Issue 1: Winter 1998-1999

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Acknowledgments

The Canadian Forum on Civil Justice is a non-profit corporation established by the Canadian Bar Association and the University of Alberta, Faculty of Law. The Forum offices are located in the John V. Decore Centre for Alternate Dispute Resolution at the Faculty of Law, University of Alberta. The Forum is a national organization established pursuant to Recommendation 52 of the Systems of Civil Justice Task Force Report. Services are provided in French and English.

This newsletter will be published in the spring and fall by the Canadian Forum on Civil Justice. It is intended to serve as an informative source of news on civil justice reform initiatives for lawyers, judges, legal educators, court administrators and members of the public.

The Canadian Forum on Civil Justice gratefully acknowledges the generosity of our funders, listed below in alphabetical order:

- Alberta Law Foundation
- Association of Canadian Court Administrators
- CBA Law for the Future Fund
- DuPont Canada
- Government of Alberta
- Government of British Columbia
- Government of the Northwest Territories
- Government of Nova Scotia
- Government of Ontario
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- Justice Canada
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- Diana Lowe

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The opinions and views expressed in this newsletter are those of the individual writers and do not necessarily reflect the opinion of the Canadian Forum on Civil Justice. We welcome your comments,

suggestions about articles for future issues, information about civil justice reform that is happening in your community and contributions. Contributions should be written in plain language, in either English or French. The Editorial Board reserves the right to edit any contributions.

Board of Directors

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Will-Say Report

The Canadian Bar Association's Will-Say Working Group was struck under the auspices of the Systems of Civil Justice Implementation Committee. Their mandate, which is set out in Recommendation 15 of the Systems of Civil Justice Task Force Report, states that:

> The CBA work with selected jurisdictions to establish pilot projects using "will-say" procedures, so as to determine whether it is useful and fair to require will-say documents in civil cases to compel early disclosure of anticipated evidence, and to assess the impact of such a requirement on delay, costs and discovery.

The Working Group has been actively researching the utility of will-say statements in Canada and, to that end, commissioned Professor Lee Stuesser to prepare a report to the CBA Systems of Civil Justice Implementation Committee's Working Group on Will-Say Statements. This report provides a thorough review of the experiences in other jurisdictions and identifies the strengths and weaknesses of Will-Say Statements, as well as a possible framework for will-say procedures in Canada.

The Working Group is of the view that the use of will-say statements in civil cases will provide a means by which to reduce cost and delay. In their final report, they propose to conduct a pilot project on the use of will-say statements in one jurisdiction. The resulting data will then be made available to the courts, governments and the profession. The Working Group's final report is available here (requires Adobe Acrobat).

The Working Group is soliciting feedback on their report and, more specifically, on the proposed procedural rules contained therein. Jurisdictions are also invited to contact the Working Group, should there be an interest in being considered as a possible site for a pilot project.

Members of the Working Group:

- David Tavender, Q.C., Chair (AB)
- Thomas Macdonald (NS)
- A.C.J. Jeffrey Oliphant (MB)
- Justice Bob Blair (ON)
- Carl Baar (ON)
- Lee Stuesser (MB)

For additional information on the Will-Say Project, please contact Heather Nowlan of the CBA, (613) 237-2925 ext. 112, or call 1-800-267-8860.

Watch for an article on potential section 96 limits to Court annexed mediation, in our next newsletter.

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Remembering Former Chief Justice Brian Dickson

The death of the Honourable Brian Dickson last fall was a great loss to the cause of law reform in Canada. Although at times weakened by ill health, he continued to make a significant contribution to public life after his retirement from the Supreme Court. Among his many interests were aboriginal rights, military justice, and the operation of the civil justice system. He was adviser to the Primer Minister in setting up the Royal Commission on Aboriginal Peoples. He had written two of the leading decisions in this field: *Guerin* v. *The Queen* (1984) and, with Justice La Forest, *Sparrow* v. *The Queen* (1990). Later, he chaired a special task force to advise the Minister of National Defence on changes in the military justice system. The day he died he was scheduled to travel to Vancouver on a similar assignment.

