INTO THE FUTURE

The Agenda for Civil Justice Reform

Into the Future

Civil Justice Reform in Canada
1996 to 2006 and Beyond

December 2006

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Research Project – Final Report

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Introduction to the Final Report

The two-part Conference ***Into the Future: The Agenda for Civil Justice Reform*** is sponsored by the Canadian Forum on Civil Justice (the Forum), the Canadian Bar Association (CBA) the Association of Canadian Court Administrators (ACCA), and the Canadian Institute for the Administration of Justice (CIAJ). Part 1 of the Conference was held in in Montreal from April 30 to May 2, 2006. Part 2 of the Conference will be held in Toronto from December 7 to 8, 2006.

The Conference marks the 10-year anniversary of the publication by the CBA of the Report of its ***Task Force on Systems of Civil Justice*** (the CBA Task Force Report). The Report is available online at: www.cba.org (click on "Publications" on the sidebar, then on "Report" and scroll down to "Free Downloads"). The CBA Task Force account of the systems of civil justice in Canada as they stood in 1996 and its 53 recommendations provide a useful benchmark from which to assess developments over the past decade and consider future reforms.

In conjunction with the Conference, the Forum undertook a Research Project to collect information about developments since 1996 in systems of civil justice in Canada, gather opinions about the appropriateness of the 1996 vision for the years 2006 and beyond and canvass for ideas about the direction reform of the systems of civil justice in Canada could or should take in the future.

The Research Project was conducted in three stages:

- In the first stage, ACCA Board members arranged for representatives from each jurisdiction to report on developments in the civil justice system in their jurisdictions by completing a "**jurisdictional questionnaire**". The jurisdictional questionnaire covered CBA Task Force recommendations 1-11, 13-31, 34, 36 and 37. It was distributed to each of Canada's 10 provinces, 3 territories, the 3 federal courts and the Supreme Court of Canada (SCC). The results of Stage 1 were published in an *Interim Report* which was distributed at Part 1 of the Conference ***Into the Future: The Agenda for Civil Justice Reform***. In this, the Final Report, those results are reproduced in the section headed "Stage 1."

- In the second stage, "**recommendation-specific questionnaires**" were directed to individual organizations or groups named in the Task Force recommendations to perform certain tasks (*e.g.*, the CBA, ACCA, the judiciary, Canadian Council of Law Deans, law societies and the Canadian Centre for Justice Statistics). This batch of questionnaires covered CBA Task Force recommendations 12, 15, 23, 26, 32, 33, 35, 36 and 38-53. Stage 2 completed the collection of information about changes since 1996 that relate to the CBA Task Force recommendations.

- In the third stage, wide distribution was given to a questionnaire asking for ideas

and opinions about the direction the systems of civil justice in Canada should take in 2006 and Beyond. The "**2006 and beyond questionnaire**" built on the foundational principles and philosophical premises which formed the basis for the CBA Task Force recommendations. In all, 123 questionnaires were distributed to governments, Chief Justices of every Court, the Canadian Bar Association, Law Societies, the Association of Canadian General Counsel, law school deans, legal aid organizations and public legal education bodies throughout Canada, and to the Consumers Council of Canada. Of this number, 52 questionnaires representing a good cross-section of these constituencies were completed and returned. The distribution package for the Stage 3 questionnaire included the Interim Report on the Stage 1 results.

The systems of civil justice in Canada are changing, of this there can be no doubt. Despite its influential effect, the CBA Task Force cannot take credit for all of the changes that have occurred. The process of reform is interactive. The Task Force studied reforms that had been introduced or were being considered in civil justice systems within and outside Canada. For example, by 1996, Saskatchewan, early off the mark, was already offering mediation as an alternative to trial. Two provinces, Ontario and British Columbia, were conducting their own civil justice system reviews. Major jurisdictional initiatives continue to be taken, and the CBA Task Force Report and recommendations – together with other choices, events and influences within a particular jurisdiction – are considered in this connection. Examples here include: Quebec, which introduced the first round of reforms to its *Code of Civil Procedure* in 2003 and is now working on the second phase; Alberta and Nova Scotia, where law reform commissions are currently working on major rewrites of their rules of court; and the Yukon, which is writing its own rules of court (historically, the Yukon has relied on the British Columbia rules).

A great deal has been accomplished over the past decade, but the systems of civil justice in Canada still attract both public criticism and concern from within the civil justice community. The question we must face is: what should be the focus of reform in *2006 and Beyond*?.Responding to this question will be the challenge for participants in Part 2 of the Conference ***Into the Future: The Agenda for Civil Justice Reform***.

The Forum wishes to thank all of the persons who took the time to complete the Research Project questionnaires. Completion was no small feat. The questionnaires, particularly those for Stages 1 and 3, were lengthy and demanding. The willingness of so many players in Canada's civil justice systems to participate in the Research Project is strong evidence of the commitment of the civil justice community to undertake reform in the interest, and for the benefit, of all members of Canadian society.

The reports on the results in Stages 1, 2 and 3 of the Research Project follow this Introduction.

Stage 1

The report on Stage 1 is based on the information that jurisdictions have provided about themselves in response to the "**jurisdictional questionnaire**". These results were first published as the *Interim Report on the Jurisdictional Questionnaire* and distributed to the participants in attendance at Part 1 of the Conference ***Into the Future: The Agenda for Civil Justice Reform*** held in Montreal from April 30 to May 2, 2006.

ACCA Board members arranged for the completion of the jurisdictional questionnaire by representatives from each of Canada's 10 provinces, 3 territories, 3 federal courts and the Supreme Court of Canada. The jurisdictions responded, in a relatively short time, to the large number of questions posed. The questionnaire was distributed in mid-February. By early April, all but three jurisdictions (Nunavut, New Brunswick and the Supreme Court of Canada) had responded by completing the questionnaire. Nunavut is concentrating on building a new court house; responses from New Brunswick and the Supreme Court of Canada remain pending.

For each CBA Task Force recommendation, the jurisdictional questionnaire asked: whether the recommendation had been implemented (fully or partially) or not implemented (implementation being considered, not considered or rejected); and, if implemented, the authority for the implementation (*e.g.*, rule, practice directive, statute or other provision), a description of highlights of the provision, and other comments. The Forum will use the results to build a database of information that will be available to assist jurisdictions with future reforms, among other uses. All going well, this data-gathering process will be repeated periodically, perhaps at two or three year intervals, in order to track changes and maintain currency.

The discussion in the Stage 1 report is organized around six of the themes[1] put forward in the CBA Task Force Report: creating a multi-option civil justice system; reducing delay through court supervision of the progress of cases; reducing costs and increasing access; appellate reform; improving public understanding; and managing the courts of the twenty-first century. Those responding have made different choices about the amount of detail to give about reforms in their jurisdictions. Over time, as jurisdictions contribute additional information to the database and as the questionnaire is refined for use in future years, greater consistency in detail can be expected.

A wealth of information has been amassed. It is not possible within the compass of this report to include all details of the information provided in the questionnaire responses. Discretion has been used in the selection of the examples that illustrate the content of various reform initiatives. The Forum is giving thought to various means of further

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[1] The Final Report will discuss the CBA Task Force recommendations on other themes, such as the role and responsibilities of the legal profession and an increased focus on systems of civil justice in Canada. These themes are covered in the questionnaires for Stages 2 and 3.

disseminating the information gathered, for example, in articles in its publication *News & Views on Civil Justice Reform*, the publication of a book on Canada's evolving civil justice systems, and an online database of the questionnaire responses.

An effort has been made to stay true to the language used in the responses to the jurisdictional questionnaire, at times by reproducing the exact words, at other times by closely paraphrasing them.

The Chart appended to the Stage 1 report (Appendix A) records the authorities cited, state of implementation and the year of commencement of any initiative reported. In some instances, respondents have responded separately for different courts or programs, and the Chart reflects this. Sometimes "full" implementation refers to a particular court or program, and not to implementation of the recommendation in all of its aspects.

First Theme: Multi-Option Civil Justice System

Task Force Recommendations 1 to 3 promote the idea of creating a multi-option civil justice system. The multi-option theme focuses on the inclusion, within the civil justice system, of methods of dispute resolution that are alternative to traditional litigation and ultimate determination by a judge. The alternative methods should be non-binding, leaving resolution to agreement by the parties to the dispute, and available both early in the court process and post-discovery. The parties should be under an obligation to consider using alternative processes to resolve the dispute.

A. Early and Post-Discovery Non-Binding Dispute Resolution (Recommendation 1)

RECOMMENDATION 1:
Every jurisdiction
(a) make available as part of the civil justice system opportunities for litigants to use non-binding dispute resolution processes as early as possible in the litigation process and, at a minimum, at or shortly after the close of pleadings and again following completion of examinations for discovery;
(b) establish, as a pre-condition for using the court system after the close of pleadings, and later as a pre-condition for entitlement to a trial or hearing date, a requirement that litigants certify either that they have availed themselves of the opportunity to participate in a non-binding dispute resolution process or that the circumstances of the case are such that participation is not warranted or has been considered and rejected for sound reasons; and
(c) Ensure that individuals involved in helping litigants in non-binding dispute resolution processes have suitable training and support to carry out this function.

IMPLEMENTATION POINTS:
– Providers of dispute resolution services could include court personnel, judges, the private sector, or a combination of these.
– Dispute resolution services could be court-annexed, provided by the private sector, or some combination of these two.
– Consideration to be given to issue of how these services are to be funded.

The jurisdictional responses disclose much activity on the multi-option front. Of the 14 reporting jurisdictions, 8 jurisdictions report full or partial implementation (in most instances, full); two other jurisdictions are considering implementation. Most of the innovations post-date 1996. Non-binding dispute resolution processes are not viable in the Tax Court of Canada (Tax Court) because the Minister of National Revenue lacks authority to enter into compromise settlements.

1. Range of options

The processes put in place for dispute resolution vary from jurisdiction to jurisdiction. Court-connected processes tend to offer mediation, typically interest-based. The dispute resolution may be facilitated by persons drawn from the private sector and placed on a roster (*e.g.,* mandatory mediation in Ontario; mediation in Alberta small claims and the Queen's Bench pilot project), by public sector employees (*e.g.*, mediation services in Saskatchewan) or senior lawyers (*e.g.*, mediation of child custody or support order variations in Alberta). Often a dispute resolution option commences with a pilot project in one or two court centres, then expands to other centres.

The dispute resolution options being introduced may be available or required in the general civil justice system or for certain types of dispute. Family law matters and small claims are often identified. Ontario has a separate rule for contested estates, trusts and issues of legal incapacity to make decisions. Ordinarily, provision is made for exemption, usually by court order on application by a party, from any requirement to use a dispute resolution option (*e.g.*, British Columbia, Ontario, Alberta).

Recommendation 1(a) calls for the use of dispute resolution options on two occasions – one early in the litigation process (at the close of pleadings) and the other later in the process (post-discovery). Many jurisdictions expect a dispute resolution option (mediation) to be used early in the litigation process. Courts in some jurisdictions mandate front-end conferences with a judge (*e.g.*, small claims in Alberta). Post-discovery, jurisdictions tend to place greater reliance on conferences with a judge. These conferences are known by assorted names (*e.g.*, pre-trial conference, settlement conference, judicial dispute resolution conference, and so forth). Generally, jurisdictions have not imposed a requirement to use dispute resolution options at two points in time – early in the proceeding and again post-discovery.

2. Mandatory or voluntary use

Some jurisdictions mandate the use of certain programs (*e.g.*, early mandatory mediation in five designated judicial centres in Saskatchewan; early mandatory mediation of most case-managed actions in Ottawa, Toronto and Windsor; certain family law programs in Alberta). Other jurisdictions hold fast to the principle of voluntary use (*e.g.*, Quebec with the exception of mandatory attendance at an information session in family law matters). Mandatory participation may be systemic (*e.g.*, Ontario

mediation program), initiated by one party by the delivery of a notice to mediate (*e.g.*, British Columbia Supreme Court and Provincial Court; civil mediation pilot project in Alberta Court of Queen's Bench) or court-ordered in an individual case. In Alberta, in the superior court, two pilot programs mandate the use of dispute resolution options for certain family law issues. In contrast, in the provincial court, small claims matters are systemically screened for mandatory mediation; once selected, the parties must participate or obtain a court order exempting them.

3. Judicial involvement

As will be seen in the discussion of the Second Theme, the CBA Task Force called for greater involvement of the judiciary in the management of civil litigation. Partly in consequence of this involvement, judges have come to assume a greater role in both encouraging and facilitating settlement. At conferences with the parties, judges explore the possibility that the parties may be able to reach agreement without going to trial, encourage the use of the dispute resolution options, and even facilitate settlement discussions between or among the parties. In some jurisdictions, these conferences operate as an extension of pre-trial conference rules which pre-date 1996. Initially, a pre-trial conference was held late in the proceeding, prior to trial, for the purpose of readying the case for trial. Later, the rules were revised to include canvassing the possibility of settlement (*e.g.*, Ontario, Alberta, Saskatchewan). In Alberta, a pre-trial conference now may be held at any stage in the proceeding.

In a growing trend, some jurisdictions provide for a judicial role in facilitating dispute resolution by scheduling judicial time for this function (*e.g.*, Alberta, Manitoba, the Federal Court). Judicial dispute resolution at the appellate court level may also be available in some jurisdictions (*e.g.*, Quebec, Alberta). In Quebec, mediation is generally the preserve of the judiciary both at trial and at appeal; however, accredited mediators handle family law matters and small claims.

The mingling of the roles of case management, settlement facilitation and adjudication is more pronounced in provincial small claims courts than in the superior courts. In contrast, in the superior courts, a judge who participates in case management or settlement facilitation usually does not conduct the trial.

4. Costs

Some dispute resolution options are government-funded and may be taken up at no cost to the litigants (*e.g.*, small claims mediation in Alberta, a 3-hour mediation session in Saskatchewan). More commonly, the costs of using a dispute resolution option fall on the parties (*e.g.*, mandatory mediation in Ontario). Provision may be made to subsidize the costs of low income litigants. An advantage claimed for the role of judges in facilitating settlement is that the civil justice system absorbs the costs.

5. Certification of use

Recommendation 1(b) proposes that litigants be required to certify either that they have availed themselves of the opportunity to participate in a non-binding dispute resolution process or that the circumstances of the case are such that participation is not warranted or has been considered and rejected for sound reasons. This requirement would operate as a pre-condition for using the court system after the close of pleadings, and later as a pre-condition for entitlement to a trial or hearing date.

The jurisdictions say little about the requirement for certification. Under Ontario's simplified procedure, the party who sets an action down for trial must certify in the notice of readiness for pre-trial conference that there was a settlement discussion. In situations where mandatory use of an option is systemically imposed, the system controls may remove the need for individual certification. Certification is inconsistent with the philosophy of jurisdictions that take a wholly voluntary approach to the use of dispute resolution options (*e.g.*, Quebec).

6. Training of facilitators

Recommendation 1(c) asks jurisdictions to ensure that individuals involved in helping litigants in non-binding dispute resolution processes have suitable training and support to carry out this function. This requirement is dealt with in the responses to Recommendation 36.

British Columbia		
Supreme Court: Notice to Mediate Notice to Mediate regulations under: *Motor Vehicle Act*, *Homeowner Protection Act,* and *Law and Equity Act*	Full	199819992001
Family justice counsellor *Family Court Rules*, Rule 5		1999
Parenting After Separation Ministry policy		
Provincial Court: Court Mediation Program *Small Claims Rules*, Rule 7.2		1996
Provincial Court: Notice to Mediate *Small Claims Rules*, Rule 7.23		2005
Alberta	Implemented	Year
Provincial Court; Pretrial Conference *Provincial Court Act,* R.S.A. 2000, c. P-31, ss. 64, 65, and 66	Full	2001

Provincial Court; Civil Claims Mediation Program *Provincial Court Act*,, ss. 65 and 66; Mediation Rules, Alta. Reg. 271/97	Partial	1998 (Edmonton & Calgary) 2006 (Lethbridge & Medicine Hat)
Court of Queen's Bench: Judicial Dispute Resolution Process Guidelines for Judicial Dispute Resolution, Court of Queen's Bench of Alberta Consolidated Notices to the Profession.	Full	mid-1980s
Court of Queen's Bench; Civil Mediation Program Civil Practice Note "11", Court Annexed Mediation, effective September 1, 2004	Partial (pilot project)	2005 (Edmonton & Lethbridge)
Court of Queen's Bench: Dispute Resolution Officers (DRO) Family Practice Note No. 9	Partial	2002 (Calgary)
Court of Queen's Bench: Child Support Resolution Officers (CSRO) Practice Directive by the Chief Justice	Partial	2002 (Edmonton)
Provincial Court and Court of Queen's Bench: Family Justice Services Mediation *Family Law Act* November 1, 2005 s. 5, Duty of Lawyer s. 97, Dispute Resolution	Full	2005 (program commenced in early 1970s, transferred to Alberta Justice in 2000)
Court of Appeal: Judicial Dispute Resolution (JDR) Court initiative	Full	2004
Children's Services Mediation Pilot *Child, Youth and Family Enhancement Act*, s. 3.1, Alternative Dispute Resolution	Partial	2005
Court of Queen's Bench: Family Law Pretrial Conferences Family Law Practice Note "5"	Full	2003
Saskatchewan		
Dispute Resolution Office Established to provide and encourage the provision of dispute resolution/mediation services to the public		1988
Mediation *The Queen's Bench Act*, Part VII, s. 42	Full	1995 (pilot in 2 judicial centres, now in 5 judicial centres)
Pre-Trial Conferences *Rules of the Court of Queen's Bench for Saskatchewan*, Rule 191 and Practice Directive No. 4	Full	1978, revised 1988
Provincial Court: Case Management Conferences in Small Claims Matter *The Small Claims Act*, s. 7.1	Full	2006

Manitoba		
Judicial Assisted Dispute Resolution (JADR) Notice to the Profession	Partial	
Ontario		
Superior Court of Justice: Mandatory Mediation *Rules of Civil Procedure*, Rule 24.1 (civil, case managed actions) Rule 75.1 (contested estate matters)	Partial Expansion to additional sites is under consideration	1999 (Toronto, Ottawa) 2002 (Windsor) 2006
Superior Court of Justice: Pretrial Conferences *Rules of Civil Procedure*, Rule 50.01		pre-dates 1996
Quebec		
Judicial Dispute Resolution *Code of Civil Procedure of Quebec* (abbrev. CCPQ), R.S.Q., ch. C-25, Rules 151.14-151.22, 508.1, 814.3-814.14 and 973	Full	2003
Family Law Matters Mandatory attendance at one information session		
Small Claims Voluntary mediation by accredited mediators		
Nova Scotia		
Practice Memoranda (PM) 5 and 27		
Prince Edward Island		
	Not implemented	
Newfoundland & Labrador		
	Not Implemented	
Northwest Territories		
	Under consideration	
Yukon		
Small Claims Court *Small Claims Court Regulations*, Regs. 39-44	Full	1995
Supreme Court: Judicial Dispute Resolution *Supreme Court Rules*, Rule 35	Partial	Unknown
Certification Requirement	Not Implemented	

Federal Court		
Judicial Dispute Resolution Conference *Federal Courts Rules*, Rules 386-391		
Federal Court of Appeal		
Alternative Dispute Resolution (ADR) *Federal Courts Rules*	Full	
Tax Court of Canada		
	Rejected	

B. Obligation to Consider Settlement (Recommendation 2)

> **RECOMMENDATION 2:**
> Each jurisdiction through its rules of procedure impose on all litigants a positive, early and continuing obligation to canvass settlement possibilities and to consider opportunities available to them to participate in non-binding dispute resolution processes.

Few jurisdictions report having placed an outright "positive, early and continuing obligation" on the *litigants* themselves to canvass settlement possibilities and to consider participating in non-binding dispute resolution processes. Ontario's simplified procedure requires the parties to consider the possibilities of settlement, either by meeting or telephone call within 60 days of the first defence. The Federal Court rules place an obligation on *solicitors* to "discuss the possibility" of settling and of asking the court for a dispute resolution conference to deal with unsettled issues. The trend in most jurisdictions has been to build in procedures, often in conferences with judges (*e.g.*, pre-trial, case management), that encourage litigants to look to these possibilities. Such conferences may be mandatory (e.g. Alberta's family law mandatory pre-trial conference which has a settlement and a case management component; mandatory case management for cases under $1,000,000 under a 2-year pilot project in selected centres in British Columbia) or initiated on request.

British Columbia	Implemented	Year
Family Law Judicial Case Conferences (Pilot Project) *Supreme Court Rules.*, Rule 60E Rule 60E -" (June 26, 2002)	Full	2002
Fast Track Litigation *Supreme Court Rules.*, Rule 66		1998
Expedited Litigation Project Rule *Supreme Court Rules.*, Rule 68 (2-year pilot project available in 4 registries)		2005
Pre-trial Conference *Supreme Court Rules.*, Rule 35		

Case Management for Trial over 20 days in length Practice Directive		1998
Small Claims Court *Small Claims Rules* Rules 7 (mandatory settlement conference) Rule 10.1 (monetary penalties for failure to accept an offer to settle close to final court judgment)		19911995
Alberta		
Court of Queen's Bench: Pre-trial Conference *Alberta Rules of Court,* Rule 219, and Civil Practice Note "3"	Full	1998
Saskatchewan		
Pre-trial Conference *Rules of Court*, Rule 191(2)	Full	1988
Manitoba		
Expedited Actions: Case Conference at Close of Pleadings *Queen's Bench Rules*, Rule 20A	Partial	1996
Ontario		
Simplified Procedure *Rules of Civil Procedure*, Rule 76	Full	1996 (pilot) 2001 (permanent)
Civil Case Management *Rules of Civil Procedure*, Rule 77		1997
Quebec		
	Rejected	
Nova Scotia		
	Under consideration	
Prince Edward Island		
Rules Committee, *Rules of Court*	Partial	1998
Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
	Not Implemented	

Yukon		
Small Claims Court *Small Claims Court Regulations*, ss. 39-44	Partial	1995
Supreme Court *Supreme Court Rules*, Rule 35	Partial	unknown
Federal Court		
Duty of solicitors *Federal Courts Rules*, Rule 257	Full	1998
Federal Court of Appeal		
	Not Considered	
Tax Court of Canada		
Appointment of Case Management Judge Practice Notes #7 and #12 (status hearing) Practice Note #11 (pre-trial conference)	Partial	

C. Post-Discovery Dispute Resolution Process (Recommendation 3)

RECOMMENDATION 3:
Every court undertake studies or pilot projects to determine best practices concerning the integration of non-binding dispute resolution processes in the post-discovery stages of litigation.

Recommendation 3 invites jurisdictions to launch studies or pilot projects to determine best practices concerning the integration of non-binding dispute resolution processes in the post-discovery stages of litigation. Action on the implementation of this recommendation is slow in coming: the majority of jurisdictions have not considered it. Saskatchewan sees no need to undertake studies or pilots because the experience with pre-trial conferences has already proven the value of integrating non-binding dispute resolution processes in the post-discovery stages. Alberta is working on the determination of best practices in two areas – the judicial dispute resolution process and the children's services mediation pilot (for child welfare cases). The Federal Court is considering changes to its pre-trial conference rule. It has also implemented rules regarding offers to settle.

British Columbia	Implemented	Year
	Not Implemented	
Alberta		
See Recommendation 1: Court of Queen's Bench of Alberta -- Judicial Dispute Resolution Process and Children's Services Mediation Pilot.	Full	

Saskatchewan		
	Not Considered	
Manitoba		
	Not Considered	
Ontario		
Quebec		
	Not Considered	
Nova Scotia		
Practice Memorandum 27		2000
Prince Edward Island		
	Not Implemented	
Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
	Don't know	
Yukon		
	Not Considered	
Federal Court		
Federal Courts Rules, Rules 258 - 263,	Partial	1998
Federal Court of Appeal		
	Not Considered	
Tax Court of Canada		
	Rejected	

Second Theme: Reducing Delay Through Court Supervision of the Progress of Cases

Task Force Recommendations 4 to 11 advance the theme of reducing delay through court supervision of the progress of cases. Seven strategies are proposed: establishing a caseflow management system; setting fixed trial dates; providing for individual case management; introducing multiple litigation tracks; imposing time standards for trial

courts; automatic dismissal of cases that are not moving forward; and setting time standards for rendering judgment.

A. Caseflow management (Recommendations 4 and 5)

RECOMMENDATION 4:
Every court have a caseflow management system to provide for early court intervention in the definition of issues and for the supervision of the progress of cases.

RECOMMENDATION 5:
While the design of a caseflow management system should be at the discretion of each court, at a minimum systems should provide for
- early court intervention by designated and trained individuals in all cases;
- the establishment, monitoring and enforcement of timelines;
- the screening of cases for appropriate use of non-binding dispute resolution processes; and
- reliable and realistic fixed trial dates.

IMPLEMENTATION POINTS:
– the commitment and co-operation of all anticipated participants;
– articulation of guidelines for judicial supervision;
– appropriate technical support; and
– introduction and subsequent monitoring of clear time standards.

Twelve jurisdictions have implemented at least some of the features of a caseflow management system that provides for early court intervention in the definition of issues and for supervision of the progress of cases. In most cases, the initiative has been taken since 1996. Some jurisdictions have systems that provide caseflow management in some courts (*e.g.*, Quebec Court of Appeal), in some court centres or for some types of case (*e.g.*, most civil non-family actions and applications over $50,000 in Ottawa and Windsor; full case management of most family cases in Winnipeg Centre). Other jurisdictions achieve this effect by allowing the court to direct certain activities. All three federal courts provide for status reviews based on timelines.

In Ottawa and Windsor, the steps and timeline are imposed automatically. This system establishes time frames for specific events to guide the pace of litigation (on either a standard track or a fast track), with flexibility to meet the circumstances of each case. The process provides opportunities for parties to settle, narrow or consolidate issues, and for dismissal for delay. It also involves early and active intervention by the court by means of judicial conferences (case conference, settlement conference, trial management conference) to promote resolution of disputes or to bring cases to trial in a timely manner. (In Toronto, a modified case management rule was introduced on a pilot basis in 2005. The pilot is set to expire in 2008.)

British Columbia	Implemented	Year
Supreme Court *Supreme Court Rules*, Rules 35, 60E, 66 and 68 Case Management for Trial over 20 days in length, Practice Directive	Full	1998
Provincial Court *Small Claims Rules*, Rule 7 Notice to the Profession		1991, 1998 2006
Alberta		
Early court intervention and screening of cases for appropriate use of non-binding dispute resolution: see Recommendation 1	Under Consideration (Rec. 4) Partial (Rec. 5)	
Saskatchewan		
Under the authority of the Chief Justice of the Court of Queen's Bench	Partial	Ongoing
Manitoba		
Court of Queen's Bench, Family Division *Rules of Court*, Rule 70 (Family Proceedings)	Full	1996 (pilot project) 2002 (full case management in Winnipeg Centre)
Ontario		
Civil Case Management *Rules of Civil Procedure*, Rule 77	Full	1997
Quebec		
Implemented in the Court of Appeal	Partial	2003
Nova Scotia		
Civil Procedure Rules, Rule 68	Partial (Halifax)	2000
Prince Edward Island		
Practice Directive	Full	1997
Newfoundland & Labrador		
	Rejected	
Northwest Territories		
Rules of the Supreme Court, Rule 284	Full	1994

Yukon		
	Not Considered	
Federal Court		
Federal Courts Rules, Rules 380 - 385	Full	1998
Federal Court of Appeal		
Federal Courts Rules	Full	1998
Tax Court of Canada		
	Full	2005

B. Fixed trial dates (Recommendation 6)

RECOMMENDATION 6:
Every court that does not currently provide for fixed trial dates develop practices and procedures to ensure greater certainty and reliability in the fixing of trial dates.

Eleven jurisdictions have fixed trial dates or have established practices and procedures to ensure certainty and reliability in the fixing of trial dates. Among the jurisdictions giving dates, the provisions were introduced after 1996 in 4 jurisdictions, before 1996 in 3. In British Columbia, at least, instances of overbooking are rare or non-existent.

British Columbia	Implemented	Year
Supreme Court Rules, Rule 68 (2-year pilot project available in 4 registries) Practice Directives for Trials over 20 days in length	Full	20051998
Alberta		
	Full	
Saskatchewan		
	Not Implemented	
Manitoba		
	Not Considered	
Ontario		
	Not Implemented	
Quebec		
Code of Civil Procedure, Rules 275 and 278, and Rules of Court	Full	

Nova Scotia		
Civil Practice Rules, Rule 28.11	Partial Under consideration	1971
Prince Edward Island		
Practice Directive	Full	1997
Newfoundland & Labrador		
	Full	1998
Northwest Territories		
Always had fixed trial dates	Full	1996
Yukon		
Supreme Court, Practice direction #11	Full	Ongoing
Federal Court		
	Full	
Federal Court of Appeal		
Federal Courts Rules	Full	
Tax Court of Canada		
Tax Court of Canada Act	Full	1993

C. Individual case management (Recommendation 7)

RECOMMENDATION 7:
Every jurisdiction provide for case management in all cases where there is a need for judicial supervision or intervention on an ongoing basis.

All 14 reporting jurisdictions provide for the management of individual cases pursuant to court order on party application or the court's own initiative, with a good proportion of the provisions having been introduced since 1996. This is in addition to conferences that are imposed systemically for certain categories of case (*e.g.*, in British Columbia, case management conferences for trials over 20 days in length, pre-trial conferences for Supreme Court trials that will exceed 3 days or for small claims cases that require more than ½ day; in Manitoba, in most family cases in Winnipeg Centre of Queen's Bench). In the Yukon, the judge determines at the pre-trial conference how intensely Supreme Court files should be case managed. Alberta places an obligation on the parties to apply for the appointment of a case management judge in certain actions (e.g., civil jury trial, very long trial action, a class proceeding).

British Columbia	Implemented	Year
Supreme Court Rules, Rule 68 (2-year pilot project available in 4 registries) Practice Directives for Trials over 20 days in length.	Full	20051998
Provincial Court, Notice to the Profession		2006
Alberta		
Court of Queen's Bench of Alberta Civil Practice Note "1"	Full	2001
Saskatchewan		
The Court uses its authority to control its own process, to call case management conferences on an ad hoc basis as needed	Full	Ongoing
Manitoba		
Rules of Court, Rule 70 (Family Proceedings) Notice to Profession	Full	1996/1997
Ontario		
Rules of Civil Procedure, Rules 37.15 and 77.09	Full	
Quebec		
Code of Civil Procedure, Rules 151.11 to 151.13	Full	2003
Nova Scotia		
Civil Practice Rules, Rule 68	Full	2000
Prince Edward Island		
Practice Directive	Full	1997
Newfoundland & Labrador		
Rules of Court, Rule 18A	Full	2006
Northwest Territories		
Rule 281	Full	1994
Yukon		
	Full	Ongoing
Federal Court		
Federal Courts Rules, Rules 380-385	Full	1998

Federal Court - Court of Appeal		
Federal Courts Rules, Rules 380-385	Full	
Tax Court of Canada		
	Full	

D. Multiple tracks (Recommendation 8)

RECOMMENDATION 8:
Every jurisdiction provide a multi-track system for the resolution of civil disputes.

Ten jurisdictions report having multiple tracks, most having been established since 1996. British Columbia has a fast track, an expedited track and a standard track in its Supreme Court, and case management of trials over 20 days in length. It also makes special provision for some small claims (*e.g.*, motor vehicle related liability matters are set directly for trial, small claims between $10,000 and $25,000 are set for longer settlement conferences before trial). Ontario has 3 separate tracks depending on the monetary value of the claims – cases up to $10,000 are dealt with in small claims; cases between $10,000 and $50,000, under a simplified procedure; and cases over $50,000, under the ordinary rules of civil procedure. Cases subject to case management are routed to a standard track for complex cases and a fast track for less complex cases or those with a small number of parties. Other jurisdictions have introduced simplified procedures in their superior courts for claims for up to a specified amount (*e.g.*, $50,000 in Saskatchewan and the Federal Court, $75,000 in Alberta).

British Columbia	Implemented	Year
Supreme Court *Supreme Court Rules*, Rules 66 and 68 Case Management for Trial over 20 days in length, Practice Directive	Full	
Small Claims Court *Small Claims Rules*, Rule 7(1), 7(2), 7.2		1998
Family Law Family Rules and policy, Rule 5		
Alberta		
Alberta Rules of Court, AR 390/68, Part 48, Rules 659-673 (streamlined procedure rules)	Partial	1998
Saskatchewan		
Court of Queen's Bench for claims under $50,000	Full	1998

Simplified Procedure *Rules of the Court of Queen's Bench*, Part Forty, and Practice Directive 8	Full	
Manitoba		
	Not Considered	
Ontario		
Rules of Civil Procedure and *Small Claims Court Rules*	Full	
Quebec		
	Not Implemented	
Nova Scotia		
Civil Practice Rules, Rule 68	Full	2000
Prince Edward Island		
Small Claims Rule, Simplified Procedure Rule, Family Law	Partial	1997
Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
	Not Considered	
Yukon		
	Not Considered	
Federal Court		
Federal Courts Rules, Rules 292, 299, 300-334	Full	1998
Federal Court of Appeal		
Federal Courts Rules	Full	
Tax Court of Canada		
Tax Court of Canada Act	Full	1993

E. Time standards for trial courts (Recommendation 9)

RECOMMENDATION 9:
Every court set timelines for the overall determination of civil cases and develop suitable means which to enforce such timelines.

Less progress has been made in setting time standards than in other areas of reform. Five jurisdictions indicate full or partial implementation – 3 after 1996 and 2 before. The Federal Court rules provide for set periods for the completion of procedural steps, status reviews and restrictions on extensions of time. The Tax Court has set periods for the completion of procedural steps in both its informal and general procedures, and a case may be dismissed for delay in prosecution. In Ontario, if an action has not been placed on a trial list within two years after the filing of the defence, the registrar sends a status notice warning the parties that the action will be dismissed for delay unless it is set down for trial within 90 days after service of the notice. If a party requests a status hearing, the judge may dismiss the action or set time limits for completing the steps necessary for the action to be placed on the trial list. If the time limits are not met, the registrar may dismiss the action for delay with costs. Some jurisdictions impose time standards for specific types of case, but not generally (*e.g.*, in Alberta, with some exceptions, a case conference must be held for family law matters that are not settled or set down for trial within 365 days from the date of the first contested court application; in British Columbia, a small claims settlement conference must occur within 2 months of the close of pleadings and trial, within 4 months of the settlement conference).

British Columbia	Implemented	Year
Provincial Court	Full	1997
Supreme Court	Not Considered	
Alberta		
Deadline for Resolution of Family Litigation Court of Queen's Bench, Family Practice Note No. 11	Full	2001
Saskatchewan		
	Rejected	
Manitoba		
	Not Considered	
Ontario		
Rules of Civil Procedure, Rule 48.14 (Status hearings and dismissal for delay)	Full	1991

Quebec		
	Don't Know	
Nova Scotia		
Civil Practice Rules, Rules 28.11 and 68	Full	2000
Prince Edward Island		
Practice Directive	Partial	1997
Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
Yukon		
	Not Considered	
Federal Court		
Federal Courts Rules, Rules 203, 189, 191, 205, 206, 202, 380, 223, 236, 238, 255, 256, 257, 258, 264, 279, 281, 268, 287, 380	Partial	
Federal Court of Appeal		
	Not Considered	
Tax Court of Canada		
Tax Court of Canada Act and Rules	Partial	1993

F. Automatic dismissal (Recommendation 10)

> **RECOMMENDATION 10:**
> Every jurisdiction provide by its rules of procedure for the automatic dismissal of cases where they have not been determined within a specified period, subject to the discretion of the court to order otherwise in compelling circumstances.

