1992. At that point, the draft rules were abandoned for a number of reasons. First, the rule provided for trial within three months of the statement of defence and there was a concern that the court could not handle the volume of cases that arise within that short time frame. Second, the rules that were developed were very similar to County Court rules and it was decided a better approach was to raise the Small Claims Court jurisdiction to $10,000, which was done. Lastly, while the intent was to design rules for use by self-represented litigants, it was anticipated that most claims would be brought by lawyers, who would bring applications to gain access to pre-trial processes not available under the Rule. This would have made the process more lengthy and expensive.

In 1998, the BC Supreme Court introduced the Fast Track Litigation Pilot Project, which was seen as a form of simplified procedure. Rule 66 came into effect on September 1, 1998 and applies to cases filed in the Vancouver, New Westminster and Kamloops registries. It does not apply to family law actions.

Rule 66 is sometimes described as economical litigation. However, instead of taking the more common approach of qualifying cases on the basis of their monetary value, Rule 66 applies to actions that will take no longer than two days to try (the Supreme Court Litigation Management Committee has recently decided to increase this to four days). This approach does not capture matters that are complex but involve relatively small amounts of money.

The main components of Rule 66 are:

- a 2 hour limit on the duration of examinations for discovery;
- use of interrogatories only with the consent of the court;
- expedited trial date (within four months of application for date);
- requirement for a trial agenda including time estimates for opening statements, examinations of witnesses and submissions;
- discretion in the court to limit parties to time estimates; and
- fixed limits on costs.

The Supreme Court has completed an evaluation of Rule 66 which found that it has generally not been successful in achieving its objectives. In response, the Litigation Management Committee has amended the Rule to include cases that will be no longer than **four** days to try.

An evaluation of Ontario's Simplified Procedure Rule, which covered cases with a monetary value of under $25,000, was published in the fall of 2000. The Evaluation Report made the following findings:

- 25% of all actions were brought under the Rule;
- 35% of the cases were undefended;
- 79-85% of cases resolved in 1.5 years from filing (compared to 39.2% before the Rule);
- 6% trial rate (compared to 14% before the Rule);

- motions activity was dramatically reduced; and
- cost to litigants was significantly reduced.

The Report's recommendation that the monetary limit under the Rule be raised to $50,000 was recently implemented. However, it should be noted that under the current rule discovery is eliminated. The recommendation to raise the monetary limit was accompanied by a further recommendation that limited discovery should be allowed under a Rule with a higher monetary jurisdiction.

6.2. Expanding Small Claims Court Monetary Jurisdiction

The arguments that are used to support the introduction of an economical litigation track are also cited in favour of raising the monetary jurisdiction of the Small Claims Court. Flowing from the recommendations of the 1988 Report of the Justice Reform Committee, in 1991 the province introduced a number of significant reforms in the Small Claims Court, including an increase in the monetary jurisdiction from $3,000 to $10,000. The limit has not been raised since then.

In 2001, the BC Provincial Court Judges Association passed a resolution in the following terms:

> That the Provincial Court Judges Association of B.C. endorses in principle the expansion of the monetary jurisdiction of the Civil Division of the Provincial Court, and expresses its willingness to work with other parties to ensure that the public interest is served by providing for a just, speedy and inexpensive resolution of civil disputes.

An increase in jurisdiction had previously been the subject of discussions between the Supreme and Provincial Court judiciary and the Ministry in the fall of 2000. The proposal remains a subject of discussion. There are a number of questions that require careful consideration and assessment before reforms could be introduced, including:

- Would increased jurisdiction change the nature of the court, shifting its focus from individual consumers to commercial parties?
- Would cases become more complex and so take more court time and/or need more processes such as discovery?
- Would there be an increase in legal representation in the Court and what would that mean for the process?

- Is there a latent pool of disputes that would be realized if the jurisdiction were expanded, resulting in a flood of cases that would not have been tried today? If so, where will the required resources come from?