In additional to his ground-breaking opinions on the foundations of the Charter, Dickson always strove to improve the form and quality of legal writing. In an interview with Justice Robert Sharpe he said:

> *I think it is imperative that our judgments be understandable to people who have not had legal training. We are not writing simply for legal academics or other judges. The cases we deal with affect every man, woman, and child in the country. I also think from the point of view of judges of the other courts who are required to follow our judgments, sometimes reading them late at night preparing for a jury charge, it is very much easier for them to read something which is written in everyday language.*
>
> *[The Advocates Society Journal, (Summer 1998) at 24.]*

The Chief Justice served as Honorary Chair of the Systems of Civil Justice Task Force (1996-1997) and continued in that capacity with the Implementation Committee (1997-1998). Like everything he undertook, he threw his considerable energies into these tasks, attending many meetings and carefully reviewing, and correcting, the text of our reports. He kept in touch with many of us on a regular basis.

Dickson believed passionately in civil justice reform, and criminal justice reform too. In addition to supporting the Forum, he was interested in any reforms which would speed up the litigation process at reasonable cost. Court connected mediation, standards for *pro bono* work by lawyers and law firms, and the use of will-say statements in civil cases were projects which he embraced with enthusiasm.

Former Chief Justice Dickson speaking with Doug F. Robinson, Q.C. (left) and P. André Gervais, c.r. at the 1998 CBA Annual Meeting.

His opening remarks on the occasion of the National Conference on Systems of Civil Justice (Toronto, February 1, 1996), are a striking reminder of the reality of the task:

> *We have a clear sense of what the problems are. We are beginning to have a better grasp of the root causes of symptoms such as cost and delay. We need to focus now on developing a better system. We cannot start from scratch - we have to deal with the reality of our institutions as they have developed over the centuries. We must safeguard the central principles which make our system fair. Yet we must not be afraid to question the ways in which we have carried out our business. We must separate those elements of our civil justice system which are essential and those elements which we can no longer afford.*

In August 1998, only a few weeks before he died, he participated in the CBA Annual Meeting in St. John's to demonstrate his support for the Task Force and its work. He attended an all-day meeting of the Implementation Committee, a meeting with the Civil Justice Committee on the Canadian Judicial Council and a reception in honour of the establishment of the Forum, all of this in his wheelchair. It was a remarkable performance and inspiring to us all.

Brian A. Crane, Q.C.

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Simplified Proceedings

By June Ross, Associate Professor, Faculty of Law, University of Alberta and Member of the Forum's Board of Directors, and by Mark Opgenorth, student, Faculty of Law, University of Alberta. A special thank you to Chantal Corriveau (Member of the Forum's Board of Directors) for reviewing a draft of this article and providing us with her advice with respect to Quebec's Simplified Procedure by Way of a Declaration.

1. Introduction
   - A - Application
   - B - Pre-Trial Procedure
   - C - Trial
   - D - Costs and Other Sanctions
2. Simplified Proceedings Table
3. Endnotes

INTRODUCTION

Recommendation 14 of the *Systems of Civil Justice Task Force Report* encourages every jurisdiction to establish "expedited and simplified" proceedings that are mandatory in actions were $50,000 or less is at issue and available at the option of the parties where the subject-matter of the case warrants. In common with the *Civil Justice Review* of Ontario and with *Lord Woolf's Report* in England, the Task Force concluded that simplified proceedings would increase access to the civil justice system for simpler, or smaller value, claims. The essential underlying principle is proportionality: the costs of litigation should be proportional to the amount at issue. It is, of course, essential that the basic requirements of fairness and the adversary process be retained. But the simplification of procedure does not necessarily interfere with these fundamentals, especially for less complex claims. On the other hand, "the most perfect procedures that can be imagined work injustice because their cost makes them unusable." [1]

