The Curious Case of Civil Procedure Reform in Canada,
So Many Reforms Proposals With So Few Results

by

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The subject of my thesis is one which has been subject of many reports of reform of civil justice system across Canada. I consider that the reform of civil justice system is of fundamental importance for our society affecting all the citizens of our country and is, also, a fascinating topic.

This thesis examines the changes proposed by Honourable Judge Coulter Osborne through the lens of the reform in civil procedure rules operated in the U.K. as a result of Lord Wolfe’s report because the Canadian justice system is founded upon Anglo-Saxon common law principles.

My conclusion is that any substantial reform of the civil justice system must start with an increased role of the judge over the case, in the way promoted in U.K’s Civil Procedure Rules, and that Justice Osborne’s civil justice project still doesn’t propose a much needed overhaul change of Civil Procedure Rules in Ontario.
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I. Introduction

The reform of civil procedure is a major and constant preoccupation for nearly every province in Canada. Provincial Governments, law reform commissions, judiciary and non-government organisations, public opinion in general, have all called for improving the efficiency and the effectiveness of civil procedure rules, but so far the results are modest. While with respect of delays of civil cases and appeals in civil matters the situation has relatively improved, a large proportion of citizens still confronts with the problem of the access to justice.

However, the reforms regarding the “access to justice” have been a major preoccupation of legislators not only in Canada, but in different jurisdictions around the world, and, in my paper I will refer from time to time to the measures taken in those countries to improve the functioning of the legal system. Because the Canadian justice system is founded upon common law principles, for the purposes of this thesis, I will give a particular attention to the reforms of civil justice which have been adopted in the United Kingdom as a result of Lord Wolfe’s report.1 Also, where it is possible, I will make reference to the reform of civil justice in other countries and provinces, and in particular to the new British Columbia Supreme Civil rules which will come into force from June 2010.2

This thesis examines the changes proposed by Honourable Judge Coulter Osborne3 through the lens of the reform in civil procedure rules operated in the U.K.. Because the Osborne’s report is very recent and many of his recommendations are still to be implemented, we do not have any data yet which could give us an idea about how much or if the civil justice system has been improved as a result of the reform measures. As a result of Justice Osborne’s

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1 Lord Wolfe Interim Report to the Lord Chancellor on the civil justice system in England and Wales
recommendations, the Province of Ontario has operated a series of changes to the Rules of Civil Procedure which come in force in January 2010. Among the most important ones are: the duty of the expert to the court (r. 4.1.01); on a summary judgment motion the judge will have the power to weigh the evidence, evaluate credibility, draw reasonable inferences, order oral evidence be presented (r. 20.04 (2.1)); the proportionality of the discovery (r. 29.2); also, the test for discovery is changed, and what is required to be disclosed is every document “relevant to any matter in issue” (r. 30.02(1), (2); 30.03(2) to (4)); the duration of the examination for discovery cannot exceed 7 hours, regardless of the number of parties, except on consent or with leave (r. 31.05.1) etc. However, I am the advocate of a reform of civil justice system meant to put Canada on the same path as the UK or to go even beyond the changes operated there.

In my view, the goal that the Canadian reform of civil justice system should attain is the “access to justice”. Both represented and unrepresented litigants must have real access to the civil justice system which is impaired for many of our citizens at present principally due to high costs of litigation, and, secondly, due to the delay in the resolution of the cases “Justice delayed is justice denied”. While the fairness of trial and cost effective justice are other possible goals of a civil system justice reform, given the significant accomplishments of the existing system in these aspects, I will prioritize access to justice since this is where the most reform is need it.

Beside the “access to justice” principle, the proportionality principle is the other thread which runs through all the chapters. I consider that the principle of proportionality is indispensable in designing a system of civil justice which

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4 Ontario Regulation 438/08 made under the Courts of Justice Act, which come into force in January 1, 2010, for see all major changes available at http://www.virtualassociates.ca/links/PDF/rules%20amendments.pdf;  
5 See expert evidence section.  
6 William Gladstone, British politician (1809-1898) and Prime-minister (1868-1894)  
can respond adequately to the challenges raised by the actual trends in the society.

The interest in the success of the reform of the civil justice system in Canada should be at the heart of the interest of all the actors who are involved in civil litigation: clients who complain that their cases take too long to get to trial and that they cannot afford the high cost of litigation; judges who deal with more and more unrepresented litigants and who need to manage the cases; as well as the attorneys who represent the parties in front of the courts.

At the base of the reform of the civil justice system lies the public interest in having the resolution of civil disputes settled by the courts in a fair, timely and at a reasonable-cost-for-the-parties manner.

The public interest in the judicial resolution of disputes is founded on the need that the disputes take place under the public scrutiny and that the resolution of the cases which are in dispute be the result of an adjudicatory process through/by the courts which “must ensure that a just resolution is reached and that the principles upon which this resolution is founded accord with the law.”

In the last years, observers have noted, a decline in the number of the cases brought before the courts, as well as at the erosion of the role of the courts in the resolution of disputes in light of the rise of Alternative Dispute Resolution which is now seen as a viable alternative to the civil trial, the traditional way of resolutions of the disputes.

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9 Ministry of Attorney General, document available at [http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/firstreport/courts.asp](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/firstreport/courts.asp); in 1983 in USA 88% of cases were settled and only 9% went to trial, see Marc S. Galanter Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) about Our Allegedly Contentious and Litigious Society, 31 U.C.L.A. L. Rev. (1983), more recently, in a study from 2004, 97% of the cases were settled or dismissed without a trial in USA, document available at [http://www.bizjournals.com/phoenix/stories/2004/05/31/newscolumn5.html](http://www.bizjournals.com/phoenix/stories/2004/05/31/newscolumn5.html); in Canada the number for settled cases is around 95% (NEED CHECK THE ACCURACY OF THE SOURCE).
Owen Fiss, in his influential article Against Settlement\textsuperscript{11}, wrote: “Settlement is for me the civil analogue of plea bargaining. Consent is often coerced, the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.” I consider that the courts should be the usual forum in which the litigants are seeking justice and all the reforms of the civil justice system should be undertaken with the broader purpose of maintaining public confidence in the justice system.

My essay will be divided in 5 chapters which will deal with parts of the civil procedure rules whose reform is necessary to increase the “access to justice” by alleviating the problems of excessive cost and delay, which, in my view, are the most problematic issues the civil justice system is currently facing.

The first chapter is dedicated to the analysis of the proposals made in Osborne’s report with regard to the costs of litigation which have increasingly become a major theme of any agenda of reform of civil justice system. Among the issues covered in this section are: why the principle of proportionality of the cost of litigation should be included in a future code of civil procedure; why the counsels of the parties should prepare a litigation budget and whether USA’s “no shifting cost” rule in civil trials should be adopted in Canada.

The last chapter is consecrated to the summary disposition of cases. Summary judgment is an important procedural mechanism which is underutilized now and which could be useful for reducing the delay and the cost of litigation. I will discuss and argue in this chapter in the favour of a reform of the summary judgment such as to eliminate the cost sanctions imposed or to change the test of “no genuine issue for trial” which is provided in s.20 of the Ontario Civil Procedure Rules, so that this procedural mechanism may become friendlier to litigants. As a result, it concludes that the success in implementing a

\textsuperscript{11} Owen Fiss, Against Settlement, (1984) 93 Yale L.J. 1073
new summary disposition of cases mechanism will become an effective tool for providing benefits to the judicial system.

In the second chapter, I will analyse the issue of unrepresented litigants. Without taking into consideration and finding solutions for the difficult situation of unrepresented litigants, any reform of civil justice is deemed to fall into derisory. The focus of this chapter will be on the measures to improve the access to justice for unrepresented litigants by increasing the legal funding, by changing of procedural rules in measure to make the judicial system more accessible, and by increasing the role of the Bar in assisting unrepresented litigants. I conclude that a change in the approach of unrepresented litigants is necessary given the fact that, in the last years, due to the high cost of litigation, more and more citizens of this country go to trial without having legal advice or legal representation and this situation is going to become worse for both the judicial system and litigants if immediate action is not taken to provide support for unrepresented litigants.

As we all know, discovery has become the pre-trial stage of a case which consumes most of the financial resources of the parties and which is the most time consuming phase of the trial. It is very clear that a reform of the discovery process needs to be undertaken. The third chapter explores the changes proposed for discovery by Justice Osborne’s report such as, for example, whether to narrow the scope of discovery or whether there should be a time limit of the duration for discovery, and, also, why we need to do a more radical reform of discovery than that suggested by Justice Osborne in his report. Also, in this chapter is included the expert evidence which, due to increased complexity of cases, has become more utilised and, in consequence, contributes to the increases in the cost of litigation and to delays for the litigants. Expert evidence rules as they are in this moment should be reformed and this section presents the arguments in favour of why this should be done, while I propose a more aggressive change of the rules governing expert evidence than that undertaken in the U.K.
Chapter four examines the case-trial management reform, both pre-trial and trial case management, proposed by Osborne’s report, and, after a look at the UK and the USA case management models, it explains why the current justice system needs a procedure for case management, and why an approach closer to the UK case litigation management model is more favourable for litigants although it will cost more the taxpayers.

The last chapter is consecrated to the summary disposition of cases. Summary judgment is an important procedural mechanism which is underutilized now and which could be useful for reducing the delay and the cost of litigation. I will discuss and argue in this chapter in the favour of a reform of the summary judgment such as to eliminate the cost sanctions imposed or to change the test of “no genuine issue for trial” which is provided in s.20 of the Ontario Civil Procedure Rules, so that this procedural mechanism may become friendlier to litigants. As a result, it concludes that the success in implementing a new summary disposition of cases mechanism will become an effective tool for providing benefits to the judicial system.
II. Costs of Litigation

Prof. Neil Andrews wrote: “the topic of ‘costs’ is a large, pervasive, technical, fundamental and indeed fascinating subject. In some respects it has become the most prominent and even the most vexed aspect of modern civil procedure in England.”\(^\text{12}\) This could be said not only about costs of justice in England but also in Canada or in other countries based on common law.\(^\text{13}\)

In Canada the rising costs of litigations has been recognized from almost two decades. Thus, in the 1990’s, the Civil Justice System Reform Project in Ontario tried to indentify, without too much success, solutions to this issue.\(^\text{14}\)

Meanwhile, the situation became worse, and, as I already presented above in the chapter referring to unrepresented litigants, more and more people cannot afford going in court to defend their rights. Not only litigants complain about the costs of litigation but even litigation lawyers or members of the judicial power acknowledge this situation and ask that something be done about it.

For example, in pleading to the Law Society, Mr. Justice Lane said he could not afford to go to court as a litigant in his own court.\(^\text{15}\)

The high costs of litigation affect neither the people who can bring their claim in the Small Claim Court nor the corporations or wealthy litigants with large claims who can afford the costs of a trial, but affect “those with claims between $50,000 to $ 1 million, or with non-monetary claims, who face the prospect of disproportionately large legal costs.”\(^\text{16}\)

\(^\text{15}\) Thomas G. Heintzman, see supra note 14
\(^\text{16}\) Thomas G. Heintzman, see supra note 14
As a result of this situation, the costs of litigation became an object of study for different reports which have made several recommendations to address this issue. Unfortunately, the space of this paper doesn’t allow me an exhaustive analysis of the costs of litigation, so I focused the discussion on the principle of proportionality in civil litigation, the courts control over the costs of litigation and the cost-shifting rule.

A. The Proportionality Principle

All along this paper, I will make referral to the proportionality principle. A detailed analysis of what this principle entails is necessary at this point. From a civil litigation perspective, the proportionality principle could be defined as “the amount of process used for a case […] proportionate to the value, complexity and importance of the case”. 17

The proportionality concept is based on the idea that all cases are not equal. The cases are different with respect to the value, the complexity or the importance. Thus, the value claimed could vary from a few hundreds of dollars in a case brought in a Small Claim Court to billions of dollars like in the Exxon Valdez pollution case. Some cases are simple and don’t raise any complex issues (i.e a commercial contract where the merchandise was delivered but the price wasn’t paid), while others are quite at the opposite (i.e. mass tort actions, such as anti tobaccos cases, where thousands of people were injured and several medical expertises were undertaken to prove the impact of smoking over the health of the consumers).