- Should some types of cases, such as liquidated or low-value claims, be streamlined to prevent detrimental effects on caseflow? (Note that the feasibility of a rule 18A-type process for Provincial Court cases was considered by the Civil Rules Committee in 1999, but abandoned.)

- How many of the reforms discussed above would need to be considered for an expanded Small Claims Court?

The issue of increased jurisdiction is being revisited by the Provincial Court Judiciary in its planning process, the results of which are anticipated later in the year.

7. By Law and Traffic Offences

7.1. Municipal By-law Dispute Process

Enforcing municipal by-laws through the courts is hampered by the high cost of retaining lawyers and the low priority of by-law matters in scheduling court dates. As a result municipalities and UBCM have been requesting a separate forum dedicated to by-law matters.

About 80 per cent of municipal by-law violations are non-moving traffic (i.e., parking) violations, which are initially commenced by a voluntary payment notice. The remaining 20 per cent, non-traffic matters, are generally enforced either by Information or MTI. By-law matters arising from the laying of an Information are generally heard in front of a Provincial Court Judge (PCJ), except in Kamloops, Kelowna, Prince George and Vancouver, where JJPs have been given authority by the Chief Judge to hear these matters in prototype By-Law Courts in operation since late 1980's. However, resources are not available to the Ministry to provide the additional JJPs, court personnel and accommodation to expand the prototype By-Law Courts into other municipalities.

The Ministry of Attorney General released a paper in June, 2002 for public consultation on a proposal to create a non-court process for all non-serious by-law disputes. The proposal is to create separate by-law dispute system run and funded entirely by the municipalities. Serious by-law matters, where a substantial fine, jail or court order is being requested would continue to be heard by a Provincial Court Judge.

7.2. Traffic Fine and Dispute Process

Processing and hearing violation ticket (VT) disputes is very expensive for the Province and time consuming for the Provincial Court. Recent amendments to the *Offence Act* will:

- allow a reduced fine if the person pleads guilty and pays within 30 days
- allow "hearings in writing"
- allow enforcement officers to provide evidence in writing unless the justice grants leave to have the officer attend in person.

These initiatives could also help reduce the impact of courthouse closures on local police.

An Implementation Team comprised of the Ministries of Attorney General and Solicitor General, ICBC and representatives from the police is starting to work on implementation tasks such as redesigning the violation ticket and developing a client-focused web site. Input on these issues that is received through the Justice Review process will be provided to the ministry.

8. Technology

8.1. Cybercourt

Many jurisdictions are using technology to overcome justice system challenges, including issues of access and efficiency. The success of some reforms, such as case management, can be dependent on the availability of improved court technology. There are several components subsumed under this heading, including court services on-line, provision of legal information, case management and tracking, and advanced management information.

Rapidly developing courtroom technology has the potential to fundamentally alter the litigation process. While a few true "cybercourts" exist, the components of a virtual courtroom have been identified, and many of them are being used in courts in the US and Canada and Australia, The components of "cybercourt" include:

- *E-filing* – Changes to court rules can permit or require pleadings, affidavits, factums and other court documents to be sent and exchanged electronically.
- *Web-based court scheduling* – Electronic scheduling systems can decrease needed court appearance. Some systems even integrate lawyers' calendars.
- *"Virtual clerk's office"* – This is created when all the material for a case flows electronically through the court and scheduling is done via the web.

- *Electronic access* – A result of the e-filing of pleadings, factums and other documents is increased public access to court information. While much of this has always been available for public scrutiny to those who wanted to take the time to seek it out, creating it in electronic form makes facilitates access. This raises significant policy issues that need to be addressed.

- *Multi-media briefs on CDroms* – There are now procedures in place in the US Court of Appeals for use of high technology briefs.

- *Technology to convert the court record and discovery evidence into digital format*

- *Use of technology to present evidence and counsel originated information* - This includes document camera, video evidence (discussed in greater detail below), remote witness testimony and remote appearances by judges, counsel and others.