Provision for automatic dismissal has not found widespread favour. Most jurisdictions make provision for dismissal on court order (*e.g.*, for lack of activity or non-compliance such as failure to meet a prescribed time period), but only six jurisdictions provide for automatic dismissal, three indicating implementation since 1996, two before, and one not giving a date. Alberta's "drop dead" rule imposes a 5-year mandatory limit on delay: if nothing has been done to materially advance the action for 5 years, the Court must dismiss the action. The Federal Court sets time frames for status review where required steps have not been taken (*e.g.*, pleadings not closed within 180 days of issuance of

statement of claim; pre-trial conference not requested within 360 days of issuance of statement of claim; hearing date not filed within 180 days of issuance of application or appeal). At the status review, the Court may dismiss the proceeding but dismissal is not automatic. Quebec and Saskatchewan allow cases to proceed at the discretion of and on the time frame selected by the parties. Provisions in the Saskatchewan rules allow either party to push a matter forward if they see fit. In the Yukon, there is no demand for this, or for many other reforms.

British Columbia	Implemented	Year
Supreme Court Rules, Rules 2, 3, 5 15(8), 25(1) *Small Claims Rules*	Full	1991
Alberta		
Alberta Rules of Court, AR 390/68, Part 24	Full	1996
Saskatchewan		
	Rejected	
Manitoba		
	Not Considered	
Ontario		
Rules of Civil Procedure Rule 24 (Dismissal of Action for Delay) Rule 48.14 (Status Hearings and Dismissal for Delay)	Full	
Quebec		
	Not Considered	
Nova Scotia		
Civil Practice Rules, Rule 28.11	Full	1971
Prince Edward Island		
Simplified Procedure, Timelines for perfection of appeals	Full	1997
Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
	Under consideration	

Yukon		
	Not Considered	
Federal Court		
Federal Courts Rules, Rules 380 – 382	Partial	1998
Federal Court of Appeal		
	Not Considered	
Tax Court of Canada		
	Not Implemented	

G. Standards for rendering judgment (Recommendation 11)

RECOMMENDATION 11:
Every trial court
- require that judgements be rendered promptly and by no later than six months after completion of the trial, and
- develop procedures for monitoring compliance with this standard.

Ten jurisdictions report full, or in 2 instances, partial implementation of the requirement for judgments to be rendered promptly and by not later than 6 months after completion of the trial. Standards for rendering judgment are seen to fall within the purview of the judiciary, and the initiatives generally are not new. Responsibility for addressing delay is generally viewed as a matter for the Chief Justice who finds guidance in the time frame recommended by the Canadian Judicial Council for rendering decisions under reserve (maximum of 6 months: *see* "Ethical Principles for Judges," part IV, item 10 of http://www.cjc-ccm.gc/cmslib/general/ethical-e.pdf). Some jurisdictions have systems for tracking reserve judgments and reporting delays to the Chief Justice (*e.g.*, Alberta, British Columbia, Saskatchewan and the Federal Court; in the Tax Court judges also receive a personalized report). Some jurisdictions set shorter time periods for some types of case (*e.g.*, in Quebec, 4 months for small claims, 2 months for adoption, alimony and custody matters; in the Tax Court, 90 days for the informal procedure).

British Columbia	Implemented	Year
Judicial practice	Full	
Alberta		
	Full	+ 25 years ago

Saskatchewan		
General supervisory responsibility of the Chief Justice, after consultation with the other Judges regarding an appropriate time frame. For general supervisory authority, *see* section 14 of *The Court of Queen's Bench Act.*	Full	1990's
Manitoba		
	Not Considered	
Ontario		
	Not Implemented	
Quebec		
Code of Civil Procedure, Rule 465	Full	Well established Rule
Nova Scotia		
The Judicature Act	Partial	
Prince Edward Island		
Supreme Court Act	Full	
Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
Judge's inter office memo	Full	1998
Yukon		
	Not Considered	
Federal Court		
	Partial	
Federal Court of Appeal		
	Full	
Tax Court of Canada		
	Full	1993

Third Theme: Reducing Costs and Increasing Access

Task Force Recommendations 13 to 21 advance the theme of reducing costs and increasing access. Nine mechanisms are proposed: small claims courts; expedited and simplified proceedings; early disclosure; discovery curtailment; restrictions on expert opinion evidence; judicial assistance and direction on the use of experts; interlocutory proceedings; summary trials; and changing the incentive structure.

A. Small claims court (Recommendation 13)

RECOMMENDATION 13
Every jurisdiction that has not already done so give serious consideration to providing for small claims courts with a monetary jurisdiction of up to $10,000. Procedures should include options for use of non-binding dispute resolution processes.

IMPLEMENTATION POINTS:
– Consider whether it is appropriate to have judge acting as adjudicators or mediators or whether quasi-judicial or legally-trained personnel can fulfil this function.
– Address training issues, regardless of who is in charge of the process.
– Consider a multi-staged approach, tailored to different classes of claims.

Monetary limit. The monetary limit in small claims courts is on the rise. The CBA Task Force recommended a small claims jurisdiction of $10,000. Today, the limit in Manitoba is $7,500, raised from $5,000 in 1999; in Ontario, $10,000, raised from $6,000 in 2001; in Quebec, $7,000, raised from $3,000; in Saskatchewan, $10,000, raised from $5,000.Four jurisdictions have set their small claims limit at $25,000, Alberta, raised to $25,000 from $7,500 in 2002; British Columbia, raised to $25,000 from $10,000 in 2005; Yukon, raised to $25,000 as of April 1, 2006; and Nova Scotia, where an increase to $25,000 from $15,000 is pending. In Alberta, the Lieutenant Governor in Council has authority to raise the limit to $50,000.

Adjudication or mediation by non-judges. In Ontario, the principal small claims adjudicators are deputy judges (members of the Bar appointed for 3-year terms). In the Yukon, mediation at pre-trial conferences is often conducted by Justices of the Peace who are trained in mediation. Saskatchewan rejected the option of non-judicial or quasi-judicial officers to conduct case management conferences. In that province, the overwhelming response from those consulted was that litigants wanted to hear the opinion of a judge about the merits of the case. As has been seen, a number of jurisdictions offer mediation programs using private or public sector mediators.

Multi-staged approach, tailored to different classes of claims. A multi-staged approach is being tried in some jurisdictions. In 2005, British Columbia made its notice to mediate process available for small claims between $10,000 and $25,000. A mediation program for claims up to $10,000 is available in 5 registries. Saskatchewan has a 2-step process. The first step is a case management conference (which the judge

can waive) to settle the litigation or narrow the issues and resolve procedural matters. It includes familiarizing self-represented litigants with the process that will be followed at trial. The second step is trial, to which the first step has paved an efficient way. The Yukon is considering separate approaches for claims of less than $10,000 with mediation occurring at the pre-trial conference and claims between $10,000 and $25,000 for which mediation would be one stage and the pre-trial conference a second stage.

Training. In Ontario, the Deputy Judges Council established in 2001 is responsible for approving standards of conduct and a training program for deputy judges. Judicial training for Saskatchewan's 2-step process includes a Bench Book for small claims judges, a 1-day session for judges on case management conferences and training sessions for court staff from each court office. In British Columbia, all small claims judges are trained in interest-based mediation with refresher courses offered from time to time.

British Columbia	Implemented	Year
Small Claims Act and Rules 7.2, 7.3	Full	2005
Alberta		
Monetary Jurisdiction *Provincial Court Act,* RSA 2000, *c.* P-31, s. 9(1)(I), and *Provincial Court Civil Division Regulation*, AR 329/89, s. 1.1	Full	2002
Provincial Court: Civil Claims Mediation Program *Provincial Court Act*, ss. 65 and 66, and Mediation Rules, AR 271/97	Full	1998 (Edmonton & Calgary) 2006 (Lethbridge & Medicine Hat)
Saskatchewan		
The Small Claims Act and Regulations; Report from the Minister's Advisory Committee which conducted a review of the small claims process in 2005.	Full	2006
Manitoba		
The Court of Queen's Bench Small Claims Practices Act	Partial	1999
Ontario		
Small Claims Court Jurisdiction, O. Reg 626/00 ,and *Rules of the Small Claims Court*, O.Reg. 258/98	Full	2001

Quebec		
Code of Civil Practice, Rules 953, 965 and 997	Partial	2003
Nova Scotia		
Small Claims Act	Full	1993 2004 (amended)
Prince Edward Island		
Supreme Court Act, Small Claims Rules	Partial	1988
Newfoundland & Labrador		
Northwest Territories		
	Full	
Yukon		
Act to Amend the Small Claims Court Act (2005), s. 2	Partial	2006
Federal Court		
	Not Implemented	
Federal Court of Appeal		
	Not Considered	
Tax Court of Canada		
	Rejected	

B. Expedited and simplified proceedings (Recommendation 14)

RECOMMENDATION 14:
Every jurisdiction establish expedited and simplified proceedings that are
(a) mandatory, save as the court may otherwise direct, for all cases where $50,000 or less is at issue; and
(b) available at the option of the parties and with leave of the court in other cases where more than $50,000 is at issue and where the subject-matter of the case warrants.

Ten jurisdictions have made provision for expedited and simplified proceedings, seven in or since 1996, one before 1996, and two not reporting the date of implementation. Ontario, Saskatchewan and the Federal Court require the use of this procedure in cases where $50,000 or less, exclusive of interest or costs, is in issue. In Alberta, use of the procedure is specified for cases of $75,000 or less; in the Tax Court, for GST appeals and income tax appeals of less than $12,000 of federal tax and penalty. In

some jurisdictions, the procedure is available for disputes involving a higher amount where the parties agree or the court considers it appropriate. The key features of the Ontario rule provide an example of the contents of simplified proceedings. They include:

> ... simplified forms and procedures; cost consequences for failing to proceed under the simplified procedure; no examinations for discovery or cross-examination on an affidavit or an examination of a witness; reduced motion activity; lower threshold for summary judgment; automatic dismissal for delay (i.e. where plaintiff does not obtain judgment or set action down for trial within prescribed time); disposal of certain motions by the registrar on consent or where no responding material is filed; mandatory attendance at a pre-trial conference; availability of summary trials (evidence in chief by affidavit, time limit for cross-examination on affidavits; limited time for oral argument).
>
> – Ontario response to jurisdictional questionnaire

Alberta exempts jury, divorce, class action, foreclosure and judicial review proceedings from the simplified procedure. The streamlined procedure in British Columbia is a two-year pilot project available in four locations. It requires parties to exchange comprehensive information at an early stage of the proceeding, and limits pre-trial and trial procedures.

British Columbia	Implemented	Year
Supreme Court Rules, Rule 68 (2-year pilot project available in 4 registries) *Small Claims Act*	Full	2005
Alberta		
Alberta Rules of Court, AR 390/68, Part 48	Full	1998
Saskatchewan		
Queen's Bench Rules, Rules 478, 479, 480	Full	1998
Manitoba		
Court of Queen's Bench Rule 20A (Expedited Actions)	Full	1996
Ontario		
Rules of Civil Procedure, Rule 76	Full	1996 (Pilot) 2001 (Permanent)
Quebec		
Code of Civil Procedure, Rules 110, 110.1 and 151-151.10, and *Code of Civil Procedure*, Rules 481.1 to 481.17 (implemented in 1996 and replaced by the 2003 reforms) .	Full	2003

Nova Scotia		
	Under consideration	
Prince Edward Island		
Civil Procedure Rules	Partial	1998
Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
	Not Considered	
Yukon		
	Not Considered	
Federal Court		
Federal Courts Rules, Rule 292	Full	
Federal Court of Appeal		
Federal Courts Rules	Full	
Tax Court of Canada		
Tax Court of Canada Act	Full	1993

C. Early disclosure (Recommendation 15)

RECOMMENDATION 15:
The CBA work with selected jurisdictions to establish pilot projects using 'will-say' procedures, so as to determine whether it is useful and fair to require will-say documents in civil cases to compel early disclosure of anticipated evidence, and to assess the impact of such a requirement on delay, costs and discovery.

Very little momentum has developed in establishing pilot projects that use "will-say" procedures to compel early disclosure of anticipated evidence. Only British Columbia, Quebec and the Northwest Territories report taking initiative. The Northwest Territories provision introduced in 1996 has not been assessed. Quebec rules introduced in 2003 require each party to provide the other party with all of the evidence its intends to present during trial.

In British Columbia, a 2-year Supreme Court pilot project requires parties, early in the proceeding, to provide a list of witnesses and a summary of what they are expected to say. Commencing January 2006, "will say" statements must be brought to the mandatory pre-trial conference in small claims cases requiring over ½ day for trial.

British Columbia	Implemented	Year
Supreme Court Rules, Rule 68 (2-year pilot project available in 4 registries)	Full	2005-2006
Alberta		
	Don't Know	
Saskatchewan		
	Not Considered	
Manitoba		
	Not Considered	
Ontario		
Quebec		
Code of Civil Procedure, Rules 119, 331.1-331.8	Full	2003
Nova Scotia		
	Under consideration	
Prince Edward Island		
	Not Implemented	
Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
Rule 326	Full	1996
Yukon		
	Not Considered	
Federal Court		
	Don't Know	
Federal Court of Appeal		
	Not Considered	
Tax Court of Canada		
	Not Considered	

D. Discovery (Recommendation 16)

> **RECOMMENDATION 16:**
> Every jurisdiction
> (a) amend its rules of procedure to limit the scope and number of oral examinations for discovery and the time available for discovery, and
> (b) devise means to assist parties in scheduling discovery disputes in an efficient manner.

Ten jurisdictions report taking initiatives since 1996 (for the most part) to limit the scope and number of oral examinations for discovery and the time available for discovery. Sometimes limitations are placed on the number of persons a party can examine (*e.g.*, employees or former employees of a party). Alberta rules permit judges to impose terms on discovery where a party uses or attempts to use discovery for an improper purpose or where full compliance with the discovery rules would produce expense, delay or difficulty grossly disproportionate to the likely benefit. These terms may include: costs, time limits, written interrogatories, the production of documents, a change of venue and the supervision of further discovery by a judge, master, commissioner, clerk or referee. The Federal Court rules make provision against unduly onerous examination; moreover, unless with leave of the Court, an adverse party may be examined only once. In 2003, Ontario's *Task Force on the Discovery Process* issued a report with 57 recommendations for cost and time savings in discovery. To date, the Civil Rules Committee has approved only a few minor rule amendments. The reforms that have been implemented have focused on the development of best practices for the conduct of discovery, as well as e-discovery guidelines.

Limitations on discovery in expedited or streamlined proceedings. Superior court provisions for expedited or streamlined proceedings in several jurisdictions place limitations on discovery. In Alberta, examinations for discovery are limited to 6 hours and a party can elect to conduct written interrogatories. In British Columbia's streamlined procedure pilot project, examinations for discovery are available only by agreement or court order and are limited to 2 hours. Under expedited actions in Manitoba, the court may make orders dispensing with or limiting the nature, scope and duration of examinations for discovery. Ontario, Quebec and Saskatchewan do not permit examinations for discovery in streamlined proceedings. In Ontario, the restriction extends to examinations for discovery, cross-examination on affidavits and examination of witnesses on a motion. Unless the judge permits, parties may only call as a witness those persons whose names and addresses have been disclosed within 10 days of the close of pleadings. In Quebec, they may take place only as agreed by the parties or decided by the court and the court may order the termination and award costs with respect of discoveries that are abusive, vexatious or futile.

Discovery by written questions and answers. In order to avoid or reduce the need for examination for discovery in family matters, Alberta has introduced a process to instigate the exchange of information in writing. The "Notice to Reply to Written Interrogatories" may set out a maximum of 30 questions which are to be answered by

affidavit. The court also has discretion to order discovery by written interrogatories in general civil litigation. The Tax Court provides for oral discovery or discovery by written questions; there, discovery by written questions is subject to specific time frames for questions and answers.

Less activity is reported with respect to recommendation 16(b), prompting jurisdictions to devise means to ***assist parties in scheduling discovery disputes in an efficient manner***. The Federal Court has detailed rules with respect to examinations (*e.g.*, location, interpreters, travel fees, directions to attend, production of documents, service).

British Columbia	Implemented	Year
Supreme Court Rules, Rule 68 (2-year pilot project available in 4 registries)	Full	2005
Alberta		
Family Matters Court of Queen's Bench, Family Practice Note No. 6 (Notice to Reply to Written Interrogatories)	Full	1997
Civil Matters *Alberta Rules of Court,* Part 13, Division 2	Partial	1995
Saskatchewan		
Part 40 (Simplified Rules)	Partial	1995
Manitoba		
Rule 20A (Expedited Actions)	Partial	1996
Ontario		
Rules of Civil Procedure, Rule 76 (Simplified Procedure)	Full	
Quebec		
Code of Civil Procedure, Rules 151.1, 151.6 and 396.1-396.4	Full	2003
Nova Scotia		
	Under consideration	
Prince Edward Island		
Rules of Civil Procedure	Partial	1998

Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
	Not Implemented	
Yukon		
	Not Considered	
Federal Court		
Federal Courts Rules, Rules 87-100, 234 - 248, 296, 299.24	Full	
Federal Court of Appeal		
	Not Considered	
Tax Court of Canada		
Tax Court of Canada Rules	Full	

E. Expert opinion evidence (Recommendation 17)

Recommendation 17:
Every jurisdiction amend its rules of procedure concerning experts to
a) Require early disclosure of expert report,
b) Provide for the exchange of expert critique reports in a timely fashion before trial or hearing,
c) Impose a continuing obligation to disclose expert reports as they become available.

Eleven jurisdictions have taken initiatives with respect to expert reports, at least 6 in or since 1996. The initiatives include:

- specifying the time for exchanging reports and objecting to admissibility either in the rules (*e.g.*, Alberta, Ontario and the Federal Court) or by judge's order (*e.g.*, expedited action in Manitoba);
- limiting the number of expert witnesses who can be called without leave of the court (*e.g.*, in British Columbia, one per party in the simplified procedure pilot);
- prohibiting expert testimony on issues unless the substance of the testimony on that issue is set out in the expert's report or supplementary report and is served in time;
- imposing cost consequences, including denial of assessed costs and disbursements for the expert witness, for failure to comply with notice requirements; and
- requiring service of affidavits setting out the proposed evidence of experts, before the holding of a pre-trial conference (*e.g.*, under consideration for the Federal Court: http://canadagazette.gc.ca/partI/2006/20060211/html/regle1-

e.html and discussion paper http://www.fct-cf.gc.ca/bulletins/notices/DISCUSSION_en.pdf).

British Columbia	Implemented	Year
Supreme Court Rules, Rule 68(33)	Full	2005
Alberta		
Alberta Rules of Court, Part 15 (Experts), Rule 218.1 and ff.	Full	1998 and ongoing
Saskatchewan		
Queen's Bench Rules of Court, Rules 284(C) and 284(D; *The Saskatchewan Evidence Act*, s. 48 (limits the number of expert witnesses who can be called without leave of the court)	Full	1984 (New Rule) 1987 (Amended)
Manitoba		
Rule 20A (Expedited Actions)	Partial	1996
Ontario		
Rules of Civil Procedure Rule 76 (Simplified Procedure) Rule 53 Rule 30	Full	
Quebec		
Rules 331.1-331.8	Full	2003
Nova Scotia		
	Under Consideration	
Prince Edward Island		
Evidence Act and *Civil Procedure Rules*	Partial	Ongoing
Newfoundland & Labrador		
Rules of Court	Full	1986
Northwest Territories		
Rules 279-280	Full	1996
Yukon		
	Not Considered	

Federal Court		
Federal Courts Rules, Rules 279 - 281	Partial	
Federal Court of Appeal		
	Not Considered	
Tax Court of Canada		
Tax Court of Canada Rules	Full	

F. Judicial assistance and direction on use of experts (Recommendation 18)

RECOMMENDATION 18:
In every jurisdiction, judges play a more active role in assisting parties to limit the costs and delay associated with the use of experts.

Only British Columbia, Quebec, Saskatchewan and the Federal Court report having introduced provisions in which judges play a more active role in assisting parties to limit the costs and delay associated with the use of experts. The innovations post-date 1996 in 3 of these jurisdictions but pre-date 1996 in Saskatchewan. No change is reported in any other jurisdiction. In the simplified procedure being piloted in British Columbia, expert witnesses are limited to one per party. On application, a judge may decide that additional expert witnesses are appropriate. In Quebec, the court may order the experts who have prepared contradictory reports to meet, in the presence of the parties or their legal counsel who wish to be present, in order to reconcile their opinions, decide on the points of conflict and prepare a report for the justice and the parties within a set time frame. The court may also mitigate the costs related to expert opinion requested by the parties (*e.g.*, whenever it believes the expertise to be futile, the costs to be unreasonable or when one expert would have been sufficient). In the Federal Court, the new case management rules for specially managed proceedings give the case management judge considerable discretion to make directions that "are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits" as well as to "fix and conduct any dispute resolution or pre-trial conferences that he or she considers necessary." Most Saskatchewan provisions pre-date 1996. However, the 2003 addition of a broad discretion in awarding costs permits the judge to consider the conduct of any party that tended to shorten or unnecessarily lengthen the proceedings. As well, in the case management portion of a pre-trial conference, the judge ensures that the requisite expert notices have been served and a trial date will not be set until this requirement has been complied with. The judge may also set time frames for service.

British Columbia	Implemented	Year
Supreme Court Rules, Rule 68(33)	Full	2005

Alberta		
	Not Implemented	
Saskatchewan		
The Saskatchewan Evidence Act, s. 48 Rules 284(C), (D) and 545	Full	Pre-1965 2003
Manitoba		
	Not Considered	
Ontario		
Quebec		
Code of Civil Procedure, Rules 413.1 and 477	Full	2003
Nova Scotia		
	Under consideration	
Prince Edward Island		
	Not Considered	
Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
	Not Implemented	
Yukon		
	Not Considered	
Federal Court		
Federal Courts Rules, Rule 385	Full	1998
Federal Court of Appeal		
	Not Considered	
Tax Court of Canada		
	Not Implemented	

G. Interlocutory proceedings (Recommendation 19)

RECOMMENDATION 19:
Every jurisdiction
a) strictly limit appeals from non-dispositive interlocutory orders,
b) provide for costs awards in suitable cases, payable immediately, in interlocutory matters, and
c) introduce strict financial sanctions, payable immediately, for clear cases of abuse.

Seven jurisdictions make provision for handling non-dispositive interlocutory orders, the immediate payment of costs awards in interlocutory matters and strict financial sanctions for cases of abuse. Only Alberta and Nova Scotia report having made changes since 1996. The approaches differ from one jurisdiction to another. The Alberta Court of Appeal fast tracks procedural and child custody and access appeals so that they may be heard quickly, and trials are not unduly delayed. On average, these appeals are heard within 3 months of being filed and account for approximately 30% of the civil appeals filed. Costs and financial sanctions are available, as always. Features of the fast track procedure include:

1. No need to agree on contents of appeal books.
2. Cheaper and faster format for appeal books.
3. No need to speak to list; automatic scheduling similar to that used for sentence appeals.
4. Special frequent hearing dates.
5. Leave to appeal needed for appeals from mid-trial rulings, security for costs, or pre-trial fixing of dates or deadlines.

(Alberta response to jurisdictional questionnaire)

British Columbia allows small claims appeals of judgments made at trial, with leave from the Court of Appeal. Cost awards and financial sanctions in the Supreme Court are determined on a case-by-case basis, and the Court has power to award special costs. Nova Scotia provides for costs to be payable forthwith. In Ontario, leave to appeal an interlocutory order is granted only where another judge or court in Ontario or elsewhere has rendered a conflicting decision on the matter in the proposed appeal and the judge hearing the motion thinks that leave should be granted, or the judge hearing the motion doubts the correctness of the order in question and the matter is one of importance. Appeals to the Federal Court of Appeal on interlocutory decisions occur as of right; however, the hearing is limited to one hour and is expedited.

British Columbia	Implemented	Year
Small Claims Act *Supreme Court Rules*, Rule 19(24)	Full	
Alberta		
Court of Appeal of Alberta Consolidated Practice Directions, Part J.	Full	October 2004

Saskatchewan		
Judicature Act, 1894 (adopting leave requirements from English Law *The Court of Appeal Act, 2000*, s. 8, and *The Court of Appeal Rules*, Rule 11	Full	1894
Manitoba		
	Not Considered	
Ontario		
Rules of Civil Procedure, Rule 62	Full	1990
Quebec		
	Not Implemented	
Nova Scotia		
a) *Civil Practice Rules*, Rule 62	Partial	2002
b) costs payable forthwith	Partial	2002
c)	Under Consideration	
Prince Edward Island		
	Not Considered	
Newfoundland & Labrador		
	Don't Know	
Northwest Territories		
	Not Considered	
Yukon		
	Not Considered	
Federal Court		
	Rejected	
Federal Court of Appeal		
Federal Courts Act	Full	
Tax Court of Canada		
Federal Courts Act	Partial	

H. Summary trials (Recommendation 20)

RECOMMENDATION 20:
Every jurisdiction provide for, and promote the use of, summary trial procedures.

Twelve jurisdictions have made provision for summary trials, many in the decade before 1996. Summary trial differs from summary judgment. A summary trial is a shorter and usually simpler procedure for resolving particular issues in an action, or a dispute in its entirety, whereas a summary judgment may be granted where no defence has been filed or a party claims that no defence has been made out to the whole or part of a claim. Usually, the trial is conducted on the basis of written evidence. Alberta describes its Queen's Bench procedure for summary judgment as follows:

> A summary trial is started by notice of motion requiring at least 21 days notice. The notice must include a list of all the evidence the applicant intends to rely on. The responding party is required to give similar notice of all the evidence he or she intends to rely on at least 7 days before the application. Evidence for a summary trial is in document form and can include affidavits, transcripts, answers to interrogatories and admissions. Oral evidence can be given only with leave of the Court.
>
> The judge has discretion to order whether the evidence on which a party intends to rely must be filed and served, whether there will be cross-examination, whether briefs must be filed and timelines for completing any of the above. Upon hearing the evidence, the Judge can grant judgment on an issue or on the action as a whole, direct the matter proceed to trial, impose terms respecting the enforcement of a judgment given at summary trial and award costs. If the judge directs the matter proceed to trial, he or she may make orders and directions to expedite the action.
>
> (Alberta response to jurisdictional questionnaire)

British Columbia and the Yukon allow evidence to be presented by affidavit with legal argument by oral submission in a summary trial before the Supreme Court. This rule is used quite often in the Yukon Supreme Court.

Ontario's simplified procedure provides for a summary trial (evidence in chief by affidavit, time limit for cross-examination on affidavits, limited time for argument). Saskatchewan's simplified procedure rules are likewise intended to produce very short and inexpensive proceedings.

British Columbia	Implemented	Year
Supreme Court Rules, Rules 18 and 18A	Full	
Alberta		
Court of Queen's Bench *Alberta Rules of Court*, AR 390/68, Part 11, Division 1, Rules 158.1-158.7 (Summary Trial Rules) Civil Practice Note No. "8".	Full	1998

Saskatchewan		
Queen's Bench Rules, Part Forty	Full	1998
Manitoba		
Rule 20 (Summary Judgment and Expedited Trial)	Full	1989
Ontario		
Rules of Civil Procedure, Rule 76	Full	1990
Quebec		
Nova Scotia		
Civil Practice Rules, Rule 13	Full	2002
Prince Edward Island		
Rules of Court	Full	1996
Newfoundland & Labrador		
Rule 17A	Full	1995
Northwest Territories		
	Not Implemented	
Yukon		
Supreme Court Rules, Rule 18A	Full	Ongoing
Federal Court		
Federal Courts Rules, Rules 213 - 219	Full	1994
Federal Court of Appeal		
	Not Considered	
Tax Court of Canada		
Tax Court of Canada Act (Informal Procedure Appeals)	Full	1993
Formal Procedure	Not Considered	

I. Changing the incentive structure (Recommendation 21)

> **RECOMMENDATION 21:**
> Every jurisdiction
> a) develop a system of incentives and sanctions to encourage settlement and the prudent use of court time, and
> b) as an essential component of such a system, undertake a reassessment of current indemnity principles.

Four jurisdictions report full implementation and two jurisdictions partial implementation, of a system of incentives and sanctions to encourage settlement and the prudent use of court time and of undertaking a reassessment of current indemnity principles. Only Alberta, which cites its summary trial procedure, gives a date post-1996. British Columbia credits its Supreme Court hearing day fees structure for promoting more efficient use of court time and working as disincentives for longer trials (*e.g.*, a hearing exceeding ½ day costs double the amount of a hearing that is ½-day long or less). To similar effect, a small claims judge may order a party to pay up to 10% of the claim for proceeding to trial with no reasonable basis for success. Sanctions against a party who does not accept an offer and does not recover a judgment equal to or better than the offer help to promote settlement in both the Supreme Court and Small Claims Court. Fast track litigation in the Supreme Court encourages settlement and provides for specific costs to be awarded based on the trial length. Increases to the tariff in the Supreme Court rules – the basis on which litigants are indemnified for their litigation costs – are being considered. Manitoba is currently reviewing its Queen's Bench tariff. Nova Scotia, Ontario and the Federal Court cite their provisions on settlement offers which are similar to the British Columbia provision (*see* federal Discussion Paper, http://www.fct-cf.gc.ca/bulletins/notices/Discussionpaper-OffertoSettle.pdf). Quebec is examining these questions in the second phase of reform of the *Code of Civil Procedure*. In exercising its discretion over costs, the Tax Court may consider, among other matters: any offer of settlement made in writing; the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and the denial or the neglect or refusal of any party to admit anything that should have been admitted.

British Columbia	Implemented	Year
Supreme Court Rules Fees, Appendix C, Schedule 1, item 14. Rule 37 Rule 66 (for trials up to 2 days)	Full	
Small Claims Rules, Rules 10.2, 20(5)	Full	
Alberta		
Court of Queen's Bench *Alberta Rules of Court*, AR 390/68, Part 11, Division 1, and Civil Practice Note No. "8"	Full	1998

Saskatchewan		
	Not Considered	
Manitoba		
	Under Consideration	
Ontario		
Rules of Civil Procedure, Rule 49 (Offer to Settle)	Full	
Quebec		
	Not Implemented	
Nova Scotia		
Civil Practice Rules, Rule 41	Partial	
Prince Edward Island		
	Not Considered	
Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
	Not Implemented	
Yukon		
	Under Consideration	
Federal Court		
Federal Courts Rules, Rules 419 - 422	Full	1987
Federal Court of Appeal		
	Not Considered	
Tax Court of Canada		
Tax Court of Canada Rules	Partial	

Fourth Theme: Appellate Reform

Task Force Recommendations 22 to 25 deal with reform at the appellate level. The recommendations cover: time standards; the production of appeal books; case management of appeals; and control over civil dockets.

A. Time standards (Recommendation 22)

RECOMMENDATION 22:
Every appellate court
a) develop and promote the attainment of the following goals:
I. the initiation of appeals within 30 days after the filing and service of the trial judgement;
ii. the hearing of appeals within 9 to 12 months after the filing of a notice of appeal; and
iii. the rendering of judgements promptly and, save in complex cases or where new questions of law are being developed, by no later than 6 months from completion of the appeal; and
b) develop procedures to monitor performance against these goals

Twelve jurisdictions report compliance with the CBA Task Force recommendation for time standards for the initiation of appeals within 30 days after the filing and service of the trial judgment; the hearing of appeals within 9 to 12 months after the filing of a notice of appeal; and prompt rendering of judgments (usually no later than 6 months from completion of the appeal). They also report having procedures to monitor performance against these goals. Often, the provisions pre-date 1996.In Ontario, the Rules of Civil Procedure require service of a notice of appeal within 30 days following the order being appealed, and service of a notice of motion for leave to appeal within 15 days of the order. Most civil appeals are to be heard within 6 months of perfection (all facta filed), but some appeals are heard more quickly. The Ministry works closely with the judiciary in monitoring time to hearing data on a regular basis. In Quebec, the Court of Appeal examines all requests for appeal and, according to each case, may suggest conciliation to the legal counsel – a less cumbersome process with summary trial evidence being submitted rather than the briefs required under the *Code* – or it may offer case management assistance in more complicated cases. The Court of Appeal targets 7 months as the maximum delay allowed for an appeal to be heard. In Saskatchewan, a date for hearing an appeal is fixed within 6 weeks of perfection. Some appeals are expedited through a more streamlined process (*e.g.*, in all family law matters). Because there is only one sitting per year in Whitehorse, in the Yukon the hearing date depends on trial scheduling. Counsel who wish to have the matter heard sooner arrange for a hearing in Vancouver. The Federal Court of Appeal meets all of the goals recommended by the CBA Task Force.

British Columbia	Implemented	Year
	Full	
Alberta		
The *Alberta Rules of Court*, and various other provincial and federal legislation, govern the time limit for the initiation of appeals.	Full	

Saskatchewan		
22(a)(I) - 30 day appeal period *The Court of Appeal Act*, 2000, s. 9(2), and *The Court of Appeal Rules*, Rule 9(2)	Full	Standard practice for over a decade
22(a)ii) - hearing of appeals *The Court of Appeal Rules* prescribe process that would make this target attainable.	Full	
S. 22(a)iii) 6 month rule for judgments This has been the standard for the Court of Appeal. There is nothing formal that would compel this standard, other than the commitment of the Justices to try to attain it in most cases.	Partially	
Manitoba		
Rules of Court and court practice	Full	1992
Ontario		
Rules of Civil Procedure, Rule 61 Judicial Practice Direction Concerning Civil Appeals in the Court of Appeal	Full	2004
Quebec		
Implemented in the Court of Appeal	Full	
Nova Scotia		
Civil Practice Rules, Rules 62 and 65; and *Judicature Act*	Full	1979
Prince Edward Island		
Supreme Court Act	Full	1997
Newfoundland & Labrador		
	Don't Know	
Northwest Territories		
	Not Implemented	
Yukon		
Court of Appeal Act, s. 10	Partial	ongoing
Federal Court		
Federal Court of Appeal		
Federal Courts Act and *Federal Courts Rules*	Full	

Tax Court of Canada		

B. Production of appeal books (Recommendation 23)

> **RECOMMENDATION 23:**
> The CBA, in consultation with members of the judiciary and lawyers, develop guidelines for the production of appeal books.

Seven jurisdictions have guidelines for the production of appeal books. The provisions pre-date 1996. Under the Ontario rules, the appellant must file an appeal book and compendium as a single document book, containing copies of any excerpts from transcripts, exhibits, or other relevant documents that are referred to in the appellant's factum. The factum is to contain these references by tab, page number and line in the appeal book and compendium, as well as in the exhibit book. The respondent must also file a compendium of those materials referred to in its factum, which must contain similar detailed references to the compendium. A Court of Appeal practice direction introduced in 2004 supplements the rules with guidelines respecting a number of matters. Saskatchewan imposes an obligation on the parties to "make every reasonable effort to exclude irrelevant material from the appeal book, avoid duplication and otherwise confine the contents to that which is necessary for the purposes of the appeal." Costs can be awarded against a party for non-compliance (*e.g.*, lack of co-operation in reaching a written agreement about which portions of the transcript should be transcribed). Parties before the Federal Court of Appeal are to include in an appeal book only such documents, exhibits and transcripts as are required to dispose of the issues on appeal.