Since the publication of the Report in 1996, the Federal Court and the superior courts in Nova Scotia, Manitoba, Saskatchewan, Alberta and British Columbia have joined the Tax Court [2] and courts in Ontario, Quebec and Newfoundland, in adopting some form of simplified procedure [3]. In some cases these procedures are as yet untried - the Alberta and British Columbia rules, for example, came into effect on September 1, 1998. The varied names of and provisions regarding these procedures are summarized in chart form (Table: Simplified Proceedings). An examination of these reforms indicates that, while they possess common features, they also differ in important respects. This review will examine the range of approaches to the definition of cases subject to simplified procedure, the restrictions on pre-trial procedure, the mode of trial, and costs and sanctions.

Within this review a number of questions are posed. We are soliciting responses to

these questions and other comments, which will be summarized and presented at a future date. We also welcome comments regarding developments in New Brunswick, the Northwest Territories, PEI and the Yukon Territory, which have not been included in this discussion as, to our knowledge, they do not yet provide for simplified procedures.

Responses are comments may be provided:

- directly on the questionnaire posted on the Forum's web-site
- by email - cjforum@law.ualberta.ca
- by fax - (780) 492-6181 or
- by mail:
  - 110 Law Centre, University of Alberta
    Edmonton, AB T6G 2H5

A. APPLICATION

In surveying the range of approaches to the identification of cases, three questions arise. First, is a monetary amount to be utilized and, if so, what amount? Secondly, what, if any, discretion should be left to the parties and/or the court as to the application of the procedure? Thirdly, are there particular subjects or types of cases that should be included or excluded from the simplified procedure?

Given the underlying concern with proportionality, it is not surprising that in most jurisdictions, the application of simplified procedures is related to the money value of the claim. The stipulated amounts range from $15,000 (Newfoundland) to $25,000 (Ontario and Tax Court), $50,000 (Quebec, Manitoba, Saskatchewan and the Federal Court) and $75,000 (Alberta). In Nova Scotia and British Columbia, application depends on the anticipated complexity of the case or length of the trial, as indicated by the parties and subject to judicial supervision. Most of the jurisdictions relying on monetary limits allow for consensual or judicial exclusion from the simplified procedure. Ontario and Saskatchewan are the exceptions, with no such provision.

All of the jurisdictions relying on monetary limits, other than Quebec, provide for the inclusion of larger claims under simplified procedure when there is agreement of the parties and/or court order. Quebec's simplified procedure applies to specified claims, such as the sale price of movable property, price in a contract for services, employment, lease, deposits or loans of money, of any amount [art. 481 .1, al. 2 (a-fl], but other claims may not exceed $50,000. When there is doubt regarding the nature of the claim, the courts have chosen to favour the application of the rule over ordinary procedure [4].

Where there is discretionary application of or exclusion from the procedure, it may be useful to establish criteria to determine the suitability of the case for a simplified process. For instance, cases that raise issues of public importance or involve complex evidentiary or legal issues might appropriately be excluded [5]. Generally the rules of court have not specified the grounds for including or excluding a case from simplified procedure, leaving this to judicial development. Manitoba, however, provides that a judge may consider any "appropriate" matter, including "the nature of the action ... the amount at issue ... the complexity of the issues ... and the likely expense .." [6].

Some, but not all, jurisdictions exclude particular types of claims from simplified procedure. These vary significantly.

- Are monetary amounts a suitable basis on which to determine the applicability of simplified procedures? What has been your experience with the monetary threshold in your jurisdiction?

- Should availability depend on consent of the parties or Judicial discretion? What are pertinent factors or guidelines for the exercise of judicial discretion? Are there discernible trends as to the exercise of judicial discretion; e.g., favouring

application of simplified or ordinary procedure?

- Are there particular types of claims or actions that are not suitable for simplified procedures?