As a recognition of this principle of proportionality, many jurisdictions have shifted from the traditional rules of civil procedure which don’t differentiate between cases based upon their value, complexity or importance, treating the cases more or less the same, to a new set of rules based upon the idea that we must “match the extensiveness of the procedure with the magnitude of the dispute”. 18 The main reason

for the adoption of this principle is to increase access to justice, which could be achieved by balancing the interest of justice with cost-effectiveness.

Also, another benefit conferred by this approach is that it puts the parties in a position of equality, as it limits the excessive use of proceeds by the side with more resources.\(^{19}\)

Lord Woolf’s report identified five aims which civil justice reform should follow. Among them was the one “to make litigation more efficient and less costly by avoiding excessive and disproportionate resort to procedural devices.”\(^{20}\)

This proportionality principle, together with the other procedural aims, has been integrated as an “Overriding Objective” in the new code of civil procedure in UK. Thus, dealing with cases justly includes: ensuring that the parties are on an equal footing; saving expenses; ensuring that it is dealt with expeditiously and fairly; allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases; dealing with the case in ways which are proportionate: (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; (iv) to the financial position of each party.\(^{21}\)

Moreover, the court must give effect to the overriding objective when it exercises any power given to it by the Rules or interprets any rule,\(^{22}\) while the parties are required to help the court in the application of the overriding objective.\(^{23}\)

Canada’s first province which included the principle of proportionality in its code of civil procedure is British Columbia. Here, this principle is defined as conducting the proceeding in ways that are proportionate to (1) the amount involved in the proceeding; (2) the importance of the issue in dispute, and (3) the complexity of the proceeding, with the aim of securing the just, speedy and inexpensive determination of a proceeding on its merits.\(^{24}\)

\(^{19}\) BC Justice Review Task Force, Effective and Affordable Civil Justice, November 2006, p. 54
\(^{22}\) U.K., Civil Procedure Rules, Rule 1.2
\(^{23}\) U.K., Civil Procedure Rules, Rule 1.3
\(^{24}\) British Columbia, new Supreme Court Civil Rules, Rule 1-3.
Justice Osborne recommended in his report that the proportionality principle “should be expressly referenced in the Rules of Civil Procedure as an overarching, guiding principle when a court makes any order.” 25 My view is that the recommendation made in Osborne’s report should be welcomed and that the Rules of Civil Procedure of Ontario should include rules similar to the rules 1.2 and 1.3 of the U.K’s Civil Procedure Rules.

It goes without saying that the proportionality principle should be used by the court at the end of proceeding when is assessing the costs of litigation. The costs should take into consideration “not only what time and expense may be involved in the proceeding but also what time and expense were justified, given the circumstances of the case.” 26 For this purpose, a rule meant to guide the court in assessing the costs and to which should be applied the overarching principle should be adopted in Canada. In England, the Court of Appeal in Lownds v. Home Office 27 laid down the requirement of proportionality when making costs orders and when assessing the amount of costs. 28 In my view, this test could be useful in guiding the Canadian courts as well.

B. Courts Control Over the Costs of Litigation

The courts have found new ways to exercise a greater control over the costs of litigation. The first method to control the costs is by requiring cost estimates. The second one is by imposing costs caps. 29

The cost estimate method requires the lawyers to provide to their clients a budget of the coming litigation before a Statement of Claim or a Statement of Defence has been filed. This budget should be updated at certain stages of the litigation. 30 I think that it is in the parties’ interest, as well as in that of the courts,

25 Honourable Coulter A. Osborne report, see supra note 3, p. 134
26 Honourable Coulter A. Osborne report, see supra note 3, p.134
28 Peter T. Hurst, Civil Costs, Sweet & Maxwell, 2002, p.24
30 O’Hare & Browne, see supra note 29, p. 519; Honourable Coulter A. Osborne report, see supra note 3, p.134
when making assessments of costs, to be able to make an informed decision regarding whether to commence or defend a claim and also regarding the way in which to pursue or defend the claim. For example, a wealthy defendant can choose an aggressive manner to defend him/herself, despite the fact that, even if (s)he wins the case, (s)he wouldn’t receive all the costs claimed due to his/her tactics. The court may take into account the estimate as a factor among others when assessing the reasonableness of any costs claimed.\textsuperscript{31} An example of how these estimates may affect any subsequent detailed assessment of costs is provided by the U.K. Court of Appeal decision Leigh v. Michelin Tyre Plc.\textsuperscript{32} Thus, a low estimate may cap the amount of recoverable costs if the paying party can show it relied upon it by carrying on with litigation rather than settling. Also, the cap may also be limited to the amount from the estimate if the court relied upon it and would have given different case management directions if it had been provided with a realistic estimate.

The caps costs are a limit upon recoverable costs which a party gets at the end of the litigation. For sure, a party can spend more than the cap imposed by the court but it cannot recover more than the amount capped.

However, capping costs is used only in some special contexts such as defamation actions brought under conditional fee agreements without “after-the-event” legal expense insurance\textsuperscript{33}. Also, on grounds of public interest, if the court makes a prospective order in favour of the applicant, it may be appropriate to set a budget on the applicant’s costs in that case.\textsuperscript{34} I consider that cost capping should not be included in the Rules of Civil Procedure because the courts can control excessive costs through case management powers.\textsuperscript{35}

\textsuperscript{31} U.K., Cost Practice Direction, par. 6.6
\textsuperscript{32} U.K. Court of Appeal, Leigh v. Michelin Tyre Plc [2004] 2 All E.R. 175
\textsuperscript{33} King v. Telegraph Group Ltd. [2004] EWCA Civ 613
\textsuperscript{34} R. (Corner House Research) v. Sec. of State for Trade and Industry [2005] EWCA Civ. 192;
\textsuperscript{35} Neil Andrews, see supra note 12, p. 173
C. Cost-Shifting Rule

In my opinion, the fee shifting is a major obstacle to the “access to justice.” For this reason, I consider that “no-shifting” cost rule should be adopted in Canada. In case that the “no-shifting” cost rule is considered not desirable, I think that a new rule could be included in the new civil procedure code, such as proposed by Thomas G. Heintzman in his article: “A party may serve a notice (a “No Costs Notice”) offering to have the action tried without any costs being awarded against the opposing party. If No Costs Notice is accepted, then no costs shall be awarded in the action.”

The policy reason behind the “fee-shifting” rule is that it acts as a disincentive against bringing or defending unmeritorious claims because the would-be litigants are aware of the costs of litigation that they would need to pay to the winning party. Moreover, the “no shifting cost” rule will promote a litigation culture which will agglomerate the Courts and will overstretch the limits of judicial systems resources.

The reverse of the coin is that fee shifting rule combined with the high costs of litigation deter many persons “from vindicating their meritorious rights or presenting sound defences to bogus or exaggerated claims.” From my perspective, “no shifting” rule will enhance the access to justice and will avoid the situation present in many cases in which the losing party pays less for damages than for the winner’s actual costs of litigation.

Nevertheless, even in U.K., where Lord Woolf’s report failed to address the costs issue, the wind of change is blowing. Personalities such as Lord Scott, when still Vice-Chancellor and Head of Civil Justice, expressed the idea that “the Costs Rules [have] now become so complex and involved, that serious thought should be given to doing away with fee shifting altogether.”

36 Thomas G. Heintzman, see supra note 14, p.1
37 Thomas G. Heintzman, see supra note 14, p. 6
38 Neil Andrews, see supra note 12, p. 170
39 Stephen Gerlis, We will all end up paying for the rising cost of litigation, Times Online, 11 January 2008, available at http://business.timesonline.co.uk/tol/business/law/columnists/article3170763.ece.
40 Peter Hurst Senior Costs Judge, Fee shifting, p 5
Under a “no-shifting” costs regime it may happen that one of the parties act abusively and cause high costs to go up. In order to prevent abusive claims or defences and to deter any egregious conduct of a party, the court should have a residual power to order costs against the vexatious party.\(^{41}\) I consider therefore that rule 57.01 (e), (f) and (g) should be maintained in case that a “no-shifting” costs regime is adopted.\(^{42}\)

Recently, in U.K., another review of the costs of civil litigation has been undertaken, as a result of their important increase after Lord Wolfe report.\(^{43}\) In this review, Jackson L.J. suggested a rule of cost-shifting in which the winner is not automatically awarded its costs. Such a rule would allow a judge to order the overall winner party to pay its own costs for the issues which it has lost, which would encourage the parties to keep their costs reasonable and to consider alternative dispute resolution methods.\(^{44}\)

Finally, a mid-way solution could be to adopt a “no-shifting” rule in particular types of cases or some categories of litigations such as public law litigation or class-action.

The high costs of litigation have steadily increased the number of the litigants who cannot afford legal assistance. The next chapter deals with the problem of unrepresented litigants and the ways in which the state and the legal profession could improve their harsh situation.

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\(^{41}\) Thomas Heintzman, see supra note 14, p. 7; Peter Hurst, see supra note 40, p. 6

\(^{42}\) Ontario Rules of Civil Procedure rule 57.01:

- (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- (f) whether any step in the proceeding was,
  - (i) improper, vexatious or unnecessary, or
  - (ii) taken through negligence, mistake or excessive caution;
- (g) a party's denial of or refusal to admit anything that should have been admitted;


III. Unrepresented Litigants

In the past decade, in several provinces across Canada, studies have been conducted and reports have been elaborated with the aim to reform the civil justice system and to improve “the access to justice” for all the citizens of this country. In this context, the unrepresented litigants are a major issue which must be addressed by any reform project of the civil justice system.

This growing problem of unrepresented litigants was acknowledged by the Chief Justice McLachlin who said:

“Unrepresented litigants – or self-represented litigants as they sometimes are called – impose a burden on courts and work their own special forms of injustice. Trials and motions in court are conducted on the adversary system, under which each party presents its case and the judge acts as an impartial decider. An unrepresented litigant may not know how to present his or her case. Putting the facts and the law before the court may be an insurmountable hurdle.”

The high cost of litigation has become a real barrier in having access to justice and many of the plaintiffs have to choose between self-representing themselves and taking their chances in court or foregoing their rights. In the case of Coronation Insurance Co v. Florence, Cory J. declared that:

“True litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced.”