British Columbia	Implemented	Year
	Full	
Alberta		
Alberta Rules of Court, R. 530, and Consolidated Practice Directions of the Court of Appeal of Alberta, Part J	Full	
Saskatchewan		
Court of Appeal Rules	Full	Always been there
Manitoba		
Rules of Court	Full	1992

Ontario		
Rules of Civil Procedure Rule 61.10 (Appeal book and compendium) Rule 61.10.1 (Exhibit book) Judicial Practice Direction Concerning Civil Appeals in the Court of Appeal	Full	2004
Quebec		
Nova Scotia		
Civil Practice Rules, Rules 62 and 65	Full	1995
Prince Edward Island		
	Not Considered	
Newfoundland & Labrador		
	Don't Know	
Northwest Territories		
	Not Implemented	
Yukon		
Civil Appeal Rules	Full	1993 (updated 2005)
Federal Court		
Federal Court of Appeal		
	Not Considered	
Tax Court of Canada		

C. Case management of appeals (Recommendation 24)

RECOMMENDATION 24:
Every appellate court take a more active role in supervising the progress of appeals.

Appellate courts in all jurisdictions take an active role in supervising the progress of appeals. Many jurisdictions have introduced reforms since 1996. In Alberta, specific types of appeal requiring more intense monitoring by a judge are brought to the attention of list managers in Edmonton and Calgary for the purpose of appointing a

case management judge or affixing a timetable for filing materials. In addition, list managers “speak to the general appeal list” four times a year. The Court of Appeal rules in British Columbia govern every step of the process. In Ontario, the Court of Appeal practice direction introduced in 2004 establishes a number of guidelines to enhance the court’s ability to supervise the progress of civil appeals and to supplement the rules respecting the content and formatting of materials filed on appeal. These include:

- guidelines for the expeditious hearing of motions to the Court of Appeal in civil matters;
- provision, in exceptional cases, for the assignment of a judge to manage the conduct of appeal through the use of appeal management conferences;
- guidelines respecting unnecessary evidence and exhibits, timely preparation of transcripts, the content and formatting of factums, appeal book and compendium and respondent’s compendium, books, the use of technology;
- scheduling procedures;
- costs; and
- post hearing submissions.

(Ontario response to jurisdictional questionnaire)

Saskatchewan provides for a pre-hearing conference at the request of a party or at the initiative of the Court, allows an appeal to be determined on the basis of factums where the parties agree, sets out the process and time limits for “expedited appeals” (mandatory for appeals that meet the definition), and authorizes the Registrar to handle many procedural issues (*e.g.*, the determination of contested applications for adjournment of appeals that have been set for hearing). In the Yukon, appeals that have sat on the inactive list for 180 days are automatically dismissed as abandoned. The Federal Court of Appeal takes an active role in supervising the progress of appeals; the rules set out the parameters of a status review in this regard.

British Columbia	Implemented	Year
Court of Appeal Rules, Rule 29	Full	
Alberta		
A List Manager in each of Edmonton and Calgary is actively involved in the supervision of all appeals.	Full	
Saskatchewan		
Rule 41 (pre-hearing conference at the request of a party or at the initiative of the Court)	Partial	1997
Manitoba		
Court practice under office of the Registrar	Full	2002
Ontario		
Judicial Practice Direction Concerning Civil Appeals in the Court of Appeal	Full	2004, Jan 1

Quebec		
Code of Civil Procedure, Rules 26, 497 and 501	Full	2003
Nova Scotia		
Discretion of Chief Justice	Full	2000
Prince Edward Island		
Supreme Court Act	Full	1997
Newfoundland & Labrador		
	Don't Know	
Northwest Territories		
Practice Direction	Partial	2006
Yukon		
Court of Appeal *Court of Appeal Rules, 2005*	Partial	2005
Supreme Court	Under consideration	
Federal Court		
Federal Court of Appeal		
Federal Courts Rules	Full	
Tax Court of Canada		

D. Control over civil dockets (Recommendation 25)

RECOMMENDATION 25:
Every jurisdiction consider measures to give appellate courts, including the Supreme Court of Canada, greater control over their civil dockets.

IMPLEMENTATION POINTS:
– The elimination of appeals as of right to the Supreme Court of Canada and to provincial and territorial appellate courts; and
– The expansion of leave to appeal requirements in defined classes of court.

Seven jurisdictions report taking steps to give appellate courts greater control over their civil dockets, including giving consideration to eliminating appeals as of right and expanding leave to appeal requirements in defined classes of court. In two of these

jurisdictions, steps have been taken since 1996; in one, the steps occurred before 1996; other jurisdictions do not provide dates. In Alberta, the threshold for leave to appeal was raised from $1,000 to $25,000 in 2003, interlocutory appeals on procedure or child custody and access are handled expeditiously, the usual court quorum is 3 judges but the Court may designate that certain appeals be heard by panels of fewer than 3, and the court may reduce the number of unnecessary appeals. The British Columbia Court of Appeal has inherent control over its own docket. Control over civil dockets is not an issue for the Manitoba Court of Appeal. The appeal route in Ontario is more complex than in other jurisdictions, with some appeals lying to the Divisional Court and others to the Court of Appeal. Leave is required for appeals from an order made with the consent of the parties, or an order as to costs in the discretion of the court that made the order. Quebec has raised the ceiling for an appeal as of right from $20,000 to $50,000, and added as a reason for dismissal of an appeal, the "absence of a reasonable chance of success." It also requires special permission for the appeal of a judicial review. The Saskatchewan Court of Appeal routinely hears chamber motions by telephone conference. Since 1997, the Registrar has been able initiate action on an inactive appeal by way of a show cause hearing. Leave to appeal is necessary for interlocutory orders, and parties have no right to appeal a ruling by a chamber justice either granting or denying leave. The *Court of Appeal Act, 2000* vests rule making power entirely with the Court. This basically ensures that the Court has complete control over process and procedure.

Unlike appellate courts in the provinces and territories, the Federal Court of Appeal does not have control over the cases coming before it. Rather, the *Federal Courts Act* confers an appeal as of right from the Federal Court and the Tax Court on all judgments or orders, whether final or interlocutory. The federal response to the questionnaire notes that there are no appeals as of right to the Supreme Court of Canada from the Federal Court of Appeal.

British Columbia	Implemented	Year
	Full	
Alberta		
Alberta Rules of Court. Rule 505(4), Court of Appeal Consolidated Practice Directions, Part J *Court of Appeal Act*, RSA 2000, c. C-30, s. 7	Partial	2003
Saskatchewan		
Teleconference applications *The Rules of Court*, Rule 48(7) - the Court routinely hears chamber motions by telephone conference.	Partial	Years ago
Show Cause Hearings *The Rules of Court*, Rule 46(2) - allows the Registrar to initiate action on inactive appeals.	Partial	1997

Expanded Powers of the Registrar *The Court of Appeal Act, 2000*, s. 21(1), and Rule 60.	Partial	
Leave to appeal requirements *The Court of Appeal Act, 2000*, s. 9(2), and Rule 9(2). s. 20(3) - Leave to appeal necessary for interlocutory orders. No right to appeal ruling of chamber justice either granting or denying leave.	Partial	
Rule Making Power *The Court of Appeal Act, 2000*, s. 10 vests rule making power entirely with the Court. This basically ensures that the Court has complete control over process and procedure.	Partial	
Manitoba		
Rules of Court and leave to appeal provisions found in various statutes	Full	
Ontario		
Courts of Justice Act s. 133; s. 6(1) (Court of Appeal) s. 19(1) (Divisional Court)	Full	
Quebec		
Nova Scotia		
See CBA Task Force Report, p. 50	Full	Pre-1996
Prince Edward Island		
	Rejected	
Newfoundland & Labrador		
	Don't Know	
Northwest Territories		
	Not Implemented	
Yukon		
	Don't Know	
Federal Court		

Federal Court of Appeal		
	Not Considered	
Tax Court of Canada		

Fifth Theme: Improving Public Understanding

Task Force Recommendations 26 to 30 advance the theme of improving public understanding of the civil justice system. The recommendations pertain to: public information and education; point of entry advice and assistance; public consultation and involvement; and court charters.

A. Public information and education (Recommendation 26)

RECOMMENDATION 26:
a) The CBA enter into discussions with provincial and territorial ministries of education or their equivalents to facilitate the teaching of dispute resolution skills and the operation of the civil justice system in Canadian elementary and secondary schools; and
b) these efforts be undertaken in consultation with law societies, law schools, members of the judiciary, and governments.

IMPLEMENTATION POINTS:
– Members of the judiciary, lawyers and notaries and provincial and territorial law societies should become more involved in public education efforts;
– Public legal educators should be encouraged and supported in efforts to share information and identify best practices;
– Courts should consider the use of media liaison officers to assist in communication efforts; and
– Special consideration should be given to the unique access issues that will arise as part of a civil justice public education program.

Nine jurisdictions report having taken steps to facilitate the teaching of dispute resolution skills and the operation of the civil justice system in Canadian elementary and secondary schools and to involve the judiciary and legal profession in public legal education efforts. Two more jurisdictions are considering taking this step. Most of these steps have been initiated since 1996. Examples of the steps being taken are:

- the inclusion of units in elementary and high school curriculums (*e.g.*, Alberta);
- efforts (individual and collaborative) by government, Bar, Bench and community agencies to offer public education speakers and programs (*e.g.*, justices of the federal courts; partnering in Ontario; Alberta's Education Speaker Centre: http://www.justice.gov.ab.ca/public_education/just_edu_speak_centre.aspx;);
- brochures, pamphlets and do-it-yourself information packages available in courts, at government locations, in libraries and so forth;
- website publications, available on court, court services and public legal education agency websites;
- establishment of local justice education network committees (*e.g.*, Ontario);

- issuing a request for proposals for a feasibility study for a Northern Institute of Justice (in the Yukon); and
- instituting media, public education and public relations liaison officers in the courts (*e.g.*, Manitoba, Nova Scotia, Saskatchewan).

British Columbia	Implemented	Year
	Full	
Alberta		
General Operation of Justice System	Full	2005
Justice Education Speakers Center	Full	2005
Saskatchewan		
Produced two brochures Solving Problems and Resolving Disputes and Family Mediation	Full	1995 - 1996
The Dispute Resolution Office of Saskatchewan Justice participates with the Saskatchewan Legal Education Society in the Bar Admissions courses and in the continuing education seminars for practicing lawyers.	Full	1995 - ongoing
The Dispute Resolution Office assisted the legal community is establishing a Collaborative Lawyers of Saskatchewan in 2001.	Full	2001
The Saskatchewan Department of Justice and The University of Saskatchewan College of Law entered into a joint project with respect to the development and integration of Appropriate Dispute Resolution into the curriculum. There continues to be a very close working relationship with the Dispute Resolution Office of Sask Justice ensuring the students have opportunities to grain practical experience in mediation.	Full	1996 - 1999
The position of Saskatchewan Courts Communications Officer was created. This position coordinates public education programming on behalf of the courts, acts as a media liaison and maintains the court website. Information on the Court Education Program is available on the Courts' website, at http://www.sasklawcourts.ca/. The Communications Officer also works with other organizations that provide public legal education programs in the province.	Full	2002
Manitoba		
	Full	Early 1990's
Ontario		
Court Services Division Five-Year Plan	Full	2003

Quebec		
Nova Scotia		
	Partial	2002
Prince Edward Island		
	Partial	ongoing
Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
	Not Implemented	
Yukon		
	Under Consideration	
Federal Court		
	Under Consideration	
Federal Court of Appeal		
	Full	
Tax Court of Canada		
	Partial	

B. Point of entry advice and assistance (Recommendations 27 and 28)

RECOMMENDATION 27:
Every court provide point-of-entry advice to members of the public on dispute resolution options in the civil justice system and available community services.

RECOMMENDATION 28:
Every court undertake initiatives to assist unrepresented litigants, including simplifying procedures and forms and using plain language.

Nine jurisdictions report full or partial implementation of initiatives to assist unrepresented or other litigants by providing point-of-entry advice on dispute resolution options in the civil justice system and available community services, simplifying procedures and forms, and using plain language. Most of these initiatives have taken place since 1996. Two more jurisdictions are considering implementation. The initiatives include:

- providing user-friendly written information on the trial, pretrial conference and mediation processes to members of the public and parties to small claims actions, family and other actions;
- stamping information about dispute resolution options on the backing sheet of the statement of claim when it is filed (*e.g.*, Alberta);
- placing information on court, court services and community public legal education agency websites;
- providing in-person or by-telephone information about dispute resolution options and community referrals;
- creating simplified forms and procedural instructions for family law, residential tenancy and other matters that arise with frequency;
- creating committees that include members of the public to advise on the needs of self-represented litigants (*e.g.*, Alberta);
- providing family duty counsel to assist lay litigants with legal advice and document preparation (*e.g.*, British Columbia)
- introducing an online Small Claims Filing Assistant (*e.g.*, British Columbia);
- website access to court forms (*e.g.*, Ontario);
- drafting rules with an emphasis on ease of comprehension and plain language; and
- supporting and promoting community organizations devoted to public legal education (*e.g.*, Quebec).

British Columbia	Implemented	Year
	Full	
Alberta		
Recommendation 27 - Associated with Mediation Programs in both the Provincial Court and the Court of Queen's Bench as outlined in Recommendation 1.	Full	1998 - 2005
Recommendation 28: Re Forms and Procedures ***Family Law Act* Application Forms and Instructions** *Family Law Act*, S.A. 2003, c. F-4.5 *Family Law Act General Regulation*, O.C. 383/2005 *Provincial Court Procedures (Family Law) Regulation*, O.C. 384/2005 *Family Law Act General Regulation*, O.C. 383/2005 *Alberta Rules of Court Amendment Regulation,* O.C. 381/2005 [which introduces Part 44.2 (*Family Law Act* matters) to the *Alberta Rules of Court*] Alberta Child Support Guidelines, O.C. 382/2005;	Full	2005
Queen's Bench Family Law Court Procedure Booklets *Alberta Rules of Court*, Part 44, 44.1 and 44.2 Various federal and provincial statutes/regulations relating to family law matters.	Full	2000

Residential Tenancies Act **Forms and Instructions** *Residential Tenancies Act,* S.A. 2004, c. R-17.1 *Provincial Court Act*, R.S.A. 2000, c. P-31	Full	2004
Recommendation 28: Re Self-Represented Litigants Committee	Full	2005
Saskatchewan		
Parent education program The Dispute Resolution Office	Full	1990's
Manitoba		
Recommendation 27 through office of court media/public relations	Full	early 1990's
Recommendation 28 In the Court of Appeal (2005) with courts website self-represented litigant packages for appeal proceedings.	Full	2005
In the Court of Queen's Bench, packages were developed for family proceedings to assist in the variation of child support orders.	Full	2003
Ontario		
Court Services Division Five-Year Plan	Full	2003 and ongoing
Quebec		
Recommendation 27	Not Implemented	
Recommendation 28 - Announcement of services available to the public	Partial	2004
Nova Scotia		
	Partial	2002
Prince Edward Island		
Recommendation 27	Rejected	
Recommendation 28 *Rules of Court*, *Small Claims Rules*, brochures, etc.	Partial	1997
Newfoundland & Labrador		
	Not Considered Under Consideration	
Northwest Territories		
	Partial	2005

Yukon		
None	Partial	
Federal Court		
	Under Consideration	
Federal Court of Appeal		
	Not Considered	
Federal Court - Tax Court		
Tax Court of Canada Act	Full	1993

C. Public consultation and involvement (Recommendation 29)

RECOMMENDATION 29:
Every court establish an advisory committee composed of members of the public and other involved in the civil justice system for the purpose of obtaining advice on
a) ways to improve the administration of civil justice,
b) reducing or removing barriers to access, and
c) implementing, evaluating and monitoring reform measures.

Courts in seven jurisdictions have established committees for the purpose of obtaining advice on ways to improve the administration of civil justice, reducing or removing barriers to access and implementing, evaluating and monitoring reform measures. Six jurisdictions report full implementation; 1 jurisdiction reports partial implementation. The committees are composed of members of the public and others involved in the civil justice system. Most of these initiatives have occurred since 1996. Alberta's Justice Policy Advisory Committee has established a Subcommittee on Access to Justice with broad public representation to report on this issue in the fall of 2006. British Columbia has established a Justice Review Task Force to identify a wide range of reform ideas and initiatives that may help make the justice system more responsive, accessible and cost-effective. Ontario annually convenes Court Services Advisory Panels comprised of both government and community stakeholders to obtain input on court services standards and best practices. Quebec has put in place committees with public representation to check on the effectiveness of laws that introduce family mediation and the methods for setting alimony payments. The work of parliamentary commissions also allows for public representation and civil justice system intervenors. Saskatchewan's Ministerial Advisory Committee on Dispute Resolution, which operated from 1995-2000, included members from legal, consumer, mediator, aboriginal, business, labour and education groups. The Committee received numerous suggestions and also served as a forum for the exchange of information and ideas for dispute resolution on a multi-disciplinary basis. The Federal Court of Appeal participates in various committees with

members of the public and others involved in the justice system. The Prince Edward Island Working Group on *Access to Civil Justice Report* is not currently active.

British Columbia	Implemented	Year
	Full	2002
Alberta		
	Full	2005
Saskatchewan		
The Ministerial Advisory Committee on Dispute Resolution was formed in 1995, with membership from legal, consumer, mediator, aboriginal, business, labour and education groups. Numerous recommendations were received by the Committee on dispute resolution. As well, it served as a forum for the exchange of information and ideas for dispute resolution on a multidisciplinary basis.	Full	1995
Manitoba		
	Not Considered	
Ontario		
Court Services Division Five-Year Plan	Full	2003
Quebec		
Family mediation, setting of alimony payments	Full	1998
Nova Scotia		
	Don't Know	
Prince Edward Island		
	Partial	2000
Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
	Not Implemented	
Yukon		
	Not Considered	
Federal Court		
	Not Considered	

Federal Court of Appeal		
	Full	
Tax Court of Canada		
	Not Implemented	

D. Court Charters (Recommendation 30)

RECOMMENDATION 30:
Every court develop and implement a charter specifying standards of service to be provided to members of the public coming into contact with the court.

IMPLEMENTATION POINTS:
– Use of a consultative process to develop court charters, involving representatives of all interested groups;
– Once a court charter has been developed and published, a process should be developed to monitor progress in implementing it; and
– Use of annual reports to describe progress in implementing court charters should be considered.

Four jurisdictions report having developed and implemented a charter specifying standards of service to be provided to members of the public coming into contact with the court; 3 jurisdictions report partial implementation; and 1 jurisdiction is considering a charter. Much of the activity is post-1996. Alberta expects the results of a Client Satisfaction Survey conducted in February and March 2006 to lead to standards on customer service. These standards will be monitored by annual client satisfaction surveys. British Columbia does not have a charter; however, the courts monitor many aspects of the judicial process to assess the level of service being provided. Both the Provincial Court and the Supreme Court publish annual reports which present a variety of statistics on the flow of cases through the civil justice system. The Ministry of the Attorney General publishes its business plan and annual reports. Ontario has developed quality assurance standards for the delivery of services such as counter wait times, court interpreter services, and complaint resolution. These standards are published in the Court Services Division annual report. In addition, the division seeks ongoing feedback from court users through Client Satisfaction Surveys. Quebec has issued a Declaration of Services to the Public and a Statement of Principle regarding Witnesses. Performance indicators have been developed. The Justice Department's annual report gives an accounting of performance based on these indicators. Saskatchewan has developed a Service Management Strategy and commitment to clients. The Courts Administration Service for the Federal Court and Federal Court of Appeal provides a "Mission, Vision, and Values" document at: http://www.cas-satj.gc.ca/about_cas/mission-vision-values_e.php.

British Columbia	Implemented	Year
	Partial	

Alberta		
	Partial	2006
Saskatchewan		
	Full	
Manitoba		
	Not Considered	
Ontario		
Court Services Division Five-Year Plan	Full	2003
Quebec		
Declaration of Services to the Public	Full	1991
Statement of Principle regarding Witnesses	Full	2003
Nova Scotia		
	Not Considered	
Prince Edward Island		
	Rejected	
Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
	Under consideration	
Yukon		
	Not Considered	
Federal Court		
	Partial	2003
Federal Court of Appeal		
	Partial	2003
Tax Court of Canada		
	Under Consideration	

Sixth Theme: Managing the Courts of the Twenty-First Century

Task Force Recommendations 31, 34, 36 and 37 deal with four topics: court management and administration; technology and management information systems; training, monitoring and supervision of persons providing court-supported dispute resolution services; and a 12-month court calendar.

A. Court management and administration (Recommendation 31)

RECOMMENDATION 31:
Every jurisdiction establish a suitable model for management and administration of the courts that embodies the following:
a) preservation and enhancement of judicial independence in both its individual and institutional elements,
b) preservation and enhancement of the independence of the Bar,
c) strong community input and public involvement,
d) recognition by governments of the need for autonomy in the management and administration of the courts while ensuring accountability for the expenditure of public funds,
e) within the model chosen, clear lines of responsibility and accountability for administrative and operational matters,
f) a commitment by government to provide adequate funding and administrative infrastructure,
g) recognition by governments in budgeting processes of the revenue-producing aspects of the court system and of cost recovery achieved through court fees, and
h) provision for enhanced training and development to create additional well-trained and efficient court administrators and managers.

Nine jurisdictions have taken initiative toward establishing a suitable model for management and administration of the courts that embodies the eight components recommended by the 1996 CBA Task Force. Five jurisdictions report full implementation; four jurisdictions report partial implementation. For the most part, these initiatives have taken place since 1996. British Columbia strives continually to achieve all of the Task Force goals. In Ontario, the Court Services Division Five-Year Plan attends to these matters. Quebec has entered into agreements about the management of certain resources with the Court of Quebec and the Court of Appeal. These Courts have full autonomy over the management of human and budgetary resources. There is no such agreement with the Supreme Court. In the Yukon, a Court Services Executive Board composed of chief judges of Territorial and Supreme Courts, the Deputy Minister of Justice, Assistant Deputy Minister of Legal and Regulatory Services, and Director, Court Services meets monthly to discuss administrative issues. Administration of the 3 federal courts is governed by the *Federal Courts Act* and the *Administration Services Act*. Annual reports of the initial phases of the consolidation of the organizational structure of these courts are available on the Courts Administration Service (CAS) website: http://www.cas-satj.gc.ca/publications/pub_ANN_e.php. The Federal Courts have their own internets and their own servers and overall technology which enhance judicial independence.

Among a host of other initiatives, Alberta and British Columbia have devoted attention to the training and development of court administrators and managers. Since 1996, Alberta has increased overall funding for enhanced training of court administrators by almost $375,000. In addition, the Alberta Government in partnership with the University of Alberta has implemented comprehensive management training for managers, senior managers, and executive managers. Finally, Court Services has developed a "Toolkit and Learning Inventory" which outlines core competencies for court administrators as well as learning opportunities to support those core competencies and develop skills. British Columbia's Business Transformation and Change Management unit is working on the transition of all Court Services Branch (CSB) training to a fully supported online blended learning environment to deliver core and ongoing training for court administration (including training on associated case tracking applications and services).

Unlike other jurisdictions, Saskatchewan has rejected the need for a separate system for administration of the courts. Nevertheless, it has monitored the developments in other provinces and reports such as the Friedland Report and the work of the Canadian Judicial Council.

British Columbia	Implemented	Year
	Full	
Alberta		
Justices of the Peace *Justice of the Peace Act*, RSA 2000, c. J-4 and *Judicature Act*, RSA 2000, c. J-2	Full	1999
Preservation and enhancement of the independence of the Bar	Don't Know	
Strong community input and public involvement	Full	2005
Recognition by governments of the need for autonomy in the management and administration of the courts while ensuring accountability for the expenditure of public funds	Partial	1982
Within the model chosen, clear lines of responsibility and accountability for administrative and operational matters	Full	2005
A commitment by government to provide adequate funding and administrative infrastructure	Full	
Recognition by governments in budgeting processes of the revenue-producing aspects of the court system and of cost recovery achieved through court fees	Full	
Provision for enhanced training and development to create additional well-trained and efficient court administrators and managers.	Full	Continuous since 1996

Saskatchewan		
	Rejected	
Manitoba		
	Not Implemented	
Ontario		
Court Services Division Five-Year Plan	Full	
Quebec		
Judicial Independence: Court of Quebec Agreements about the management of certain resources	Partial	2002
Judicial Independence: Court of Appeal Agreements about the management of certain resources	Partial	2005
Nova Scotia		
	Don't know	
Prince Edward Island		
	Partial	Ongoing
Newfoundland & Labrador		
	Under Consideration	
Northwest Territories		
	Not Implemented	
Yukon		
Items b & g	Not Implemented	
No statutory authority - by practice only (a, b, d, e, f & h)	Partial	Ongoing
Judicial Affairs, Courts and Tribunal Policy Section		
Courts Administration Service Act	Full	2003
Federal Court		
Federal Courts Act *Courts Administration Services Act*	Partial	 2003
Federal Court of Appeal		
Federal Courts Act *Courts Administration Services Act*	Full	 2003

Tax Court of Canada		
Courts Administration Services Act	Full	2003

B. Technology and management information systems (Recommendation 34)

RECOMMENDATION 34:
Every jurisdiction establish, on a priority basis and to the extent that it has not already done so, enhanced computer-assisted management information systems to enable proper management of the work of the courts and assessment of the impact of reforms.

Five jurisdictions have established enhanced computer-assisted management information systems to enable proper management of the work of the courts and assessment of the impact of reforms; seven jurisdictions report partial implementation. Nearly all of these developments have occurred since 1996. They include:

- introducing e-filing, e-registry services and e-appeals (*e.g.*, British Columbia, Alberta Court of Appeal);
- creating a centralized case management information system for collecting, analyzing and reporting meaningful management information data (*e.g.*, British Columbia's Central Management Information System, CMIS; Ontario's FRANK; the Federal Court's dated but functional electronic Proceedings Management (PM) System which allows for tracking of Court proceedings and creation of statistical reports: *see* reports available at: http://www.fct-cf.gc.ca/about/statistics/statistics_e.shtml);
- providing for the generation of court orders in the courtroom with the use of standardized clauses (*e.g.*, being worked on for family court orders in Manitoba);
- equipping courtrooms with digital recording equipment (*e.g.*, Quebec);
- equipping all justices and their staff with office technology and a secure file exchange network (*e.g.*, Quebec); and
- providing courts with video-conferencing and teleconferencing technology (*e.g.*, Federal Court of Appeal).

Saskatchewan has never had sufficient resources to develop an adequate information system in civil cases. The development and implementation of a new computer system is under consideration in the Yukon, but has been delayed for financial reasons.

British Columbia	Implemented	Year
Court Services Branch mandate and business priority	Full	2004
Alberta		
Court of Appeal	Full	2004
General	Under Consideration	

Saskatchewan		
	Partial	1990's
Manitoba		
Rule 70 (Family Proceedings)	Partial	2004
Ontario		
New management system, FRANK	Partial Full	2004 (version 1) 2006 (target for version 2)
Quebec		
	Full	
Nova Scotia		
	Full	
Prince Edward Island		
Supreme Court Act	Partial	1996
Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
	Partial	2000
Yukon		
	Under consideration	
Federal Court		
	Partial	
Federal Court of Appeal		
	Partial	
Tax Court of Canada		
	Full	

C. Training, monitoring and supervision (Recommendation 36)

RECOMMENDATION 36:
a) Every jurisdiction develop criteria and a system for the training, monitoring and supervising of all individuals who provide court-supported dispute resolution services, and
b) the CBA develop a set of model principles and criteria to assist courts in this process.

Seven jurisdictions report having fully or partially developed criteria and a system for training, monitoring and supervising all individuals who provide court-supported dispute resolution services. Most of the developments have taken place since 1996. In Alberta, the criteria differ somewhat for Family and Children's Services mediators, the Civil Claims Mediation Program in the provincial court and the Queen's Bench Court-Annexed Civil Mediation pilot project. The requirements include meeting a specified number of hours of mediation training, completing a criminal record check, carrying professional liability insurance, a commitment to continuous learning, and adherence to a Code of Conduct and Ethics. In British Columbia, the Dispute Resolution Office oversees the Court Mediation Program which provides an opportunity for trained but inexperienced mediators to practice mediation skills in a high quality practicum environment. Graduates of the program are eligible to apply to the Provincial Court (Civil) Mediation Program where successful applicants have the opportunity to gain further mediation experience by mediating small claims cases for an honorarium. In Ontario, in those counties that are subject to mandatory mediation, Local Mediation Committees monitor the performance of mediators named in the rosters they compile. In Quebec, Department of Justice staff working in areas which involve conciliation or mediation are trained, supervised and subject to assessment of their performance. The Department oversees the accreditation of family mediators and their billing practices. All individuals employed by Saskatchewan's Dispute Resolution Office are fully trained in the facilitation of dispute resolution. The Federal Court Education Committee recently organized a 2-day in-house seminar on judicial dispute resolution for judges and prothonotaries. Members of the judiciary, the only persons who provide such dispute resolution services in the Federal Court, also take dispute resolution courses offered by the national Judicial Institute. The dispute resolution services offered by the Federal Court of Appeal are similarly Court-sponsored.

British Columbia	Implemented	Year
	Implemented	1996
Alberta		
Family and Children's Services Mediators	Full	April 2000
Provincial Court; Civil Claims Mediation Program *Provincial Court Act,* ss. 65 and 66; Mediation Rules, AR 271/97, granted pursuant to *the Provincial Court Act)*	Full	1998 (Calgary) 2006 (Medicine Hat)

Court of Queen's Bench of Alberta; Civil Mediation Program Civil Practice Note "11", Court Annexed Mediation, effective September 1, 2004	Full	2005
Saskatchewan		
	Full	1988
Manitoba		
	Not Considered	
Ontario		
Rules of Civil Procedure, Rule 24.1.07	Partial	
Quebec		
Conciliation programs set up by the courts; civil procedure (family mediation)	Full	1997
Nova Scotia		
	Don't Know	
Prince Edward Island		
	Not Considered	
Newfoundland & Labrador		
Rule 37A	Full	2003
Northwest Territories		
	Not Implemented	
Yukon		
	Not Considered	
Federal Court		
	Partial	
Federal Court of Appeal		
	Full	
Tax Court of Canada		
	Rejected	

D. Twelve-month court calendar (Recommendation 37)

> **RECOMMENDATION 37:**
> Every jurisdiction in which this has not yet occurred give immediate consideration to the merits of adopting a twelve-month court calendar.

Nine jurisdictions report having considered the merits of adopting a 12-month court calendar. Little or no change has been implemented since 1996. In British Columbia, both the Provincial Court and Supreme Court have adopted a 12-month court calendar. Nova Scotia has used a 12-month calendar for some time, as have the Northwest Territories and the Federal Court. The Registry of the Federal Court of Appeal is open for business year-round. The Court sits throughout the year, except for Christmas and summer recesses during which time the Court will still hear motions and urgent matters. In Ontario, matters relating to the scheduling and assignment of judicial duties fall within the responsibility of the Chief Justice of the Superior Court of Justice.

Alberta and Saskatchewan have rejected a twelve-month court calendar; it has not been considered in Manitoba or Newfoundland and Labrador. Alberta gives the following reasons for rejection:

1. Most judges attend seminars during the summer months.
2. Many trials set during the summer months were adjourned due to unavailability of witnesses. (The Court of Queen's Bench now concentrates their efforts on judicial dispute resolution sessions during July and August.)
3. Court staff is greatly reduced in the summer months. As a result, available staff have difficulty covering a "regular sitting" schedule.
4. Several judges, members of the Bar, and police and other witnesses travel with their families during the summer months.
5. Seminars such as Judgment Writing, the Canadian Bar Association Annual Meeting, and criminal and civil law seminars are usually held during the summer. These seminars deplete judicial resources.
6. The judiciary use the summer months to prepare judgments that did not get written during the 10 month period when the Court is extremely busy.

(Alberta response to jurisdictional questionnaire)

Saskatchewan operates on a 10-month court calendar, although trials and Chambers are available throughout the year. Saskatchewan does not have a trial delay problem; therefore, changes to the schedule are not considered necessary.

British Columbia	Implemented	Year
	Full	
Alberta		
	Rejected	

Saskatchewan		
	Rejected	
Manitoba		
	Not Considered	
Ontario		
	Full	
Quebec		
Nova Scotia		
	Full	
Prince Edward Island		
Supreme Court Act	Full	1988
Newfoundland & Labrador		
	Not Considered	
Northwest Territories		
	Full	
Yukon		
Informal, by practice	Full	Ongoing
Federal Court		
	Full	
Federal Court of Appeal		
Federal Courts Rules	Full	
Tax Court of Canada		
	Full	

Summary of Results

Canada's civil justice systems have been actively making changes during the decade spanning 1996 to 2006. Reform consistent with the 1996 CBA Task Force recommendations is happening. As one would expect, more change is evident in some areas than in others. Major headway is apparent in:

- the establishment of multi-option civil justice systems – primarily through the imposition of requirements to use (or consider using) mediation or other non-binding dispute resolution methods as an alternative to litigation, the development of court-connected mediation services, and the availability of judicially-assisted dispute resolution;
- increased management of the flow of cases through the court, in some jurisdictions mandated systemically for some cases or in some courts, but more commonly determined by court order on an individual basis;
- the case management of appeals;
- an abundance of public information and education initiatives – including the liberal distribution of brochures about the civil justice system and its non-binding dispute resolution programs, the development of simplified forms and procedures, and the creation of websites with public access;
- improvements in the availability of point of entry advice and assistance to litigants, and public consultation and involvement in planning for civil justice system reforms; and
- continuing attention to court management and administration including planning mechanisms, technological innovations, initiatives for the training and development of court administrators and managers and the development and establishment of enhanced computer-assisted management information systems.

Less, but still considerable, activity is evident in:

- movement toward the establishment of multiple litigation tracks, with related increases in the monetary ceiling imposed on small claims courts and the introduction of expedited and simplified proceedings;
- placing limitations on discovery, mandating the use of written interrogatories and controlling the use of expert reports, particularly in connection with expedited or streamlined proceedings;
- the introduction of court charters that set standards for the services to be provided to members of the public coming into contact with the court; and
- the training, monitoring and supervision of all individuals who provide court-supported dispute resolution services.

Low momentum is apparent in:

- launching studies or pilot projects to determine best practices concerning the integration of non-binding dispute resolution processes in the post-discovery stages of litigation;
- setting time standards for completion of steps in litigation and providing for automatic dismissal; and
- establishing pilot projects that use “will-say” statements to compel early disclosure of anticipated evidence.

Low activity in some areas is explained by the pre-1996 implementation of the CBA Task Force recommendations in many jurisdictions. Examples include:

- handling non-dispositive interlocutory orders, summary trials and changing the incentive structure;
- appellate level reform of time standards, the production of appeal books and control over civil dockets; and
- the adoption of a 12-month court calendar.

Stage 2

In Stage 2 of the research project, recommendation-specific questionnaires were distributed to: the Canadian Bar Association; the Association of Canadian Court Administrators; the Canadian Centre for Justice Statistics; the Deans of every law school in Canada (23 in all) and to the Law Societies in all ten provinces and the three northern territories (13 in all) as well as the Institute de médiation et d'arbitrage du Québec and the Chambres des notaires du Québec.

The CBA was asked to respond to Recommendations 12, 15, 23, 26, 32, 33, 36, 42, 43, 44, 45, 46, 47, 48, 49, 52 and 53 of the CBA Report of the ***Task Force on Systems of Civil Justice*** published in 1996:
<http://www.cba.org/CBA/pubs/pdf/systemscivil_tfreport.pdf>.