B. PRE-TRIAL PROCEDURE

The strategies used to expedite pre-trial proceedings vary widely. The primary differences relate to the extent of judicial discretion and the use of time limits and/or restrictions on the available procedures. In Newfoundland and Manitoba every limitation on procedure is determined by the discretion of the court, while in Ontario pre-trial examinations are absolutely prohibited. Other jurisdictions specify restrictions but allow the courts some discretion in relaxing these limitations. Discretionary determinations may be made in the context of case management, regarding which there is again a broad range of approaches [7].

Every jurisdiction places limits on examination for discovery, characterized in the Task Force Report as a key cause of procedural delay. Examination for discovery is restricted by a variety of methods: complete prohibition (Ontario and Saskatchewan); prohibition of oral examinations (Federal Court and Tax Court); prohibition of written interrogatories (British Columbia); time limits for examinations (British Columbia and Alberta); and deadlines by which discovery must be complete (Nova Scotia, Quebec, British Columbia). Ontario and Saskatchewan, which have opted to abolish examination for discovery, provide instead for the disclosure of witnesses' names.

It is interesting to consider the relationship of the monetary threshold and the nature of the restrictions on discovery. Ontario, with no examination for discovery, has a relatively low monetary threshold ($25,000). Saskatchewan increased the threshold ($50,000), but allowed for judicial exemption from the no discovery rule. Alberta's relatively high threshold ($75,000) is accompanied by the right to a time limited examination for discovery.

Virtually every jurisdiction uses general or judge-imposed deadlines to expedite pre-trial procedure, but Nova Scotia and Quebec do so exclusively. They place no limits on the scope or nature of discovery, except for requiring that it be completed by a certain date.

- Are general or judge-imposed restrictions effective? In the case of general restrictions, is it useful or counter-productive to provide for discretionary relief from them ?
- Are time limits or limits on the nature of pre-trial procedures fair and effective? Again, is it useful or counter-productive to provide for discretionary relief?
- Is there a reasonable correspondence between the restrictions on procedure and the monetary threshold?

C. TRIAL

Simplified procedure does not imply in every jurisdiction a modification to the trial process itself. In Nova Scotia and Quebec, for example, only the scheduling of the trial is expedited-the procedure is that of an ordinary action. Other jurisdictions give the court the option to restrict evidence to afffidavits only.

Special note must be made of the provisions for summary judgment and summary trial. Every jurisdiction has provisions for summary judgment, and some also have summary trials under ordinary procedure. In Saskatchewan and Ontario, these procedures have a special application under simplified procedure. In each case, motions for summary judgment are encouraged by a lower threshold for granting judgment. While under ordinary procedure a "genuine issue for trial" precludes summary judgement, under simplified procedure summary judgment is granted unless the judge is unable to decide the issues in the absence of cross-examinations or if it would be otherwise unjust. Summary trial is another option under simplified procedure for litigants in Saskatchewan and Ontario. Essentially, summary trials proceed on the basis of affidavit evidence only, with limited time for cross-examination, re-examination and oral argument. In Ontario special procedures govern motions for summary trials, while in Saskatchewan an ordinary trial will be granted only under special circumstances.

The Federal Court prohibits summary judgment applications for simplified actions, and provides for what is essentially a summary trial for all simplified actions. Newfoundland, Manitoba and Alberta have moved in this direction, by providing for the increased use of affidavits at trial.

Other than Federal Court, all jurisdictions permit resort to general rules pertaining to summary judgment and/or summary trial within the simplified procedure.

British Columbia's fast track trials have a unique feature. As indicated above, the procedure is available only where the trial has been estimated to take no more than two days. To enforce this initial estimate, two days prior to trial the parties must file an estimate of the time they will require for evidence and argument. The trial judge may accept or amend these figures and may hold the party to these limits. If it appears that the trial will exceed two days duration, the judge will adjourn the trial and the action will be rescheduled under ordinary procedure.