That was the situation in 1994. Meanwhile, the situation has become worse and as a consequence more and more people of this country feel that their access to justice is denied. Thus, in conformity with a Canadian Lawyer’s 2008 survey, a civil

trial of two days costs 25,220 dollars in lawyers’ fees.\textsuperscript{47} There are several reasons why the costs of a civil trial are so high. First of all, they are caused by too permissible rules of discovery which allow that the parties overdiscover a case.\textsuperscript{48} In the second place, I consider that the actual system of hourly billing of lawyers contribute to the increase in the costs of litigation by pushing them to keep litigation as long as possible.\textsuperscript{49}

A. Unrepresented Litigants – The Difficulties They Face

In Ontario, as Justice Osborne pointed out in his Civil Justice Reform Project, no formal study has been undertaken on the number of unrepresented litigants, the nature of legal problems they face or their socioeconomic profile.\textsuperscript{50} However, their number has reached alarming proportions and has been estimated that over 50% of proceedings involve one or more unrepresented litigants.\textsuperscript{51} In family matters their number is even higher, as some judges appreciate that unrepresented litigants represent over 60% in their courtrooms.\textsuperscript{52} It is interesting to observe that a surge in unrepresented litigants is observed in other common law jurisdictions like U.K.\textsuperscript{53}, Hong Kong\textsuperscript{54}, Australia\textsuperscript{55}.

\begin{thebibliography}{99}
\bibitem{47}Kate Lunau, When lawyers are only for the rich, Jan.14 2009, Maclean Magazine, available at http://www2.macleans.ca/2009/01/14/when-lawyers-are-only-for-the-rich/print/; , also in the same article was mentioned that an uncontested divorce now typically costs 1,620 dollars, up a staggering 72 per cent in three years. Hourly rates are soaring, too. In 2005, lawyers called to the bar that year charged $ 130 an hour. Last year, it was $ 220.
\bibitem{48}Tracey Tyler, A 3 day trial likely to cost you $ 60,000, But that won’t cover an expert witness, or opponent’s legal costs if you lose, Mar 03, 2007, The Toronto Star, available at http://www.thestar.com/News/article/187854.
\bibitem{50}Honourable Coulter A. Osborne, see supra note 3, p. 45
\bibitem{51}The Special Committee on Self-represented Litigants, Report on Self-Represented Litigants, Background & General Recommendations, Ontario Court of Justice, 1999.
\bibitem{52}Maclean Magazine see supra. 47,
\end{thebibliography}
Unfortunately, this number of unrepresented litigants is continuing to raise not only because of the raising costs of the lawyers fees, but because “the legal profession is now paving the way for even more people to appear without a lawyer.”\textsuperscript{56}

However, not all the unrepresented litigants are persons who cannot afford a lawyer. There are also persons who believe that they can represent themselves and that the lawyer is not necessary to advance their case.\textsuperscript{57} Thus, in the cases which are brought in Small Claims Court the legal representation is not necessary. In the rest of the cases, I think that the criteria which should be used by the Courts in deciding who deserves legal assistance are the complexity and the importance of the case. If a case raises particularly complex issues or issues of public interest which an unrepresented litigant cannot adequately handle, the court should ask that that party have legal assistance. This should be so even in case that a party does not wish to be assisted by a lawyer. For example, in complex common law property cases or trust cases the legal assistance should be mandatory. Also, in certain family law cases such as custody cases the legal assistance should be mandatory.\textsuperscript{58} The underpinning of this measure is that in family law cases not only the private persons are affected by the society as a whole. If a non responsible parent receives the custody of his/her child and later that child becomes addicted to drugs and commits a murder in order to procure drugs, the society as a whole will suffer the consequences of a bad judgment, not only the family involved in that particular case.

Among the many difficulties which unrepresented litigants face, the most distressing one is when they are appearing in court. In both Canada and U.K., where

\textsuperscript{55} Law and Justice Foundation of the New South Wales, The changing face of litigation : unrepresented litigants in the Family Court of Australia available at http://www.lawfoundation.net.au/ljf/app/&id=BC3741A9360C8566CA257043001BC0ED;

\textsuperscript{56} Maclean see supra note 47.


\textsuperscript{58} The European Court of Human Rights in a landmark decision stated in a legal separation case Airey v. Ireland, that the absence of legal aid was an illegitimate fetter upon her right to effective access to justice. See Neil Andrews, English Civil Procedure, p. 159.; also in Canada in N.B. v. J.G. 1999 Carswell NB 305, the SCC has established the test for determining the rights to free counsel where legal aid is not available is “directly proportional to the seriousness and complexity of proceedings and inversely proportional to the capacities of “ the indigent litigants involved in the proceeding. Available at http://www.equaljusticeupdate.org/Comparative%20cases-frames.htm;
the civil trial system is adversarial, and the litigants and their lawyers are responsible for presenting their cases and persuading the trier of fact. The unrepresented litigants often face overwhelming experience with tragic outcomes. Thus, one of the unrepresented litigants found his experience “very, very daunting. I wouldn’t wish it on anybody, but when it’s your children you’ll do anything”\textsuperscript{59} and another confessed that “Being in the court was the scariest part and the other part always had a lawyer. It’s a terrifying experience … It’s an awful set up. I’d stand in the front of the microphone and my knees would give away.”\textsuperscript{60}

I mentioned above that our civil system of conflict resolution is adversarial because this has important consequences for unrepresented litigants who cannot rely on judge’s function of fact-finder like in civil law systems where the judge gathers the evidence and intervene during the trial to advance the case before him. Thus, some critics of the actual system like Alice Woolley, ask “If one is unrepresented, how can the judge decide that case fairly, and with justice?” Moreover, even the term of self-representation has stirred controversy, some of the critics of the actual system considering that litigants without a lawyer have no representation at all.\textsuperscript{61}

Nonetheless, the unrepresented litigants, because of their lack of legal knowledge and lack of restraint bog down the courts, adding more expense and delay. As Ontario Chief Justice Warren Winkler said: “It reduces [the trial] to the lowest common denominator”\textsuperscript{62}. Ultimately, they are a “nightmare” for judges who need to deal with them, and two litigants in person – one on each side – can be the “ultimate nightmare”.\textsuperscript{63}

Thus, we can observe that an unrepresented litigant is not only more likely to get a worse outcome than a represented litigant, but usually he will cause a trial be longer and the delay will affect the other litigants as well as the entire judicial system.

\textsuperscript{59} Clare Dyer, see supra 53.
\textsuperscript{61} Maclean see supra note 47.
\textsuperscript{62} Maclean see supra note 47.
\textsuperscript{63} Claire Dyer see supra 53.
B. The State – A Call for Reform of Civil Justice System

As an institution which is at the forefront of the reform for the “access to justice” and responsible for the judiciary system, the government should take action to improve the situation of unrepresented litigants. By making this affirmation, I need to answer first the question why public money should be used to pay for the private representation of private parties in private disputes. In my view, as long as one of the fundamentals of l’etat du droit is that its citizens have access to justice and the right to a fair trial, this requires that the state intervene and equilibrate the balance of justice when one party has more resources than the other party. I advocate this measure in Canada because here, due to the adversarial system of justice, the situation of unrepresented litigants is already worse than that of unrepresented litigants in civil law countries where the inquisitorial system of justice allows the judge to investigate the case and to advise the unrepresented litigant about his/her rights. Without a strong and fair justice system where even the most unfortunate of our citizens will find justice, the confidence of the public opinion in the courts and in the state is doomed to fail if there is the perception that only the rich persons or corporations get justice.

In this matter, Canada can inspire from Article 6 (1) of the European Convention on Human Rights.64 Interpreting this article in Airey v. Ireland, which was a judicial separation case, The European Court of Human Rights held that “the absence of legal aid was an illegitimate fetter upon her right to effective access to justice”.65 Furthermore, the court held that matrimonial litigation can involve complex legal points and can provoke emotions to the parties which might prevent a person from presenting his/her case in a fair and accurate manner. In those,

64 Art. 6 (1) of the European Convention on Human Rights provides :
In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice .

65 Airey v. Ireland (1979) 2 EHRR 305, ECHR, para.24
circumstances, lack of legal aid was a violation of the access to justice first identified in Golder v. U.K.66

The European Court on Human Rights held in the above mentioned case that the right of “access to court” does not “merely bar national systems from imposing legal obstacles to access, but it requires a legal system to take positive steps to satisfy an ‘obligation to secure an effective right of access to the courts’.”67

The first measure which was recommended by the CBA is that the government increase legal aid funding.68 In the CBA report has been recommended that “the federal government of Canada should provide targeted funds to support civil legal aid. In coordination with provincial and territorial governments, the federal government of Canada should guarantee effective national standards pertaining to coverage, eligibility and adequacy of civil aid”.69 I share the same view as CBA, that the government of Canada as well as the provincial governments should assure legal aid for all poor people who cannot retain the services of a lawyer because of lack of money.

In case that it will not be possible to assure legal assistance for all the people who need it, I think that one solution might be that at least in some matters, such as criminal cases or custody cases, where the outcome can have a heavy impact over the life of the plaintiff, the legal assistance be mandatory and in case that a party cannot afford a lawyer that party be assisted by a lawyer from the Legal Aid Office.

Another way in which provincial governments can improve in a certain measure the unrepresented litigants’ difficult situation is to propose the legislative to amend the Civil Procedure Rules so that the judges to be required to assist the unrepresented litigants to ensure a fair. While I’m aware that such a measure will stir

67 Neil Andrews, see supra note 66, p.159
69 Canadian Bar association – see supra note 68
controversy and negative comments\textsuperscript{70}, nevertheless, in support of the idea that judges should assist the unrepresented litigant, I bring forward the following arguments.

First, it was already recommended by the Canadian Judicial Council’s sub-committee on self-represented chaired by Chief Justice Marc Monnin in a Statement of Principles on Self-Represented Litigants and Accused Persons that judges, where appropriate, can provide self-represented persons with information to assist them in understanding and asserting their rights or to raise arguments before the court.\textsuperscript{71}

The second argument is that some judges give advice to the parties while some others take a more traditional approach and this leads to unfairness to the unrepresented litigants because some of them might be helped and others not.\textsuperscript{72}

The third argument is, in my opinion, that if the judge will be mandated the task to assist the unrepresented litigants, this will make the trial more fair in a certain measure, thing which will have a positive impact over the judicial system.

Fourth, the role of the judge as an impartial arbiter between the parties was shaped by the accusatorial procedure which, traditionally, in common law jurisdictions took place in a large majority of cases before a jury, which is not the case now when just a very small percentage of trials are civil trials by jury. Today the number of unrepresented litigants is much higher than it was in the past because are much more family law cases, housing cases, employment cases which before were fewer. For example, the number of divorces and custody cases were very seldom even 50 years ago which is not the case now.

I am sure that there will be critics who will argue that this is against the traditional role of a judge in common law system, but, as Chief Justice Monnin said, “I believe that while judges while ensure there is a fairness to a proceedings that may

\textsuperscript{70} Judges helping unrepresented litigants is a dangerous and slippery slope, The Toronto Times, Tuesday 19 December 2006, available at http://thetorontotimes.com/content/view/781/0/
\textsuperscript{71} Valerie Mutton, Provincial Pro Bono initiatives get a helping hand from firms, The Lawyers Weekly, Tuesday, December 18 available at http://www.pbla.ca/news/article.174405- Provincial_pro_bono_initiatives_get_a_helping_hand_from_firms
\textsuperscript{72} Claire Dyer, see supra note 53.
in certain circumstances include giving information to a litigant, at the end of the day a judge will make a decision based on the information before him or her … Simply asking questions doesn’t make a judge an advocate. It is simply a question of bringing out the information which will enable the judge to make a decision.”\textsuperscript{73}

Other interesting recommendations, which might be adopted in common law provinces, have been made by the Ministry of Justice and Attorney General of Saskatchewan in his final report about unrepresented litigants.\textsuperscript{74} Among these recommendations I will mention some which I believe, if adopted, will improve the situation of unrepresented litigants. In family law cases it was recommended an enhanced case management approach in which the diversion to case management to occur at an early stage in the proceeding, and in support of this approach, the unrepresented litigants should have assistance to comply with disclosure requirements to avoid repeated appearances and associated costs and, also, enhanced use of mediation and family support services prior to the pre-trial settlement conference stage.\textsuperscript{75}

Finally, as I argue in the case management trial chapter below, an active role of the judge during pre-trial and at trial combined with the proportionality principle which require that a case should be dealt in a manner that reflects what is involved in the litigation, the complexity and importance of the case, will create a certain position of equality between parties which will benefit to unrepresented litigants.

The proportionality principle should be used to give expression of the aim of “access to justice” of unrepresented litigants though of variety of measures. Limiting the discovery process in certain cases, or exempting a party to pay the costs for the trial in a very important public matter, for example, are modalities through which the

\textsuperscript{73} Valerie Mutton, supra note 71
\textsuperscript{75} Final Report, supra note 74, p. 22
court could give expression to the proportionality principle for enabling unrepresented litigants to have “access to justice.”

C. The Legal Profession – More Commitment for Improving the “Access to Justice”

The members of the law societies, as well as law societies, should contribute through concrete programs and measures that will assist unrepresented litigants. Among these programs which are implemented, a very effective one in assisting unrepresented litigants are *pro bono* services. The legal profession has a long tradition in providing such *pro bono* services or “for public good”. Nevertheless, *pro bono* services should be only in addition on legal aid services which should remain the main pillar for assisting unrepresented litigants.