ACCA was asked to respond to Recommendations 32 and 35.

The Canadian Centre for Justice Statistics was asked to respond to Recommendation 51.

Law Societies were asked to respond to Recommendations 38, 39, 40, 41, 43, 45 and 50. Eight of the thirteen Law Societies responded to the questionnaire.

Law Deans were asked to respond to Recommendations 39 and 49. Nine of the twenty-three law Deans responded to the questionnaire.

The paragraphs in the Chart describing the responses to the Stage 2 recommendations quote freely from the responses received, especially the responses from the CBA which, in large part, are reproduced verbatim.

Second Theme: Reducing Delay Through Court Supervision of the Progress of Cases

A. Time Standards: National Time Guidelines (Recommendation 12)

RECOMMENDATION 12:
The CBA adopt national time guidelines as a model for Canadian courts and for the legal profession.

Canadian Bar Association	Implemented	Year
CBA Resolution 97-03-A.	Implemented	1997

The CBA reports that Recommendation 12 has been implemented. The CBA national guidelines include the standards previously adopted by the Canadian Judicial Council as well as additional standards referred to in the 1996 Task Force Report relating to the lawyer’s duty to act promptly on an initial retainer.

Third Theme: Reducing Costs and Increasing Access

A. Early Disclosure (Recommendation 15)

RECOMMENDATION 15:
The CBA work with selected jurisdictions to establish pilot projects using ‘will-say’ procedures, so as to determine whether it is useful and fair to require will-say documents in civil cases to compel early disclosure of anticipated evidence, and to assess the impact of such a requirement on delay, costs and discovery.

Canadian Bar Association	Implemented	Year
	Partial/Not Implemented	1997

The CBA reports that Recommendation 15 has been implemented in part only. A CBA Working Group chaired by David Tavender, QC reported in September 1998 in a report based on research work produced by the Working Group’s advisor, Professor Lee Stuesser: <http://www.cfcj-fcjc.org/docs/1998tavender.pdf>. The report included the Working Group's draft procedural rules for use in any jurisdiction contemplating a pilot project on “will-say” procedures, or otherwise wishing to implement an early exchange of witness summaries. No pilot project appears to have been launched. Several jurisdictions expressed concerns about issues of increased "front end" costs, potential slowing down of the process, the lack of a mechanism to force meaningful and truthful statements, and intrusion upon the "solicitor's brief”.

Fourth Theme: Appellate Reform

A. Production of Appeal Books (Recommendation 23)

RECOMMENDATION 23:
The CBA, in consultation with members of the judiciary and lawyers, develop guidelines for the production of appeal books.

Canadian Bar Association	Implemented	Year
	Partial	1998

The CBA reports that Recommendation 23 has been partially implemented. A CBA Working Group chaired by Justice Louise Mailhot of the Québec Court of Appeal reported in August 1998. The Canadian Judicial Council declined to follow the recommendations in the report due to the variation in rules and practices from jurisdiction to jurisdiction. The report was, however, used in Québec to reduce *facta* to 30 pages.

Fifth Theme: Improving Public Understanding

A, Public information and education (Recommendation 26)

RECOMMENDATION 26:
a) The CBA enter into discussions with provincial and territorial ministries of education or their equivalents to facilitate the teaching of dispute resolution skills and the operation of the civil justice system in Canadian elementary and secondary schools; and
b) these efforts be undertaken in consultation with law societies, law schools, members of the judiciary, and governments.

Implementation points:
- Members of the judiciary, lawyers and notaries and provincial and territorial law societies should become more involved in public education efforts;
- Public legal educators should be encouraged and supported in efforts to share information and identify best practices;
– Courts should consider the use of media liaison officers to assist in communication efforts; and
– Special consideration should be given to the unique access issues that will arise as part of a civil justice public education program.

Canadian Bar Association	Implemented	Year
	Partial	1997

The CBA reports that Recommendation 26 has been partially implemented. In 1997, CBA president, André Gervais, wrote to provincial ministers of education to solicit their support for the implementation of this recommendation. A similar message was provided to provincial justice ministers and Chief Justices were informed of the initiative. The provincial/territorial responses to the CBA's initiative were generally supportive.

President Gervais subsequently visited the ministers of education (or their deputies) of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, and P.E.I.

Manitoba education officials involved a CBA representative on a committee developing legal education outcomes for social studies as part of the western provinces protocol. In Nova Scotia, the CBA had an opportunity to comment on the validation draft of the Foundation for Atlantic Canada Social Studies Curriculum. The CBA also offered to provide teachers with access to interested volunteers to help with class presentations, if requested.

In February 2000, the CBA distributed a four-page survey to stakeholders who were thought to have an interest in or do work related to, "legal literacy." 144 surveys were distributed to provincial and territorial departments of education and justice; teachers federations; teachers of law in high schools; public legal education organizations and bar leaders. The purpose of the survey was to gather input on topics that could be covered in a legal literacy program and to identify people who would be interested in participating in the development of the project. A 43% response rate to the survey was achieved, and the responses were compiled into a June 2000 report. The intention was to develop learning modules that could be adapted by each jurisdiction as it saw fit, in accordance with their curriculum needs. The CBA retained a consultant to develop the modules, and she developed some draft materials.

Work was delayed while the CBA focussed on other projects. The funds are still available to pursue production of the learning modules and the CBA intends to do so.

Sixth Theme: Managing the Courts of the Twenty-First Century

A. Court Resources: Demonstration Project (Recommendation 32)

RECOMMENDATION 32:
The Association of Canadian Court Administrators in conjunction with the CBA and representatives of the judiciary, develop a proposal and budget for a demonstration project in one or more trial courts to study the cost-effectiveness of operations, the cost of proposed changes, and the value of results of reform.

Canadian Bar Association	Implemented	Year
	Partial	1997
Association of Canadian Court Administrators		
	Partial	

The Canadian Bar Association and the Association of Canadian Court Administrators report that Recommendation 32 has been partially implemented. The CBA established a Working Group chaired by Associate Chief Justice Oliphant of the Manitoba Court of Queen's Bench. The Working Group intended to develop a pilot project to determine

the cost-effectiveness of court operations, develop standards for court operations and draft a manual to assist in the pilot project. However, after investigation and lengthy discussion, the Working Group concluded that the pilot project was unlikely to be established and funding was insufficient to complete the breadth of tasks required for this project (project was externally funded). It recommended unanimously that the project be closed and that the remaining funds be reallocated to another civil justice reform project. It encouraged ACCA to take on a similar project independently.

ACCA has not worked directly on this recommendation, but partnered with other members of the civil justice community in convening the 2002 Trial Courts of the Future Conference which brought together representatives of the Bar, judiciary and court administration from across the country. ACCA’s Past President Co-Chaired the Conference. Other partners who worked to develop the Conference Program were the U of T Faculty of Law, the U of S College of Law, the Canadian Association of Provincial Court Judges (CAPCJ), and Saskatchewan Justice.

B. Court Resources: Standards for Court Operation (Recommendation 33)

RECOMMENDATION 33:
The CBA create a working group to devise a plan for the development of standards for court operations and to recommend how the plan should be implemented. The working group should deliver a preliminary report to the annual meeting of the CBA in 1997.

Canadian Bar Association	Implemented	Year
	Partial	1997

The CBA reports that Recommendation 33 has been partially implemented. The CBA Working Group chaired by Associate Chief Justice Oliphant of the Manitoba Court of Queen’s Bench (see recommendation #32) was responsible for implementing this recommendation. The Working Group struck a committee to devise a plan for the development of standards for court operations. The Canadian Forum on Civil Justice was approached to consider developing the standards. The CBA requested more details on the Forum’s proposal so that it could be considered by the Special Committee on Systems of Civil Justice (the smaller body within the CBA that took over overseeing the completion of the Systems of Civil Justice Implementation Committee 's Working Group projects).

C. Technology and Management Information Systems: National Standards (Recommendation 35)

RECOMMENDATION 35:
The Association of Canadian Court Administrators establish a working group to develop national standards and to recommend procedures for the use of electronic forms, filing, and document storage for legal purposes.

Association of Canadian Court Administrators	Implemented	Year
	Partial	

ACCA reports that Recommendation 35 has been partially implemented. ACCA has not worked directly on this recommendation, however, ACCA has created a Technology Committee which is doing work on e-filing. ACCA was also actively involved in work leading to the creation of the Canadian Centre for Court Technology.

D. Court-Supported Dispute Resolution Services (Recommendation 36)

RECOMMENDATION 36:
a) Every jurisdiction develop criteria and a system for the training, monitoring and supervising of all individuals who provide court-supported dispute resolution services, and
b) the CBA develop a set of model principles and criteria to assist courts in this process.

Canadian Bar Association	Implemented	Year
	Implemented	1999

The CBA reports that Recommendation 36 has been implemented. A CBA Working Group chaired by Carol Alberts issued its report on "Model Principles to Assist Courts in Developing Criteria for the Training, Monitoring and Supervising of Individuals Who Provide Court- Connected Mediation Services in Civil and Family Cases" in February 1999. The report was sent to CBA Branches, law societies, law schools, and ADR providers, and appeared on the CBA website. Mention of the report was also made in the April 1999 edition of the National magazine. A formal bound report was published by the CBA Communications Department.

Seventh Theme: The Practising Bar

A. Roles and Responsibilities of Lawyers

1. Obligation to Explore Prospects of Settlement (Recommendation 38)

RECOMMENDATION 38:
Every jurisdiction specify in its rules of professional conduct an obligation on lawyers to explore fully the prospects of settlement with their clients and an obligation to explain available dispute resolution options to clients in relation to litigation matters.

Law Societies	Implemented	Year
Law Society of Alberta Code of Professional Conduct, Chapter 16, R. 16	Implemented	
Law Society of Manitoba Code of Conduct Chapter 3, commentary 6	Implemented	1992
Law Society of Upper Canada Rules of Professional Conduct, Rules 2.02 (2) and (3)	Implemented	1978
Barreau du Québec	Pilot project	
Law Society of New Brunswick Code of Professional Conduct of the Law Society of New Brunswick, Chapter 8, Commentary 1 & 2	Implemented	2004
Nova Scotia Barristers Society Legal Ethics and Professional Responsibility (1990), R 10.2A	Implemented	Settlement in 1989, regarding ADR added in 2000
Law Society of Prince Edward Island	Implemented	
Law Society of the Northwest Territories	Not Implemented	

A questionnaire inviting responses to Recommendation 38 was sent to 13 Law Societies. Of the eight Law Societies that responded, six report having implemented the recommendation, one jurisdiction has launched a pilot project and one jurisdiction reports no implementation. Lawyers in Nova Scotia and Alberta are under a duty to advise a client to settle a contested matter where it is reasonable and in the client's best interests to do so. The Alberta Code explains that:

> ... it is to the general benefit of society and the administration of justice that lawyers discourage unmeritorious suits and seek the early resolution of disputes. The result is to keep legal costs to a minimum and ease the demands on the judicial system while encouraging cooperation among opposed parties and counsel.

Lawyers in Nova Scotia and New Brunswick (where the lawyer cannot obtain settlement), must consider the appropriateness of ADR to resolve the issues in dispute; if appropriate, instruct the client about the options; and, if so instructed, take steps to pursue those options. In Manitoba the requirement to explain ADR options is implied rather than express. Prince Edward Island uses the CBA Code of Professional

Conduct. The Northwest Territories has not implemented Recommendation 38 because it uses the CBA Code as it stood in 1987; however, this may change in December 2006.

2. Dispute Resolution Options as a Component of Legal Education (Recommendation 39)

> **RECOMMENDATION 39:**
> a) Law schools, Bar admission course educators and continuing legal education providers offer education and training on dispute resolution options and on the means by which they can be integrated into legal practice, and
> b) such courses be mandatory in Canadian law schools and Bar Admission course programs.

Law Deans	Implemented	Year
University of Victoria	Implemented	Prior to 1996 in many aspects.
University of British Columbia	39a Implemented	1992
University of Alberta	Partial	uncertain, approximately 7 years
University of Saskatchewan	Partial	mid-1990s (see comments for explanation)
University of Ottawa		
Common-Law	Implemented	2004
Queen's University	Implemented	
University of Windsor		
(I) Creation of the *University of Windsor Mediation Service* and the creation of the *Mediation Clinic* course	Implemented	
(ii) Creation of *Alternative Dispute Resolution* ("*ADR*") course	Implemented	
(iii) Creation of the *Advanced Practicum in Mediation and Conflict Resolution*	Implemented	
(iv) Creation of the *Lawyer as Conflict Resolver* course	Implemented	
(v) Creation of the *Access to Justice* Course as part of the mandatory first year curriculum	Implemented	
University of Moncton	Implemented	1997-1998

Osgoode Hall Law School	Implemented	2001 and 2007
Law Societies	**Implemented**	**Year**
Law Society of Alberta	Implemented	1992-1993 & 2004-2005
Law Society of Manitoba	Implemented	
Law Society of Upper Canada Convocation approval	Implemented	In place for at least the last 10 years.
Barreau du Québec	Implemented	
Law Society of New Brunswick	Implemented	1997
Nova Scotia Barristers Society Dalhousie Law School has had a mandatory course in Professional Responsibility since that date.	Implemented	1990
Law Society of Prince Edward Island	No Answer	
Law Society of the Northwest Territories	Not Implemented	

A questionnaire inviting responses to Recommendation 39 was sent to 23 Law Deans and 13 Law Societies. Law Deans from 9 Law Schools and Law Societies in eight jurisdictions responded.

Education and training on dispute resolution options and their integration into legal practice appears to be a standard component of law school curriculums today. Most of the schools that responded offer a range of courses related to dispute resolution. Most of these courses are available on an optional basis. Six law schools include a component on dispute resolution in a mandatory first year course (Victoria, Ottawa, Queen's, Windsor, Saskatchewan, Osgoode–to be introduced in 2007). One law school (Victoria) also includes dispute resolution in a mandatory upper year course. (The Nova Scotia Barristers Society reports that dispute resolution is a required course in third year at Dalhousie.) Some schools offer dispute resolution in a practice skills course or practicum setting (*eg.*, Queen's, Windsor). Enrolment in a dispute resolution course is not mandatory in three of the law schools that responded (Alberta, Moncton and the University of British Columbia). Alberta takes the position that, educationally, it is better to weave dispute resolution ideas through the whole curriculum, treating it in the context of each subject (*eg.*, family law, civil litigation).

Education and training on dispute resolution is being incorporated into Bar Admission courses and continuing legal education programs. Bar Admission programs in Manitoba, Saskatchewan, Alberta, Quebec, New Brunswick and Ontario include dispute resolution learning. In Quebec, learning how and when to use or suggest ADR fits within one of four educational objectives of the Bar Admission program. Alberta

identifies advocacy and dispute resolution as a required lawyering skill in the recently-adopted Competency Profile that applies to newly-called lawyers. The Barreau du Québec has put out a book on dispute resolution: *Negotiation, collection des habiletés* (2006-2007). New Brunswick includes education and training on dispute resolution within courses on different subjects (*eg.*, family law, negotiation).

Manitoba, Québec (through the Service de la formation permanente of the Barreau du Québec), New Brunswick, Alberta and Ontario all offer dispute resolution courses in their continuing legal education programs.

B. Service Focus for Lawyers

1. Statement of Client of Client Rights and Responsibilities (Recommendation 40)

RECOMMENDATION 40:
a) All lawyers develop and implement a statement of client rights and responsibilities that identifies, in clear and concise language, the essential features of the service commitments made to clients, and
b) such statements be made available in writing to clients.

Canadian Bar Association	Implemented	Year
	Partial	
Law Societies		
Law Society of Alberta	Not Implemented	
Law Society of Manitoba	Not Considered	
Law Society of Upper Canada Practice Management Guidelines, Convocation approved	Partial	2002
Barreau du Québec	Partial	January 2006
Law Society of New Brunswick	Not Considered	
Nova Scotia Barristers Society	Not Considered	
Law Society of Prince Edward Island	Don't Know	
Law Society of the Northwest Territories	Not Implemented	

A questionnaire inviting responses to Recommendation 40 was sent to the CBA and 13 Law Societies.

For the CBA response, see the discussion on Recommendation 42.

Recommendation 40 has been partially implemented by two of the eight Law Societies that responded (Ontario and Québec). In Ontario, the Law Society of Upper Canada's Practice Management Guidelines:

> ... include eight sections of acceptable practice standards that can be utilized by lawyers to inform their practice activities. The guidelines are set out in easy to use, checklist style format allowing lawyers to print the information and to potentially provide them to clients as an indication of what the client should and may expect to receive from the lawyer's service.

The use of these Guidelines is not mandatory. Similarly, in Québec, the Barreau du Québec does not impose an obligation to make a statement of client rights and responsibilities available in writing to clients.

In five jurisdictions of the remaining jurisdictions, Recommendation 40 was not considered (Nova Scotia, Manitoba, New Brunswick) or has not been implemented (Alberta, Northwest Territories). The respondent in the eighth jurisdiction did not know its state of implementation (Prince Edward Island).

2. Development of Quality Assurance Programs and Standards (Recommendation 41)

RECOMMENDATION 41:
All lawyers develop quality assurance programs and standards, specific to their practice circumstances, that identify for clients, clearly and concisely, the standards by which they can evaluate the legal services provided by their lawyers.

Canadian Bar Association	Implemented	Year
	Partial	
Law Societies		
Law Society of Alberta	Not Implemented	
Law Society of Manitoba	Not Considered	
Law Society of Upper Canada Practice Management Guidelines	Partial	2002
Barreau du Québec	Not Considered	
Law Society of New Brunswick Practice Review Rules of the Law Society of New Brunswick and Standards in the Real Estate Practice.	Implemented	2001
Nova Scotia Barristers Society Real Estate Practice Standards, <http://www.nsblcf.ca/Standards/profstand.html>	Implemented	2001
Family Law Standards Committee has developed a significant body of material that will assist lawyers to practice competently in that area. These standard have not yet been adopted.	Partially implemented	

Law Society of Prince Edward Island	Don't Know	
Law Society of the Northwest Territories	Not Implemented	

A questionnaire inviting responses to Recommendation 41 was sent to the CBA and 13 Law Societies.

For the CBA response, see the discussion on Recommendation 42.

Recommendation 41 has been implemented with respect to Real Estate Practice Standard in two jurisdictions (Nova Scotia, New Brunswick). In both jurisdictions, these are the first in a series of standards being developed by the provincial Law Society. The standards are enforced by random inspections of lawyers' files. New Brunswick reports that they are working well and that members accept the input they receive from inspectors. In Ontario, the Law Society of Upper Canada delineates standards in its Practice Management Guidelines. However, because compliance with these Guidelines is not mandatory, strictly speaking, they do not provide quality assurance even when utilized.

In four jurisdictions of the remaining jurisdictions, Recommendation 41 was not considered (Manitoba, New Brunswick) or has not been implemented (Alberta, Northwest). The respondent in the eighth jurisdiction did not know its state of implementation (Prince Edward Island).

3. Model Statement of Client Rights (Recommendation 42)

RECOMMENDATION 42:
The CBA develop and promote a model statement of client rights and responsibilities, provide analysis and information for the establishment of quality assurance programs and standards, and develop model quality assurance programs and standards for the legal profession.

Canadian Bar Association	Implemented	Year
	Partial	1997

The CBA reports that Recommendation 42 has been partially implemented. A Working Group chaired by Carol Ann Bartlett created a document that, in 2002, was used by the CBA and the Canadian Bar Insurance Association to produce a pamphlet called, "Great Expectations: A lawyer-client handbook," <http://www.cba.org/cba/PracticeLink/pdf/greatexp.pdf>. The pamphlet sets out client's rights and responsibilities and provides tips on managing the lawyer-client relationship. In 2004, the CBA published a document entitled, "30 Best Practices: Strategies for law firm management," that includes a checklist of "Client care essentials," <http://www.cba.org/cba/PracticeLink/pdf/clientcare.pdf>.

With respect to quality assurance programs, the Working Group was tasked with reviewing the Quality in Law program developed in New South Wales, Australia, and the ISO 9000 guidelines for the legal profession developed in Australia and New Zealand. The Canadian Standards Association expressed interest in working with the CBA to develop similar standards in Canada. The Working Group also met with the Canadian Council on Health Services Accreditation (CCHSA) to discuss the process by which that organization develops and implements standards for health care professionals, conducts performance reviews, accredits organizations and evaluates compliance with accreditation standards.

The Working Group recommended that the CBA Law Practice Management Section undertake a more thorough review of the health care profession's experience, the Quality in Laws program, and the Canadian Standards Association proposal, with a view to establishing recommendations for the design and implementation of quality management/assurance standards and programs for the legal profession. It does not appear that the Law Practice Management Section (now the Law Practice Management and Technology Section) has yet undertaken this work.

C. Fees and Billing Practices

1. Disclosure of Billing Practices (Recommendation 43)

RECOMMENDATION 43:
Lawyers, as a matter of standard practice and save only in unusual circumstances, make written disclosure to clients at or shortly after the outset of a retainer regarding
a) the basis upon which the client will be billed,
b) the billing methods to be used,
c) where time and circumstances permit, the nature of the services to be provided,
d) the estimated costs of such services, and
e) the estimated time within which such services will be provided.

Canadian Bar Association	Implemented	Year
	Implemented	See #44 below
Law Societies		
Law Society of Alberta Code of Professional Conduct, Chapter 13, R. 2 and C. 2	Implemented	
Law Society of Manitoba Code of Conduct Chapter 11 commentary 4	Implemented	1992
Law Society of Upper Canada Practice Management Guidlines	Partial	2002

Barreau du Québec Section 3.08.04 and 3.08.08 *Code of ethics of advocates*	Partial	1981
Law Society of New Brunswick Chapter 9 Code of Professional Conduct of the Law Society of New Brunswick & Commentary 3;	Partial	2004
Contingency Fee Rules approved in 1996		
Nova Scotia Barristers Society Legal Ethics and Professional Responsibility (1990), c 12 dealing w/ Fees, <http://www.nsbs.org/legalethics/chapter12.htm>	Implemented	1989
Law Society of Prince Edward Island	Don't Know	
Law Society of the Northwest Territories	Not Considered	

A questionnaire inviting responses to Recommendation 43 was sent to the CBA and 13 Law Societies.

For the CBA response, see the discussion on Recommendation 44.

Of the eight Law Societies responding, three report full implementation of Recommendation 43 (Nova Scotia, Manitoba, Alberta) and three report partial implementation (Quebec, New Brunswick, Ontario). One Law Society has not considered Recommendation 44 (Northwest Territories) and the respondent for one jurisdiction did not know the status of implementation (Prince Edward Island).

In Alberta,"before or within a reasonable time after commencing a representation," a lawyer must provide the client with a written statement containing "as much information regarding fees and disbursements as is reasonable and practical in the circumstances, including the basis on which fees will be determined": Code of Professional Conduct, Chapter 13, R.2. The commentary emphasized that a "good starting-point is a frank and open discussion about fees at the outset of a relationship."

In New Brunswick, the lawyer has a duty to "ensure that any fee or disbursement for professional legal services stipulated or charged to the client by the lawyer is fully disclosed, is fair and is reasonable". A statement in writing is required only if the client requests it.

In Quebec, written disclosure is not mandatory, but the lawyer is responsible to ensure that the client "has all useful information regarding the nature and financial terms of the services" and agrees to them. The lawyer must also ensure that the client is informed of any extrajudicial fees, commissions or costs that are paid to the lawyer by a third party. Case law states that the lawyer has a duty to give the client an estimation of the costs of their services and to regularly inform the client about the actual costs incurred and

explain the reasons for any differences from the initial estimation (see Collection de droit 2006-2007, *Éthique, déontologie et pratique professionnelle*, pages 81, 82 and 249).

Ontario's Practice Management Guidelines have an entire section on retainer agreements, billlng statements and so forth, including precedent documents and supporting information that lawyers can use to develop their own documentation. However, these are Guidelines only; their use is not mandatory.

2. Discussion of Fees (Recommendation 44)

RECOMMENDATION 44:
The CBA develop and promote guidelines for
a) discussions by lawyers with clients concerning fees, and
b) improved communication regarding fees.

Canadian Bar Association	Implemented	Year
	Implemented	2002, 2004 and ongoing

The CBA refers to its response to Recommendation 42. The two pamphlets mentioned in that response include guidance for lawyers and clients on discussing fees. The CBA regularly publishes information for lawyers about how to discuss fees with clients. For example, its web resource, Practice Link, has provided articles entitled "How to Get Paid," "How to Adjust Your Fees Without Losing Clients," and "Secrets Revealed: 95 Tips on Becoming a Better Lawyer," which included a section on client billing practices.

3. Use of a Variety of Billing Methods (Recommendation 45)

RECOMMENDATION 45:
Lawyers use a variety of billing methods in determining fees for legal services, with an emphasis on the value and timeliness of the results achieved, rather than time spent.

Canadian Bar Association	Implemented	Year
	Implemented	See #46 below.
Law Societies		
Law Society of Alberta Code of Professional Conduct, Chapter 13, C. 2.	Implemented	
Law Society of Manitoba	Not applicable…the recommendation does not refer to law societies.	

Law Society of Upper Canada	Partial	
Barreau du Québec *Code of ethics of advocates,* Sections 3.08.01 and 3.08.02	Partial	1981
Law Society of New Brunswick Chapter 9 Code of Professional Conduct of the Law Society of New Brunswick & Commentary 2	Partial	2004
Nova Scotia Barristers Society Legal Ethics and Professional Responsibility (1990), c 12	Implemented	1989
Law Society of Prince Edward Island	Implemented	I am unsure but expect this is ongoing.
Law Society of the Northwest Territories	Not Considered	

A questionnaire inviting responses to Recommendation 45 was sent to the CBA and 13 Law Societies.

The CBA reports that Recommendation 45 has been implemented. See Recommendation 46 for further discussion of the CBA response.

Of the eight Law Societies that responded, three jurisdictions report full implementation of Recommendation 45 (Nova Scotia, Prince Edward Island, Alberta), three report partial implementation (Québec, New Brunswick, Ontario). Recommendation 45 was not considered in one jurisdiction (Northwest Territories). The respondent in the eighth jurisdiction declined to respond, noting that the Recommendation does not refer to law societies (Manitoba).

In Alberta, “[a]s a general rule, a lawyer must explain to each client the basis on which the fee will be established.” Four examples are cited: a fixed-fee basis; a contingency-fee basis; a time-expended basis, in which case the lawyer must disclose the hourly rate; and a quantum meruit basis, in which case the lawyer must explain to the client the various factors that may be taken into account.

The Barreau du Québec lists eight factors the lawyer must take into account: experience; the time devoted to the matter; the difficulty of the question involved; the importance of the matter; the responsibility assumed; the performance of unusual professional services or professional services requiring exceptional competence or celerity; the result obtained; and the judicial and extrajudicial fees fixed in the tariffs.

In New Brunswick, a fair and reasonable fee shall depend upon and reflect factors such as: the time and effort required and spent; the difficulty and importance of the matter; whether special skill or service has been required and provided; the customary charges

of other lawyers of equal standing in the locality in like matters and circumstances; in civil cases, the amount involved or the value of the subject matter; in criminal cases, the exposure and risk to the client; the results obtained; tariffs or scales of fees authorized by the Society or by local governing bodies; reasonable office overhead; special circumstances such as loss of or adverse effect upon other work, urgency and uncertainty of reward; and any reasonable agreement made between the lawyer and the client.

In Ontario, lawyers are free to use a variety of fee structures, and they do.

4. Information About Alternative Billing Methods (Recommendation 46)

> **RECOMMENDATION 46:**
> The CBA provide information to the profession on alternative billing methods for legal services.

Canadian Bar Association	Implemented	Year
	Implemented	2002, 2004 and Ongoing

The CBA refers to its response to Recommendation 42. The two pamphlets mentioned in that response discuss alternative billing methods. The CBA's publication of information on this topic is ongoing. An upcoming edition of Practice Link will include an article entitled, "Alternatives to the Billable Hour." Further, the CBA's web-based newsletter of the Emerging Professional Issues Initiative (EPIIgram) has published articles on prepaid legal services, task-based billing and unbundling legal services. Various articles in the National magazine have related to this topic as well, notably the cover story in the March 2005 edition entitled, "A Billable (R)evolution".

D. Integration of New Technologies in Legal Practices (Recommendation 47)

> **RECOMMENDATION 47:**
> The CBA take a leadership role in disseminating information to the profession about the integration of new technologies in legal practices.

Canadian Bar Association	Implemented	Year
	Implemented	Ongoing

The CBA reports that it has published exhaustively on this issue. The CBA's Practice Link has devoted an entire section to articles on technology: <http://www.cba.org/cba/PracticeLink/TAYP/>, and many articles in EPII touch on the impact of new technologies on the practice of law. Since 2003, no less than eight such articles were published in the National magazine (<http://www.cba.org/CBA/National/>)

on this topic ("Cool Tools", July/August 2006, p. 43; "Download and drive", October/November 2005, p. 12; "The chains that bind," July/August 2005, p. 48; "The paper-less office," June/July 2004, p. 16; "The portable brain," November 2003, p. 16; "Automation for the nation," November 2003, p. 38; "Equipping a small law firm, May 2003," p. 53; "Essential technology for solos and small firms," March/April 2003, p. 13). The Ethics Committee is currently studying how the CBA Code of Professional Conduct should be updated to reflect the impact of new technologies.

E. Increasing Access to Legal Services (Recommendation 48)

RECOMMENDATION 48:
The CBA develop a program to monitor, promote and publicize *pro bono* work carried out by lawyers and notaries.

Implementation points:
– Law firms and other employers of lawyers should set minimum targets for the number of hours to be spent by each lawyer on *pro bono* work;
– *Pro bono* work should be recognized in lawyer compensation schemes; and
– Use of annual reports to describe progress in implementing court charters should be considered.

Canadian Bar Association	Implemented	Year
CBA Resolutions 98-01-A, 01-15-A, 02-14-A, 03-04-M	Implemented	1997 - Ongoing

The CBA reports that a Working Group chaired by Melina Buckley developed an options paper in 1998. In the same year, the CBA Council adopted a resolution which sets out policy on *pro bono* legal services and states that "each member of the legal profession should strive to contribute 50 hours or 3% of billings per year on a *pro bono* basis." The resolution also provides that the CBA take steps to encourage and promote this level of *pro bono* activity and to recognize *pro bono* efforts undertaken by the legal profession.

In 2001, at the behest of the CBA Council, the CBA established a *Pro Bono* Working Group to: report on the *pro bono* work being performed by CBA members; develop a business plan as to how the CBA should coordinate, facilitate and promote the *pro bono* work of its members; and consider methods of obtaining and sharing information about the *pro bono* initiative at the National and Branch levels. In August 2002, the Working Group was asked to consider whether the CBA should enter into a proposed program to support *pro bono* clinics and develop specific goals and strategies to enable all Canadians who cannot afford a lawyer or obtain legal aid to obtain free legal advice.

The Working Group proposed that a *Pro Bono* Committee be established with a mandate to cultivate the recommendations set out in their 2003 report to the Mid-Winter Meeting of CBA Council. In 2003, the CBA established the *Pro Bono* Committee by resolution of Council. The Committee's mandate is to promote and facilitate *pro bono* service in the legal profession on an ongoing basis. It is an active Committee to which each of the 13 CBA Branches can name a member. In August 2005, the Committee

launched its webpage on www.cba.org to provide valuable links and information to lawyers engaged in *pro bono* work.

Recently, in furtherance of the recommendations of the *Pro Bono* Working Group, the *Pro Bono* Committee created a business plan to map out its activities in the next few years. These activities include providing free web-based CLE's on topics of interest to *pro bono* lawyers, establishing a *pro bono* mentorship program, further developing the website to become a clearinghouse of *pro bono* materials and links, lobbying of government and liability insurance plans to facilitate government lawyers' involvement in *pro bono* work, and publishing "*pro bono* success stories" to give added visibility to the *pro bono* work of CBA members.

F. Comprehensive Legal Education Plan to Assist in Civil Justice Reform (Recommendation 49)

RECOMMENDATION 49:
a) The CBA and the Canadian Council of Law Deans form a joint multi-disciplinary committee to consider and propose a comprehensive legal education plan to assist in civil justice reform for the twenty-first century, and
b) the plan address the whole spectrum of service providers and the full range of educational opportunities.

Canadian Bar Association	Implemented	Year
	a) Implemented b) Not Implemented	1997-2000
Law Deans		
University of Victoria	No Answer	
University of British Columbia	No Answer	
University of Alberta	Don't Know	
University of Saskatchewan	Don't Know	
Queen's University	Don't Know	
University of Windsor	Not considered	
University of Ottawa (Common-Law)	Don't Know	
University of Moncton	Don't Know	
Osgoode Hall Law School	Not Implemented	

A questionnaire inviting responses to Recommendation 49 was sent to the CBA and 23 Law Deans.

The CBA reports mixed implementation. The CBA established a special Working Group chaired by Dr. Moira McConnell of Dalhousie Law School with members nominated by the Federation of Law Societies, Canadian Association of Law Teachers, and the CBA. In August 2000, the Working Group produced a discussion paper and final report entitled, "Attitudes, Skills, Knowledge: Recommendations for Changes to Legal Education to Assist in Implementing Multi-Option Civil Justice Systems in the 21st Century." The report contains eight recommendations that are specifically directed at law schools.

Of the nine law schools that responded, five did not know whether Recommendation 49 had been implemented or not (Ottawa, Queen's, Saskatchewan, Alberta, Moncton), one had not considered it (Windsor), one had not implemented it (Osgoode), and two did not answer (University of British Columbia and University of Victoria). The overall LL.B. program in the ninth law school (Victoria) achieves many of the objectives of the CBA Working Group's eight recommendations.

G. Enforcement of Competency Standards (Recommendation 50)

RECOMMENDATION 50:
a) Law societies place greater emphasis in the future on the enforcement of competency standards, and
b) in jurisdictions where legislative amendments are required to permit the vigorous enforcement of competency standards, such amendments be sought.

Law Societies	Implemented	Year
Law Society of Alberta The *Legal Profession Act* was amended in 1990 to permit regulation of competency.	Implemented	1990
Law Society of Manitoba Code of Conduct	Implemented	2003
Law Society of Upper Canada Convocation approval	Implemented	2006
Barreau du Québec Sections 109 to 115 *Professional Code* Section 3.00.01 and 4.04.01 *Code of ethics of advocates*	Implemented	1981 and 2004 (duty of skill)
Law Society of New Brunswick Practice Review Rules of the Law Society of New Brunswick	Implemented	2001
Nova Scotia Barristers Society *Legal Profession Act*	Implemented	2005
Law Society of Prince Edward Island Regulations to the *Legal Profession Act*	Implemented	1992

Law Society of the Northwest Territories	Not Implemented	

A questionnaire inviting responses to Recommendation 50 was sent to 13 Law Societies. Seven of the eight Law Societies that responded report that Recommendation 50 has been implemented (Nova Scotia, Manitoba, Québec, Prince Edward Island, New Brunswick, Alberta, Ontario). It has not been implemented in the Northwest Territories although some discussion has taken place.