- Should there be a relationship between simplified proceedings and summary trials?
- Should summary judgment be available within simplified procedure and, if so, should the threshold for granting judgment be lower than that under ordinary/ procedure?

D. COSTS AND OTHER SANCTIONS

Saskatchewan and Ontario employ costs to enforce proper use of simplified procedure. A plaintiff who has employed the ordinary procedure, and at trial receives a damage award less than the monetary threshold for a simplified procedure, will not receive costs and may be required to pay the defendant's Costs. A defendant who objects to simplified procedure risks paying the plaintiffs solicitor-client costs if the award following an ordinary trial is less than the monetary threshold. It is thus prudent to proceed under simplified procedure whenever the claim is anywhere near the threshold, due to the possibility that the ultimate award will come within the criteria of application. The federal court has a similar rule but it requires the court to find an "exaggerated claim."

In Nova Scotia, which relies exclusively on time limitations, sanctions include not only Costs, but potential dismissal of a claim or defence for failure to comply with these limits.

- Are costs or other sanctions adequate?
- Are they being enforced?

SIMPLIFIED PROCEEDINGS TABLE

PDF Version

ENDNOTES

1. T. A. Cromwell "Dispute Resolution in the Twenty-First Century," in Canadian Bar Association, Background Studies to the Systems of Civil Justice Task Force Report, 1996, at 123. See also The Rt. the Hon. Lord Woolf, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England (1996), Section 2, Ch. 2, para. 19; Ontario Court of Justice and Ministry of the Attorney General, Civil Justice Review, First Report (1995), at 259-63, Supplemental and Final Report (1996), at 131 -33; and Ontario Court of Justice, Report of the Simplified Rules of Civil Procedure Committee (1994). Return to Article

2. The Tax Court of Canada employs an Informal Procedure for some claims, primarily those involving appeals of $12,000 or less or loss determinations of $24,000 or less, subject to party election and court order (Tax Court of Canada Act, R.S.C. 1985, c. T-2 as am., ss 18-18.33; Informal Procedure Rules, SOR/90-688 as am.). This procedure is in the nature of a small claims or tribunal procedure, with no discovery of documents or witnesses, an informal trial at which the rules of evidence do not apply, and rulings that have no precedential value. In addition, a 1993 amendment to the Act makes some special provision for claims within the General Procedure, for appeals of $25,000 or less or loss determinations of $50,000 or less. It is the latter, modified General Procedure, that is referred to in the Table. Return to Article

3. For discussions of particular simplified procedures see: Law Society of Upper Canada, The Simplified Rules Simplified (1998) (Ontario); J.E. Callaghan & B.J. Caruso, "Simplified Procedure: Rule 76 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194" (1996), 18 Advocates' Quarterly 388 (Ontario); D.C. Hodson, "The New Summary Procedure Rules," (1998) The Advocate 13 (Sask.); D. Roberts, "Rule 66: A Good Start," (1998) 56 The Advocate 725 (B.C.); A. Olivier, "Splendeurs et mis□e la proc□all兆Faut-il proc□ar d□tion ou par requ泥 en matiβe de louage?" (1997), 57 Revue du Barreau 433. Return to Article

4. Vena c. Lindsey Morden Claim Services Ltd. J.E. 97-1767 Return to Article

5. This is the position taken in the Woolf Report, supra note 1, pares. 13-16. Return to Article

6. Manitoba Queen's Bench Rules, Rule 20A(4). Return to Article

7. The Table refers to case management rules only where there are special provisions for simplified proceedings. We have not surveyed approaches to case management generally. Return to Article

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Did you know . . .