During the last years, the legal profession, either through participation in formal *pro bono* projects or through individual representation on *pro bono* files, has become more involved in programs meant to assist unrepresented litigants who cannot afford paying the legal fees for lawyers. This trend should be encouraged and expanded, being beneficial to both the legal profession and the public. Thus, through participation in *pro bono* services, the law firms become more marketable to articling students and younger lawyers and, at the same time, give them the chance to acquire or to develop trial experience.

I consider that one step forward will be the creation of a joint program by the law society and the provincial government of Ontario meant to provide the parties of a private civil dispute with legal assistance and/or representation. In 1997, Professor John McCamus, in his Report of the Ontario Legal Aid Review, noted that some time ago in a whole range of civil matters, to unrepresented litigants were granted legal aid certificates, but these are not longer available being eliminated for most civil law

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76 Jeffrey S. Leon, see supra note 57, p.2
77 Honourable Coulter A. Osborne, supra note 3, p.46- 47,
78 Jeffrey S. Leon, see supra note 57, p. 3; Honourable Coulter A. Osborne see supra 3, p. 47
What I would suggest is that the law society draw up a list with lawyers which are willing to assist/represent unrepresented litigants in courts and, for the services provided, the lawyers be paid by the government at lower rate fees than market fees paid for the same legal services through a legal aid fund which is administered by the Bar. I know that this proposal provokes scepticism given the pressure put on the government to fund the criminal law side of legal aid. But if a person who is charged with a crime has the right to legal aid, why should a person who fights for the custody of his child be denied the right to civil legal aid? As I argued above, the citizens are entitled to an equitable trial and one of the responsibilities of the state is to assure social peace by having a strong and efficient civil justice system which encompasses the right to a legal assistant when it is needed. Because it will be impossible to provide this kind of services for all unrepresented litigants, the solution would be to provide legal aid certificates for certain civil law matters which are considered a priority by the public and also, in cases which are complex and in which a party has no legal representation, the judge ex-officio to send a notice to the law society through which he or she should ask that a legal counsel be appointed to represent that party. Thus, in my scheme, in some cases such as custody cases, the legal aid should be mandatory. In other cases such as trusts and estates cases or common law property cases, if the judge considers that the issues raised are novel, complex or it is in the public interest to be addressed, he/she should order that the litigant receive legal assistance from the Bar in case that the litigant asks for legal aid.

The legal aid should be provided to a litigant in case that the importance and complexity of the case justifies it even if the litigant’s revenues are higher than those allowed for requiring legal aid, if the litigant proves that the costs of litigation are too high and without legal aid (s)he cannot advance his/her case, or the welfare of his/her family will be put in danger due to high costs of litigation. On the other hand, in

79 Honourable Osborne, supra note 3, p. 48
81 See above at p 20, the decision of European Court on Human Rights
simple cases in which the Court appreciates that a party is capable to represent itself, legal aid could be denied. I would conclude by saying that legal aid should be provided to the very poor citizens, but also to the middle-class citizens, when the complexity and importance of the cases makes it necessary.

Another measure which has been taken by the Bar was to allow lawyers to have contingent fees and it seems that more and more lawyers adopted innovative billing structures. Thus, beside contingency fees which have been the norm in torts cases for many years, flat fees and sliding scale fees are used.

Another method to render the legal services more affordable would be that the legal profession offer on a large scale, like in U.S.A., unbundled legal services. The unbundling of legal services has been endorsed by Judge Osborne in his Report as well as CJ McLaughlin as an efficient tool to help unrepresented litigants. Of course, many other lawyers and judges are not convinced about the efficiency of unbundling the legal services and warn against the perils which can arise from that. However, the trend is to promote the unbundling of legal services and the law societies of Alberta and British Columbia already made steps in that direction.

82 Honourable Coulter A. Osborne, see supra note 3, p.47,
87 In a 2008 report, a Law Society of British Columbia task force described unbundling as “a midway option between full service representation and no representation”, (quoted from Janise Tibbets, see supra note 65).
Nevertheless, the law societies should adopt very clear guidelines to protect both lawyers and clients if they enter in a solicitor-client relationship. The Professional Conduct Handbook should be amended by providing guidelines for limited legal services. But as it was recommended in B.C. Report of Unbundling Legal Services Task Force, even when lawyers are providing limited legal services they should provide those services to the level expected of a lawyer in a similar situation and with the same professionalism and ethics.89

A solution I wish to propose could cover in a certain measure the need of legal services for the less fortunate of our citizens. Canada is a country receiving a lot of immigrants and each year arrive here lawyers qualified in their countries of origin who may face obstacles in gaining the access to the legal professions here. What I propose is that the Law Society of Upper Ontario to grant them a restrictive practice permit to one area of law upon satisfaction of certain requirements, something similar with consultants in immigration and refugee law who can represent their clients in front of an immigration board. For example, the highest number of unrepresented litigants are in family law courts and if a foreign lawyer wishes to work only in family law field he should be able to represent clients under the condition to follow some law courses and pass some examinations meant to assess his legal competence in family law in order to get the restrictive practice permit. The same solution could be used to solve the unrepresented litigants issue in remote locations where the lawyers are less willing to go to work. This system is already utilised in the health care system to fill up the need for doctors in remote locations in the North of Canada and I’m sure that could be utilized by the legal profession as well.

In conclusion, we have to acknowledge that unrepresented litigants are a serious and urgent problem of our civil justice system. While there is not a magic formula which to solve this problem overnight, there are modalities to improve the situation of unrepresented litigants. First of all what we need is that government to provide more funds for Legal Aid so that more unrepresented

litigants to have access to legal advice or legal representation. Program’s such as those developed by Pro Bono Law Ontario to assist those with civil legal problems in Toronto Small Claim Court should be encouraged and expanded to cover other venues as they promote access to justice and in the same time offer the opportunities to young lawyers to gain first-hand trial experience. Given the challenges that an increase in the number of unrepresented litigants poses to our judicial system, it is highly recommended that all the participants in the civil or criminal justice system continue to cooperate to develop solutions to ensure that we have an accessible trial system in which each citizen not matter his financial means can have his day in court.

As I affirmed above, one of the reasons of the high cost of trial which affect unrepresented litigants is the lengthy process of discovery. In the next chapter, we will see how the discovery rules and expert evidence rules could be reformed so as to keep the expenses in correlation with the proportionality principle.
IV. Discovery and Expert Evidence

There is consensus among participants in the civil justice system – private litigators representing plaintiffs and defendants, government attorneys, corporate counsel, and judges – that discovery increases an important part of the costs of litigation and that the most important cause of high litigation costs or delays is abuse by attorneys of the discovery process, which leads to the “overdiscovery” of cases rather than to attempts to focus on controlling issues. While the cost of discovery in Canada is not so high as it is in the U.S.A., it still consumes a lot from the litigants resources. However, some studies argue that problems with discovery abuse arise only in a small fraction of the cases.

In response to increasing costs and delay caused by a lengthy discovery process, different reports which recommended new procedural rules have been carried out across the country. Therefore, some provinces have already implemented new rules concerning discovery.

In 2003, The Task Force on Discovery Process in Ontario presented the recommendations on how Ontario’s civil discovery process may be improved. The recommendations considered essential two directions of the reform:

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91 In USA lawyers estimate that 60% of all the litigation costs arise out of discovery (Justice for all, supra note 1, p.6-7) while in Canada the First Report of the Ontario Civil Justice Review estimated that the costs of discovery to each litigant who participates in an average 3 days litigation is approximately $7,000 in legal fees. This calculation was based on a two day examination for discovery, including preparation time and documentary disclosure. It did not include, however, the costs associated with discovery-related motions that are often brought. While there is no reliable data on the percentage of such motions, we noted in our First Report that Toronto Masters estimate that 25% of all motions brought before them involve discovery issue. (Ontario Civil Justice Review, Supplementary Review, 1996, available at http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/suppreport/ch65a.asp)
94 Nova Scotia Supreme Court Civil Procedure Rules which have come into force from 1 January 2009; B.C. Supreme Court Civil Rules will come into force on July 1, 2010.
1) the development of best practices to promote among lawyers a broader acceptance of the value of collaboration and a better appreciation for cost-effective and efficient ways to conduct discovery;

2) amendments to the Rules of Civil Procedure, including a narrower scope of discovery and default time on oral discovery.

This chapter focuses on amendments which could be made to the Rules of Civil Procedure regarding discovery, so as to enhance access to justice for the plaintiffs. I consider that discovery, together with case trial management, is the key point on which the government should focus to reduce the costs and delays of trials. Also, in this part I will discuss expert evidence which is part of the discovery stage of a case.

The proportionality principle will shape both discovery and expert evidence in order to achieve the aims of “securing a just, speedy and inexpensive determination of a proceeding on its merits.”96 Thus, in order to incorporate the proportionality principle into the discovery practice, we must place restrictions on the process available to the disputing parties, while maintaining fairness.97 Expert evidence compliance with proportionality principle requires that, depending on the value, complexity and importance of a case, the judge should take into discussion and decide if a case needs expert evidence or not, if there is need of one or more experts, the deadline for delivery of expert reports etc. Thus, in simple cases, there is no need for expertise; in case that one party asks for an expertise, one expert is enough to do it. From my own experience, in simple cases like monetary claims one expert is enough to undertake an accounting expertise. On the other hand, in complex land claims three experts are usually needed and the court usually orders two or even three expertise reports. The same is valid for complex torts claims where it is very hard to get an outright cause of the accident.

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96 B.C. Supreme Court Civil Rules 1-3
97 B.C. Civil Justice Task Force, supra note 72, p.28
1. Discovery

In the above mentioned studies, certain issues concerning discovery process which need to be reformed have been identified. The most debated of these issues are:

a) whether to narrow the scope of document discovery;
b) whether to eliminate interrogatories;
c) whether the duration of oral discovery should be limited or not; and
d) the control of the court over the discovery process as an instrument to promote a better case management.

A) Limiting the Scope of Document Discovery

First of all, I agree with the view expressed by judge Osborne in his reform project that is need that the rule 30.02, which provides that “every document relating to any matter in issue in an action” and which has been interpreted in case law to require production if a document has a “semblance of relevance” must be replaced by a more restrictive test of “relevance” for the disclosure of documents. Ontario could inspire regarding this aspect from UK Civil Procedure Rules, r.31.6. In justifying the replacement of “semblance of relevance” test with a stricter one which requires that only “relevant” documents should be disclosed, it has been said that “trial by ambush” has been replaced by “trial by avalanche” and the only way to curb discovery abuse is a narrower test. Also, to give expression to the proportionality principle, the costs of discovery should be proportionate with what is at stake in a case, with its complexity and its importance. Thus, large amounts of documentary material increase the costs “by creating opportunities for calling evidence or cross-examining witnesses about matters that were not central to the issues in the case.” Moreover, instead of clarifying the facts, an avalanche of documents may tend to complicate and confuse the issues so that the court’s ability to find the truth is

98 See Honourable Coulter A. Osborne, supra note 3, p. 57
99 B.C. Civil Justice Task Force, supra note 17, p.25
100 See Honourable Coulter A. Osborne, supra note 3, p. 58
hindered. Hence, it is not only for the sake of efficiency of costs of justice “that the disclosure process needs to be controlled, but also in the interest of truth finding.”

Finally, the stricter test of “relevance” responds better to the purpose of access to justice and efficiency of the trial than the actual test of “semblance of relevance” because it will limit lawyers to use the discovery process in a manner which is not in conformity with the overarching principles.

The British case “Peruvian Guano” is considered the starting point of the broad “semblance of relevance” test. In this case, the court decided that an opponent has the right to inspect any document that contains any information that might enable him, by a train of inquiry, to uncover centrally important matters.