The new Nova Scotia *Act* gives the Law Society clear authority to develop and enforce standards of competence. The Law Society of Manitoba amended the Preamble to the Code of Conduct to include a definition of competence. Alberta and Ontario have instituted entry-level competence requirements that must be met by lawyers seeking admission to the Bar. These jurisdiction also have Spot Audit programs. In January 2007, Ontario will be introducing a random Practice Management Review program. The Spot Audit and Practice Management Review programs involve an in-person/in-firm assessment of the competence of a lawyer's practice and financial systems. In New Brunswick, for the time being, random inspections of members' files is limited to Real Estate Practice. The Barreau du Québec has established a professional inspection committee within each order. The committee is responsible to "supervise the practice of the profession by the members of the order." It has authority to conduct inspections and to inquire into the professional competence of any member of the order at the request of the Bureau or on the initiative of the committee or one of its members. The committee may recommend that the member successfully complete a period of refresher training or a refresher course or both, and restrict or suspend the member's right to engage in professional activities until that requirement is met.

Eighth Theme: Building on Experience – A National Approach

A. National Baseline Data (Recommendation 51)

RECOMMENDATION 51:
The Canadian Centre for Justice Statistics design a system and collect comparable national data on the management and performance of all civil courts with a view to identifying best practices.

Canadian Centre for Justice Statistics	Implemented	Year
	Partial	Fiscal year 2003/2004

The Canadian Centre for Justice Statistics (CCJS) reports partial implementation of Recommendation 51. The CCJS received 5 years of funding (2003/04 to 2007/08) through the Child-Centered Family Justice Strategy to develop and implement a national Civil Court Survey (CCS). In 2003/2004, the CCJS began an extensive series of consultations with its Liaison Officers Committee (LOC), the CCSO Family Justice

Committee, the Canadian Forum on Civil Justice and the Association of Canadian Court Administrators to develop survey specifications or national data requirements (NDR). In April 2004, this work was concluded and the LOC approved a final NDR. Since that time, the CCS has been implemented in 4 jurisdictions: Nova Scotia, British Columbia, Yukon, and Nunavut.

The plan is to implement 2-3 additional jurisdictions in both 2006/07 and 2007/08 (Newfoundland and Labrador, Quebec, Ontario, Alberta or the Northwest Territories). Whether or not this is accomplished depends on the jurisdictions themselves. They must be willing to participate in a project to implement the survey.

Data for the CCS are collected through the use of a computer program or interface that captures the information from the jurisdictional information system. The goal is to have all jurisdictions with automated information systems implemented by the end of the 5-year funding in 2007/08. Currently, four jurisdictions either do not have systems or do not have systems that are capable of providing data for the survey (Prince Edward Island, New Brunswick, Manitoba and Saskatchewan).

Once the 5-year funding expires at the end of 2007/08, the CCJS will need to obtain additional funds in order to continue its work on the CCS.

B. National Organization on Civil Justice Reform (Recommendation 52)

RECOMMENDATION 52:
An independent national organization on civil justice reform be created for the purposes of
a) collecting in a systematic way information relating to the system for administering civil justice;
b) carrying out in-depth research on matters affecting the operation of the civil justice system;
c) promoting the sharing of information about the use of best practices;
d) functioning as a clearinghouse and library of information for the benefit of all persons in Canada concerned with civil justice reform;
e) developing liaison with similar organizations in other countries to foster exchanges of information across national borders; and
f) taking a leadership role on information provision concerning civil justice reform initiatives and developing effective means of exchanging this information.

Implementation points:
– The organizational committee for the national organization for civil justice reform should provide a preliminary report to the CBA National Council at its mid-winter meeting in February 1997 and a final report with recommendations for the establishment of the national organization to the Council at its annual meeting in August 1997;
– The organizational committee for the national organization for civil justice reform, in accordance with its terms of reference, should devise a detailed statement of objectives for the national organization and take all necessary steps to secure funds and establish the national organization by 1998;
– Funding should be obtained from a variety of sources, including federal and provincial governments, and from the legal profession, through the CBA's Law for the Fjuture Fund, and provincial law foundations. Revenue-generating options and linkages with the private sector should also be considered; and
– The national organization on civil justice reform should be established for five years initially, with a review of its mandate and operations at the end of that time.

Canadian Bar Association	Implemented	Year
	Implemented	1998 and ongoing

The CBA reports that, in May 1998, the CBA and the University of Alberta Faculty of Law established the Canadian Forum on Civil Justice. The Board and Advisory Board of the Forum include leading members of the Bar, government, court administration, the judiciary, legal academia and the lay public from across the country. The Forum's work touches every aspect of the civil justice system in each jurisdiction, and includes access to justice issues, rules of procedure, ADR, court administration, the judiciary, the Bar, public legal education, technology and statistics.

Research – Highlights from the Forum's past and ongoing research endeavours include the following:

- The *Civil Justice System & the Public*, a $1 million research program designed to involve the public in the process of civil justice reform. The Forum conducted hundreds of interviews throughout Canada with people who work in the system and with system users to obtain information on what the public expects from our justice system.

- Research for the Canadian Judicial Council on "Self-Represented Litigants and Unrepresented Accused", to assess the nature and extent of the challenges presented across the country by these users of the civil justice system and to develop resources which will be used by the judiciary and court administrators.

- Development of a *Thesaurus of Civil Justice System Terminology* to improve bilingual and cross-jurisdictional access to the Forum's Clearinghouse and other civil justice information. The Forum believes this project will set the standard for the classification and cataloguing of civil justice materials throughout Canada.

- Planning significant research on the cost of litigation.

The Forum recently secured funding enabling it to hire a full-time Research Director who will provide long term support for its programs and allow it to better meet the many requests it receives for additional studies, consultation and reports, as well as to help build the capacity for socio-legal research in Canada.

Website: <http://www.cfcj-fcjc.org> – The Forum's website contains a searchable Clearinghouse of information with 22,000 records, a research page which provides details of its research projects, an extensive set of links to other civil justice organizations in Canada and internationally, full text copies of its publication, *News & Views on Civil Justice Reform,* and information about its *Into the Future* conference, which is being held in two parts in 2006.

Publications – The Forum publishes *News & Views on Civil Justice Reform* with updates and articles about civil justice reform initiatives throughout Canada. It also publishes reports arising from its research, and the Forum writes for other publishers.

Education and Training Programs for the Justice Community – Highlights of the Forum's accomplishments under this heading include conducting a number of CLE programs for the CBA and ACCA, developing a social context training program for the National Judicial Institute, and assisting with the development and coordination of ACCA's Education Conferences.

Education and Training Programs for the Public – The Forum is an active member of the Public Legal Education Association of Canada and works both to support the activities of PLEA providers as well as to provide information about our civil justice systems directly to the public. Other highlights of the Forum's accomplishments under this heading include working with Alberta Justice and Alberta Education to ensure that the K-12 Social Studies Curriculum Resources for the province contains a civil justice component, and teaching a Social Studies Summer Learning Institute for Alberta K-3 teachers, providing them with methods of integrating justice concepts into the new social studies curriculum.

Support for other Justice System Initiatives – The Forum provides support for a variety of initiatives aimed at improving access to justice, reducing the cost of litigation and improving the public understanding of our justice systems. In this regard, it has worked with the Alberta Justice Policy Advisory Committee and its Subcommittees, dispute resolution offices in each jurisdiction in Canada, and justice departments and ministries of the attorney general across the country. It also partnered with the Faculty of Law at the University of Alberta to explore the creation of an ADR Centre in the Law School.

In May 2006, in partnership with ACCA, the CBA and the CIAJ, the Forum hosted Part I of *Into the Future* (<http://www.cfcj-fcjc.org/conferences.htm>), a national conference on civil justice reform. This conference examined civil justice reforms that have occurred over the past 10 years since the CBA Systems of Civil Justice Task Force was released. Participants included senior representatives of government, judges, lawyers, corporate counsel, litigants, court administrators, policy makers, mediators, academics and the public. Part II of the Conference will be held in December 2006.

C. Implementation of National Agenda for Change (Recommendation 53)

RECOMMENDATION 53:
The CBA take concrete steps to implement the national agenda for change set out in this Report and work in concert with others outside the Association to achieve civil justice reform.

Implementation points:
– The immediate establishment by the CBA of an implementation committee to pursue the national agenda for change set out in this Report.

Canadian Bar Association	Implemented	Year
	Implemented	1997

The CBA reports that recommendation 53 was implemented. In 1997, the CBA established an Implementation Committee to oversee the work of implementing the recommendations. In 2000, the Committee was "sunset" at the CBA Annual meeting, as responsibility for civil justice reform devolved to the provincial/territorial committees. The remaining projects had either completed their mandates or evolved into independent initiatives.

Stage 3

In Stage 3 of the research Project, a questionnaire entitled “Creating a Vision for 2006 and Beyond” was distributed widely to Canada’s civil justice community. This questionnaire built on the objectives, fundamental parameters and philosophical premises which formed the basis for the CBA Task Force recommendations in 1996. It sought opinions on the relevance today of: the Task Force vision; the six foundational principles that frame the Task Force recommendations; the five strengths of the civil justice system identified by the Task Force; the three central issues affecting access to the civil justice system; the five major causes of barriers to access to the civil justice system; the four elements of fundamental change embodied in the 1996 vision; changes in the civil justice environment that have occurred since 1996; and the vision for a multi-option civil justice system. Finally, it inquired about an appropriate vision for this millennium.

This report follows the outline of the Stage 3 questionnaire, at times reproducing the information that was provided in it.

In total, 123 questionnaires were distributed. Of these, 52 questionnaire were completed and submitted:

Category	Distribution	Number	Responses
Government	Deputy Ministers of Justice in Canada’s federal government, 10 provinces and 3 territories	14	15 (9 from Alberta)
Judiciary			
	Appellate courts – federal, provincial and territorial	10	6
	Superior courts of first instance – federal, provinces and territories	13	5
	Provincial and territorial courts	13	6 (2 from Alberta)
Lawyers			
	Canadian Bar Association	1	1
	Law Societies in all ten provinces and the three northern territories (13 in all) as well as the Institute de médiation et d’arbitrage du Québec and the Chambres des notaires du Québec	15	4
	Association of Canadian General Counsel – distributed to 4 members	4	3
Law schools	Deans of every law school in Canada	23	3
Legal Aid	Provincial and territorial organizations	13	4
Consumers	Consumers Council of Canada	1	1
Public legal education	Distributed to organizations throughout Canada	16	4
	TOTALS	123	52

The number 52 for completed questionnaires is somewhat misleading because Alberta Justice canvassed nine constituencies within the Department. Where a constituency responded to a question, that response has been recorded as an individual submission. This fact explains the variations in the total number of responses to each question that appear in the tables that follow in this report. Also, two responses were entered for the Alberta Provincial Court.

The stage 3 questionnaire had as its primary purpose, the gathering of opinions and ideas. We do not claim statistical accuracy for the results. The results do, however, contain the opinions of a broad cross-section of persons who have an interest in the civil justice system. We believe them to merit attention by reason of the thoughtfulness of the views expressed and the broad spectrum of opinions that are represented.

In the paragraphs that follow each question, an effort has been made to capture the essence of the views expressed in the responses and to reflect their flavour. To achieve these ends, we make liberal use of the language contained in the responses. The actual words may be shown in quotations, but often they are borrowed without obvious acknowledgement.

A. THE 1996 TASK FORCE VISION

The 1996 Task Force envisaged a multi-option civil justice system that shifts the emphasis away from adversarial contestation and toward problem-solving and settlement. This vision was premised on:

- integration into the court system of various dispute resolution techniques with a focus on early dispute resolution;
- greater court supervision over the progress of cases;
- increased flexibility and proportionality in procedures through the creation of multiple tracks for dispute resolution;
- increased access through improved small claims procedures and the establishment of expedited and simplified proceedings;
- various issue-specific procedural reforms relating to such matters as discovery, disclosure and opinion evidence;
- changes in the incentive structure in litigation;
- continued use of trials as the last-resort mechanism of dispute resolution; and
- reforms at the appellate level.

B. OBJECTIVES OF THE VISION

The 1996 Task Force proposed that the success of the reforms implemented under its recommendations should be measured against their ability to promote the following thirteen objectives. It noted that in some circumstances, achieving these objectives will involve balancing competing interests (*eg*, efficiency and timeliness balanced against fairness, justice and accessibility).

1. **Justice:** The system should be just in the results obtained.
2. **Fairness:** The system should be fair and perceived to be so by
   — ensuring that parties have an equal opportunity to assert or defend their rights,

regardless of their resources;
— giving each party an adequate opportunity to advance a case and respond to the case of the opposing party;
— treating like cases alike;
— ensuring timely resolution; and
— ensuring adequate and timely disclosure,

3. **Independence:** It should preserve and promote judicial independence and the independence of the Bar.
4. **Accountability:** It should promote accountability of the courts, lawyers and legal institutions to the public.
5. **Transparency:** It should promote openness to public scrutiny and encourage public participation.
6. **Responsiveness:** It should be responsive to the needs of the persons who use it.
7. **Understandability:** It should be understandable to the people who seek to use it.
8. **Accessibility:** It should promote ready access to dispute resolution.
9. **Affordability:** It should make the justice process less costly for those involved in it.
10. **Timeliness:** It should permit and require the determination of cases within a reasonable time after commencement.
11. **Proportionality:** It should provide procedures that are proportional to the matters in issue.
12. **Certainty:** It should promote certainty to the extent permitted by the nature of a particular case.
13. **Efficiency:** It should be an efficient system with adequate resources.

1. Using these objectives as your measurement, how would you rate the success of reforms in your jurisdiction?

Total Responses	46
Highly Successful	11%
Moderately Successful	76%
Not Successful	7%
Don't Know	2%
No Answer	4%

For discussion, see question 2.

2. What are the reasons for your success/lack of success?

The majority of respondents rated the achievement of the of thirteen objectives as highly or moderately successful. Positive innovations that have contributed to successful reforms include:

- streamlined procedure or expedited action rules;
- summary trial rules;
- case management (which may contract time by reducing the number of contested motions and trials);
- court-connected mediation programs and processes for initiating mediation (although the voluntary uptake by the Bar and in-person litigants in pilot programs in Alberta's

Court of Queen's Bench and British Columbia's appellate mediation program has been disappointing); and

- Rules or Civil Code reform;
- increased monetary jurisdiction in small claims courts;
- mandatory small claims settlement conferences (where settlement is a realistic possibility);
- on-line small claims forms;
- ongoing monitoring of administrative procedures in practice (e.g., court registry, issuance of decisions);
- family law court-based information centres;
- conciliation and other family law services;
- the introduction of duty counsel;
- electronic and hard copy family law publications;
- protecting of juridical independence by establishing Judicial Compensation Commissions.

The importance of collaboration among government policy makers, the judiciary, court administrators and lawyers was emphasized.

At the same time, a number of reservations were expressed about the extent of success with reforms. Success was seen by some to be most strongly associated with timeliness, proportionality, affordability and efficiency. However, among others, these were areas in which many respondents observed little change:

- affordability (this objective may fall largely outside the courts' ability to reform);
- proportionality of process, justice and cost;
- timeliness, *eg*,
    - civil justice systems in some jurisdictions remain backlogged,
    - significant time and resources are needed to cover the long, arduous, very costly process of getting a case to trial, and
    - the discovery process needs better management;
- efficiency;
- understandability;
- accessibility (*eg*, increased small claims filing fees discourage access for smaller claims);
- complexity; and
- range of dispute resolution alternatives.

Even in light of these shortcomings, many respondents thought reforms were moving in the right direction.

Respondents identified several significant obstacles to successful reform.

Entrenchment of the current legal culture (the desire to preserve the status quo) was identified as a key impediment. For reform to succeed, respondents emphasized the importance of a "buy-in" by the persons working in the civil justice system. Reference was made to a lack of acceptance of the need for profound modification of habits and attitudes, particularly among senior litigation lawyers and some judges.

Limited resources, both financial and human, were also seen to hinder effective reform. A lack of sustainable funding for **legal aid** remains a roadblock to access to civil justice. **Aging computer systems** also slow reforms (*eg*, case management implementation).

Insufficient responsiveness to public needs, the lack of public accountability and public transparency were included as obstacles in a number of comments. A need was seen to establish a new balance between the actors in the civil justice system and the litigants.

Related observations included **increasingly widespread dissatisfaction** with civil justice in the courts, the absence of fundamental changes that acknowledge the **disadvantages faced by self-represented litigants**, and the **lack of public involvement** in the conversation about reform of the civil justice system (the conversation remains largely restricted to justice system leaders and this acts as an obstacle to significant change). Reform is needed in order to restore public confidence in the civil justice system.

Lack of hard data to guide reform attracted comment. Limited resources are available for research, to test and evaluate reform initiatives and, when initiatives prove to be successful, to implement ongoing programs.

Piecemeal reforms (tinkering with existing formats or making minor modifications to long established procedures) too often substitute for the comprehensive fundamental reform that is needed.

3(a) Are the objectives still valuable?

3(b) Are the objectives still attainable?

(a)

Total Responses	47
Yes	96%
No	0%
No Answer	4%

(b)

Total Responses	47
Yes	83%
No	6%
No Answer	11%

The majority of respondents viewed the objectives as important measurements to strive for in the effort to achieve credible service to the public. While the objectives may not be fully attainable, reform is possible and best viewed as a work in progress. Commitment to the improvement of civil justice delivery is necessary to restore public confidence in the civil justice system. This will require visionary leadership from key players in the system, significant investment in resources and technology, changes in the attitudes of players in the civil justice system, and cooperation in the coordination of services. Access to justice for all members of society is critical. The public should be engaged in discussions about “justice,” “fairness,” and the means of providing greater access. Public knowledge about efforts to improve service in the civil justice system should be promoted in order to help diffuse popular cynicism toward the courts. The new vision must be based upon a “problem-solving” approach to conflicts. As the CBA Task Force recommended, that improvement should be predicated on the implementation of a range of dispute resolution techniques. The objectives should

be prioritized and goals for action should be set. Balancing the objectives is a challenge–the inherent tensions repeatedly manifest themselves (*eg*, the principles of advocacy tend to increase the cost and length of litigation). The risk of providing poorer litigants with a more limited type of justice should be avoided. Enforcement problems and the lack of equitable jurisdiction hamper success with small claims.

4. Should the objectives of the civil justice system be revised for 2006 and beyond?

Total Responses	47
Yes	28%
No	62%
No Answer	11%

In revisiting the objectives, thought should be given to:

- viewing the civil justice system as a whole rather than restricting reform considerations to the courts;
- recognizing the real interdependence of different bodies involved in the civil justice system;
- identifying the ultimate objective of "justice delivered with dispatch";
- prioritizing the objectives and setting measurable targets with clear time-lines for achievement;
- assuring accessibility to members of racial and other minorities; and
- conducting proactive public education activities.

C. FOUNDATIONAL PARAMETERS

The 1996 Task Force identified **six fundamental parameters** to frame and shape its recommendations. They are: the role of the public; building on existing knowledge and experience; clearly expressed recommendations; the importance of judicial independence; the importance of an independent Bar; and the challenge of a national agenda. Questions 5 to 10 made statements about each of the six parameters, asked respondents to indicate the extent to which they agreed that each of the parameters provides an appropriate foundation for the creation of a vision of the civil justice system for 2006 and beyond, give **reasons** for their answers and tell about any existing or possible **reforms** in their jurisdiction that advance each parameter. Question 11 invited respondents to add to the list of foundational parameters.

5. THE ROLE OF THE PUBLIC
Members of the public must have a considerable voice in recommendations and a direct role in the reform process.

Total Responses	47
Strongly Agree	32%
Somewhat Agree	51%
Somewhat Disagree	15%
Strongly Disagree	2%
Don't Know	0%
No Answer	0%

The rate of support for a considerable public voice in recommendations and a direct role in the reform process was high. Members of the public were recognized as: the "primary users of the service"; "who we are here for"; "vital to assess key objectives"; "the persons the courts are designed for and intended to serve"; "who we aim to please"; the ones who need "to be assured there is a fair, effective (and hopefully inexpensive) and independent means for dispute resolution."

Public involvement was seen as: "important for democratic legitimacy reasons and for transparency of the system as well as making insiders aware of how the system is perceived by users"; necessary to achieve successful reform and to restore public confidence in the civil justice system; necessary to find out the public's level of satisfaction or dissatisfaction with the system; valuable in ascertaining needs "in order to gauge what services are critical to appropriately direct resources." Moreover, the public must perceive that their concerns are taken seriously.

Notwithstanding the widespread support for public involvement in civil justice system reform, reservations were expressed concerning what form public involvement should take. The importance of an aware, educated and informed public voice was stressed. One respondent observed that "[a] starting point for discussions about access to justice ... must take into account a broad definition of the justice system, one that is not merely attending court represented by legal counsel." Experience with the court system (which must fulfill the reasonable expectations of both one-time users and individuals or corporations that litigate many cases each year) would add to the meaningfulness of comments. Although the public are an important source of information, it is often difficult to determine which public voice needs to be heard and then to get the public to express their views. The public voice should be heard at the levels of principle and policy, including the development and evaluation of programs. Nevertheless, a considerable number of respondents felt that the means of translating such principle to practice should remain with government, the judiciary, court administrators and the legal profession.

Some jurisdictions have taken active steps to hear from the public. For example, in Québec, civil procedure reforms are discussed by parliamentary committees and are frequently the subject of public consultation. In 2000, the civil procedure review committee's proposals were submitted for comment to some one hundred organizations and groups, thereby providing opportunities for public input, and the public will be consulted on the reform of the *Code of Civil Procedure* in fall 2006. Québec has also established a working group to consider measures to facilitate access to justice. Manitoba has sought public input in the evaluation of the case management process in the Family Division of the Court of Queen's Bench. Alberta consulted the public during the initial phases of the process that led to the development of the Court of Queen's Bench Mediation Program. Alberta has established a Justice Policy Advisory Committee that includes members of the public, and subcommittees have been struck to focus on access to justice and initiatives for self-represented litigants. Nova Scotia has established an all-court Community Outreach Committee.

The voice of litigants in court proceedings is assisted by judge-led settlement conferencing, case management and the implementation of oral defences. Individual litigants are also assisted by online services (*eg*, interactive websites for Maintenance Enforcement Programs) and greater access to assistance (*eg*, Family Law Information Centres).

Methods suggested for obtaining public views include the use of client surveys to review programs and services, public questionnaires, taking entrance and exit polls of litigants (say, 10 questions), holding town hall meetings, and publishing proposed reforms on the Internet.

A strategy that may incite public interest in procedural reform would be "joining with universities and organizations to promote parajudicial research, which could include studying the interactions between the justice system and other social systems, such as health, education, and taxation."

6. BUILDING ON EXISTING KNOWLEDGE AND EXPERIENCE

There should be progressive evolution rather than radical departure from the existing system, with strategies and mechanisms for change built on existing work toward change.

Total Responses	46
Strongly Agree	54%
Somewhat Agree	26%
Somewhat Disagree	9%
Strongly Disagree	4%
Don't Know	2%
No Answer	4%

Respondents generally supported the notion of civil justice reform through progressive evolution rather than radical departure from the existing system. In support of evolutionary reform, they expressed opinions such as: "[t]he past has served us well – the existing system has developed over many decades and a lot good work has been done." They saw it as essential to preserve the underlying principles while testing other ways of realizing them or moving beyond them: "[s]teady evolution allows for predictability in the system while still permitting necessary changes." They observed that obtaining the necessary buy-in from stakeholders takes time: "[s]ociety evolves gradually and the courts should evolve apace." They also commented that changes must be communicated, apparent and noticeable. It is necessary to identify the barriers to change and work to overcome them. Resource management must be considered. Both new and existing systems should be constantly evaluated.

In spite of this general support, several respondents commented that progressive evolution often does not produce the desired result. Implementation delays may sap effectiveness. Reforms that take place in small measured steps "often preclude a comprehensive vision of a justice system adapted to and modeled on the needs of those involved in the system." As one lawyer observed, "[n]ecessary change may require a 'push' through legislative or rule changes" and "key leaders must become a 'vanguard of change' to lead and encourage the new way of doing things." Only radical departure may be effective in some circumstances (*eg*, where the objective is to achieve a significant change in behaviour, or where minor reforms have the tendency of "creeping back to the traditional.") As one respondent stated, the choice between evolutionary and radical reform "depends on how bad things are." However, others cautioned that "anything radical will meet with resistance" and "radical departure creates a shock to the system which would not be in anyone's interest."

Whether proposed changes are evolutionary or radical depends on what is defined as "radical." British Columbia suggests that a third option lies between these two choices, namely, "aggressive evolution." As this submission states:

> There is a real value to conservatism but at the same time the justice system must keep pace with a rapidly changing world where the demand for fast, affordable and effective dispute resolution is becoming imperative. Failure to deliver will contribute further to the diminishing public credibility of the system.

The submission continues:

> Much work has already been done in Canada, and throughout the common law world, especially in the area of conflict management theory and policy development. It makes sense to build on that body of work by considering existing reports and the range of reforms that have been tried in other jurisdictions – in other provinces and territories, in particular. It is time to stop talking about justice reform and start implementing reform initiatives in a meaningful way.

Examples of reforms that build on existing work include: summary trial rules, various family law dispute resolution options, judicial case conferences, greater access to conflict-solving processes other than trial (*eg*, civil mediation programs), revisions to small claims legislation, the introduction of new technologies. An example of a reform that was quite radical is the implementation in the Alberta Court of Appeal of a time limit on argument at an appeal hearing. Each counsel (or the party) is allocated 45 minutes within which to focus on the most important issues.

One caution is this:

> The current court process is rapidly approaching a stage where if is only accessible to the wealthy. There is a danger in initiating reforms to divert the "less wealthy" into alternatives. The objective should be equal access to the various alternatives.

7. CLEARLY EXPRESSED RECOMMENDATIONS

Recommendations should be expressed in a way that is clear, comprehensible and useful to all users of the civil justice system.

Total Responses	46
Strongly Agree	96%
Somewhat Agree	0%
Somewhat Disagree	0%
Strongly Disagree	0%
Don't Know	0%
No Answer	4%

Respondents viewed this statement as virtually unassailable. They commented that: a "common understanding is key"; "it is easy to hide behind "fuzzy" language" that doesn't clearly articular what the goal is"; the "use of plain language and simplified recommendations (as well as legislation, court rules and explanatory material) is absolutely essential"; and "the system needs to be able to communicate to all users". Reference was made to increasing numbers of unrepresented litigants. It was said that litigants find the civil justice system to be complex and difficult even when they are represented, and that, "too often, historically, reforms have been designed by judges and lawyers for judges and lawyers" whereas "the reform processes need to be more user-oriented in every respect including the language in which recommendations are framed." Members of the civil justice community, litigants and the public need to have a good understanding of the principles underlying justice reform.

Jurisdictions are now striving to use plain language in legal communications for the public. In Québec, the Ministère de la Justice promotes the use of clear language and provides various communication training programs. Alberta provides clear comprehensible language in the *Residential Tenancies Act* forms and instructions, the Provincial Court Civil Mediation Regulation, and the Self-Represented Litigant initiative as well as in brochures and on the court website. A British Columbia example is the Provincial Court Small Claims Rules. The Yukon makes several plain language publications (in French and English) available to litigants who "wish to understand the instructions they are offering their counsel or to act as self-represented litigants." Efforts to make the system clear and comprehensible in Nova Scotia include revamping its court rules and forms, introducing a court intake system in its family division, providing duty counsel and setting up family law information centres.

One respondent suggested that consideration should be given to using a "logic model" for each recommendation, establishing benchmark measures for success and building an evaluation plan into the process from the outset. Another respondent suggested that greater importance and visibility should be given to the examination of various reforms "so that the Bench, Bar associations,

governments and ultimately, the persons involved in the system, are more easily made aware of the reforms.

8. THE IMPORTANCE OF JUDICIAL INDEPENDENCE

(a) All reforms should take into account the fundamental need to preserve and enhance individual judicial independence.

(b) All reforms should take into account the fundamental need to preserve and enhance institutional judicial independence.

(a)

Total Responses	44
Strongly Agree	64%
Somewhat Agree	25%
Somewhat Disagree	2%
Strongly Disagree	2%
Don't Know	2%
No Answer	5%

(b)

Total Responses	44
Strongly Agree	86%
Somewhat Agree	9%
Somewhat Disagree	0%
Strongly Disagree	0%
Don't Know	2%
No Answer	2%

The statements about individual and institutional judicial independence both received high levels of agreement. Both forms of judicial independence are cornerstones of our democratic society, the Rule of Law and our legal system. Judicial independence best serves the public interest.

With respect to individual judicial independence, judges must be able, and be perceived, to render impartial decisions based on legal authority and principles, fair and predictable processes, and the evidence in the particular case that is brought before them. The Supreme Court of Canada has ruled on the importance of individual judicial independence in the Remuneration of Judges; Independence and Impartiality Reference Case of 1997 and the recent *Bodner* case. One important consideration regarding individual judicial independence is the ability to schedule judges to hear cases on the basis of their strengths and weaknesses in dealing with various kinds of issues. Moreover, to quote the words of one respondent, "[y]ou cannot give up on fundamental legal principles at the altar of efficiency."

With respect to institutional judicial independence, public confidence in the courts requires them to be independent from government, the Bar, lobby groups or other extraneous influences. Courts must be seen to be independent from government and the (sometimes whimsical) political process. Some respondents raised the issue of the administrative freedom of the court, saying, for example, that "[a] court that cannot administer itself free of government interference is not independent" and that courts "must possess complete administrative autonomy with a global budget that they manage themselves" as a condition of their independence. It was complained that cost conscious governments sometimes create an administrative climate that equates courts with a subordinate office of government. This is improper. The government may be a litigant before the court. Contentious issues between the government and its citizens may be brought before the court. The judiciary, in reality and in perception, must be free of any dictates imposed by other institutions.

This having been said, the judiciary have an experience and knowledge that is relevant for government to consider when reforming legislation, regulations or procedures. The government in the Yukon routinely consults the courts (*eg*, in connection with the *Interjurisdictional Support Orders Act*). Some reforms (*eg*, the use of non-traditional dispute resolution methods) may require individual judges to do things differently. In 1998, Alberta provided additional protection for independence, including financial security, in its reforms to the Justices of the Peace system.

9. THE IMPORTANCE OF AN INDEPENDENT BAR

Reforms should protect the basic right of the advocate to advance the best interests of the client fully, effectively and efficiently.

Total Responses	46
Strongly Agree	70%
Somewhat Agree	26%
Somewhat Disagree	2%
Strongly Disagree	2%
Don't Know	0%
No Answer	0%

Respondents gave strong support to the concept of an independent Bar. As the Supreme Court of Canada confirmed in *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, an independent legal profession (fully independent of the decision maker, self-regulating) is integral to our justice system. It is essential to the promotion and protection of individual rights. The principle of independence of the Bar promotes and underlies confidence in the civil justice system and court litigation. Failure to honour this principle undermines the Rule of Law and the principle of fundamental adjudicative fairness. Clients need to be able to rely on their lawyer being able to fully represent them. Confidentiality is very important.

The right of the advocate to advance the best interests of the client fully, effectively and efficiently must be exercised within appropriate ethical guidelines. Further, the right is necessarily tempered by other requirements, such as: accessibility; proportionality to the value, complexity and importance of the matter in dispute and related procedural exigencies (*eg*, limiting discovery, expert evidence, length of cases, oral argument); affordability (procedures and delays should not be used to exhaust the resources of the other party); the use of appropriate mandatory processes (*eg*, pretrial disclosure, settlement conferencing); and dispute resolution using methods other than trial. As one respondent commented:

> Use of the word "advocate" leaves the impression that the role of the lawyer is only of an advocate in the context of the adversarial model. Reforms must acknowledge a broader role for lawyers that encompasses problem-solving as well as the role of traditional litigator.

One respondent cautioned that the independence of the Bar must be preserved but "not used as a way to stop reform in the self interest of lawyers." Another respondent added the qualification that concerns about persons who are unable to instruct counsel must be considered. Yet another respondent noted that "in practical fact" many potential litigants have limited access to the services of members of the Bar.

One reform is the use of non-adversarial dispute mechanisms where appropriate. Some would argue that judges should be authorized to steer parties in this direction. Other reforms are designed to improve the knowledge of members of the public about the legal system, or to bypass the use of lawyers altogether. In the Yukon:

Self help centres, resource centres, publications that explain procedural requirements and the Internet have changed how legal services are offered and it is likely that some members of the Bar feel that this type of innovation has potential to impede their ability to advocate for a client as fully and efficiently as they would like. An example of this is recalculation models in jurisdictions, that do not necessarily involve lawyers.

When reforms are being considered, dialogue should be promoted with groups that are capable of expressing the needs of the public more directly than members of the Bar and providing a different perspective on the definition of public interest.

10. THE CHALLENGE OF A NATIONAL AGENDA

Any reforms that promote accessibility, affordability and efficiency in the civil justice system across Canada must recognize that methods of implementation will vary from jurisdiction to jurisdiction.

This statement met with strong agreement, due to the diversity across Canada of history, culture, social and economic conditions, political leanings, population demographics, geography, resources, facilities and infrastructure, availability of lawyers, substantive law, and more. Even within a single jurisdiction, regional variations may dictate different policies, different methods of implementation and different programs depending on location. In Ontario, a proposed amendment to the *Courts of Justice Act* (found in Bill 14) would permit the Ontario Civil Rules Committee to make different rules for different parts of the province. As well, the commitment to justice reform and the allocation of resources varies greatly across the country.

Total Responses	46
Strongly Agree	54%
Somewhat Agree	37%
Somewhat Disagree	4%
Strongly Disagree	0%
Don't Know	2%
No Answer	2%

Although these differences must be recognized, many respondents favoured a level of uniformity and the maintenance of minimum national standards across the country. Attending to the differences should not mean losing sight of the fundamental principles and objectives. The world has changed, clients cross borders and lawyers are mobile. The proper administration of justice is a hallmark of progressive, democratic jurisdictions and a unified provincial and territorial approach to the implementation of reform would be best. A justice system common to all Canadian citizens in terms of jurisdiction and structure would be conducive to harmonization of procedures and practices. Consideration of the law and procedures in other jurisdictions, and learning from those experiences, is key to a robust Canadian system. Some areas lead themselves to a Canada-wide approach (*eg.*, family law pretrial conciliation, mediation and other dispute resolution options, settlement conferencing and the provision of duty counsel). At the very least, it would be useful to coordinate and share “best practices” (*eg.*, collaborating around public and professional education efforts would help to minimize the resources required). However, using too broad a brush may mean accepting the lowest common denominator.

Mechanisms for exchanging information and harmonizing law and procedure already exist. An example is the Coordinating Council of Senior Officials–Family Justice (a Federal/Provincial/ Territorial group) which provides for the sharing of programs and practices across Canada. Materials are available from many sources and may be consulted. For example, civil procedure reforms in Québec involve comprehensive reflection on the civil justice system in Canada’s many jurisdictions. With regard to the delivery of information directly to litigants, the size and demographics of a

jurisdiction may lead to different approaches. For example, whereas larger jurisdictions may dedicate service centres to one area of law or practice (*eg.*, Family Law Information Centres), smaller jurisdictions may deliver a broader range of services from one centre (*eg.*, Justice Information Centres which might include services relating to financial matters, landlord and tenant matters, and so on).

11. OTHER PARAMETERS
What other parameters, if any, would you add to this list and why?

Three respondents made suggestions. The first suggestion was to add the importance of matching the dispute resolution process to the needs and expectations of the parties, that is, to ensure that the "forum fits the fuss". This suggestion assumes the existence of a wide spectrum of dispute resolution processes that are available to the parties at all stages of the dispute and mechanisms to assist the parties to select the process that best suits their type of problem and their needs. It is based on the early work of Frank Sander and his newest article: "Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centred Approach," Harvard Negotiation Law Review, Vol. 11, Spring 2006. The second suggestion was to add an "umbrella" parameter (or objective) that would ensure more accessible justice (thus at a lower cost) delivered more expeditiously: "[a]s long as the current measures do not seek essentially to reduce costs, any aims at greater accessibility are liable to remain mere 'objectives'." The third suggestion was to consider how the system is funded and how it impacts on accessibility and affordability.