In BC, the Ministry of the Attorney General and the judiciary have worked together to research and develop a draft electronic justice policy and work has begun on enabling controlled access to court records through an electronic system and the electronic filing of affidavits and exhibits. The extent to which we should be working toward a "cybercourt" vision in BC's justice system has not been widely debated and it is recognized that there are many significant policy issues to be discussed and resolved. However, given the number of households in the province that now have internet access, the possibilities for enhancing access to justice through the use of technology appears to be substantial. This is an areas in which BC could benefit from concerted research and development.

8.2. Videoconferencing

One example of the innovative application of technology to the courtroom that has been implemented in BC is videoconferencing. Videoconferencing technology enables simultaneous visual and oral communication between different locations. Currently, 28 court locations and 10 correctional centres are operational and several locations have more than one set of equipment. Most courthouse equipment is portable and is shared between Provincial Court and Supreme Court.

Practically any imaginable use has already occurred, in criminal, civil and family cases, with various configurations of links throughout North America and to other continents. Benefits of videoconferencing include:

- *Increased safety in courthouses and during escorts*: By reducing or avoiding some prisoner movements, crowding and tensions can be reduced in escort vehicles and in cellblocks.

Safety inside correctional institutions can be improved with less chance of contraband entering.

- *Improved cost effectiveness of services*: Videoconferencing can help reduce or avoid some keep of prisoner expenditures. Correctional centres can reduce time spent logging prisoners and their personal effects in and out. Virtual appearances can reduce the need to call out auxiliary deputy sheriffs or police support via emergency response teams. Regular links for inmate appearances should enable cost avoidance on expansion of cellblocks or vehicle fleet. Witness appearances can occur at reduced cost and with greater certainty.

- *Improved access to justice services*: Costs of proceedings can be reduced when witnesses, party, co-counsel or judge avoid travel. The ability to conduct a scheduled link by videoconference can eliminate or reduce obstacles to case completion and provide better access for protected and vulnerable witnesses.

In BC during the past two years, more than 3,000 court appearances have occurred by videoconference where accused persons remained in custody at detention centres. These have included administrative appearances, witness testimony and sentencing hearings with the accused remaining in custody, where the court agrees. Judges, lawyers, and inmates have almost universally reported positive experiences with their use of videoconferencing. The provisions of the Criminal Code currently limit the circumstances in which videoconferencing may be presumptively utilized in criminal matters, and it may be that recommendations for reform should be considered, for instance, for routine appearances, in respect of which prior judicial authorization is currently required on a case-by-case basis.

BC currently operates one of the most extensive court videoconferencing services in the British Commonwealth, with a total of 62 units. During the past six months, several operators have been trained at every site, to support expanding use and further expansion is planned.

8.3. Case Tracking and Information Management

Within the past three years significant improvements have been made in standardizing case tracking and case management systems. For criminal cases, JUSTIN now provides for shared case information among all levels of court. For civil cases, recently the Registry Information Tracking System (RITS) has been adopted as the civil case tracking system. Benefits include consistent case information, improved access to information, more consistent data quality and better management information.

These case tracking improvements are the foundation for further enhancements in electronic service delivery to the public and justice business partners. In addition, they result in significant improvements in the quality of management information about activities within the courts.

9. Family Law and Criminal Law

9.1. Family Justice Services

Since 1976, 16 reports on the family justice system in BC have been prepared by a variety of committees, commissions, working groups, practitioners and consultants. A consistent and compelling conclusion has been that courts are very often the wrong forums for addressing the emotionally charged issues facing separating families. All recommended non-adversarial approaches to resolving family disputes: mediation services and better information for separating parents, with special consideration (and access to court) in cases where family violence was a factor. There have also been calls for improved services after an initial resolution was reached, including better enforcement of support orders and the provision of supervised access services. Finally, greater access to services in rural areas, for non-English speaking and aboriginal people have been recommended.