The test being too broad caused delay and large legal fees and could be used by a party to intimidate the opponent by throwing upon him an avalanche of paper. In consequence, the new disclosure rules adopted in England were targeted to avoid all the deficiencies caused by the “Peruvian Guano” test and to render the process proportionate to the nature of the claim. British Columbia followed the same path, and the new B.C. Supreme Court Civil Rules requires the parties to disclose only (a) all the documents that are or have been in the party’s possession or control and that could be used by any party of the record at trial to prove or disprove a material fact and (b) all other documents to which the party intends to refer to at trial.

Nova Scotia recently made the same move, adopting a strict test of “relevance”, but there the test “potential marginal relevance” which has been applied previously was moulded after U.S. Federal Rule 26.

Whatever was the initial test applicable for discovery it is obvious now that something should be done and the broad test for discovery need to be replaced by a more strict one.

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102 Zuckerman, see supra note 101, p. 541
103 Honourable Coulter A. Osborne, see supra note 3, p. 58
104 Compagnie Financiere v. Peruvian Guano Co. (1882) 11 QBD 55, 63, CA.
105 Neil Andrews, see supra note 12, p. 96
106 R. Cranston, Complex Litigation : The Commercial Court, [2007] 26 CJQ 190,203
107 U.K. CPR 31.3(2), 31.7 (2), 31.9 (1).
108 B.C. Supreme Court Civil Rules 7-1
109 Cathy Dalziel, Clamping down on discovery : The new rules of civil procedure, June 06 2008, The Lawyers Weekly. In Nova Scotia, Rule 14.01 said that the relevance at discovery now has the same meaning as at the trial.
B) Whether to Eliminate Interrogatories

The issue of interrogatories was not discussed in Justice Osborne’s report. It was nevertheless taken into discussion in the B.C. Task Force Civil Review which recommended that interrogatories be eliminated because they are time consuming, costly and do not produce enough benefits to justify the cost, regardless of the value or complexity of the case. Moreover, interrogatories sometimes serve tactical reasons such as harassing the other party or delaying the proceedings.110

In my opinion, interrogatories should be kept as a discovery device because they do provide some advantages. For instance, during such interrogatories, the responding party needs to do at least a little investigation in preparing its answers, while the witnesses generally respond to the questions based only on their personal knowledge and recollection.111 Nevertheless, the proportionality principle would be applicable here as well because the court has the discretion to decide if the interrogatory is necessary or not for the resolution of the case. Also, depending on the circumstances of the case, the judge can restrict how many interrogatories are allowed for each party.

However, the new B.C. Supreme Court civil rules allow a party to serve interrogatories either with the other party’s consent or with the court’s leave.112 I think this approach is salutary and enables the court with the power to give expression to the proportionality principle by setting terms and conditions on interrogatories such as: the length and number of interrogatories; the matters covered by interrogatories; the timing of any response to interrogatories etc.113

I think that in Ontario rule 35 needs to be changed in the direction that the court should take over this discovery device. In doing so, the B.C. civil rules may serve as a model of reference.

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110 B.C. Civil Justice Task Force, supra note 93, p.27
112 B.C. Supreme Court Civil Rules 7-3 (1)
113 B.C. Supreme Court Civil Rules 7-3 (3) (a) (b) (c)
C) Whether the Duration of Oral Discovery Should be Limited or Not

The examination for discovery is often a long and costly process\textsuperscript{114} which forces many individuals and small businesses “to abandon claims or accept less than adequate settlements as a result of excessive discovery costs.”\textsuperscript{115} Among the factors, which contribute to the high costs of oral discovery, have been acknowledged the lack of preparation or experience on the part of the counsel, irrelevant or repetitious questions, and, sometimes, lawyer’s billing targets.\textsuperscript{116}

The recommendation which was made to make the oral discovery more focused and less costly was to put a limit on the duration of examination for discovery. Thus, the Osborne’s report recommend that “a default of one day (or seven hours) per party is sufficient in most of the cases.”\textsuperscript{117} In complex cases, where the discovery could take longer, the court would determine the time necessary for discovery in case that the parties fail to agree over discovery time allocation. Basically, these are the same recommendations which were made in the British Columbia Civil Review Task Force and which were adopted there.\textsuperscript{118}

However, in British Columbia, in fast track cases, the discovery should be completed in 2 hours or longer in case that the parties consent.\textsuperscript{119} In Nova Scotia, in cases less than $100,000, a party must complete all discoveries in maximum 3 hours, over no more than 2 sessions.\textsuperscript{120} Another provision from the new civil rules limits the questions which lawyers can ask in oral discovery. Thus, if a question was answered during the interrogatories, the lawyers cannot ask the same question again at the oral discovery.\textsuperscript{121}

I consider that in keeping with the proportionality principle, the approach to discovery adopted in British Columbia and Nova Scotia should be adopted in Ontario.

\textsuperscript{114} In the Report of the Task force on Discovery process in Ontario, the respondents in all locations in Ontario ranked oral discovery costs as the highest proportion of total discovery costs and documentary discovery costs as the second highest, p. 58
\textsuperscript{116} Honourable Coulter A. Osborne report, see supra note 3, p. 58
\textsuperscript{117} Honourable Coulter A. Osborne report, see supra note 3, p. 59
\textsuperscript{118} B.C. Supreme Court Civil Rules 7-2 (2)
\textsuperscript{119} B.C. Supreme Court Civil Rules 15 – 1 (11) (12)
\textsuperscript{120} N.S. Supreme Court Civil Rules 57.10 (3)
\textsuperscript{121} N.S. Supereme Court Civil Rules 14.04
as well. Thus, in cases under $100,000, the oral discovery must be completed in 3 hours, while in the rest of cases which have a value of over $100,000 or fall in one of the categories which need case management under Rule 78, the oral discovery must be completed in one day or any greater period to which the person to be examined consents, unless the court order otherwise. Of course that the proportionality is not only about the amount of money involved in a case. When deciding the length of discovery in a given case, the judge should pay attention to the complexity of the case and to the significance of the matter to the individual involved. For this reason, it is really difficult to impose a discovery approach to fit in all civil cases and it is better that the discovery plan be tailored according to the particularities of each case and of the situation of the parties involved in the litigation. However, when the case does not raise complex issues or the significance for the parties involved is not high, the legislators have considered that the length of discovery should be governed in function of the value of the claim.\textsuperscript{122} For example, in a straightforward creditor-debtor case in which one party loans 95,000 dollars to the other and for that party the amount is not significant, the rule that discovery should be done in 3 hours will be applicable.

In my view, the best solution to establish the duration of oral discovery is at the case planning conference which, as I will argue in the next chapter, should be held at the beginning of a case. At the case management conference held under the supervision of a judge, the parties should establish a discovery plan and in case that the parties disagree over the examination for discovery, the judge will decide over that duration. In this way the parties will know from the outset which are the time limits having the benefit of a judge assisting them in establishing a discovery plan. Also, in this way is eliminated the disadvantage presented by “the potential to generate motions seeking orders for more than one day of oral discovery”.\textsuperscript{123}

\textsuperscript{122} If its under 100.000 should be limited to 3 hours and if its more than 100.000 to be one day. However this are default time limits.
\textsuperscript{123} Honourable Coulter A. Osborne report see supra note 3, p.59
D) The Control of the Court Over the Discovery Process as an Instrument to Promote a Better Case Management

One of the recommendations made in the Osborne report was that the parties should have a duty to “develop a written discovery plan addressing the most expeditious and cost-effective means of completing the discovery process” and if they fail to accomplish this duty the court may refuse to grant any discovery relief.

As I argued above and as discussed more in the case management chapter below, in my opinion, one of the changes operated by the case management is the shift of control over the discovery process from the parties to the court. Thus, it is the court’s duty to work out together with the parties a discovery plan at the first pre-trial management conference which should be held immediately after the exchange of pleadings. This approach is in accordance with the proportionality principle because it will save time and it will reduce the costs of discovery in the long run by avoiding an avalanche of motions on discovery matters.

In keeping with the proportionality principle, the discovery plan should be tailored by the court in function of the value, complexity and importance of the case and may cover the following issues: (i) the documentary discovery; (ii) the date of the examination for discovery, the time limit for completion established either through parties’ agreement or the court’s order and the individuals names proposed for oral discovery; (iii) the number of interrogatories allowed and the questions to be answered by the parties; (iv) dates for exchange of sworn affidavits of documents; (v) number of experts and timing of delivery of expert report; (vi) disclosure of non-privileged confidential material.

2. Expert Evidence

Traditionally, in common law the experts are appointed by the parties to produce an expert report to support the parties’ assertions. Today, the development of technology and the progress of science require the use of expert evidence on a large scale from torts cases to securities litigation cases. The changes proposed to be made

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124Honourable Coulter A. Osborne  see supra note 3, p 66
to the expert traditional role in litigation are aimed to address the problems experienced with the traditional common law rules regarding expert evidence. The first problem, which draws a lot of criticism from both the legal community and the public opinion, is the tendency of the expert witnesses hired by a party to be biased in favour of their client and to tailor their report to suit the client’s case. The second issue was the need to control the number of experts necessary in a case so as to achieve proportionality between their use and the case’s value, complexity or importance. Finally, there is the desire that the difference of economic power between parties be eliminated and that the litigants enjoy “equality of arms”.

The solution, in my view, will be the adoption of the amendments similar with those implemented in the Civil Procedure Rules in the UK which are similar with the rules existing in the civil law continental countries from the European Union.

The reports produced in Canada after the adoption of the new CPR in U.K. have recommended many of the changes operated there, but there is still some room for improvements of the expert opinion rules. Thus, as I will present in the section below, I support the idea that the court should have a much greater role over expert evidence than is recommended in Justice Osborne’s report or even than in England’s CPR.

A. Court Supervision of the Expert

In moving toward an increased control of the courts over the litigation process, the legislators had to depart from the common law traditional procedural rules concerning expert evidence.

One of the changes applied in the UK rules which has attracted unanimous approval from Canadian legal experts, has already been incorporated in British Columbia civil rules. The duty owed by the expert to the court “to help the court on the matters within his expertise”, overrides any obligation to the person from whom

125 Neil Andrews, see supra note 12, p. 130
126 BC Justice Review Task Force, see supra not 72, Osborne Report, supra note 3, November 2007
127 U.K. CPR 35.3(1)
128 See British Columbia Civil Justice Task Review, see supra note 93, Honourable Coulter A. Osborne, see supra note 3, p. 75 Nova Scotia rule. 55.04 available at http://www.courts.ns.ca/Rules/cpr_consolidated_09_03_17/cpr_part_11_mar_09.pdf;
129 B.C. Supreme Court Civil Rules, rule 11-2 (1)
the expert has received instructions or payment.\textsuperscript{130} Moreover, experts must certify that they understand and have complied with their duty to the court.\textsuperscript{131} Justice Osborne argued that the overriding duty matched with a certification requirement in the expert’s report “hopefully will help limit the expert bias”\textsuperscript{132}.

While I agree that this will be a step forward from the actual situation, I consider that a better solution would be that all the experts should be considered officers of the court when they are appointed to provide expertise in a particular case. Before their appointment either by the parties’ agreement or by the court, they should not only certify, but swear an oath in front of the judge that their duty is to the court and that the report is made in conformity to that rule. Also, an expert should be subject to the same rules of refutation as a judge. I believe this is a more effective formula to assure the impartiality of the experts.

In furtherance of the court’s case management powers, no party may call an expert or put an expert’s report in evidence without the court’s permission.\textsuperscript{133}

In keeping with the proportionality principle, at the pre-trial or trial management conference, the court, in virtue of their case management powers, should have the authority “to consider and make orders as to the appropriate number of experts that may be called by each side and on particular issues and [state] whether expert evidence is admissible.”\textsuperscript{134}

\section*{B. Single Joint Expert or Multiple Expert}

In order to reduce the cost of litigation and to put the parties on an equality foot, the U.K. rules require that, where two or more parties wish to submit expert evidence on a particular issue, the court appoints a “single, joint” expert to bring

\textsuperscript{130} UK Civil Procedure Rules, r. 35.3. Both B.C. Civil Review Task Force report and judge Osborne report have recommended a new provision which to incorporate this duty of the expert to the Court.
\textsuperscript{131} UK CPR, r.35.10
\textsuperscript{132} Honourable Coulter A. Osborne, see supra note 3, p. 76
\textsuperscript{133} UK CPR, r. 35.4
\textsuperscript{134} Honourable Coulter A. Osborne report, see supra note 3, p. 82
evidence on that issue. However, in complex cases, U.K rules retain the system of party-appointed experts.