D. STRENGTHS OF THE CIVIL JUSTICE SYSTEM

The 1996 Task Force identified **five strengths** of the civil justice system. They are: public confidence in the system; procedural and substantive fairness; settlement or abandonment of cases; cost-efficiency and speed of judicial resolution; and reforms and pilot projects designed to address problems. Questions 12 to 16 made statements about each of the five strengths, asked respondents to indicate the extent to which they agree or disagree that the statement accurately describes strengths of the civil justice system in their jurisdiction, give **reasons** for their answers and tell about any **reforms** in their jurisdiction that foster these strengths. Question 17 invited respondents to identify additional strengths in your jurisdiction.

12. Public Confidence in the System

(a) There is a fairly high level of confidence in the courts, judges and lawyers.

(b) Overall, the perception of fairness increases with greater contact with the civil justice system.

(a)

Total Responses	44
Strongly Agree	16%
Somewhat Agree	45%
Somewhat Disagree	25%
Strongly Disagree	0%
Don't Know	9%
No Answer	5%

(b)

Total Responses	44
Strongly Agree	11%
Somewhat Agree	45%
Somewhat Disagree	18%
Strongly Disagree	7%
Don't Know	16%
No Answer	2%

The majority of respondents had reservations about the level of public confidence in the courts, judges and lawyers, and about the notion that the perception of fairness increases with greater contact.

Some respondents stated their belief that, essentially: the system is a fair system; the public in general has confidence in the independence of the judiciary and in the quality of judgment; and first hand experience is the best education about how the system works. Other respondents were inclined to disagree with this point of view on the basis of: the apparent constant criticism by members of the public of judges, lawyers and the courts in general; the impression that persons who work in the system often have very low levels of confidence in it; and the view that litigants who have an axe to grind may never be satisfied. Public ideas about the justice system may come from skewed information in the media, and the publicity suggesting that all is not well with the criminal justice system (*eg.*, high profile wrongful conviction inquiries) which may spill over to perceptions of the civil justice system. Often, opinions about public confidence are based on anecdotal information.

Québec opinion polls apparently show a high level of public confidence in the courts but a relatively low level of confidence in lawyers. The few studies available in Alberta indicate that the judiciary and individual lawyers are most highly regarded, but that lawyers as a group, and accessibility and fairness of courts, are not as highly regarded. Empirical research in British Columbia (not yet published) indicates that litigants' perceptions of fairness vary significantly depending on many factors, including their perception of outcome. Litigant satisfaction is strongly linked to the perception of procedural fairness (*eg.*, the need to have a voice). The existence of a direct causal relationship between increased contact and a perception of increased fairness is questionable.

Public education and understanding of the system are important to public confidence. The system will be ineffective if it is perceived as "untouchable," "unknown" or "inaccessible." Public confidence is diminished by lengthy proceedings, unnecessary motions (procedural wrangling) and hearing delays, complexity and the cost of access to justice. Most people cannot afford a lawyer, but do not qualify for legal aid. These individuals are likely to view the justice system as less fair than a party who is financially well-off. As one respondent stated:

> People who do not have access to the system cannot perceive fairness in it because they believe that justice exists only "for others". Those who do have access complain of costs and delays.

Problems with the enforcement of orders also contribute to public disaffection with the system.

Reform ideas included: public education about how law works and its importance in maintaining social order and (more pragmatically) about how to use the system; more adequate funding for court administration or independent advocacy agencies to educate and assist unrepresented individuals; the creation of "information hubs" to provide point of entry information and orientation to the public; templates for use by self-represented litigants; plain language civil procedure rules; a process for complaints about registrars and clerks or a Judicial Administration Ombudsman; education programs in schools and communities to enhance the public's knowledge and confidence in the civil justice system; a full-time public information officer available to the courts; and a well-funded legal aid system and reform of legal aid financial eligibility criteria. In August 2005, Alberta convened a Justice Policy Advisory Subcommittee on Public Confidence to: identify and define issues affecting public confidence; develop options for collaborative strategies among stakeholders; and provide recommendations for actions that could be taken by stakeholders to enhance public confidence in the justice system. In British Columbia, the Self-Help Information Centre at the Vancouver Law Courts helps unrepresented litigants learn about the Supreme Court system and its procedures, get legal information, locate and fill out the relevant court forms, find out about free legal advice and find alternatives to court.

13. PROCEDURAL AND SUBSTANTIVE FAIRNESS

(a) Procedural fairness is reasonably and consistently achieved.

(b) Substantive fairness is reasonably and consistently achieved.

(a)

Total Responses	45
Strongly Agree	24%
Somewhat Agree	58%
Somewhat Disagree	7%
Strongly Disagree	0%
Don't Know	7%
No Answer	4%

(b)

Total Responses	44
Strongly Agree	34%
Somewhat Agree	52%
Somewhat Disagree	5%
Strongly Disagree	0%
Don't Know	5%
No Answer	5%

Agreement with these statements was reasonably strong, but many reservations were also expressed.

The tension between procedural fairness and affordability attracted quite a bit of comment: "procedural and substantive fairness have become luxury items that few can afford"; "[i]mbalance in the strength and means of litigants produces unwanted effects and leads to unfairness"; "[p]rocedural complexity can be used as a weapon by those who can afford it to prevail over those who can't"; "in too many cases, the procedures are too long, needless and too expensive"; "excessive use of

preliminary procedure can ultimately be a source of unfairness because of the substantial costs for the opposing party"; "[p]erfect fairness is not only impossible, the closer you try to get to it the more expensive and less accessible justice becomes ... [c]ivil justice needs to be less 'perfect' and more affordable"; and "case results may have more to do with the relative financial capacity of the parties than with the merits".

A related observation was that procedural fairness isn't just about taking all the steps in the process; it must include some appropriate use of those steps. To be fair, procedures should be proportional, affordable, accessible and timely – objectives which, for the most part, are achieved in provincial court civil proceedings.

One respondent noted the difference between objective and subjective assessments, and observed that subjective assessment will vary widely from case to case and party to party. Another respondent saw procedural consistency as a "struggle," particularly with regard to the judicial treatment of unrepresented litigants which varies greatly from judge to judge.

Useful reforms include: pre-hearing conciliation processes and substantive changes such as family law support guidelines which help to achieve consistency; family law practice notes and procedural information for self-represented litigants; the introduction of technologies and procedures aimed at improving efficiency and consistency; and the development of a system of standardized judicial endorsements. Consistency is one objective. Proportionality is another. The system cannot afford to provide unlimited process to all. Reforms should define limits and allow judges to limit the available pre-trial procedures, to ensure that it is proportional to the value, complexity and importance of the case.

14. SETTLEMENT OR ABANDONMENT OF CASES

The vast majority of cases (95 to 97 per cent) are either settled or abandoned; they do not proceed to trial.

Total Responses	47
Strongly Agree	55%
Somewhat Agree	23%
Somewhat Disagree	6%
Strongly Disagree	4%
Don't Know	9%
No Answer	2%

The rate of agreement with this statement was high. The percentages vary (*eg.*, British Columbia, 97%; Québec, 93%). They apply to proceedings in superior courts. The number of applications that proceed to trial is likely much higher in provincial small claims courts (*eg.*, British Columbia, Québec, Newfoundland and Labrador). In Québec, despite a decrease in the number of actions commenced in the past 10 years, there have been more trials.

There is a vast difference between settling an issue and abandoning it. The statistics do not tell us what percentage of cases are settled, what percentage abandoned, or the reasons why cases are settled or abandoned. Mediation and other dispute resolution methods alternative to adjudication in court may account for a large number of pre-trial settlements. In more traditional litigation, discoveries generally provide enough evidence and impetus to resolve the case. However, settlement is not always the optimal or most fair outcome. The cost, complexity and litigation pressures (emotional stress) of the current civil justice system may force people to settle cases, even strong cases, improvidently. Abandonment may be the result of frustration or lack of resources. Cases that are abandoned by defendants may go by default. In short, improvident settlements or outright abandonment may be indicative of failures

in the system and account for a subsequent lack of confidence in it. There is a need for more detailed data on all of these issues. It may be that in a truly accessible and affordable system, a higher percentage of cases would proceed to trial. The goal should be to ensure that the matters that go to trial are those that really need a trial.

Examples of reforms that promote dispute resolution at an early stage include: court-annexed mediation programs (either voluntary or mandatory participation); case management and judicial settlement conferencing; and judicial dispute resolution processes (in courts of first instance and appellate courts). The resolution of disputes as early as possible should be encouraged. A shift in focus from the outset, away from an adversarial approach and toward a problem-solving approach might help. Cases that settle at the eleventh-hour waste court resources if other cases are held up by unused court bookings. The Internet and calling of cases through cyberspace might minimize the inconvenience this type of settlement causes to the justice system. Consideration could be given to the possibility of amending commencement procedures in matters that are usually heard by default (*eg.*, liquid and exigible claims which are generally not contested): "[t]his would make the court a real forum for discussion and settlement of matters rather than a mandatory lever for forcing delinquent or procrastinating debtors to satisfy an obligation that is certain." Precedents for amended commencement procedures can be found in administrative and European law.

15. Cost-efficiency and Speed of Judicial Resolution

(a) The civil justice system provides a relatively cost-efficient judicial resolution mechanism that meets the interests of the parties.

(b) The civil justice system provides a relatively speedy judicial resolution mechanism that meets the interests of the parties.

(a)

Total Responses	47
Strongly Agree	9%
Somewhat Agree	13%
Somewhat Disagree	55%
Strongly Disagree	17%
Don't Know	2%
No Answer	4%

(b)

Total Responses	47
Strongly Agree	9%
Somewhat Agree	13%
Somewhat Disagree	53%
Strongly Disagree	19%
Don't Know	2%
No Answer	4%

Disagreement with these statements prevailed.

Respondents held the view that justice is too expensive, making statements such as: "[justice is] often not accessible for middle class citizens"; "litigation with legal representation is often affordable only to the wealthy or institutional litigants"; "efforts to simplify, expedite and limit costs seem always to have limited success"; and "the system is costly even for large companies". Comments such as these tended to be directed toward proceedings in superior courts. In contrast, small claims courts were seen as offering a fairly cost-efficient and speedy dispute resolution process. Nevertheless, in

some jurisdictions, small claims fees have been raised, reducing access to persons with little means and truly small claims.

Various explanations account for the high costs. Some respondents saw legal fees as a barrier to launching a claim, the main obstacle to cost-efficient dispute resolution and the biggest incentive to settlement. Others pointed to the labour-intensive nature of the present system, with its many, time-consuming steps and the adversarial imperative that requires lawyers to turn over every stone in case something of value lies underneath. Still others pointed to process issues such as the increasing complexity of proceedings and the length of time involved.

The connection between process and cost is apparent from the responses. The speed of dispute resolution in the superior courts is compromised by factors such as: long delays to obtain a trial date (still a problem in some jurisdictions) and the wait-time for trials; lack of strong rules to manage the discovery process (the discovery process should match the needs of the case and issues in dispute); lawyers who are not prepared and judges who ignore the problem; and numerous adjournments. In appellate courts, delays result from the time necessary to prepare appeal books and transcripts (due to the length of trials, the number of exhibits, and the amount of paper than has to be produced and copied). To counter some of these obstacles, the New Brunswick Court of Appeal has discontinued the use of printed Books of Authorities and instituted videoconferencing procedures to permit hearings from distant parts of the province without the requisite travel costs for personal appearances.

Some respondents noted that cost-efficiency and speed can be achieved if the parties and their lawyers agree. Where the parties are willing, the tools are available (*eg.*, use of mediation or other dispute resolution methods alternative to trial, use summary procedures). However, arguably, some processes end up adding another step to the litigation process, thereby adding to the cost and delay.

Reforms that have been or are proposed to respond to the problems of cost and pace include: removal of filing fees (*eg.*, Alberta has no filing fees under the *Family Law Act* for most applications); mechanisms to request a reduction in filing fees; increasing the eligibility threshold for legal aid (*eg.*, Québec, see online: www.justice.gouv.qc.ca/English/ministere/dossiers/aide/aide-a.htm); expansion of dispute resolution alternatives; more resources for the promotion of pre-trial settlement; use of provincial small claims courts for actions involving smaller dollar amounts; use of streamlined (expedited) procedure rules or summary trial procedure for claims brought in superior courts; case management; judicial intervention to ensure that cases are matched to the most appropriate dispute resolution mechanism; use of Judicial Dispute Resolution to facilitate settlement (superior courts of first instance, appellate courts); rules reform to simplify procedures and limit pre-trial processes (*eg.*, in Ontario, eliminate mandatory case conferences in simple matters that should be able to proceed directly to a motion); court information websites; and legal advice to enable self-represented litigants to successfully navigate the court system.

16. Reforms and Pilot Projects Designed to Address Problems

Reforms and pilot projects designed to address problems of cost, delay and access have been actively explored and implemented.

Total Responses	47
Strongly Agree	11%
Somewhat Agree	51%
Somewhat Disagree	15%
Strongly Disagree	9%
Don't Know	15%
No Answer	0%

Support for this statement was heavily qualified.

According to respondents, there has been much exploration of reforms but much less implementation (*eg.*, very few pilot projects). More needs to be done. However, financial resources for reform are lacking. Moreover, the legal community has not yet fully adapted to the reforms that have been implemented. One respondent observed that "[a]ny reforms that have been implemented have proven to be completely ineffective for the large lawsuit." In short, there is still a long way to go.

In addressing problems of cost, delay and access, dollars should not always dictate how best to manage a lawsuit. As one respondent observed:

> The issues in a small dollar lawsuit may result in multi-million dollar impacts in business and must be considered. As well, large dollar lawsuits can be relatively straightforward legal issues. The legal issue need to be considered and managed appropriately to its impact.

Examples of reforms that have been implemented or are proposed are: streamlined (expedited) procedures; summary trial rules; case management and judicial case conferences; multiple litigation tracks (*eg.*, early trial date for fast track litigation); a range of dispute resolution options, including judicially-assisted dispute resolution, notice to mediate, family law conciliation processes, parenting after separation sessions; monetary increases in small claims court jurisdiction; video and telephone conferencing for motions; information management system technology and court on-line services (*eg.*, online searching of documents, electronic filing of documents); websites and tools for the public (*eg.*, information kits, self-help centres); and more core resources for public legal information organizations to meet public needs for information and resources,

One respondent spoke favourably about the opportunity in British Columbia for parties to apply for trial dates as soon as the pleadings close. This means

> ... that a lot of work to prepare for the trial can take place in the time between when the trial is booked and when the trial takes place. Not having to wait until the parties are actually ready to proceed to trial (i.e. after discoveries have been completed) means that there are fewer complaints about the length of time it takes to get a trial date. The fact of the matter is that most lawyers and their clients needs the time between when the trial is booked and when the trial takes place to get ready for the trial.

At the wider policy level, British Columbia has a Civil Justice Reform Task Force with direct involvement and leadership by members of the judiciary on the Task Force and its working groups. In Québec, a government report with contributions from the judiciary, the Bar and court officers has been tabled in the National Assembly. Public consultation will ensue. Québec's 2003 reform included an evaluation component.

17. OTHER STRENGTHS
Describe any strengths in addition to the strengths identified by the Task Force that you observe in your jurisdiction today.

Respondents noted two important strengths of traditional dispute resolution in the courts. The first strength is "judicial independence and no-charge infrastructures allowing access to the civil justice system (courtrooms, digital recording, clerks, court ushers, court offices, etc.). These are the traditional system's strong points, compared to private justice (arbitration tribunals)." The second strength is governance by the Rule of Law, precedence of case law and procedural fairness.

Respondents also spoke of the high level of commitment to reform that exists among many stakeholders who are willing to work together to make meaningful change. Better forums than ever before exist for moving justice reform forward in a collaborative manner. In British Columbia, communication between the courts, the Bar and the Ministry has improved over what has historically been the case, leading to "more policy work completed and a more informed understanding of what is needed." Reform in the Yukon is "innovative, community oriented and concerned about client service." In Nova Scotia, the Department of Justice's Self-Represented Litigants Project fosters the sharing of information and the development of strategies on the issue of self-represented litigants. In Alberta, reforms at the appellate level meet every objective.

E. CENTRAL ISSUES AFFECTING ACCESS TO THE CIVIL JUSTICE SYSTEM

The 1996 Task Force identified **three central issues affecting access** to the civil justice system. They are: delay, cost and public understanding. Questions 18 to 20 were divided into several sub-questions. For each sub-question, respondents were asked to indicate the extent to which they agree or disagree that the statement accurately describes an aspect of a central issue in their jurisdiction, give reasons for their answers and tell about any related **reforms** in their jurisdiction. Question 21 invited respondents to add to the enumeration of the central issues affecting access to civil justice.

18. SPEED WITH WHICH DISPUTES ARE RESOLVED
(a) The slowness of dispute resolution is a key concern of:
(i) professional participants (judges, lawyers and court administrators);
(ii) members of the public and other users of the system.

(a)(i)

Total Responses	46
Strongly Agree	37%
Somewhat Agree	39%
Somewhat Disagree	20%
Strongly Disagree	4%
Don't Know	0%
No Answer	0%

(a)(ii)

Total Responses	46
Strongly Agree	76%
Somewhat Agree	13%
Somewhat Disagree	2%
Strongly Disagree	7%
Don't Know	0%
No Answer	2%

Respondents saw the slowness of dispute resolution as slightly more of a problem for members of the public and other users of the system than for professional participants. The desire to provide a system in which disputes are resolved in a timely manner is generally recognized. Jurisdictions are working on solutions to slowness. Goals are being set for trial within a specified number of months from filing. Slowness may have a positive side in that in some respects it may favour settlement, but it also creates stress for those who are experiencing it. Slowness may erode public confidence and increase frustration and distrust of the system. Individuals may feel that the procedures are being used to unfairly delay the process, exhaust resources and avoid reaching a hearing. The goals of judges and administrators may differ from those of litigants and lawyers. The slowness may be caused by extra-judicial events which may or may not be in the control of the parties. Some would argue that the civil justice system has some counterproductive incentives in that speed and efficiency are not always rewarded (the hourly rates approach may reward the opposite).

Reforms do or could include: increased access to and use of dispute resolution alternatives; a change in culture to improve the identification and narrowing of issues; improved entry conditions for justice system users; case management; expansion of family justice services; provision of sufficient judicial and clerical resources to staff the courts to handle the workflow; streamlined procedures; judicial intervention to stop unnecessary delays in process; and lawyer education to change the legal culture.

(b) The factors that contribute most to delay between the commencement of a proceeding and readiness for trial include:

(I) the complexity and breadth of discoveries;

(ii) lawyers' schedules and time constraints arising from practice requirements.

(b)(i)

Total Responses	44
Strongly Agree	23%
Somewhat Agree	45%
Somewhat Disagree	2%
Strongly Disagree	7%
Don't Know	18%
No Answer	5%

(b)(ii)

Total Responses	44
Strongly Agree	23%
Somewhat Agree	59%
Somewhat Disagree	5%
Strongly Disagree	2%
Don't Know	9%
No Answer	2%

Respondents generally agreed with this statement, but with qualification. The responses likely refer to superior court proceedings in that provincial small claims courts, discoveries are rarely complex, and lawyers are not usually representing the parties.

Perhaps the question should be what contributes to the delay between the development of the dispute and the resolution. Within the court system, mention was made of excessive procedures, unnecessarily broad discoveries, often trivial discovery requests, exaggerated claims in proportion to actual damage, too many expert appraisals given the nature of the dispute, and lengthy pre-trial applications and examinations. Unmanaged, one respondent saw the discovery process as an

ineffective, costly and prejudicial beast. Many respondents wanted stronger more robust rules for limiting discovery coupled with timelines.

This being said, in Ontario, the Task Force on the Discovery Process found that discovery problems arise primarily in complex cases. They do not arise in the majority of cases. One of the key problems is difficulty and delay in scheduling discoveries.

It was suggested that overall thinking about civil justice should be broader than the court system. Thought should be given to what process would be best for the particular dispute and the parties.

Reforms include: limiting oral discovery and the scope of relevance for document discovery as is done in streamlined procedure rules; and increasing the monetary jurisdiction of small claims courts to allow more cases to proceed without discovery. In Québec, the parties make an agreement on the conduct of proceedings that includes discovery examinations and expert testimony. The judge managing the case must attempt to limit the use of these procedures in compliance with the proportionality rule. British Columbia posts available court dates for all registries on the court website. This gives lawyers and members of the public accurate information about how long it takes to get trial dates – as of August 2006, it is possible to get trial dates for a 1-5 day civil or family matter within 6 months.

(c) The factors that contribute most often to delays between readiness for trial and the trial itself include:

(i) the availability of judges to conduct trials;

(ii) the large volume or backlog of cases pending before the courts;

(iii) other trial scheduling issues, for example, overbooking of trials by the courts and lengthy delays for trial dates.

(c)(i)

Total Responses	44
Strongly Agree	9%
Somewhat Agree	36%
Somewhat Disagree	20%
Strongly Disagree	14%
Don't Know	16%
No Answer	5%

(c)(ii)

Total Responses	44
Strongly Agree	11%
Somewhat Agree	25%
Somewhat Disagree	27%
Strongly Disagree	14%
Don't Know	18%
No Answer	5%

(c)(iii)

Total Responses	44
Strongly Agree	7%
Somewhat Agree	27%
Somewhat Disagree	16%
Strongly Disagree	18%
Don't Know	25%
No Answer	7%

These factors weighed in midway between agreement and disagreement, with many reservations being expressed. The considerations do not apply to appellate courts or provincial small claims courts. The availability of judges was named as a concern, as were: the availability of counsel; ensuring adequate pre-trial disclosure; last minute settlements that prevent other cases from proceeding; lack of court support staff; and under-estimation of trial time by counsel. Vast improvement has been seen over the past 10 years, such that volume and backlogs are no longer a problem in most jurisdictions, at least for short trials (1-5 days). Scheduling more lengthy and complex trials is more difficult. Where backlogs do exist, an increase in the number of judge days is needed to bring hearing times into line with reasonable expectations.

Suggested reforms include: analysis and improved screening of cases at entry; better identification of the real issues; tighter judicial case management; restrictions on adjournments to await rulings on discovery objections; reduction in written pleadings; limits on the duration of trials (a tendency towards longer trials has been observed); and technology to better manage scheduling. The indications are that mediation in child protection cases is leading to decisions made more quickly and children spending fewer days in care.

(d) Very significant delays in the time to obtain and process appeals arise from backlogs in the appellate court or other causes.

Delays in appeals do not appear to be a problem in most jurisdictions (*eg.*, Québec, Ontario, British Columbia, Alberta, New Brunswick). In northern jurisdictions such as the Yukon the Court of Appeal usually sits only once a year, so the delay can be considerable for this reason. The three northern jurisdictions have been examining the possibility of a Northern Court of Appeal. In Nova Scotia, the court is exploring appeal court dispute resolution for certain cases.

Total Responses	44
Strongly Agree	5%
Somewhat Agree	11%
Somewhat Disagree	23%
Strongly Disagree	23%
Don't Know	36%
No Answer	2%

(e) Reform measures must pay special attention to the disproportionate amount of court time required by long trials.

This statement received considerable support, but often with qualification. In general, respondents felt that long trials take up a disproportionate amount of court resources and can cause delays for other litigants. They viewed court time as a scarce resource and thought that the proportionality principle should be brought into play in considering the appropriate allocation of time to each case. According to one respondent, the key is to weed out all cases that should be settled, obtain accurate assessments of the length of those trials that must proceed, and then have sufficient courts and judges to hear them. Respondents also noted that: last minute settlements skew the assignment of court resources; reforms in family law should focus on adequate pre-trial conciliation, disclosure, and dispute resolution options alternative to trial; and lengthy trials are not common in small claims matters.

Total Responses	44
Strongly Agree	25%
Somewhat Agree	41%
Somewhat Disagree	7%
Strongly Disagree	2%
Don't Know	18%
No Answer	7%

Reform possibilities include: making case management mandatory for long trials (in Alberta, trials that exceed 25 days); narrowing the issues and shortening proceedings, by order if necessary; training lawyers in their ability to synthesize; introducing measures to limit costs; and revisiting the rules of evidence and the standard of proof (*eg.*, does growing use of a "clear and convincing evidence" test to meet the "balance of probabilities" standard contribute to longer trials?).

(f) Procedural pressure points that cause or contribute to delays and costs in complex cases include:

- ***(i) documentary and oral discovery;***
- ***(ii) interlocutory applications and appeals;***
- ***(iii) the preparation and presentation of expert evidence;***
- ***(iv) the conduct of trials; and***
- ***(v) the processing of appeals (eg.. getting leave to appeal, filing transcripts etc.)***

(f)(i) doc./oral discovery

Total Responses	45
Strongly Agree	27%
Somewhat Agree	44%
Somewhat Disagree	7%
Strongly Disagree	0%
Don't Know	22%
No Answer	0%

(f)(ii) interlocutory applic.

Total Responses	45
Strongly Agree	24%
Somewhat Agree	42%
Somewhat Disagree	16%
Strongly Disagree	0%
Don't Know	18%
No Answer	0%

(f)(iii) expert evidence

Total Responses	45
Strongly Agree	27%
Somewhat Agree	33%
Somewhat Disagree	9%
Strongly Disagree	4%
Don't Know	27%
No Answer	0%

(f)(iv) conduct of trials

Total Responses	45
Strongly Agree	16%
Somewhat Agree	38%
Somewhat Disagree	20%
Strongly Disagree	4%
Don't Know	22%
No Answer	0%

(f)(v) processing of appeals

Total Responses	45
Strongly Agree	2%
Somewhat Agree	36%
Somewhat Disagree	18%
Strongly Disagree	4%
Don't Know	40%
No Answer	0%

In Ontario, the Task Force on the Discovery Process advocated for reforms to deal with the special problems that arise with complex cases. The Task Force noted that complex cases tend to involve greater documentary and oral discovery, more motion activity, more expert evidence, and lengthier trials.

(g) With the exception of small claims procedures, the civil justice system lacks measures to avoid or limit procedural steps and requirements in cases that are not complex.

Total Responses	45
Strongly Agree	16%
Somewhat Agree	29%
Somewhat Disagree	27%
Strongly Disagree	11%
Don't Know	16%
No Answer	2%

Responses to this statement tended to gather around somewhat agree or disagree. Measures to avoid or limit procedural steps and requirements do exist. In Québec, for example, rules in the *Code of Civil Procedure* allow judges to closely manage cases and provide the means to reduce hearing times (*eg.*, oral defences, proportionality to maintain a balance between the value and magnitude of the litigation). However, "without a change in legal culture, lawyers may not seek to apply these rules and judges may not apply them." Other measures designed to avoid or limit procedural steps and requirements include: streamlined (expedited) procedures (*eg.*, in British Columbia certain procedural steps may be taken only where an applicant satisfies the judge that the cost of the procedural step is proportional to the amount in dispute); case management; summary trials; and litigation tracks (simple, standard, and customized) each with its own timetable (under consideration in Alberta). The areas of abuse most often cited include: excesses with oral discovery; document production; and the use of expert witnesses.

19. Affordability of Dispute Resolution in the Civil Courts

(a) The affordability of dispute resolution is a particularly acute concern in disputes where the amount in issue is low.

Total Responses	45
Strongly Agree	44%
Somewhat Agree	29%
Somewhat Disagree	13%
Strongly Disagree	7%
Don't Know	7%
No Answer	0%

This statement received a high rate of agreement. Respondents recognized cost as of prime concern to most users of the civil justice system. However, they did not see cost as the only consideration. They commented that: "the amount in issue may be small but the principle large"; "[w]hat matters should be the efficiency, accessibility and affordability of the process, not the size of the amount in issue"; and "[a]ffordability is a concern regardless of the amount involved, and the cost of litigation is generally disproportional to its value". Anecdotally, it is heard that individual and small business litigants are forced to abandon their claims or settle due to the disproportionate cost of discovery.

As for reform, suggested solutions to the problem include:

- using mediation or other dispute resolution options – some jurisdictions make mediation available at no cost to the user (*eg.*, family mediation in Alberta where one parent earns less than $40,000 annually and there are dependent children) or modest cost (*eg.*, a three-hour session in Ontario under the mandatory mediation program in which the cost is fixed at relatively modest levels and shared by the parties; mediation offered on a sliding fee scale in Nova Scotia);

- increasing the monetary jurisdiction of provincial small claims courts (where a lawyer is not required) – small claims courts exist to make the resolution of claims for small amounts affordable; and
- introducing reforms to keep procedures and expense proportional to the matter in issue (*eg.*, expedited procedures).

(b) Several trends or themes can be identified in considering the impact of cost on accessibility:

(i) lack of sufficient financial resources to fund the costs of litigation is a barrier to access to civil justice resolution;

(ii) more and more Canadians fall into the category of people unable to gain access to the civil justice system because of the cost.

(b)(i)

Total Responses	45
Strongly Agree	60%
Somewhat Agree	29%
Somewhat Disagree	7%
Strongly Disagree	0%
Don't Know	4%
No Answer	0%

(b)(ii)

Total Responses	45
Strongly Agree	64%
Somewhat Agree	18%
Somewhat Disagree	4%
Strongly Disagree	0%
Don't Know	13%
No Answer	0%

A high percentage of respondents agreed that the cost of litigation is becoming a barrier to more nd more people. Empirical data is lacking, but evidence of this can be seen by the growing numbers of self-represented litigants appearing in all levels of court. Members of the middle class are especially affected because they do not have the financial resources to pay lawyer fees and hourly rates and they are not eligible for legal aid. In Ontario, the Terms of Reference for the Civil Justice Reform Project note that cost and delay continue to be cited as formidable barriers that prevent average Canadians from accessing the civil justice system. However, no formal study has been conducted to confirm this perception. In British Columbia, individuals, small businesses and large businesses all report that litigation is prohibitively expensive. Business says that even if it has the money, this is not the preferred way to spend it.

Reform initiatives and suggestions include: expanding legal aid coverage; establishing *pro bono* legal clinics; self-represented litigant information and help centres; duty counsel; filing fee waiver mechanisms for low-income litigants; providing administrative recalculation services for child support; and making clients the front-line focus of court administrators.

(c) All litigants should have the benefit of cost-efficient dispute resolution services.

Total Responses	45
Strongly Agree	80%
Somewhat Agree	20%
Somewhat Disagree	0%
Strongly Disagree	0%
Don't Know	0%
No Answer	0%

Agreement with this statement was virtually unanimous, but with some reservations. One respondent agreed with this statement "only if this service is financially supported by the governments." Other reservations included recognition that public funds for private dispute resolution have limits and the observation that some nuisance litigants do not want cost-efficient dispute resolution. As well, while methods of dispute resolution other than litigation may be more cost-efficient and offer other benefits (*eg.*, a healthier way to resolve matters, more empowering, long term commitment, timely, and cost effective), the benefits may not be shared by both parties. Some respondents felt that disputants should be able to choose whether to participate in a dispute resolution method or follow the traditional path of litigation. One respondent expressed reservations about publicly funding an unnecessarily complex process.

Reforms include: court-connected mediation programs; judicial case conferences; improving access to legal aid; streamlined procedures; and summary trials.

(d) The public has an interest in maximizing the use of scarce public resources through an efficient civil justice system.

Total Responses	44
Strongly Agree	68%
Somewhat Agree	25%
Somewhat Disagree	0%
Strongly Disagree	2%
Don't Know	5%
No Answer	0%

The rate of agreement with this statement was high. One respondent claimed that the public wants systems that are effective and efficient, and resources that can effectively manage those systems. They want one-stop shopping. They do not want to travel to several different locations to secure the public services, including court services, they require. Another respondent suggested that the public would like to have a flexible, accessible and efficient justice system. Yet another respondent felt that efficiency should respect the requirements for judicial independence. In a contrary view, one respondent asserted that effectiveness matters more than efficiency. The point was made that most cases do not require final adjudication by a court and that court resources should be preserved for the few cases that merit this approach. A further point was that more legal aid funding might be available for cases that require legal services for best results if scarce resources were better managed. A question to ask is whether we should accept that public resources are scarce when it comes to funding such an essential part of the constitutional system.

Reform suggestions included: identifying cases that are capable of settlement at an early stage and directing them to an appropriate process for a fast resolution; simplified procedures; and video- and tele-conferencing to enable the court to hear and decide motions or appeals where the parties are in different locations.

20. PUBLIC UNDERSTANDING OF THE WORK OF THE COURTS AND THE SYSTEM AS A WHOLE
(a) Many aspects of the civil justice system are difficult to understand for those untrained in the law. Barriers to understanding include:
(i) unavailability and inaccessibility of legal information;
(ii) complexity of the law, its vocabulary, procedures and institutions; and
(iii) linguistic, cultural and communication barriers.

(a)(i)

Total Responses	46
Strongly Agree	22%
Somewhat Agree	48%
Somewhat Disagree	26%
Strongly Disagree	2%
Don't Know	2%
No Answer	0%

(a)(ii)

Total Responses	46
Strongly Agree	43%
Somewhat Agree	46%
Somewhat Disagree	9%
Strongly Disagree	2%
Don't Know	0%
No Answer	0%

(a)(iii)

Total Responses	46
Strongly Agree	35%
Somewhat Agree	46%
Somewhat Disagree	15%
Strongly Disagree	2%
Don't Know	0%
No Answer	2%

These statements attracted agreement, but with considerable qualification. Respondents observed that there will always be barriers. Barriers not listed in the statement in 20(a) include: inconsistency in the application of procedures and outcome; the numerous choices that have to be made among options; and difficulties in the courtroom for persons who are not represented (particularly in the superior courts of first instances).

With respect to the availability of legal information, several respondents commented that through websites sponsored by the courts, government, law societies, Bar associations, and public legal education organizations, more information about the law and legal process is available than ever before (*eg.*, especially in the areas of family law and civil debt actions brought in small claims court). The difficulty for lay persons is finding and understanding that information. It is not organized to be available in one place. The law is complicated and while attempts are being made to write publications in plain language, the processes remain complex and difficult for a non-lawyer to understand and the materials are often too complicated for the average person. More information about alternative administrative resolution options needs to be disseminated. The fine line between information and legal opinion tends to restrict the scope of the information provided. As well, the quality of the information varies. All too often, public perceptions of the civil justice system are influenced by much inaccurate information, whether word-of-mouth stories from friends or family who had a slow or expensive experience, or from TV and news accounts. The referrals that are made do not always lead persons to the information they need.

With respect to the complexities of law, its vocabulary, procedures and institutions, these are major obstacles for those who attempt to rely on the civil justice system. The law and legal processes, perhaps understandably, are not user-friendly from the lay perspective. That is to say, it may be unrealistic to think the system can be too greatly simplified. Some respondents felt that not enough value is placed on educating citizens about the law. Programs are needed to explain, popularize and demystify the civil justice systems for the public. The education system fails to educate youth about the law and legal institutions. Public legal information organizations are under-resourced. The superior court system was not designed for self-represented litigants. These persons consume much time, and have many questions.

With respect to linguistic, cultural and communication barriers, it was observed that these barriers can plague any system. Public exposure to our institutions is a key element of trust in the system. People who have had adverse experiences with the legal system in their country of origin may lack trust in the legal system and choose not to litigate. English or French may not be their first language and they may not be comfortable communicating. Litigants who do not understand the extent of the legal issue may not communicate all the details to those they speak to in the legal system.