Since 1995 many of these recommendations of these reports have been implemented:

- Family Justice Centres that offer mediation services now operate in 30 communities; mediators who work there are all trained and certified to national standard.
- Parent education programs are offered in 28 communities; in 10 communities, attendance is mandatory prior to an appearance in Family Court.
- Information on family law and dispute resolution services is available through a toll free telephone line and Ministry website.
- Support enforcement mechanisms have been strengthened to enhance the administrative, rather than court based, enforcement of child support.
- A family case management approach, including referrals to mediation and family case conferences before trials, has been implemented at some provincial court locations.
- Mandatory attendance at a “triage” interview with a Family Justice Counsellor prior to a Family Court appearance is being pilot tested in locations. During triage, Family Justice Counsellors conduct case assessments and refer parties to appropriate dispute resolutions services.

Interim evaluation findings indicate that this project is highly successful in diverting cases from court.

- A pilot in Kelowna (the Comprehensive Child Support Service) attempts to expedite the process of changing child support orders and agreements by integrating family justice service delivery, including legal advice and representation.

- Use of family case conferences before a judge in Provincial Court.

These existing programs providing early information to clients and early diversion to non-court resources appear to be sound. However, we must continue to look for ways to provide more services. Services are not available in all locations and service gaps remain in some areas, e.g. supervised access is available only on a very limited basis. While the services provided across the justice system – by the courts, the ministry and the LSS – are far more coordinated than they were ten years ago, even greater coordination is certainly possible. Although there are some helpful resources already available to family litigants, the needs of this group are very considerable and it is of prime importance that the system continues to explore ways to assist this group. We must find efficiencies that result in family issues getting resolved without bogging down the courts with issues that could better be resolved in a less contentious setting.

While there are a range of family justice services available in the community, some litigants still end up at the courthouse without adequate information or resources. The absence of on-site information and referral results in litigants not accessing available community services and burdens the courts and registry staff with non-court related activities. The problem can be addressed in at least two interconnected ways: by improving provision of point of entry information and by building the connections between the courthouse and the services available in the community.

Strategies for providing better point of entry information in the civil context are discussed in Part 3 of this paper. Many of the ideas discussed in that section, including court based assistance centres and on-line self help, would be equally helpful to family litigants.

Another resource for the provision of point of entry assistance, unique to family law, is the family court committee. These volunteer can be appointed by municipal councils under the *Provincial Court Act*. Their role is set out in section 5 of the *Act* :

> (6) The family court committee must do the following:

(a) meet at least 4 times a year to consider and examine the resources of the community for family and children's matters, to assist the court when requested and generally, and to make the recommendations to the court, the Attorney General or others it considers advisable;

(b) assist the officers and judges of the court, if requested, to provide a community resource or assistance in individual cases referred to the committee;

(c) report annually to the municipalities involved and to the Attorney General respecting their activities during the past year.

It may be worth considering whether these committees have a greater role to play in both providing assistance to litigants in the courthouse and linking them to other family justice services available in the community.

Other methods for linking the courthouse to community services should also be explored. Ideas to consider might include direct phone and taxi lines from courthouses to Community Justice Centres, more training for registry staff and better print publications guiding people to appropriate resources.

9.2. Legal Aid Reform

The Legal Services Society (LSS) is working on reforms to the legal aid system in response to budget reductions and new governing legislation. From the Task Force's perspective, there are three ways in which reforms may affect the LSS:

- some initiatives will be purely internal to LSS
- some broader justice system initiatives will directly affect and involve the LSS
- some broader justice system initiatives may affect the LSS, but they will not directly participate in them.

The Task Force will work closely with the LSS to ensure two-way information sharing, consultation and coordination of reform initiatives, where necessary.

9.3. Improvements to the Criminal Justice System

9.3.1. Criminal Caseflow Management

Criminal caseflow management has been the subject of intensive examination in most common law jurisdictions over the past two decades. Consistent with this the Provincial Court of British

Columbia recently instituted rules designed to ensure more effective management of criminal cases. Criminal Case Flow Management Rules (CCFM), implemented between 1999 and 2000 were designed by a Task Force, which included judges, Crown counsel, defence counsel, and representatives from Court Services, the Legal Services Society and the Law Society.