. . . that the Australian Institute of Judicial Administration (AIJA) recently conducted a research project and published a report on "Courts and the Public"? The report examined the relationship between the courts and their public and focused on the extent to which courts should become consumer-oriented. Careful consideration was given both to defining who is included in the term "the public" and to challenging the traditional perception of the courts by encouraging a view of the courts as a multi-faceted civil organization. The report is based on qualitative research primarily in the form of interviews with approximately 100 individuals, and concludes with 16 recommendations which fall within three themes:

1. promoting better communication and the better identification of needs;
2. environment, facilities and support; and
3. system wide recommendations including establishing performance indicators, developing public education programs about the work of the courts, and establishing an independent national body to facilitate and monitor change.

The recommendations are intended to promote better communication between the courts and the public, which in turn will ensure that appropriate services are identified and that the quality of service is improved, to the benefit of both the courts and the public.

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Regular Features

We would like to encourage research and the sharing of opinions or initiatives for civil justice reform, by providing a forum where you can learn about developments and pilot projects undertaken in your own and other jurisdictions. We will continue the reports on Task Force initiatives in each province and territory, which began with the Systems of Civil Justice Implementation Committee Reports. If you have had experience with a new rule or are active on a committee which is responding to the Task Force recommendations, please share your experience with us or let us know what is happening where you are.

We are asking you to tell us what topics you are interested in learning more about. We would appreciate hearing your feedback about articles you've read in this newsletter, as well as about our website. We are also seeking the contribution of articles for future issues. We ask that all contributions be written in plan language, and we reserve the right to edit. We look forward to hearing from you!

You can reach us by:

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We're Online!

On November 27, 1998, we launched our new website at cfcj-fcjc.org. This enables us to share information about civil justice initiatives from across the country and internationally, as well as provide you with an opportunity to comment and become involved in the discussion.

Our site includes a bibliographic database of more than 2,300 documents on civil justice issues and initiatives. The database has an easy-to-use search engine. We will be updating and adding to the database, and will also soon provide a full text database on our website.

We welcome your comments, suggestions, and information about new initiatives through our feedback page or by e-mail at cjforum@law.ualberta.ca.

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Forum Opening

The opening of the Forum was celebrated on November 27, 1998, at a reception held in our new offices in the John V. Decore Centre for Alternative Dispute Resolution, at the University of Alberta, Faculty of Law. We were joined by a large number of guests including international and provincial ombudspersons and others who were in Edmonton for an international human rights conference, members of the Bar, members of faculty, and students.

A first look at our new website – November 27, 1998.
From left to right – Sol Rolingher, Dean Lewis Klar, Diana Lowe, Doug F. Robinson, Q.C., June Ross and Rod Wachowich, Q.C.

The Chair of our Board, Doug F. Robinson, Q.C., took this opportunity to present certificates of appreciation which recognize June Ross and Sol Rolingher for their efforts in the formation and establishment of the Forum.

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Welcome to the Forum

Forum means "a place of meeting for public discussion" (The Canadian Oxford Dictionary), making this the perfect name for the Canadian Forum on Civil Justice. Our purpose is to facilitate the exchange of information and sharing of experience on civil justice reform, to assist the judiciary, court administrators, governments and most importantly, the Canadian public. We encourage your participation in the process of civil justice reform.

Our work will be aimed at improving access to justice through a number of initiatives which will include, but not be limited to, simplified court procedures, public legal education, appropriate forms of dispute resolution and a recognition that the courts and the legal profession must be responsive to the needs and concerns of the public.

You can support the Forum and receive our semi-annnual newsletter by becoming a general member and paying our $50 annual membership fee. To encourage membership, we are willing to waive the fee in our first year of operation. We hope you will be convinced to continue your membership after the waiver expires. Those who donate in excess of $50 will be considered Sustaining Members.

The Forum offices were opened on October 1, 1998, when Diana Lowe began work as our Executive Director. She was recently joined by our Administrative Assistant, Carmen Baldwin-Déry, who is bilingual and will assist us in ensuring that all of our services are available in French and English.

Diana Lowe, Executive Director

We look forward to an active association which will preserve our judicial institutions, but make them as accessible as possible for all Canadians.

Doug F. Robinson, Q.C.
Chair, Board of Directors