The respondents report an impressive array of reform initiatives to overcome these barriers. Rules of court are being rewritten to maximize clarity and make them more user-friendly. Justice departments and courts are providing public legal information to assist litigants in bringing or defending claims (available on websites, in courthouses and other public venues). Some jurisdictions provide internet access to court forms. The Alberta Court of Appeal has posted check return forms for the majority of its procedures on the Alberta Courts' website. These forms provide step-by-step instructions to lawyers and litigants on certain processes. The Court is currently exploring the option of audio clips to supplement the forms.

Pro bono clinics have been a very positive contribution, and self-help centres are being developed. British Columbia is hoping to take the self-help centre concept one step further by creating an information and assistance "hub." This "hub" will serve as a front door to the justice system. It will be a place that is well-known to the public and easy to find, where people can obtain access to all of the information, services and advice they require to move forward with their legal problems. It will: coordinate and promote existing legally-related services; provide legal information; establish a multi-disciplinary assessment service to determine the legal problem and provide referrals to appropriate services; and provide access to legal advice and representation, if needed, through a clinic model.

Family law reforms abound. In Alberta, the goals of clearer language and process have guided implementation of the new *Family Law Act*. Litigants are now able to choose their court (provincial family court or the Court of Queen's Bench), the forms are consistent, intake workers are available to assist litigants, and legal aid is available to assist persons in provincial court proceedings. A Self-Represented Litigants Advisory Committee was formed in August 2005 to respond to issues involving Self-Represented Litigants. One of its projects is a mapping exercise designed to document the range of government and non-government services and supports currently available to self-represented litigants in Alberta, and to record the referral networks and other relationships that may link these services together: "[b]y mapping services, supports, and referral networks, insight will be gained into the issues surrounding current service delivery to self-represented litigants and may uncover possible ways of bringing services more closely in-line with the needs of this growing group".

Suggestions for further reform include: broadening information sources and increasing direct access lines to information centres; providing more resources for public education organizations; providing additional human resources to assist self-represented litigants; making additional resources available to immigrants and marginalized people; exploring alternatives to the written language materials to ascertain if there are other mediums that might be better able to assist; and meeting educational needs by "beginning at the school level and proceeding through systematic and sustained age-appropriate treatment".

(b) Without assistance it is difficult, if not impossible, to gain access to a system one does not comprehend.

Total Responses	46
Strongly Agree	57%
Somewhat Agree	33%
Somewhat Disagree	4%
Strongly Disagree	0%
Don't Know	4%
No Answer	2%

Respondents expressed strong support for this statement. Several respondents commented that the court system would work much better if everyone was represented by counsel. One respondent suggested that, ideally, the process should be so simple and easy to navigate that everyone could afford counsel for at least summary advice about how to proceed.

Obviously, to have access to justice, one must understand how to gain that access. When referral networks are linked together, gaining access is possible and perhaps less difficult. Some persons have the will and resources to access the system but others (the majority) need assistance or they give up. Court administrators try to provide assistance where necessary. However, a tension exists between providing users with more information on the one hand and reducing the costs of justice to encourage representation by counsel rather than self-representation on the other hand. The steep learning curve for litigants who are unrepresented is best addressed by having representation. However, some litigants manage to adequately represent themselves, often depending on the nature of the proceeding.

Research in British Columbia shows that self help information services are used only by relatively sophisticated litigants, with above average levels of education and some technological know how.

Reforms to assist include: the publication of brochures; website information; public education classes (*eg.*, parenting after separation seminars); the expansion of family justice services (*eg.*, mediation and intake); legal aid expansion; and the provision of duty counsel. Reforms that would help include: accurate information and referral tools; a review of procedures in order to simplify them ("do they have to be so complicated?"); the services of "court workers" whose role would be to provide litigants with information before the hearing begins; and the unbundling of legal services (which is being studied by law societies).

(c) Present procedures are complex for
(i) unrepresented parties;
(ii) represented parties who have the benefit of professional advice.

(c)(i)

Total Responses	46
Strongly Agree	63%
Somewhat Agree	26%
Somewhat Disagree	4%
Strongly Disagree	2%
Don't Know	0%
No Answer	4%

(c)(ii)

Total Responses	46
Strongly Agree	11%
Somewhat Agree	41%
Somewhat Disagree	24%
Strongly Disagree	20%
Don't Know	0%
No Answer	4%

Respondents strongly regarded procedures as complex for unrepresented parties, and complex but far less so for represented parties. Generally, non-lawyers have a hard time understanding legal procedures. The complexity also extends to the related rules of practice and substantive law. Even those with counsel often find the process intimidating and foreign. Whether represented parties understand the procedures or not depends on the extent to which their lawyers explain the procedures and the degree to which the parties are capable of grasping them. Although a competent lawyer can explain the process to most people, lawyers sometimes forget that their clients need to understand and have control over their own disputes. Moreover, the lawyer may believe that their client understands more than he or she actually does – clients may be reluctant to ask questions about the process and, if being billed by the hour, clients may want to limit the costs by limiting contact with the lawyer.

The problems tend to exist in the superior court. Lay litigants may have no difficulty with the small claims process ("whose simplicity may confound lawyers, especially the more senior ones"). Changes that provide for simpler, more straightforward processes in smaller value cases help (*eg.*, streamlined litigation process, larger value for small claims) but, even with reforms, the procedures are inherently complex for many people. It is also important to remember that simpler or less complex is not always the route to due process.

Regarding reform, if the move toward parties seeking to represent themselves is to be minimized, the Bar must take measures. Many reforms to assist the understanding of lay persons have been initiated. They include: simplifying processes and the rules of court; providing members of the public with accurate information about procedures (in plain language, whether written or oral); improving the referral tools; delivering better overall education about the legal system starting with the school system; and improving the dialogue between lawyers, law societies and legal information groups about the issue of litigant understanding. By way of example, in Ontario, material prepared by the Ministry of the Attorney General for litigants in the Small Claims Court and the Superior Court of Justice provides information about court procedures and direction on completing various forms (http://www.attorneygeneral.jus.gov.on.ca/english/courts/default.asp). In addition, the Ministry has created a website where all court forms may be accessed and completed electronically (http://www.ontariocourtforms.on.ca/english/).

(d) This complexity can be traced to various sources, including:
(i) the current state of rules of procedure;
(ii) a multiplicity of practice directions
(iii) obscure and uncertain substantive law.

(d)(i)

Total Responses	45
Strongly Agree	24%
Somewhat Agree	53%
Somewhat Disagree	13%
Strongly Disagree	0%
Don't Know	4%
No Answer	4%

(d)(ii)

Total Responses	45
Strongly Agree	18%
Somewhat Agree	33%
Somewhat Disagree	22%
Strongly Disagree	9%
Don't Know	16%
No Answer	2%

(d)(iii)

Total Responses	45
Strongly Agree	4%
Somewhat Agree	53%
Somewhat Disagree	20%
Strongly Disagree	7%
Don't Know	11%
No Answer	4%

Support for these statements tended to come with reservations. Several additional sources of complexity were identified. These include: the complex regulatory system and complex legal language; the litigant's ability to comprehend and retain information; a lack of understanding of the different levels of court; a lack of customer service-oriented staff who have the time to explain the variety of courts and options; the geographic distance between different levels of court; the inability for a litigant to pick up relevant documents from each location, even if the document relates to a different court; and the lack of a good on-line guide to the courts.

Respondents recognized the complexity of both procedural and substantive law, explained at least in part by reason of the fact that the adversarial system is designed for parties represented by lawyers: "[t]he rules and practice directions have traditionally been written for the legal profession" which is "why the language used is complicated and not understandable for the ordinary citizen". This is slowly changing. The rules and practice directions are being supplemented by other, simple documentation such as check return forms. However, in the words of one respondent, "[t]here is a limit to which vulgarization [plain language] can be effected beyond which procedural fairness may be compromised."

With respect to the rules of procedure that govern superior courts of first instance and appellate courts, respondents commented that these rules have been written for experts, namely lawyers. Although they could be modified somewhat, in general they are not more complex than is required for the conduct of procedures that ensure a substantive and procedurally just outcome. It would be unwise to attempt to simplify them to the extent that they lose all meaning and value. Lay persons object that the rules are not recognized or not explained well.

With respect to the multiplicity of practice directions, "[practice directions provide assistance to those who can read and understand them". They are written for legal practitioners and not for the self-represented. Some jurisdictions have reissued them and, in so doing, reduced the number and resolved any conflicting directions. Other jurisdictions do not see practice directions as a problem.

With respect to the substantive law, some respondents disagreed with the statement that the substantive law is obscure and uncertain in most areas. However, they recognized that unrepresented persons would find it very difficult to ascertain the applicable legal principles. No

matter how clearly the substantive law is expressed, “non-lawyers are unlikely to perceive it as simple since it is frequently abstract, technical and outside the experience of the general public”.

Reform steps that have been taken include: rewriting court rules to simplify matters; revising, rewriting and consolidating practice directions in an effort to ensure that they are clear and concise; publishing amendments at regular intervals (*eg.*, twice a year) rather than sporadically in order to eliminate the problem of constantly changing rules and provide some stability in practice for both the profession and private citizens; making information more accessible (*eg.*, publishing rules and court processes on court websites and on CanLII.org, establishing self-help centres); providing duty counsel; and *pro bono* initiatives.

Additional suggestions include: providing plain language guides to procedure; attaching the relevent procedures to the specific statute; and undertaking statutory reform to modernize and simplify the law.

(e) Linguistic, cultural and communication barriers prevent many citizens from entering the unfamiliar, imposing and complicated environment of the courts.

Total Responses	46
Strongly Agree	39%
Somewhat Agree	41%
Somewhat Disagree	9%
Strongly Disagree	2%
Don’t Know	4%
No Answer	4%

This statement received considerable support, often with qualification. General observations included the fact that “[w]e live in a society which welcomes and celebrates linguistic, cultural, ethnic and religious differences”. However, “barriers such as these may be inevitable in a pluralistic society”. Our justice system is “based on one tradition and it is the glue that holds all of the other parts together”.

No jurisdiction reported having empirical data to support this statement. Therefore, we don’t really know the number of persons who need the civil justice system but are unable to access it due to language or cultural barriers. Nevertheless, the barriers are recognized anecdotally, especially in large urban centres. A disconnection exists between the persons who design forms, procedures and other plain language materials (who usually have a post graduate education) and the intended user. The vocabulary may be too technical and forbidding for persons with low levels of literacy. Persons whose first language is not French or English will have additional barriers to overcome (in some parts of Canada, Francophones may not have access to civil proceedings in French). Individuals from other cultures who have had negative experiences with the justice system in another country require specific education, not just translation. Cultural difficulties are present in remote northern communities.

Reforms that will help include: simplifying civil procedure rules; designing forms and other materials with the user in mind; helping service providers to assist people who are involved, or have the potential to be involved, in a court matter by providing them with accurate information and referral tools; utilizing native mediation and peace making models and healing circles; covering interpreter costs; collaboration between courts and legal education providers; collaboration between courts and self-help centres in developing tools and information booklets to enable self-represented litigants to work their way through the system (*eg.*, in British Columbia, this assistance includes drafting guidebooks for various court procedures such as preparing affidavits, preparing an application, appearing in Chambers); and increasing the number of education materials available in languages

that reflect the ethnic make-up of a jurisdiction (*eg.*, in British Columbia, Chinese, Punjabi, Korean, Tagalog, Spanish, etc.).

Empirical studies should be undertaken to find out who is affected by these barriers and in what way. The impact of immigration and changing demographics should be recognized when developing plans for service delivery.

21. OTHER ISSUES
Describe any additional central issues affecting access to the civil justice system in your jurisdiction today and tell us about any related reforms.

A number of other issues that affect access to the civil justice system were identified. Delays in filling judicial appointments in the superior courts cause delays in the disposition of civil cases: "[g]overnments should be required to appoint judges at predefined and mandatory times so that the courts of justice always have the staff prescribed by the law and are consequently able to meet demand". Transportation to centralized justice centres is a problem for persons living in rural areas. Legal aid's narrow funding focus creates barriers for unrepresented individuals coming before tribunals (e.g., utility review boards, child protection hearings). The low monetary jurisdiction for small claims is a problem in some jurisdictions. Psychological barriers also affect access (*eg.*, "the judge won't understand me"; "it's my word against his"; "general lack of confidence in ability of public institutions to meet needs of people"; general lack of self-esteem – worthiness to receive help, be believed, warrant compassion".

On a positive note, the judiciary, justice officials, the private Bar, legal aid bodies and other members of the civil justice community recognize many of the barriers. This is an essential first step towards reform.

F. CAUSES OF BARRIERS TO ACCESS TO THE CIVIL JUSTICE SYSTEM

The 1996 Task Force identified **five major causes** of barriers to access to the civil justice system: lack of sufficient user orientation; complexity and inflexibility; impact of traditional approaches to litigation; inadequate management tools and resources; and accountability and transparency of the system. Questions 22 to 26 made statements about the causes of barriers to access and asked respondents to indicate the extent to which they agree or disagree with the statements, give **reasons** for their answers and tell about **reforms** in their jurisdiction that lower these barriers and improve access. Question 27 invited respondents to identify additional barriers to civil justice in their jurisdiction.

22. Lack of Sufficient User Orientation

The absence of a user-oriented or client-focused perspective

(i) is a leading cause of erosion of public confidence in legal institutions;

(ii) contributes to delays, costs and lack of understanding.

(i)

Total Responses	45
Strongly Agree	13%
Somewhat Agree	53%
Somewhat Disagree	13%
Strongly Disagree	4%
Don't Know	11%
No Answer	4%

(ii)

Total Responses	45
Strongly Agree	24%
Somewhat Agree	49%
Somewhat Disagree	11%
Strongly Disagree	2%
Don't Know	9%
No Answer	4%

This statement was strongly supported, but with qualification. Respondents stated that we need to make the system user friendly. Some processes are user-oriented. Provincial small claims courts are an example. However, the superior court system was not designed for laymen. It was designed with the expectation that professional legal assistance would be available and used. Modernization, and a move away from doing things "because they have always been done that way", is necessary in order to reduce delays and increase public confidence in the courts. In Alberta, the Justice Policy Advisory Subcommittee on Access to Justice looked at the current environment to determine what kinds of programs are currently operating. It found that a number of user-oriented or client-focused programs are available to assist individuals. Unfortunately, governments in some jurisdictions have slashed budgets for court offices, thereby reducing the availability of services to the public and producing less stability in the remaining services, leading to reduced opportunity to inform the public. One of the difficulties in providing a user-oriented or client-focused perspective may be the absence of an easy way to solicit public input and accommodate the needs of all users. In Alberta, the Justice Policy Advisory Subcommittee on Access to Justice is working towards understanding public perceptions and expectations of the justice system by developing and implementing an integrated approach for researching justice issues and the best way to address these issues. Overall, despite the efforts that have been made, too many people still believe that the institution lacks consideration for them.

Reforms that are being taken to respond to user or client needs include: revised civil procedure rules; more accessible information sources (*eg.*, court websites); better intake systems; mediation or conciliation services; duty counsel; self-help centres; information hubs; and assistance in completing forms. Other reforms that would help include: reducing the amount of paper required for litigation; addressing scheduling inefficiencies; and reinvesting in human capital in the court offices.

23. Complexity and Inflexibility

(a) Required or optional procedural steps create too many opportunities for extensions of time, reopening of earlier decisions, and litigation of minor points.

Total Responses	45
Strongly Agree	29%
Somewhat Agree	36%
Somewhat Disagree	16%
Strongly Disagree	9%
Don't Know	7%
No Answer	4%

This statement received strong support, but with qualification. In support of a variety of procedural steps, respondents suggested that reducing the ability to use procedural steps could be viewed as limiting one's rights under the justice system. One respondent pointed out that:

> Regardless of focus or aim of rules of court, whether rules require a step or make it optional, there will always be the opportunity for extensions of time; re-opening of earlier decisions, *eg.* dispute over contents of a case conference memorandum as to what litigants are expected or required to do, and the litigation of minor points.

Litigants who are not interested in resolving a lawsuit sometimes use the rules relating to procedure for delay but the rules in most jurisdictions specifically disentitle the parties and counsel from engaging in these practices. Moreover, courts today are generally vigilant to prevent abuses. Nevertheless, one respondent expressed the view that the steps create too many adjournments.

The rules of procedure were seen to work where litigants take reasonable positions and competent lawyers by-pass the opportunities to prolong the proceedings for more expedient routes.

Reforms that address the problem identified in the statement in 23(a) include: simplified and streamlined rules and procedures, particularly for simpler or lower value cases; case management; and judicial conferences. In the last few years, the Alberta Court of Appeal has implemented several self-policing initiatives designed to keep appeals moving and heard on an expedited basis, while minimizing delay. Should a party fail to comply with prescribed timelines, consequences exist.

(b) The uniform application of procedures to most disputes results in a lack of procedural flexibility and an inability to match procedures to disputes.

Total Responses	45
Strongly Agree	11%
Somewhat Agree	40%
Somewhat Disagree	18%
Strongly Disagree	7%
Don't Know	20%
No Answer	4%

This statement received only moderate support. Respondents spoke of a need for procedural certainty: "[t]tailoring the application of procedure to a specific dispute, if done as a general practice, is likely to lead to procedural unfairness." Procedures should be predictable. A certain standard of uniformity must prevail. We must endeavour to develop uniform procedure of a nature that simplifies justice and makes it more accessible.

The problem was seen to lie in the practical application of the procedures. The procedure should be flexible but it should not be applied so differently to specific cases that it would engender a sense of unfairness between individuals and between individuals and enterprises. The principle of proportionality should be observed. For example, lawsuits involving a simple, straightforward issue may require limited or no

oral discoveries. Even in small claims, when the jurisdiction reaches $25,000 or more, there needs to be procedural proportionality. The rules in most jurisdictions allow parties to apply to the court for directions about the procedural course that should be followed in a particular proceeding. The court then has discretion to decide whether to allow a deviation from the rules of procedure that are ordinarily applied in such cases.

In the area of reform, streamlined procedures and summary trial rules help produce the desired result. Individualized attention is given in case management and pre-trial conferences, with the result being more procedural flexibility. Case planning conferences which allow the judge to match the dispute to the process most suitable for the circumstances of the case could be employed. It is suggested that civil procedure rules be designed with the unrepresented litigant in mind or that a simplified set of rules be written for them: “[t]he Rules shouldn’t be used as a means to "weed out" unrepresented litigants.” Alberta provides a High Conflict Consultant to assist high conflict families by reviewing procedures and services with them.

(c) The complexities of substantive law (increasing regulation, rules and judge-made law)
(i) give rise to greater uncertainty about the possible outcomes of civil disputes;
(ii) require lawyers and judges to keep abreast of vast amounts of legislative and regulatory information and to research its application in specific cases, which in turn has an impact on time and costs.

(c)(i)

Total Responses	44
Strongly Agree	9%
Somewhat Agree	52%
Somewhat Disagree	23%
Strongly Disagree	7%
Don’t Know	5%
No Answer	5%

(c)(ii)

Total Responses	44
Strongly Agree	27%
Somewhat Agree	50%
Somewhat Disagree	14%
Strongly Disagree	5%
Don’t Know	2%
No Answer	2%

This statement received moderate support, with qualification. Respondents made comments along the following lines: Resolving differences of opinion about substantive legal issues is what civil litigation is all about. Cases may be more complex than ever before but there is nothing new here. A degree of uncertainty is inherent in the tradition of the common law system and has allowed the development of the law to meet changing values and expectations. Some complexities are unavoidable. It is the mission of lawyers and judges to have the required professional expertise by keeping informed about changes in legislation and regulations. Expertise is presumed and ought not to impact on the time and cost of litigation. Competence should not be an obstacle but rather an advantage characteristic of law professionals. Lack of uniform application of substantive law may give rise to greater uncertainty of outcomes than does the volume of complexities of substantive law.

Respondents observed that the complexity of today’s cases causes judges and their staff to spend considerably more time researching statutes, regulations, case law and the legal literature available

on the subject to ensure that they fully understand the situation. Articled clerks and paralegals undertake a lot of the research. As well, strides in technology (*eg.*, on-line research, on-line posting of court decisions) have improved access to developments in case and statute law for judges, lawyers and the public.

Codifying the law was not seen to be the answer to the concerns. The "codes" that could be put in place would necessarily create a new body for substantive law of the interpretation of the "code". Strong judges, with practical experience and versed in the area of law in the case before them will result in better, more consistent decisions of substantive law.

The suggestions for reform are related to financial support. Governments should provide Increased financial assistance to train judges and to assist the Bar in the training of lawyers. Delays could be minimized by the provision of additional judicial and staff resources.

24. IMPACT OF TRADITIONAL APPROACHES TO LITIGATION

(a) The desire to preserve the status quo creates barriers to substantial change in many aspects of the system.

Total Responses	47
Strongly Agree	26%
Somewhat Agree	40%
Somewhat Disagree	11%
Strongly Disagree	6%
Don't Know	11%
No Answer	6%

There was a high rate of agreement with this statement, with qualification. One respondent would rephrase the statement as a resistance to change from the present way of doing things rather than a positive desire to preserve the status quo. However phrased, this "culture issue" was seen as a huge barrier: "[t]he beliefs, values and assumptions inherent in the adversarial model about how to manage conflict are deeply held and often not available for examination, and therefore highly resistant to change, even in the face of evidence that they don't work." Citizens do not want the status quo. They want a justice system that is responsive to their needs on a timely and cost-effective basis.

While it is true that the legal world has a long conservative tradition, nevertheless courts have been proactive in studying the need for change and in introducing important changes over the past several years (*eg.* case management, judicial dispute resolution). Lawyers have also introduced innovative practices (*eg.*, collaborative law). Judges, lawyers and court administrators would like to see streamlining. When problems are identified, there is generally a strong willingness for change to occur. A greater impediment to change may be the lack of well thought out, feasible alternatives. Without clear alternatives for improving the system, combined with measurable results, it is difficult to build a consensus for change.

On the other side of the coin, some respondents saw it to be in the interest of an independent Bar to retain systems and procedures that require their expertise and training. One jurisdiction reported resistance from the Bar to family law reform (*eg.*, changes in language, process and forms were seen as unnecessary). The general resistance to change may suggest that a gradual incremental approach to reform should be taken:

> Before changes can be accepted and implemented, it is necessary to critically examine the problem, carefully consider reform options and their potential impact, educate the profession and the users of the court on the reforms, and confirm that the system is

able to accommodate the proposed reforms. These steps take a significant amount of time.

Once a reform is implemented, it is necessary to evaluate its success before further reforms are implemented.

It is clear from the responses that the legal culture must change in order to accommodate modern day commercial and social needs. This change can be achieved partly by introducing new processes and rules and partly by education (*eg.*, presentations to law firms and the courts, training modules). As can be seen from the vast array of reforms identified in the responses to questions in the *2006 and Beyond* questionnaire, this cultural change is well under way.

(b) Many of the reasons for opposing change proceed from a focus on the desirability of trials rather than the desirability of early resolution of disputes.

Total Responses	47
Strongly Agree	4%
Somewhat Agree	30%
Somewhat Disagree	30%
Strongly Disagree	13%
Don't Know	17%
No Answer	6%

Respondents tended to disagree rather than agree with this statement. Most lawyers and litigants would prefer mutually agreed resolutions of cases rather than the costs of a trial. Generally, lawyers settle cases. As the statistics show, cases rarely go to trial. However, many lawyers manage them as if they do: it is "[n]ot so much a desire for trials as a persistent focus on trials as the 'usual' or default outcome of a litigated matter." Often, the settlement comes after a great deal of time-consuming and costly process – the proverbial "settlement on the court house steps". This may lead to the public perception that trials are the first resort for resolving civil procedures, not the last resort.

In cases where litigants are unable to settle the matter amongst themselves, it is suggested that many lawyers are unsure about alternative methods for resolving disputes (*eg.*, mediation). Lawyers are often not trained in early dispute resolution techniques, and active use in practice may be discouraged by senior members of the profession. The reasons for opposing change "often reflect a knee-jerk reaction to the unknown and the comfort afforded by the status quo." It is also possible that trials are still the preferred option for dispute resolution because judges (and juries) are seen to be objective, impartial and fair – other modes of dispute resolution may not be so widely trusted.

Lack of alternative dispute resolution mechanisms may be another reason for too great a focus on trials. We need many different roads to resolution so that the process can be designed to fit the dispute. Trials are necessary and the best option in some cases, but definitely not all.

Work is being done to change the legal culture with respect to dispute resolution processes, and users welcome real improvement. One respondent observed that "[m]any members of the Bar feel that caseflow management is cashflow management and that timely resolution of files is to their advantage." Although there may still be some lawyers who use delays and superfluous procedures to "milk" files, it is likely that they constitute a small minority.

Reforms that are being introduced include: a requirement for parties to appear personally at a case planning conference where the judge will encourage a less adversarial, more "problem solving" approach to the dispute (*eg.*, judicial case conferences in British Columbia's Supreme Court and

judicial settlement conferences in British Columbia's provincial court for small claims, child welfare and family cases); caseflow conferencing; case management; court-connected mediation programs; mandatory sessions with court-appointed mediation officers (*eg.*, in Alberta, for variation of family law support orders); collaborative law; and, in family law cases involving children, parenting after separation seminars. Efforts are also being made to educate lawyers to methods of dispute resolution other than traditional adversarial litigation leading to trial. Court staff and government personnel make presentations to law firms about the court-connected mediation programs; law schools are offering courses in dispute resolution alternatives to traditional litigation; and public legal education organizations are educating the public generally. In Alberta, all civil government lawyers have the opportunity to take training in alternative dispute resolution methods.

(c) Dispute resolution techniques should be promoted as integral components of the civil justice system, not alternatives to it.

Total Responses	47
Strongly Agree	53%
Somewhat Agree	36%
Somewhat Disagree	2%
Strongly Disagree	4%
Don't Know	2%
No Answer	2%

This statement received strong support both with and without qualification. The goal of the civil justice system should be to respond to the fundamental needs of citizens. Respondents felt that the point of the system should be to resolve conflicts, not try cases: "[w]e should have a dispute resolution system, not a trial system."; "[t]he goal of all practice should be to resolve the client's issue in a fair, equitable, and cost effective manner; the goal should not be to get to trial." Given that the majority of cases settle, the system needs to support that process.

The dispute resolution technique employed should be tailored to fit the nature of dispute – alternative dispute resolution is just one component of a multi-door justice system. We need trial (and the impartiality of the courts), it is plainly indispensable, but we do not need a trial-focused system. Some respondents viewed alternative dispute resolution processes as fair and transparent, giving parties a greater investment in outcomes and some responsibility for the cost of procedures, and functioning as a healthier and more empowering way to solve matters than traditional litigation in cases where relationships are ongoing. These processes may increase the likelihood of an appropriate solution but they still require legal information and remedies for enforcement purposes. Other respondents held to the view that parties should only go to other dispute resolution mechanisms if they all agree. Disputants should not get swept away into procedures that do not do justice to their case.

Cost efficient resolution is an objective. Sometimes the alternative dispute resolution technique is no less costly or complex than a traditional lawsuit. Additional dispute resolution procedures may simply add additional procedures to the process (one respondent objected that "mandatory mediation has not achieved the right balance in terms of cost and often extends the process by putting litigants and lawyers who are not open to mediation through another step").

A distinction should be made between dispute resolution methods that are instituted and conducted by the judiciary and those that are undertaken at the parties' initiative. Some dispute resolution techniques may be best employed outside of the civil justice system or civil court system.

Existing reforms include the many reforms listed after the statement in 24(b). Other suggestions are: give judges greater authority to refer cases to dispute resolution processes; and, in family law matters, provide families with both legal resources and dispute resolution options to get the job done.

(d) A preoccupation with gaining advantage through an adversarial approach too often has the result of displacing substantive communication, common sense and a problem-solving orientation to resolving disputes.

Total Responses	47
Strongly Agree	40%
Somewhat Agree	45%
Somewhat Disagree	9%
Strongly Disagree	0%
Don't Know	2%
No Answer	4%

This statement received strong agreement, both with and without qualification. Respondents commented that the adversarial imperative results in a much too labour-intensive (and therefore expensive) process. As well, adversarial procedure does not adapt well to some types of conflicts (*eg.*, family matters and claims of lesser monetary value). We need new ways to approach conflicts in these and other areas.

The Ontario Discovery Task Force found that problems with discovery are often attributable to a general erosion of civility by reason of the conduct and tactics of counsel. It noted that lawyers in smaller communities or who practice in specialty areas tend to be more collegial, perhaps because their paths cross frequently or because they are well known to the presiding judiciary. The Task Force recommended the adoption of best practices to assist the profession with greater communication early in the litigation process, as a measure to promote early settlement of disputes.

In large part, the preoccupation of lawyers with gaining an advantage through an adversarial approach has to do with how lawyers are trained. In addition, clients often instruct lawyers to proceed through traditional channels. Some respondents expressed the view that gaining advantage through an adversarial approach, based on the proper facts and law, can contribute to more substantive communication and earlier resolution. Unfortunately, however, there are lawyers who favour the adversarial battle rather than resolution of the dispute in an efficient manner.

Many of the reforms that are underway in Canadian jurisdictions are designed to encourage substantive communication, common sense and a problem-solving orientation to disputes by fostering frank, without prejudice, discussions between the parties: see the reforms listed after the statement in 24(b). Lawyer education about reforms to improve access and promote dispute resolution processes other than court adjudication must also be addressed.

25. INADEQUATE MANAGEMENT TOOLS AND RESOURCES

(a) Courts lack basic management tools and resources, as indicated by:

(i) the lack of statistical data on the system and its efficiencies (or inefficiencies);

(ii) absence of adequate and modern management information systems;

(iii) reliance on incomplete or unreliable statistics;

(iv) impossibility of comparative and constructive analysis due to different assumptions made in assembling data;

(v) inadequate technological infrastructure of courts in many jurisdictions.

(a)(i)

Total Responses	47
Strongly Agree	34%
Somewhat Agree	34%
Somewhat Disagree	13%
Strongly Disagree	4%
Don't Know	15%
No Answer	0%

(a)(ii)

Total Responses	47
Strongly Agree	30%
Somewhat Agree	32%
Somewhat Disagree	11%
Strongly Disagree	9%
Don't Know	19%
No Answer	0%

(a)(iii)

Total Responses	47
Strongly Agree	19%
Somewhat Agree	26%
Somewhat Disagree	13%
Strongly Disagree	6%
Don't Know	28%
No Answer	9%

(a)(iv)

Total Responses	47
Strongly Agree	23%
Somewhat Agree	28%
Somewhat Disagree	11%
Strongly Disagree	4%
Don't Know	34%
No Answer	0%

(a)(v)

Total Responses	47
Strongly Agree	32%
Somewhat Agree	26%
Somewhat Disagree	6%
Strongly Disagree	4%
Don't Know	28%
No Answer	4%

These statements generally received more support than not, but with much qualification.

With respect to the statement in 25(a)(i), some provinces have introduced or are working on technologies that provide advanced data collection and analysis abilities. The leading examples are British Columbia and Ontario. In British Columbia, the Court Services Branch has done considerable work to improve its electronic civil case tracking and management systems, including the development of the Civil Electronic Information System (CEIS) which stores case-tracking information and the Civil Management Information System (CMIS) which allows the information to be retrieved and analyzed. The Provincial Court of British Columbia now knows to the minute the length and number of cases in all areas of jurisdiction in 88 locations. Whereas, historically, system design decisions were based on assumptions and anecdotal perceptions about what is going on inside the civil justice system, projects are underway to provide systems that are capable of supporting true information-based decision making. In Ontario, the Court Services Division of the Ministry of the Attorney General recently implemented a new electronic case tracking system in all of its civil court

locations. The system, called FRANK, automatically monitors regulated time periods for individual cases; provides an automated index of cases; and generates many required forms, notices and court lists and provides a calendaring and scheduling tool for trial schedulers. Data from FRANK is collected on a provincial basis to allow statistical information to be drawn on civil case activity. FRANK encourages greater consistency in business practices and improved accuracy of statistical data collected. In addition, various quality assurance mechanisms have been implemented to ensure data accuracy. Through FRANK and staff with expertise in data management, Court Services Division of the Ministry of the Attorney General is able to better track and report on civil case activity.

Other jurisdictions are taking steps to replace technologies that are antiquated and ineffective. Alberta is one such example. The existing systems in Alberta provide a limited amount of statistics to inform evidence-based decision making. Implementation of a modern Justice Information Management System (JIMS) is beginning. For the situation in Québec, see the "Rapport d'évaluation de la Loi portant réforme du Code de procedure civile" (available at: www.justice.gouv.qc.ca/francais/publications/rapports/crpc-rap4.htm).

With respect to the statement in 25(a)(ii), several provinces still lack adequate and modern information systems. The main reason for delays in implementation is the expense. For example, in the Yukon, the court information system is almost 20 years old. While the process of replacing it is now underway, it will take at least 4 years to put in place a system that will provide comprehensive and accurate information as well as integrated service.

With respect to the statement in 25(a)(iii), the lack of effective basic management tools and resources necessitates reliance on incomplete or unreliable statistics.

With respect to the statement in 25(a)(iv), the lack of infrastructure and technical resources funding is a major obstacle to comparative and constructive analysis. All too often, the data sets (for different courts or for districts within a single court) are not comparable, as is illustrated by the absence of reliable cost and performance data.

With respect to the statement in 25(a)(v), the courts and other justice system administrators are aware of the inadequacies in their infrastructure and strive for improvement.

In the area of reform, various jurisdictions are looking at better ways to improve the collection and retrieval of data and to measure their activities in order to align them with their desired outcomes for the justice system. Clear objectives with measurable results are needed, and measurable results require an information baseline from which to measure success. The management tools, together with adequate resources, should be standardized across the courts so that subsequent analyses are able to provide a comprehensive vision of the justice system based on a uniform source of information. An integrated information system that provides a case inventory and a complete listing of events and filings as well as a comprehensive report functionality for data presentation would save staff time and make an overall case management approach much easier.

(b) The management structure of many courts does not encourage a general sense of responsibility to the public.

Total Responses	46
Strongly Agree	15%
Somewhat Agree	24%
Somewhat Disagree	28%
Strongly Disagree	7%
Don't Know	26%
No Answer	0%

There was an almost even split between those who agreed and those who disagreed. The management of the courts is generally shared between court administrators (government) and the judiciary. These persons are increasingly sensitive to the needs and expectations of the public. However, the interactions of the courts with the public are restricted by the very nature of the judicial function. The absence is not in the will to perform but in the tools to effect this result. It is possible that the greatest sense of responsibility to the public is in smaller locations where contact with the public by management is greatest.

Courts have varying structures and often different administrative autonomy from jurisdiction to jurisdiction. Judicial independence may produce varying practices across a jurisdiction.

Ontario has taken various management initiatives in order to ensure that court staff are responsive to the needs of the clients who use the courts. For example, Court Services Division has adopted a 5-Year Plan, which sets out various service standards that it has committed to. In its annual report, the Court Services Division reports on whether or not it has met the service standards set out in the 5-Year Plan. The Yukon uses a Court Services Executive Board to jointly approach issues. Officials in Alberta Justice fall into a chain of command that is ultimately accountable to the head of the department. They have day-to-day interaction with the public.

One respondent stressed that it is important for the policy makers and administrators to have a clear understanding of the deliverable expectations.