In Canada, this model has not enjoyed much success so far. Thus, the Osborne Report considered that this model “is a good idea which will not work in practice” and that the decision whether one expert is enough is better left to the counsel, while in Alberta, the reserves concerning the “single, joint” model were even stronger.

I think that the judge, not the counsel, at the first pre-trial management conference, should have the right to appoint one or more experts, if (s)he considers that expert evidence is necessary, in function of the complexity and importance of the case. Where parties cannot agree over the appointment of the expert(s), the court will select them randomly at the first pre-trial conference, from a list provided by the local expertise office or by the parties. First of all, in conformity with case management powers granted to the judge, he is the person most aware of the complexity of the case and the decision to appoint one or more experts in a given case should lie with him. Secondly, in order to eliminate suspicions and discussion about the qualifications and level of expertise of the experts I consider that it would be better that each court have a list provided by the professional body which governs a certain domain, a list with the most respected and qualified experts who can do an expertise report. For example, for an accounting expertise, the expertise should be done only by a certified accountant with at least 5 years of practice.

Finally, I propose that the judge should appoint the expert at the first pre-trial conference so that the parties have time to formulate more questions to the expert until the date of the trial or in case that a new report of expertise needs to be asked for.

135 U.K. CPR r. 35.7
136 Neil Andrews, see supra note 12, p. 129
137 Osborne report, see supra note 3, p. 71-72
138 Alberta Law Reform Institute, Expert Evidence and “independent” Medical Examinations (Consultation Memorandum nr. 12.3) (Edmonton : ALRI 2003) at 23.
139 This is solution provided in the new Romanian Code of Civil Procedure and which I consider to be the best method to choose the expert if the parties disagree over which person to be expert. A local expertise office is an office which is attached to each court and which keep the lists of the experts which are authorised to make an expertise ordered by the court. The new Romanian Code of Civil Procedure had used as models Code de Procedure Civile du Quebec, Code de Procedure Civile de la France, and Belgium Code de Procedure Civile.
Also, after the results of the expertise report are provided to the parties, they can easier reach an agreement if they realise that is not worth going further with the litigation.

Nevertheless, in order to accommodate the desire of the parties to have an expert chosen by them to participate at the expertise, I propose that a new section should be added at the Canada Evidence Act. This section should allow that at the preparation of the expertise by the court appointed experts may assist experts assigned by the parties and approved by the court, having the quality of the counsel of the parties. They can ask questions and make observations, and if they consider it appropriate, they can draft a different expertise report concerning the conclusions of the expertise. The parties’ appointed experts have the same duty to the court as the court appointed expert. Even if the principle of “equality of arms” means that each part should be allowed the same number of experts, the court’s order may sometimes go against this requirement. In England, in the case Daniels v. Walker, Lord Wolfe indicated that the court would permit the party to appoint its own expert only if the party has substantial reasons for disputing the joint expert and only if it is proportionate to the value of the case and its importance. Another argument in favour of the party appointed experts is that banning entirely the parties to appoint an expert who can challenge the report presented by the court appointed expert could lead to a denial of justice and “would effectively transform the role of joint expert from that of a witness into that of a judge.”

A litigant has the right to consult any number of experts without seeking the court’s permission. But there are two disadvantages for a party: first, the expert’s fees for the extra-judicial expertise will not be recoverable as costs in the action, and second, in case that the court will permit that the extra-judicial expert report be used

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140 In Field v. Leeds CC (2000), 17 E.G. 165, Waller L.J. said “The question whether someone should be able to give expert evidence should depend on whether: (i) that it can be demonstrated that he or she is aware of their primary duty to the court if they give expert evidence.”

141 In Kirkman v. Euro Exide Corp (CMP Batteries) Ltd. [2007] EWCA Civ 66, Smith L.J. stated: “The desirability for equality of arms was not intended to result in an absolute rule that, in every case, the parties must be eliminated to calling the same number of experts”

142 Daniels v. Walker [2000] 1 W.L.R.

143 Adrian Zuckerman, see supra note 101, p. 734

144 Adrian Zuckerman, see supra note 101, p.734

145 Vasiliou v. Hajigeorgiou [2005] 1 WLR 2195, CA
as evidence, the report will not have the same weight as a report produced by a court appointed expert.¹⁴⁶

To sum up, my approach is different from that taken in both U.K. and Canada because it allows not only single joint expert but multiple joint experts appointed by the court and, in case that the parties ask and the court consider it appropriate, the court may approve parties appointed experts to participate at the expertise.¹⁴⁷ In this way, both the concept of proportionality and the requirement of impartiality of the experts are satisfied. The former, because the court has the freedom to choose the number of the experts required for the fair, just, expeditious and cost-effective resolution of the proceeding, and the latter, because the experts not only are court appointed or approved by the court but all have a primary duty to the court, fact that will give more credibility to their evidence.

Another advantage provided by the above solution is that imposing that the experts appointed by the parties take part at the expertise conducted by the court appointed expert, they need to meet to consider the issues which are the object of the expertise report. In case that they agree with it, they will prepare a joint report, and in case that they disagree over the conclusions, they can prepare a different report in which to explain why they reached a different conclusion. Among the advantages conferred by the meeting of the experts is that they “provide a level of peer review that expert opinions do not now routinely undergo”.¹⁴⁸

The Osborne report recommendations about expert evidence are quite different than mine because, despite some changes that it proposes, the model remains the traditional one in which parties appoint experts.

I have the same opinion about the expert model provided by the CPR. Even if UK’s approach is better, in my view, than what Osborne’s report proposed, I consider Lord Wolfe’s recommendation regarding experts to be an unfortunate attempt to combine two incompatible systems. As a learned author said about expert

¹⁴⁶ The evidence provided by an extra-judicial expert report will enjoy the same weight such as that provided by an expert which the party’s employee. The courts consider that employee’s manifest lack of independence will reduce the weight of his evidence. Field v Leeds [2000] 1 EGLR 54 CA.
¹⁴⁷ This is the solution provided in civil law systems where the expert assists the judge in discovery process.
¹⁴⁸ Honourable Coulter A. Osborne, see supra note 3, p. 77
evidence rules reform in England, “It may work more or less satisfactorily for a time, and while it does so it may prove cheaper in operation than its predecessor. Eventually, however, the inherent inconsistencies in its underlying structure are likely to bring serious practical difficulties in their train. There is, in the last resort, no half-way house between an expert witness and an expert “auxiliaire du juge”.”

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Unfortunately, in Canada, we have not yet even reached half-way house.

V. Case Trial Management

Case management is a procedural device developed first in the United States\(^{150}\) and later used in common law jurisdictions (UK, Canada, Australia)\(^{151}\) to speed up trials and make them less costly. This approach, which shifts more responsibility for the pace of litigation to the court, marked a significant departure from the traditional common law model of trial in bringing closer the common law and civil law trial procedure.

Thus, in Canada, as elsewhere in the common law world where the judicial case management was implemented, the system is still adversarial but the role of the courts has become active giving to the judge an interventionist role. In UK this active role of the judge has become more pronounced than in any other common law jurisdiction as a result of the reform of the civil procedure rules based on Lord Wolf’s report.

As it has been observed, the importance given to the civil justice reform in UK “lies primarily in the fact that new Rules reduced the adversarial character of English civil actions, increasing the judge’s case management considerably, and that, consequently, English legal procedure was brought closer to the Continental Procedural models.”\(^{152}\)

In both UK and Canada, case management was developed with the purpose to accomplish three functions: to encourage settlement of disputes by mediation where this is practicable; to prevent cases from progressing too slowly and inefficiently, and the third function, and probably the most important one, to ensure that the judicial resources are allocated proportionately, as is required by the Overriding Objective in UK’s CPR Part One.\(^{153}\)

Thus, in case that a settlement is not reached, case management is still useful because it may assist in identifying and narrowing the issues for trial so


\(^{152}\) C.H. van Rhee (ed), Judicial Case Management and Efficiency in Civil Litigation, Intersentia, 2008

\(^{153}\) Neil Andrews, see supra note 12, p. 22-23
that the trial can take place as soon as possible by means of a cost-effective hearing strictly limited to the resolution of the true issues in dispute and strictly limited in duration\textsuperscript{154}.

As a result of the civil procedure reform in U.K., case management covers both the pre-trial and the trial stage of a case and covers such matters as: helping parties to settle all or part of the case;\textsuperscript{155} identifying the issues in the case;\textsuperscript{156} summarily disposing of some issues and deciding in what order issues should be resolved;\textsuperscript{157} controlling the amount of disclosure of documents necessary for a case; limiting the amount of expert and other evidence that should be heard; and setting timetables for the conduct of the trial;\textsuperscript{158} deciding whether a proposed step in the action is cost-effective, taking into account the size of the claim.\textsuperscript{159} The rules 1.4 and 3.1 of the C.P.R. set out the case management rules. Therefore, the court is not limited to the express powers conferred by the law, but it is enabled by CPR 3.1 (m) “to take any other step or to make any further order for the purpose of managing the case and furthering the overriding objective.” In furtherance of this objective, rule 3.3 CPR enables now the court to make orders on its initiative.\textsuperscript{160}

In Canada, case management has made the object of several reports in the last 20 years\textsuperscript{161} and of several pilot programs in Ottawa and Toronto\textsuperscript{162} with rather encouraging results, despite some criticism.\textsuperscript{163}

\textsuperscript{155} CPR 1.4 (2) (f).
\textsuperscript{156} CPR 1.4 (2) (a)
\textsuperscript{157} CPR 1.4 (2) (d); 3.1 (2) (j).
\textsuperscript{158} CPR 1.4 (2) (g)
\textsuperscript{159} CPR 1.4 (2) (h) and 1.1 (2) (c)
\textsuperscript{160} Sir Anthony Clarke, Master of the Rolls, The Supercase – Problems and Solutions, KPMG Forensic’s Annual Law Lecture 2007, 29 March 2007, p. 7
Currently, the Rules 77 and 78 of the Ontario Civil Rules govern the case management in Ontario. However, in Ontario, rules 37.15 and 48.14 allow litigation management of the cases outside the case management rules if certain conditions precedent are met. In other Canadian provinces, case management regime varies considerably, at one end of the spectrum being British Columbia which has implemented a comprehensive case management regime and at the other end of the spectrum being the provinces where the case management objectives are implemented through the operation of the pre-trial conference.\textsuperscript{164}

If we take a hard look at the new litigation management which is implemented in England, it is clear, in my view, that the case management regime needs a uniform approach, one in which the proportionality principle is applied when dealing with case trial management. I mean, in each case, the management by the court should be proportional with the importance and complexity of the case. If a case raises complex issues or has a particular importance for the public, the court may keep several pre-trial conferences to assure that the case is properly managed. A simple case which does not raise any problem should be dealt in a brief and expeditious manner by the court. For example, in a common law property case in which the outcome is very clear, the judge could enter a summary judgment on its own motion. If a case raises one or more issues and for that reason the court cannot deal with it on a summary judgment motion, the judge can order a pre-trial conference to streamline the issues and to try to convince the parties to reach an agreement.

The traditional model in which the parties have the control of the case should be admitted only as an exception to the case flow management regime which should become the rule and not the exception.