The purpose of the rules is to "provide simple, effective and efficient management of all proceedings of a criminal nature in order to secure a just and timely determination of every case before the Court." The goal is to generate early discussions between Crown counsel and defence counsel with a view to achieving early resolution or narrowing of trial issues.

Some concerns have been expressed about certain aspects of CCFM, particularly with respect to the number of appearances counsel are obliged to make and the benefits of some of those appearances. On the other hand, there appears to be a significant reduction in matters set for trial and a reduction in witness expenses co-incidental with but not necessarily attributable to the implementation of CCFM. Associate Chief Judge Spence has recently conducted a review of CCFM and his report is now available on the Provincial Court website.[23] It is anticipated that a Committee will be struck to consider the Report and recommendations for reform of the process or amendments to the Rules may arise from it.

Bill C-15A, a recently introduced federal bill which makes changes to the preliminary inquiry provisions of the Criminal Code, outlines another procedure that involves the judiciary playing a role in a criminal case in narrowing issues between the prosecution and the defence. The enactment of Bill C-15A would demonstrate Parliament's endorsement of judicial involvement in case management, which may encourage acceptance of a commitment to these kinds of processes by all justice system participants. The provisions of Bill C-15A are being brought into force over the next several months.

9.3.2. Use of technology

Increased **use of technology** is steadily taking place. At the F/P/T table, British Columbia has advocated legislative changes which will ensure that the rational use of technology is not inhibited by a failure of the law to keep pace with technological development.

Legislative changes which will ensure that the rational use of technology is not inhibited by the failure of the law to keep pace with technological development. This will facilitate attaining the same or an enhanced level of reliability in a more efficient manner by using available, anticipated,

[23] www.provincialcourt.ca

and even unanticipated, technology. The use of video conferencing, electronic signatures and the recording of court processes by whatever means is demonstrably reliable are some examples.

9.3.3. Improvements to criminal procedure

BC has also been an actively involved in an ongoing process to improve criminal procedure through the F/P/T consultative process. In that forum, BC has advocated an examination of questionable "pro forma" procedural requirements which involve the use of time and resources without obvious benefits. For example, judicial supervision of subpoenas issued by Crown Counsel, and perhaps defence counsel.

9.3.4. Other criminal law reforms

The bar has proposed a number of ideas for improving the criminal process:

- having the provincial prosecution service take over federal prosecutions from federal agents
- diverting mentally disturbed accused persons from the court process
- substantially expanding the use of restorative justice for both youth and adult criminal cases
- expanding family group conferences as an alternative to court for young offenders throughout the province
- substantially increasing restorative justice initiatives for First Nations people in the criminal justice system
- restoring high level consultation between the Provincial Court, crown and defence counsel with a view to using cooperative methods to resolve the maximum number of criminal cases at the earliest possible moment in the process.

9.4. Large Criminal Case Management

The cost of running large criminal cases is an issue of concern in B.C. and elsewhere in Canada. The increasing costs of these few cases represent a considerable drain on the justice system that needs to be addressed. “Big case management” is an area deserving of special emphasis. Although data to support the claim is difficult to come by, many argue that a small number of big cases take up a disproportionate amount of justice system resources, including legal aid resources.

The LSS has implemented Strategic Case Assessment Program for large criminal cases involving certain serious offences. While the program is not designed to reduce costs, it is designed to

achieve greater predictability of costs in long trials, a better allocation of scarce legal aid funding, and adequate representation of clients in large criminal cases.

Other steps need to be taken to address the issue on a system wide basis, including a consideration of the role of courts, crown, the defence bar and the federal and provincial governments in the management of large cases. The F/P/T Heads of Prosecution Committee is presently looking at this issue.