However, any case flow management regime in Canada needs to take into consideration the proportionality principle which requires, as I presented above, that the proceedings should be conducted in ways that are proportionate

to the importance of the issues in dispute, and the complexity of the proceeding. Sir Anthony Clarke, Master of the Rolls, speaking about case management regime said that “Taken together, the Overriding Objective (similar to BC supreme rule 1-3 (2)) and active judicial case management seek to ensure that each case is afforded no more than a proportionate amount of judicial and party resources, that the real issues are identified early and concentrated upon by the court and the parties, and that the claim is dealt with expeditiously.” 165

In order not to waste the court resources and not to incur heavy expenses on the parties at a trial, the case litigation management should be available or not in function of the complexity of degree of the case or the track on which the case was assigned. Thus, with the exception of small claims, the litigation management should be mandatory from the early moments of a trial. On the other hand, it has been observed that requiring a pre-trial conference in simple cases is a waste of time and resources 166. In this kind of trials that are usually assigned to small claim courts in Canada, case management should be available only in the form of a case management conference upon request of one of the parties or if the court considers it to be necessary. However, in those cases where one of the parties is an unrepresented litigant, the case management should be mandatory.

A) Pre-Trial Case Management

Another feature of a new regime for case management in Canada should be that the control of the courts over the trial start early in the litigation process, which will enhance the efficiency and speed of the trials, because the parties will have a road map which will streamline their case. 167 A solution would be that the civil procedure rules should provide a mandatory, case-planning conference at

167 Neil Andrews, see supra note 12, p. 48 to 52
the outset of the litigation process but after the statement of claims and statements of defence have been filled and changed between parties.

In Canada the first province to adopt such a rule, which could be used as a model by others, including Ontario, is British Columbia. In the new B.C. Supreme Court Civil Rules which will come into force on July, 2010\textsuperscript{168}, this province adopted the rule stipulating that each case must have a case plan order which “to address dispute resolution options, dates for the exchange of documents, an electronic document protocol, the parameters of oral examinations for discovery, and basic information about planned use of experts”\textsuperscript{169}. Also, the new rules stipulate that if the case order is not established through the parties’ agreement, the order has to be made through a case planning conference before any steps are taken to litigate the case\textsuperscript{170}.

The first advantage which can be brought forward to support this solution, is that, in this way, the cost of litigation will be kept in reasonable limits. It is very important that, during the litigation process, the costs be kept proportionate to the benefits to be gained by the proceedings, as far as possible.

The second advantage for the economy of the trial, brought by a case management conference early in the litigation process, is that of reducing the delay of the cases since the parties will have established from the outset the deadlines which have to be met as well as the date and length of the trial\textsuperscript{171}. Also, at this moment the judge should warn the parties that in case that they fail to respect time limits, sanctions will be imposed upon them.

Also, at the case plan conference, the judge may consider many other matters in addition to the matters presented above. Among these matters, I consider discovery to be a central issue to the case plan conference. Thus, at this moment, the court may seek to clarify what discovery will be appropriate, establish its deadlines, provide that where documents of a similar type are


\textsuperscript{169} B.C. Justice Review Task Force, see supra note 168, p.1

\textsuperscript{170} Rule 5-1 of the new BC Supreme Court Civil Rules.

\textsuperscript{171} B.C. Civil Justice Task Force, Effective and Affordable Civil Justice, see supra 17, p. 10
involved, discovery should either be limited by the use of sampling methods or occur in stages.172

In deciding over the discovery plan, all the above factors presented above should be taken into consideration by the court. Only the costs would not justify that the court imposes a certain discovery plan. The efficiency and fairness of the trial cannot be left aside by a judge in deciding what kind of discovery will be appropriate, establishing the deadlines for discovery etc. This last measure will help, in a certain measure, to keep down the costs of the litigation.

I consider that having a detailed discovery plan approved by a judge from the outset will reduce the delay and cost to the parties, and make unnecessary a discovery management mechanism in discovery process as Osborne’s report suggested.173 In his report, Justice Osborne “concluded that the introduction of discovery management mechanism into Ontario’s discovery process would assist in reducing many of the key problems identified in his review”, but “the task force noted that parties in most of the cases are generally able to manage the discovery process efficiently without any court intervention, and it was therefore unwilling to impose a mandatory discovery management scheme for all cases. Instead, it found that court-assisted discovery management would be of greatest value in complex cases or those in which discovery problems can be anticipated”.174

I do not share the view taken by the task force on the discovery management issue and I consider that continuing to let the discovery process in the parties’ hands, with the exception of complex cases, will not change too much the actual system characterized through an over zealousness discovery due to adversarial approach to litigation from the part of the lawyers.

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173 Honourable Coulter A. Osborne report, see supra note 3, p. 86
174 Honourable Coulter A. Osborne report, see supra note 3, p 87
The pre-trial case management should have two important pre-trial conferences. In addition to the case management conference which takes place at the outset of the trial, another pre-trial conference which should take place after the discovery process has ended should be implemented. In the said conference, the focus should be the preparation for the coming trial or, in case that a settlement is possible, the pre-trial judge should order a pre-trial settlement conference under the supervision of a judge or master, depending on the object of the case.

The practice in England is that in the Commercial Court the judges hear all the pre-trial applications, including case management hearings, and only in civil trials Masters participate in hearings in pre-trial conferences. I consider that this practice should be followed in Canada too, or at least in Ontario, where the business activity is more intense and where, consequently, most of commercial litigation takes place.

Another matter which needs to be discussed at this point is the participation of the parties at pre-trial conferences. For sure, it is preferable that the parties attend in person pre-trial conferences, but as long as they are represented by a lawyer or by another person having a power of attorney, their presence is not necessary unless the court orders so. However, as Osborne’s report points out, in case of a pre-trial settlement conference, the parties should be present or in case that one party cannot attend, the defence counsel should ensure that someone with settlement authority is available by telephone.

B) Trial Management at Pre-Trial

In case that the parties do not settle their case, the court should keep a pre-trial review to prepare the case for trial. The foremost purpose of this pre-trial conference is the identification and the simplification of the trial issues.

175 Neil Andrews, see supra note 12, p. 50
176 Honourable Coulter A. Osborne report, see supra note 3, p. 94
177 In UK pre-trial reviews are normally established between 8 and 4 weeks before the trial date see O’Hare&Browne see supra note 29, p. 320; while in USA they are usually held “shortly before trial.”
Also, at this hearing the judge should formulate a plan for trial. This plan would establish the number of witnesses for each party, the length of each party’s time to present evidence, the time limit for oral argument, the order of presenting evidence etc.\textsuperscript{178} Finally, the judge should have the authority to decide “the possibility of the trial of preliminary issues” in order to shorten the length of the ensuing process.\textsuperscript{179}

To be effective, the pre-trial review should take place 4 to 8 weeks before the trial date established at pre-trial review.\textsuperscript{180} I think that the term recommended in Osborne’s report for pre trial conference “within the four to six months before trial in all regions”\textsuperscript{181} is too long and may be outdated until the date of the trial. The purpose of the pre-trial review being to prepare the parties for the trial, a longer period of time between the trial management conference and the effective trial could affect the efficient and fair conduct of the trial. For example, an aged witness could die meanwhile or could find himself in incapacity to testify at the trial. And in case that the trial is one with a civil jury, the outcome is very probable to be affected.

Another recommendation made in Osborne’s report, which I believe unnecessary, is that, in complex cases, “an informal administrative practice should be adopted in each region to permit parties to request a second pre-trial conference”. For the reasons presented above, a pre-trial review within 4 to 8 weeks before the trial is early enough not to require another pre-trial conference. Nevertheless, even when another pre trial conference is needed, this would not be a problem giving the power of the judge to take all the measures necessary including to order a pre-trial conference as many times as necessary.

A mechanism which is available in UK, and which I believe should be implemented here, is a pre-trial checklist. Basically, this is a form which must be

\textsuperscript{178} Flaming James Jr., Geoffrey C. Hazard Jr., John Leubsdorf, see supra note 111 p. 355; Osborne’s report, see supra note 3, p.95
\textsuperscript{179} Neil Andrews, see supra note 12 , p. 50 & 85, 3.17, 5.17
\textsuperscript{180} This is the term used in UK ., see O’Hare & Browne supra note 29, p. 142 , In BC the new rules of Supreme Court said that “to ensure that trials run smoothly, trial conference will be held between two and four weeks before trial. “
\textsuperscript{181} Honourable Coulter A. Osborne report, see supra note 3, p. 97
completed by the parties and returned to the court at a specified date but not later than 8 weeks before the trial date so that, in case that the court considers necessary to order a hearing, it can have enough time to do it. However, this pre-trial checklist will not prevent the court from keeping a pre-trial review, with the exception of simple cases or the cases where the parties agree over the orders to be made for the trial. In this situation, a pre-trial conference becomes unnecessary. Another advantage is that the judge would know what the issues in dispute are, and over which the parties agree, so he would manage the conference with better results.

C) Case Management During the Trial

The first measure, which if it were adopted would enhance the efficiency of the process, would be that the pre-trial judge serves as the trial judge as well. The arguments in favour of such a rule are compelling: pre-trial judges are already familiar with the facts of the case and also with the particular issue which the case raises; continuity also helps ensure that the case management orders made at the pre-trial conference are fulfilled and that the trial proceeds as planned.

In civil law jurisdictions, there is the principle of continuity which means that the judge participating in the discovery of the case should sit on the bench at the trial. I think that this principle should be adopted in common law countries even if the procedure is different. Moreover, along with the shift of the case management from the parties to the court, it is recommendable to have the same judge from the beginning of the trial until the end.

One issue which should be addressed is whether the judge who participates at the pre-trial settlement conference should hear the trial as well. My recommendation is that the same judge who presides over the pre-review case conference should be assigned at trial. But when the goal of the pre-trial

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182 O’Hare & Browne, see supra note 29, p.320
conference is to reach an agreement between the parties, it is preferable to assign
a judge who has a special expertise in alternative dispute resolution and who has
better chances to obtain a settlement.

Giving to the court more powers over the cases will definitely change
the way in which litigation is conducted. This, it will affect the functioning of
every procedural device and the court will have the “ultimate responsibility for
the control of the litigation.”

The last section before the conclusion analyzes the summary judgment
which could become a very effective procedural tool in an efficient and cost-
effective resolution of a case, but that, provided that some major changes are
undertaken.

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184 Zuckerman, see supra note 29, p. 405
V. Summary Disposition of Cases

Summary judgment is a procedural mechanism which allows the court to dispose of cases without trial when one party is unable to produce enough evidence to demonstrate a genuine issue for trial with respect to a claim or defence. The first codification of summary judgement was in the U.S. Federal Rules of Civil Procedure from where it was adopted in Ontario procedure. The actual form of Rule 20 is the result of changes made in 1984 to the Rules of Civil Procedure.

The present test, used by the courts on a motion to grant summary judgment was articulated by the Supreme Court of Canada in Hercules Management Ltd. v. Ernest & Young where, speaking for the Supreme Court, Iacobucci and Bastarache J.J., said:

“The appropriate test to be applied on a motion for summary judgement is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgement is a proper question for consideration by the court…. Once the moving party has made this showing, the respondent must then “establish his claim as being one with a real chance of success”.

The meaning of “genuine issue for trial” was explained by Morden A.C.J.O. who wrote in Irving Ungerman Ltd. v. Galanis:

“ It is safe to say that “genuine” means not spurious and, more specifically, that the words “for trial” assist in showing the meaning of the term. If the evidence on a motion for a summary judgement satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to satisfy the court that the requirements of the rule have been met. Further, it is

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186 Idem p.430
important to keep in mind that the court’s function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists”.188

In Ontario, the current approach of courts concerning the summary judgement rules was reviewed by Doherty J.A. in Folland v. Reardon189, where he stated:

Summary judgement under Rule 20.04 (2) (a) is granted where there is no genuine issue for trial with respect to a claim or defence advanced in the litigation. On a summary judgement motion, the judge will take a “hard look” at the evidence.

Summary judgement is appropriate only when the motion judge is satisfied that a trial is clearly unnecessary.190 A summary judgement motion is not a substitute for a trial, even where the material produced on the motion virtually duplicates the evidence that will be available for trial. Even if a motion judge may be as well-positioned to address the merits of a claim as the eventual trial judge, he or she cannot move beyond the limited role assigned under Rule 20.04(2).191

From the above summary judgment decision, as well as others, we can observe that the role of the court is very limited in deciding a motion for summary judgment. All that a court should do is to determine if there exists a genuine issue as to material facts requiring a trial. In assessing the existence of the genuine issue for trial, the court cannot evaluate credibility, weigh the evidence, or draw any factual inferences.192 If there is a genuine issue for trial, then, no matter how weak the claim or defence, it is not open to the motion judge to resolve the issue, and the case should proceed to be decided by the trier of fact.

189 Folland v. Reardon, [2005] O.J. No. 216 (Ont. C.A.), at paras. 32-33
Summary judgment is granted only in those situations where it is crystal clear that a trial is unnecessary.\textsuperscript{193}

Taking into consideration the high threshold for granting a summary judgment and the high indemnity costs against a moving party that is not successful in obtaining summary judgement, it is no wonder that summary judgment motions are brought in very few cases,\textsuperscript{194} although, given the high rate of settlement, this might actually represent a higher number of the cases actually going forward to trial.

Something should be done against this state of things. The most recent report on civil justice reform in Ontario is that of Honourable Coulter A. Osborne, Q.C.\textsuperscript{195} who proposed several recommendations regarding summary judgment in Ontario.

The starting point of the reform is the fact “that rule 20 is not working as intended”\textsuperscript{196}, the reason for that being the narrow view of the role of the motion judge taken by the Court of Appeal.\textsuperscript{197}

One way in which it is possible to increase the access to justice to unrepresented litigants and also to reduce the number of trial list is to change the section 20 of the Rules of Civil Procedure. The Osborne’s report noted that a subcommittee of the Civil Rules Committee has proposed to replace the current “no genuine for trial” test to expand the application of the rule 20.\textsuperscript{198} However, the report recommended not to “amend the test of “no genuine issue for trial” in rule 20”\textsuperscript{199} because the issue is not the wording of the rule but the narrow interpretation given to the powers of the motion judge or master under rule 20, which have limited the effectiveness of the rule.\textsuperscript{200}

\begin{footnotes}
\item[193] Hi-Tech Group Inc. v. Sears Canada Inc. [2001]
\item[194] For example in 2005-2006, summary judgement motions were commenced in only 642 of Ontario’s 63,251 Superior Court civil cases (1%).
\item[195] From now one I will use either Osborne’s report or report, see supra note 3,
\item[196] Honourable Coulter A. Osborne, supra note 3, p.33,
\item[197] Honourable Coulter A. Osborne, supra note 3, p.33
\item[198] Honourable Coulter A. Osborne, supra note 3, p.33
\item[199] Honourable Coulter A. Osborne, supra note 3, p.42
\item[200] Honourable Coulter A. Osborne, supra note 3, p. 35
\end{footnotes}
My opinion is that it would be a good decision to adopt in Ontario the test of “no real prospect of success” for granting a motion on summary judgement, which is currently used in England and Wales (rule 24.2 of Civil Procedure Rule) as a result of Lord Wolfe’s Access to Justice Report. As a result of the adoption of the new test, the threshold for granting summary judgement will be lower, making easier for applicants to satisfy the test for getting a summary judgment in their favour. It is not easy to get precision in this kind of test because different judges may have different ideas of what counts as “real” and what counts as “fanciful”.  

However, in UK, the new test for granting summary judgement “must therefore be understood in the context of the Report’s policy to promote proportionate use of resources.” The U.K. courts have started to apply the new test and, as a result, the courts have started to enter summary judgment where normal processes are not likely to make a difference to the outcome. However, we should be aware that the adoption of the new CPR summary judgment test does not represent a marked departure from the older RSC test, but allows the court to reject bad claims or defences slightly more readily than under the previous rules. I think that the same result will be produced in Canada if we adopt a similar summary judgment test.

The test that the court would apply when deciding whether to grant summary judgement is whether it is satisfied, in the case of an application against the claimant, that the claimant has no real prospect of succeeding on the claim or issue, and, for an application against the defendant, that he has no real prospect of successfully defending the claim or issue, and, in both cases, that there is no other compelling reason why the case or issue should be disposed of at a trial (r.24.2 from Civil Procedure Rules).

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201 Adrian Zuckerman, see supra note 29, 8.47 at p 285
202 Zuckerman, see supra note 29, 8.49 at p. 286
Based on rule 24.2, the correct test on an application for summary judgement against a claimant is not whether the claim is bound to fail, but whether the claimant has no real prospect of succeeding on the claim or issue.\footnote{Peter Robert v. Camdes LBC (2000) LTL, 24 October, CA quoted from Paula Loughlin & Stephen Gerlis, Civil Procedure, Second Edition, Cavendish Publishing, 2004, p.349}

In Swain v. Hillman\footnote{Swain v. Hillman [2001] 1 All E.R. 91}, Lord Woolf M.R. explained the “no real prospect of success” test: “The words ‘no real prospect of being successful or succeeding’ do not need any amplification, they speak for themselves. The word ‘real’ distinguishes fanciful prospects of success and directs the court to the need to see whether there is a ‘realistic’ as opposed to a ‘fanciful’ prospect of success.”

The main argument against the adoption of “no real prospect of success at trial” test is that just simply replacing it with the actual test of “no genuine issue for trial” will not expand the scope of summary judgement which lies rather in the way in which the Court of Appeal construed the authority of the motion judge in granting summary judgement than the test itself.\footnote{Honourable Coulter A. Osborne, supra note 3, p.33; Robert J. van Kessel, Dispositions without trial, second edition, LexisNexis, p.229-230}

However, if the test itself is changed, I do not see any reason why the courts should continue to stick to the old interpretation of the summary judgement, and, even, Justice Osborne considers in his report that “at a minimum, it would signal a more liberal approach to summary judgement motions.”\footnote{Honourable Coulter A. Osborne, supra note 3, p.35} With the adoption of the test “no real prospect of success”, the interpretation given by the courts should be in the favour of a liberal approach toward granting summary judgement which is in conformity with the application of this test by the courts in England, in opposition with the narrow interpretation used by USA courts and which is supported by the actual test.

Basically, we have to choose between the US model or the English test model of summary judgment. Our aim, which is to enhance “access to justice” by giving the chance to all litigants to have their day of trial, seems to be
contradicted by the fact that a motion for granting summary judgement seems to be easier to get. However, this is not at all against the idea of “access to justice” because summary judgment will bar only the litigants who bring frivolous claims which only consume the time and resources of the courts allowing to the judge to deal only with real claims in a timely manner.\textsuperscript{210}

In addition to the adoption of the test, “no real prospect of success”, the rules should permit the court on a summary judgement motion to weigh, draw and evaluate the evidence in appropriate cases. If the trial judge is not permitted to make a more serious assessment of the evidence, it’s almost impossible for him/her to grant a summary judgement or to decide that the issue be determined at the trial.

Moreover, it is recommend, that, besides the current summary judgment rules, Ontario should adopt rules similar to those used in Rule 18 A of the British Columbia Supreme Court Rules which allow a court to grant judgement in cases where there is an issue on the merits “unless the court is unable, on the whole evidence before it, to find the facts necessary to decide the issues of fact or law” or unless “the court is of the opinion that it would be unjust to decide the issues on the application”\textsuperscript{211} The Rule 18 A allows the court, in deciding a summary trial, to use affidavit and other documentary evidence, including evidence taken on an examination for discovery and written statements of an expert’s opinion.

The Federal Court adopted a summary trial mechanism through the Rules Amending the Federal Courts Rules changed the rules 213 and 219 which provide for summary judgment in the Federal Court.\textsuperscript{212}

One of the recommendations made by Justice Osborne was to “amend rule 20 to permit the court to direct a “mini-trial” on one or more issues, with or

\textsuperscript{210} Lord Woolf in Swain v. Hillman, wrote that summary judgement “ it saves expenses, it achieves expedition, it avoids the court’s resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interest of justice.”

\textsuperscript{211} B.C. Supreme Court Rules, BC Reg. 221/90, r. 18A(11)

without viva voce evidence, where the interests of justice require a brief trial to dispose of the summary judgement motion. The same judicial official hearing the summary judgement motion would preside at the “mini-trial”. I consider that such amendment will not be necessary to dispose on summary judgment motion. In England it is often said that “Summary judgment hearings should not be mini-trials. They are simply summary hearings to dispose of cases where there is no prospect of success.”213 If the judge has the right to weigh evidence, evaluate credibility and draw inferences, he can grant a summary judgment without directing a “mini-trial” on one or more issues. As Prof. Zuckerman observed, even if the summary procedure is not a mini-trial, the fact remains that an application for summary judgment does involve adjudication on the merits.214

Another reason for rejecting the “mini-trial” proposal is that, if an evidentiary issue is so complex that a mini-trial needs to be directed, it is better that that evidentiary issue to be decided at trial, otherwise we will depart from the original procedural function of summary judgment.

Another issue which must be addressed regarding the summary judgment regards the cost sanctions against a moving party that is unsuccessful in obtaining summary judgement. It is very clear, in my view, that as long as rule 20.06215 continues to be in force, the potential litigants will be deterred to bring a motion for summary judgement. However, it is reasonable to award substantial indemnity costs against litigants who bring motion for summary judgment in bad faith or for the purpose of delay.216

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214 Zuckerman, see supra note 29, 8.54 at p. 287
215 Ontario Rules of Civil Procedure, rule 20.06 (1) Where, on a motion for summary judgment, the moving party obtains no relief, the court shall fix the opposite party’s costs of the motion on a substantial indemnity basis and order the moving party to pay them forthwith unless the court is satisfied that the making of the motion, although unsuccessful, was nevertheless reasonable.
(2) Where it appears to the court that a party to a motion for summary judgment has acted in bad faith or primarily for the purpose of delay, the court may fix the costs of the motion on a substantial indemnity basis and order the party to pay them forthwith.
216 The new amendments to Ontario Rules of Civil Procedure which will come in force on 1 January 2010 address this issues. Thus, Rule 20.6 said that the Court may fix costs on a substantial indemnity basis if a party acted unreasonably or acted in bad faith for the purpose of delay.
VII. Conclusion

At the end of the day, what is at stake in Canada in the process of civil justice, as well as in the U.K. and other common law jurisdictions, is the survival of the adversarial process in civil litigation. What U.K. legislators understood, and as a result they vigorously reformed their civil justice rules, is that a pure adversarial trial model in the XXIst century is no longer possible to maintain.217 I consider that Prof. Jolowicz was right when he wrote that:

"It is, however, difficult to believe that the old philosophy of the adversary system and the refusal to acknowledge that there maybe be value in a judicial attempt to find the truth, can survive much longer".218

Lord Wolfe’s report which proposed a bold reform of the civil justice system in the U.K. was widely commented and his proposals followed in different common law jurisdictions around the world.219 The key points of this reform were the increased powers of the judge over the trial and the overriding objective which incorporates the proportionality principle.220

While going further than other reform proposals, Judge Osborne’s civil justice project still doesn’t propose a much needed overhaul change of Civil Procedure Rules in Ontario. As a result, we will probably be witnessing in the future another proposal of reform of civil justice system in Ontario.

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217 For example, the broad test of relevance called “Peruvian Guano”, in XIX century and first part of XX century was possible because “There was little commercial printing. But in the last of the twentieth century, the legal process was battered by the documentary tidal-waves of photo-copying and word-processing. This process of release and inspection could result in large legal fees. The discovery process also caused delay.” See Neil Andrews, supra note 79, p 96
218 J.A. Jolowicz, see supra note 149, p. 385
My view is that any substantial reform of the civil justice system must start with an increased role of the judge over the case, in the way promoted in U.K’s Civil Procedure Rules, because, as Donaldson M.R. said:

“Litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object.”

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\[221\] Davies v. Eli Lily and Co. [1987] 1 W.L.R. 428, 431