Of those who felt that a general sense of responsibility to the public is lacking, one respondent suggested that the stakeholders, particularly lawyers, may not be candid about the accountability issues because of a concern about being perceived as criticising a judge or manager, which would not be good for their practice. Another respondent commented that the status of courts that have no administrative autonomy as “perpetual beggar” discourages any sense of responsibility.

Suggestions for reform are: give courts greater administrative autonomy and make them accountable through mandatory public reports; undertake initiatives to better inform the public about the responsibilities and operation of particular courts (*eg.*, self-help information centres; and self-help kits and interactive online forms).

26. ACCOUNTABILITY AND TRANSPARENCY OF THE SYSTEM

(a) It is difficult for persons not intimately involved with the civil justice system to know whether the federal or provincial government is the responsible authority on a given issue.

Total Responses	45
Strongly Agree	33%
Somewhat Agree	49%
Somewhat Disagree	7%
Strongly Disagree	0%
Don't Know	9%
No Answer	2%

The majority of respondents agreed with this statement. Federal systems are complicated. Where an issue falls between two or sometimes three levels of government, obtaining information can be a problem. Many of the responsibilities are constitutionally mandated, but the dividing line between the respective powers of the federal and provincial governments is not always clear. Where there is overlapping jurisdiction, the issue of paramountcy adds to the complexities (*eg.*, provincial jurisdiction over family law as a matter of property and civil rights under the Constitution, but federal jurisdiction over divorce law, which takes precedence in matters of support and child custody). The complexities may exist within a jurisdiction (*eg.*, in family law, spouses have to go to a superior court for the division of property, but may be in provincial court for custody and access matters; in some jurisdictions, "unified" family courts serve urban centres, but not rural areas). Administrative arrangements between federal and provincial or territorial governments add to the complexities. Understandably, all of this is confusing for the public.

Suggested reforms involve making more information accessible to the public.

(b) Inadequate transparency in the operation of the civil justice system
(i) undermines public understanding;
(ii) gives rise to suspicions that something is being hidden or obfuscated.

(b)(i)

Total Responses	45
Strongly Agree	22%
Somewhat Agree	51%
Somewhat Disagree	9%
Strongly Disagree	0%
Don't Know	16%
No Answer	2%

(b)(ii)

Total Responses	45
Strongly Agree	13%
Somewhat Agree	49%
Somewhat Disagree	13%
Strongly Disagree	4%
Don't Know	18%
No Answer	2%

These statements received highly qualified agreement. Certainly, members of the public do not always recognize the extent to which the civil justice system affects all our lives until they, or a relative, colleague or friend, has to go through a civil court process. The problem may be more one of complexity than of transparency: "[o]ne can see through the veil but the body has more parts than the beholder had hoped to witness."

Holding suspicions about something being hidden or obfuscated was not seen to be a widespread problem, although a minority of unsuccessful litigants may feel this way.

The point was made that transparency requires effective systems and procedures. These will go along way toward ensuring enhanced access and transparency within the system.

Reforms that have been implemented or are being considered include: plain language information booklets; simplified forms; self-represented litigant initiatives; public education programs; aiming information about the reform agenda not just at judges, lawyers and administrators, but also at the public and the politicians (*eg.*, reports and recommendations); and replacing aging information systems with modern technology which will enhance access to all courts (*eg.*, in family law matters, Alberta is working towards "one family, one file" so all relevant information is held in one place).

(c) Lack of public understanding of the civil justice system affects the extent of public demand or support for additional resources for the system, making it particularly vulnerable to budget cuts.

Respondents generally agreed with this statement, but with more reservations than not. One reservation arose from the absence of empirical evidence to support this statement. All components of the civil justice system were regarded as vulnerable because of a lack of public understanding. Evidence of this comes from budgets that fail to keep up with the demand for legal services (*eg.*, legal aid availability, inadequate courthouse access, unfilled judicial appointments). Although the justice system is foundational to the operation of all other social institutions, its foundation (like those of other structures) is not visible.

Total Responses	44
Strongly Agree	25%
Somewhat Agree	45%
Somewhat Disagree	14%
Strongly Disagree	0%
Don’t Know	14%
No Answer	2%

The civil justice system was seen as a poor cousin (“we do not have the political weight”) to health and education institutions. The impacts of health or education funding are more apparent to the public so, in the political competition for scarce government dollars, health and education spending will usually trump justice spending. The criminal justice system has more political profile than the civil, so when funding does come it is more likely to be for the criminal side.

As for reform, extensive public education should be undertaken.

27. Other Barriers to Access

Describe any barriers to access in addition to the barriers identified by the Task Force that you observe in your jurisdiction today, and tell us about reforms that lower these barriers and improve access.

Respondents identified a number of factors that contribute to public frustration with, or unwillingness to use, the justice system. These included: lack of knowledge, support or financial means; fees and other costs; and time. In addition, in a small jurisdiction, it is sometimes difficult for litigants to find representation, due to conflicts, especially in complex, multi-party actions.

Self-represented litigants were seen as a challenge. The numbers appear to be increasing. Fees and other costs associated with lawsuits are a major factor. However, one respondent opined that the "tendency to promote access by self-represented litigants [is] based on the mistaken belief that most are self-represented because of their inability to pay" and that, "[i]n fact, most are self-represented because their cases lack basic merit and by facilitating access by them the courts are clogged and those on the other side are put to unnecessary hardship." Reforms to ameliorate the cost barrier include the waiver of fees in cases of legal aid representation, in family law actions or, in other actions, by court order on the basis of means.

Other barriers to access include: psychological barriers (*eg.*, see the comments on the statement in 21); battle fatigue; physical barriers (*eg.*, distance from legal services and the courts, transportation issues); and the failure to recognize the problem as having a legal dimension. In Alberta, the strong economy and growing population are creating resource pressures for the provincial government (*eg.*, living allowances are offered to persons who work in the areas most impacted so that the government is able to compete with oil and gas companies to attract and retain staff).

The courts in Québec have made a case for the creation of a unified trial court: see *A Judicial Reform Based on the Needs of Citizen: Report of the Reflection and Orientation Committee on Courts of First Instance in Québec* (April 2005). In the opinion of one respondent, the integration of the jurisdiction of provincially - and federally - appointed judges into one court "would allow for more judge days and facilitate greater cohesion and effectiveness of the justice system as opposed to a court organization of the "silo" type (closed jurisdiction between the various courts managed differently from one court to the other), that is, based on the jurisdiction of each court."

G. ELEMENTS OF FUNDAMENTAL CHANGE IN 1996 VISION

The 1996 Task Force vision for civil justice in the twenty-first century embodied **four elements of fundamental change** from the civil justice system that existed in Canada in 1996. They were responsiveness to the needs of users and encouragement of public involvement; the provision of many options for dispute resolution; a framework managed by the courts; and an incentive structure that rewards early settlement and values trials as a last resort. Questions 26 to 29 made statements about the elements of fundamental change. Respondents were asked to indicate the extent to which they agreed or disagreed with each statement, give **reasons** for their answers and tell about any related **reforms** in their jurisdiction. Question 30 invited respondents to suggest elements of fundamental change they would include for 2006 and beyond.

28. RESPONSIVENESS TO THE NEEDS OF USERS AND ENCOURAGEMENT OF PUBLIC INVOLVEMENT

In responding effectively to community needs, challenges for the civil justice system include

(i) attention to the principle of equality;

(ii) adherence to the principles of substantive and procedural fairness for all.

(i)

Total Responses	45
Strongly Agree	53%
Somewhat Agree	33%
Somewhat Disagree	2%
Strongly Disagree	0%
Don't Know	4%
No Answer	7%

(ii)

Total Responses	44
Strongly Agree	61%
Somewhat Agree	27%
Somewhat Disagree	2%
Strongly Disagree	0%
Don't Know	2%
No Answer	7%

This statement received strong support, with some qualification. Equality and fairness are (or should be) hallmarks of the justice system. Citizens expect lawmakers and the public administration to uphold the fundamental principles of equality before the law and fairness and to treat them in accordance with those principles. One respondent cautioned that the more rules we create to try to achieve perfect justice or complete fairness the less accessible the process becomes.

By way of reform, it is suggested that the civil justice system should "develop mechanisms for listening, be responsive to expressed needs, and assess its approach and projects in the light of these principles."

29. Many Options for Dispute Resolution

(a) The court system should provide users with a broad array of integrated dispute resolution options focussed on early settlement (e.g., mediation, early neutral evaluation, judicial settlement conferences and mini-trials, consensual arbitration and adjudication).

(b) Trial should be only the final stage; access to a trial or hearing followed by (subject to appeal) a binding decision imposed on the parties by a judge should be restricted in the first instance.

(a)

Total Responses	46
Strongly Agree	57%
Somewhat Agree	37%
Somewhat Disagree	2%
Strongly Disagree	0%
Don't Know	0%
No Answer	4%

(b)

Total Responses	46
Strongly Agree	22%
Somewhat Agree	26%
Somewhat Disagree	24%
Strongly Disagree	13%
Don't Know	7%
No Answer	9%

The statement in 29(a) received strong support. The rates of agreement and disagreement with the statement in 29(b) leaned slightly toward support.

With respect to the statement in 29(a), respondents noted that the existing law in most jurisdictions already provides a number of mechanisms for dispute resolution. They supported the idea that more choices should be available, with strong systems or procedures in those choices. Although the courts may encourage the use of one or another dispute resolution option that focuses on early settlement, they should not assume responsibility to provide all the alternative methods: "some options for dispute resolution may not be best housed within the judicial and/or court system"; "cheaper and better private options are available". Moreover, it may not be possible for a jurisdiction to provide a wide variety of dispute resolution services (*eg.*, in a small jurisdiction, the choice is likely to be more limited). Furthermore, although early settlement may be the goal, the path to getting there must be tested for efficiency. In some cases, alternative choices may produce better outcomes. In other cases, the commitment to case conferences and continuing records actually prolongs proceedings and makes them more complex.

With respect to the statement in 29(b), many respondents opposed mandatory requirements to use non-traditional options, stating that the parties should be helped and encouraged to solve their disputes without a trial; however, if they cannot, access to a trial should not be denied. They stressed that trials are an important part of the civil justice system and should not be considered the result of a failure. Trials before judges should not be viewed as the worst option in all cases.

Many respondents opposed the idea of restricting access to a binding decision imposed on the parties by a judge. In their view, access to a trial within a reasonable time, at reasonable cost, should be one of many options available in a multi-option civil justice system. In fact, one of the goals of reform in British Columbia is reduce costs and delays within the court system with a view to

increasing the capacity of the system to provide timely trials in all the cases that need them. Some respondents felt that an early trial without the use of other types of dispute resolution should be available as of right: “[d]espite being desirable, other dispute resolution options must at no time constitute a barrier”; “[s]ome matters need to just go to trial as quickly as possible”; “[i]mposing compulsory preliminary procedures will add to expense and delay”. In Québec, section 23 of the Charter of Human Rights and Freedoms guarantees the right to a public and impartial hearing. Moreover, restricting access to a trial may not be appropriate in all situations (*eg.*, where there is an imbalance of power or control because of a history of family violence or economic circumstance, the “weaker” party may feel compelled to choose a non-trial alternative even if it is not the most appropriate). One respondent noted that if the litigation route was more efficient, there would be less need to envisage integrated dispute resolution options that aim at early settlement. Another respondent warned of the danger of trials becoming an option only for the wealthy or the represented litigant. Other respondents accepted the idea that all cases should be subject to careful consideration, as a part of the court process, with respect to whether trial is the "right" or best option.

As for reform, the court systems in a number of jurisdictions already provide a fairly broad array of integrated dispute resolution options focussed on early settlement. These include: mediation programs or processes; judicial conferences; judicial dispute resolution opportunities; court-appointed dispute resolution officers for certain categories of case (*eg.*, in Alberta, in cases seeking variation of a family law support order); and special services for particular types of case (*eg.*, in Alberta, a residential tenancy dispute resolution service). What litigants need is a full range of options with information and education about the merits, appropriateness, and cost of each.

30. FRAMEWORK MANAGED BY THE COURTS

(a) The court should play a larger role in facilitating settlement through

- ***(i) court supervision of the progress and pace of cases;***
- ***(ii) the integration of non-binding dispute resolution focussed on early settlement.***

(b) Multi-option civil justice should encompass a series of dispute resolution tracks, all of which provide an opportunity for early consensual resolution and the possibility of a trial.

(c) Disputants generally should select a process that is appropriate for resolving their dispute.

(d) A mandatory process should be required for particular classes of cases (e.g., claims that lend themselves to simplified or expedited proceedings).

(e) The entry point to the multi-option system should be the commencement of an action or other formal initiation of court process.

(f) To ensure an informed choice, the system should provide expressly for the availability of “point of entry” advice to disputants before the commencement of formal court action.

(a)(i) Court Supervision

Total Responses	46
Strongly Agree	39%
Somewhat Agree	46%
Somewhat Disagree	4%
Strongly Disagree	0%
Don't Know	7%
No Answer	4%

(a)(ii) Dispute Resolution

Total Responses	46
Strongly Agree	35%
Somewhat Agree	48%
Somewhat Disagree	4%
Strongly Disagree	2%
Don't Know	9%
No Answer	2%

(b) Multi-option D.R

Total Responses	46
Strongly Agree	37%
Somewhat Agree	52%
Somewhat Disagree	2%
Strongly Disagree	0%
Don't Know	7%
No Answer	2%

(c) Resolution Process

Total Responses	46
Strongly Agree	39%
Somewhat Agree	46%
Somewhat Disagree	7%
Strongly Disagree	0%
Don't Know	7%
No Answer	2%

(d) Mandatory Process

Total Responses	46
Strongly Agree	43%
Somewhat Agree	37%
Somewhat Disagree	4%
Strongly Disagree	0%
Don't Know	11%
No Answer	4%

(e) Entry point

Total Responses	46
Strongly Agree	35%
Somewhat Agree	39%
Somewhat Disagree	9%
Strongly Disagree	7%
Don't Know	9%
No Answer	2%

(f) Informed Choice Advice

Total Responses	46
Strongly Agree	52%
Somewhat Agree	24%
Somewhat Disagree	4%
Strongly Disagree	9%
Don't Know	9%
No Answer	2%

All of the statements in question 30 received support, both with and without qualification. One respondent noted that the statements confuse the terms "courts", "court system" and "civil justice" and explained that:

> The courts are tasked with deciding disputes and although encouraging settlements may be part of their mission, it must not be their primary role. The purpose of case management is to ensure the efficient conduct of proceedings, not to promote settlements. Civil justice is a different matter; the law and the public administration may offer options that more broadly target dispute resolution processes and the establishment of information and assistance programs.

With respect to the statement in 30(a), an action can be managed in a number of ways. The people involved are often best positioned to come to the best resolution for themselves. Most respondents agreed that the courts have a place to assist with the management of cases (*eg.*, where it is clear that court time will otherwise be required). Several jurisdictions already do a lot of case management, especially for longer trials (20 days or more). In some jurisdictions, the rules provide judges with the authority to order parties to attend settlement conferences. One respondent expressed the opinion that the appropriateness of the resolution process can only be assessed once the issue is joined. Another respondent was in favour of early mediation but thought that "early" mediation should be conducted through the private sector. Other respondents held the view that the courts exist to try cases and hear appeals; they should not assume jurisdiction for authorizing or supervising all forms of dispute resolution. In some cases lawyers should be left alone to deal with cases as they see fit: "[g]ood lawyers know when they need help from a judge to settle a case".

With respect to the statement in 30(b), respondents felt that the introduction of dispute resolution tracks would have to be well researched and monitored in order to work efficiently in practice. Point of entry advice should be available before disputants choose any dispute resolution track.

With respect to the statement in 30(c), respondents agreed that disputants should be able to select a process appropriate for them. Comments included the following: "[this might mean not seeking the involvement of the court at all"; "[litigants] should be able to select another process if the first is unproductive"; "insofar as [the process] is recognized in a procedural rule"; and "while parties should have a variety of options, in some cases it may be appropriate for a judge to refer them to a specific kind of dispute resolution." The possibility of implementing a mandatory process is under study in Québec.

With respect to the statement in 30(d), this approach has been taken in some jurisdictions (*eg.*, expedited actions in Manitoba). Several respondents were opposed to mandatory process requirements (*eg.*, "nothing should be 'mandatory' without input from the parties"; "ADR should be an option of either party in the litigation, and not mandatory"). One respondent emphasized the need to be very careful in selecting these classes of cases. Another respondent suggested that the entry point should be when pleadings are closed. Yet another respondent would not want to restrict the availability of procedures to particular cases – the options should be "available throughout, when case/facts/parties lend themselves to effective use."

With respect to the statement in 30(e), some respondents felt that it should be possible to enter the system (*eg.*, to get information and possibly even to formally explore settlement) without having to formally commence an action or without having to initiate or trigger the litigation process. A related view is that certain dispute resolution processes (*eg.*, mediation) should be available to a disputant who, after receiving point of entry advice, decides not to commence a formal court action. Currently, some services (*eg.*, family court counsellors) don't require the filing of a formal court action before services are provided.

With respect to the statement in 30(f), respondents generally agreed with the importance of providing individuals, particularly unrepresented litigants, with point of entry advice early in the process so that they are not confused or overwhelmed and can make the most appropriate choice. This was seen as the first step toward the quick and cost-effective resolution of a matter. Perhaps the information and assistance should be available much earlier than the eve of action commencement because generally people want to solve their own problems. One respondent commented that point of entry advice implies making lawyers available to disputants and questioned whether this should be the role

of the courts. Providing assistance with navigating court forms and explaining the process may be more appropriate.

Reforms that are in place or underway include: mediation programs (*eg.*, in Alberta, including court power to award costs in a case of non-attendance and failure to obtain an exemption); mandatory attendance at parenting after separation seminars in family matters (*eg.*, the Alberta seminars educate litigants about the benefits of cooperation rather than litigation); caseflow and intake regulations for family matters; court-appointed dispute resolution officers (*eg.*, variation of support orders in family matters); judicial dispute resolution; information centres to assist litigants; and policy and planning initiatives for self-represented litigants (*eg.* Alberta's Self-Represented Litigant Initiative).

31. INCENTIVE STRUCTURE THAT REWARDS EARLY SETTLEMENT AND VALUES TRIALS AS A LAST RESORT

(a) Various incentives and sanctions should enhance possibilities for early consensual resolution.

(b) The system should provide the opportunity for an early adjudicated resolution where early consensual resolution is not achieved.

(a)

Total Responses	46
Strongly Agree	30%
Somewhat Agree	43%
Somewhat Disagree	7%
Strongly Disagree	7%
Don't Know	11%
No Answer	2%

(b)

Total Responses	46
Strongly Agree	37%
Somewhat Agree	39%
Somewhat Disagree	4%
Strongly Disagree	9%
Don't Know	9%
No Answer	2%

These statements received strong support both with and without qualification.

With respect to the statement in 31(a), consensual resolution was seen as desirable, "if that is what the parties want." Litigants should be encouraged to be realistic and settle rather than use court resources to resolve small differences: "[t]hose cases capable of settlement should be settled early and those cases that require a trial should get to trial quickly". However, consensual dispute resolution is not the best solution in all cases. Trial should be an option: "[t]here are times when forcing parties to attend mandatory mediation, etc. is a waste of everyone's time and the best option would be to provide an early date for a trial or application before a judge"; "[t]here should be a direct path to timely adjudication in appropriate cases."

Respondents expressed many reservations about the use of incentives and sanctions. Many felt that litigants should not be penalized for seeking a court hearing if they feel it is the most appropriate option. Others wondered how dispute resolution could be consensual if there is an incentive to adopt it or a sanction for not adopting it. If used, the sanction and incentives should be very carefully

designed and considered by both Bench and Bar before a position is taken. They should not be too numerous and they should not impact disproportionately on poorer litigants thereby denying equal access.

With respect to the statement in 31(b), respondents agreed that where there is no early consensual resolution, litigants should be able to set the matter down for timely and efficient resolution by adjudication.

On the subject of reform, some incentives and sanctions have already been implemented. One example is the opportunity to proceed with an oral defence (*eg.*, in Québec). Rules regarding "compromise using court process" provide another example:

> Defendants who pay money into court or make an offer of judgment may be awarded costs if the plaintiff fails to recover more than the sum paid in or a more favourable judgment than the one offered. Likewise, Plaintiffs who offer to settle may be awarded double costs if they recover judgment equal to or more favourable than the one offered.

32. OTHER ELEMENTS OF FUNDAMENTAL CHANGE
Describe any additional elements of fundamental change that you would include in your vision of the civil justice system for 2006 and beyond.

Responding to the needs of self-represented litigants should be a priority for fundamental change. An incentive for early consensual resolution would be a reduction in court tariffs. In addition, focus should be placed on implementing a structure to allow for quick hearings of cases if the parties choose a summary or streamlined procedure once they have opted not to proceed with a consensual resolution mechanism.

H. CHANGES IN THE CIVIL JUSTICE ENVIRONMENT SINCE 1996

The items in this section made statements about changes in the civil justice environment that are seen to have occurred since 1996. In questions 33 to 42, respondents were asked to indicate the extent to which they agreed or disagreed with each statement made, give **reasons** for their answers and tell about any related **reforms** in their jurisdiction. Question 43 invited respondents to describe changes in addition to those set out in the questionnaire.

33. SELF-REPRESENTATION

The number of self-represented litigants in the civil justice system has grown significantly since 1996.

Total Responses	44
Strongly Agree	52%
Somewhat Agree	23%
Somewhat Disagree	0%
Strongly Disagree	2%
Don't Know	20%
No Answer	2%

This statement received strong agreement. In the superior courts, the number of self-represented litigants was seen to have increased exponentially in the last few years. The time required by judges, lawyers, and staff to deal with these self-represented litigants was also seen to have increased. However, these are anecdotal observations. Reliable statistical data is generally lacking (*eg.*, data in British Columbia does not show an increase, but the data is said to have many gaps). The increases are not as apparent in provincial small claims courts where most cases do not involve lawyers because of the cost. In some jurisdictions, the small claims numbers have been more or less stable even with monetary increases in jurisdiction (*eg.*, British Columbia, Newfoundland and Labrador).

Self-represented litigants were seen as a diverse group with different levels of ability and different reasons for representing themselves. Two types were identified: those who are representing themselves by choice, and those who have little or no choice but to represent themselves. Reasons given for the apparent increase in numbers are: rising costs due to the complexity of cases (affecting uncertainty and duration); the cost of legal assistance (high professional fees); relatively static legal aid eligibility guidelines; lack of available services; a negative experience with the legal profession; the case is simple and does not require legal representation; or self-represented litigant believes they can do just as well on their own.

Reform initiatives include: revision of court rules; self-help information centres; duty counsel; family justice innovations; and Alberta's Self-Represented Litigants Initiative.

34. USE OF PRIVATE ARBITRATION

The use of private arbitration to resolve disputes has increased since 1996

(i) pursuant to agreement negotiated by the parties;

(ii) pursuant to use of standard form contracts proffered by the party with the greater knowledge and means (e.g., a commercial or government body).

(i)

Total Responses	43
Strongly Agree	28%
Somewhat Agree	21%
Somewhat Disagree	2%
Strongly Disagree	0%
Don't Know	44%
No Answer	5%

(ii)

Total Responses	44
Strongly Agree	16%
Somewhat Agree	14%
Somewhat Disagree	7%
Strongly Disagree	5%
Don't Know	55%
No Answer	5%

These statements received fairly strong support from those who responded, but a high percentage did not know. Respondents were under the impression that mandatory alternative dispute resolution clauses in commercial contracts have been growing in popularity in recent years. However, statistics to verify or dispel this impression are lacking. Some respondents suggested that, if the use of private arbitration has increased, it is because the private arbitration system better meets the expectations of certain parties in terms of the costs of conventional litigation, hearing delays, eligibility according to the desires of the parties and agreement on the choice of arbitrators. A counter suggestion was that the use of arbitration clauses in commercial contracts may be a negative side effect of uneven bargaining positions. In Newfoundland and Labrador, the focus in government contracts is on mediation. In Québec, the use of arbitration clauses in government contracts is limited.

35. INTERNATIONAL COMMERCE

The growing practice of the parties to international contracts to provide for dispute resolution through private arbitration under the laws of a country of their choosing compromises the ability of Canada's civil justice systems to regulate the conduct of companies doing business in Canada.

Total Responses	44
Strongly Agree	16%
Somewhat Agree	14%
Somewhat Disagree	7%
Strongly Disagree	5%
Don't Know	55%
No Answer	5%

Of the few respondents who felt knowledgeable enough to give an opinion, the majority agreed with this statement, but on a qualified basis. *Regulate the conduct of companies doing business in Canada* was described as "too broad a statement". All that is compromised is the ability to regulate the conduct as it pertains to that particular dispute. It is not up to the civil justice system to regulate the conduct of companies doing business in Canada. The role of the civil justice system is to adjudicate disputes, but there is an absence of specialized commercial courts and the cost of litigation discourages the use of the general courts. Commercial institutions should be free to make

any (lawful) deal that they want, including choice of forum. This is the essence of private ordering. If given the option, companies will choose to have disputes handled under laws more favourable to their interests.

36. Lawyer Participation in Non-Adversarial Dispute Resolution Processes

Increasing numbers of lawyers are participating in non-adversarial dispute resolution roles and processes (e.g., mediation, collaborative law, interest- rather than legal issue-based resolution).

Total Responses	45
Strongly Agree	29%
Somewhat Agree	51%
Somewhat Disagree	2%
Strongly Disagree	0%
Don't Know	16%
No Answer	2%

This statement received strong support, much of which was qualified. Several jurisdictions report a growing interest in the use of dispute resolution processes other than trial, especially in family law matters. Public demand is a factor in that these processes are widely perceived as less expensive and more likely to promote better future relationships between the parties. The use of these processes varies widely. Even within a single jurisdiction, the legal profession in some regions may be more resistant to the new approaches than others. In Ontario, the introduction of mandatory mediation is believed to have spurred a growing number of lawyers to participate in mediation. British Columbia data show that the numbers of mediations held in areas where they are being tracked (such as motor vehicle personal injury cases) has been steadily rising. Anecdotal evidence for areas not being formally tracked suggests the same, but the trend is slow. One respondent suggested that perhaps, within the court system, the use of non-adversarial dispute resolution processes should be "reserved to judges who enjoy the very special characteristic of judicial independence".

The keys to fundamental reform were identified as legislative or rule changes and strong leadership. Existing reforms that encourage increasing numbers of lawyers to participate in non-adversarial dispute resolution roles include: court-connected civil mediation programs; judicial dispute resolution (in both trial and appellate courts); lawyer training (*eg.*, mediation and arbitration certificate courses – in Alberta, all civil government lawyers in Alberta have the opportunity to take this training; collaborative law training, accredited law school courses in dispute resolution options); court appointment of lawyers as dispute resolution officers for specific types of case (*eg.*, in Alberta, variation of support orders in family law matters); alternative dispute resolution processes attached to a variety of tribunals; and growing use of private mediation or arbitration services;

37. Access to Legal Assistance

(a) Government funding for legal aid to assist in civil an family disputes is on the decline.

Total Responses	44
Strongly Agree	34%
Somewhat Agree	23%
Somewhat Disagree	16%
Strongly Disagree	0%
Don't Know	25%
No Answer	2%

Views on this statement were divided. Although they were aware of complaints about the lack of legal aid funding, respondents could not verify that funding is on the decline. It is perhaps more likely that legal aid funding is not keeping up with dramatically increasing demands for service in civil matters, leaving legal aid proportionately and increasingly underfunded. The under-funding was attributed to scarce resources (strict budgetary constraints) and divergent political priorities. Respondents commented on the lack of federal funding given the fact that the lion's share of legal aid funding is disbursed for representation in criminal matters (where the liberty of the subject is at stake), which comes under federal jurisdiction.

As for reform, the main suggestion was to increase legal aid funding for civil matters. The British Columbia government submits that civil legal aid must look beyond just providing people with lawyers:

> Central to the reform of civil legal aid is the concept of proportionality. A reformed civil legal aid program must preserve the basic elements of fairness but remove elements of services that are not proportionate to the magnitude of the dispute. This means a new definition of civil legal aid, where access to justice for lower income people means adopting a multidisciplinary approach offering a continuum of legal and non-legal strategies and services depending on such factors as the nature of the issue at stake, the forum in which the issue will be resolved, and the availability of organizations and resources to assist the individual with the problem. Under this definition, civil legal aid services and strategies will [range from] public legal information, alternative dispute resolution strategies such as mediation and family case counselling, to the use of "unbundled" legal services, advice and assistance services where lawyers provide limited advice and representation dealing with only certain components.

(b) The solution to the decline in government funding for legal aid lies in the provision by lawyers of more services pro bono.

Total Responses	44
Strongly Agree	5%
Somewhat Agree	14%
Somewhat Disagree	23%
Strongly Disagree	39%
Don't Know	14%
No Answer	7%

Respondents expressed strong disagreement with this statement. While the provision by lawyers of *pro bono* services can help and should be an integral part of the civil justice system, *pro bono* services are not an entire, or the only, solution. *Pro bono* services have real limitations (*eg*., lack of ability to develop a body of law and practice in types of matters dealt with; lack of continuity of service). Neither the efficiency of the justice system nor the availability of legal assistance for society's most vulnerable populations should depend on the provision by lawyers of *pro bono* services: "[a]ccess to justice is a fundamental right, not a charity". Many lawyers already devote a great deal of time

volunteering their services, particularly in the family law field, but the delivery of *pro bono* services should not be mandatory: “[n]o one should be forced to work for free”; “[a] privilege does not translate into a right”. Providing adequate legal services requires a multi-faceted comprehensive solution. Better funding for legal aid is one component of the solution; providing staff lawyers may be another alternative.

By way of reform, the solution was seen to lie in a properly funded public legal aid system. We must “at least index the threshold of admissibility”. The legal profession might look at this issue and set some guidelines as to the expected level of *pro bono* work perhaps working in partnership with a legal information organization. Participation to services such as lawyer referral should be encouraged. In Québec, an advisory committee is currently studying how to improve these services.

(c) The unbundling of legal services should be encouraged as a means of improving access to legal advice.

Total Responses	44
Strongly Agree	20%
Somewhat Agree	32%
Somewhat Disagree	0%
Strongly Disagree	2%
Don’t Know	32%
No Answer	14%

This statement was greeted with modest agreement. Not everyone understood what was meant by “unbundling of legal services”. To explain, the concept “is based on the assumption that it is possible to break a legal issue into discrete steps that would permit a litigant to have a lawyer do a portion of the work on a limited retainer”. Unbundling is a tool to increase access to justice. The crux of the idea is to make access to legal advice and assistance less costly. Litigants would not need a lawyer to do everything: “[s]ome people are able to do some things themselves”. Early advice was seen to be critical to the successful resolution of a dispute. Receiving legal advice at a crucial point in the proceedings may be enough for some litigants to come to an agreement with the other party, particularly in family law where an experienced lawyer could prepare for and participate in a settlement conference very efficiently – in the opinion of one respondent, a "win-win".

Several respondents expressed reservations about the unbundling of legal services. They cautioned that: “[n]ot all legal issues may be appropriate for a limited retainer and not all litigants would benefit”; “[w]here lawyers nip in and out of lawsuits, things become complex and confusing for the litigants and the court”; “we don’t know what side effects or other consequences there might be to the profession”; and “[l]awyers may still be exposed to liability even if the client seeks advice on a particular aspect or at particular intervals of the case”.

On the subject of reform, law societies in some jurisdictions are currently studying the unbundling of legal services (*eg.*, British Columbia, Nova Scotia). One respondent suggests that paralegals could be trained to do certain kinds of tasks. Another respondent sees a better solution to be simplifying the legal process to the degree that legal services can be provided at affordable rates. In Alberta:

> ... the new *Family Law Act* and its regulations have done much to simplify the law and procedure. In particular, forms and guidelines have been developed. There are a variety of services that provide legal information to family law litigants (*eg.*, the Family Law Information Centres assist with child support issues). Many areas in the provinces have access to intake services to assist litigants. Legal Aid has a telephone law line available for questions and provides legal information.

38. OPENNESS OF DISPUTE RESOLUTION IN THE COURTS
(a) More and more court processes are being conducted out of public view (e.g., court-connected mediation; judicial dispute resolution conferences conducted in private chambers in which judges assist the parties to resolve the dispute through agreement).

(b) The use of court processes that are conducted out of public view:
- ***(i) speeds up dispute resolution;***
- ***(ii) reduces cost to litigants.***
- ***(iii) enhances public confidence in the civil justice system.***

(a)

Total Responses	46
Strongly Agree	17%
Somewhat Agree	52%
Somewhat Disagree	7%
Strongly Disagree	2%
Don't Know	20%
No Answer	2%

(b)(i)

Total Responses	46
Strongly Agree	22%
Somewhat Agree	33%
Somewhat Disagree	9%
Strongly Disagree	4%
Don't Know	26%
No Answer	7%

(b)(ii)

Total Responses	46
Strongly Agree	17%
Somewhat Agree	39%
Somewhat Disagree	9%
Strongly Disagree	4%
Don't Know	24%
No Answer	7%

(b)(iii)

Total Responses	46
Strongly Agree	7%
Somewhat Agree	20%
Somewhat Disagree	20%
Strongly Disagree	11%
Don't Know	35%
No Answer	9%

There was strong, but qualified, agreement with the statements in 38(a), 38(b)(i) and 38(b)(ii). Views on the statement in 38(b)(iii) were divided. Several respondents commented on the absence of empirical evidence or statistical information to support these statements: (*eg.*, "we believe these statements to be true but we do not have sufficient hard data to know for sure"; "[s]ince statistics on the phenomenon are uncertain or have not been sufficiently developed, it would be somewhat risky to draw conclusions on the cost to litigants or on 'out of public view' as an incentive, except perhaps in family matters".

With respect to the statement in 38(a), views varied about what the public wants. According to one view, the public wants justice to be seen to be done. It was observed that any time something is hidden, it attracts suspicion. Individual litigants were seen to be concerned that they understand the process, that the dispute is resolved in a court of record in case they want to appeal, and that the

hearing is fair and, ideally, resolved in their favour. In a number of jurisdictions (perhaps most), judicial case management and settlement conferences are usually held in open court and on the record. Family judicial case conferences may constitute an exception, being attended only by the parties and their counsel.

A contrasting view is that the general public may not care too much about civil justice issues unless they are affected, and that these "out of public view" processes are an effective means of resolving disputes. Litigants were thought to feel less open to public scrutiny, more comfortable in an informal setting, and more positive about an outcome if they've participated in the decision making. In addition, they may save in costs.

With respect to the statements in 38(b)(i) and (ii), respondents believed that providing litigants with a variety of dispute resolution options makes sense. They noted that if the processes described in the statement in 38(a) are faster and cheaper (research is needed), it has to do with efficiencies in those processes and not the fact that they are conducted out of full public view. Most dispute resolutions occur "out of public view"; that has always been the case with direct negotiated settlements of cases that are before the courts. The cost to litigants of using these processes may not be less than trial (*eg.*, some briefs and long judicial dispute resolution sessions cost as much as a trial). In Québec, the number of settlements appears to have remained relatively constant. In Manitoba, in the Winnipeg Centre where the Manitoba Court of Queen's Bench case manages family proceedings, experience "has shown a decline in the number of contested motions and trials".

With respect to the statement in 38(b)(iii), some respondents could not see how public confidence in the civil justice system can be improved if the processes are conducted outside judicial proceedings. The gains in efficiency may engender confidence but there are risks with "closed justice" It is a slippery slope. Other respondents felt that the involvement of a judge or other court official in dispute resolution processes should add to the court's credibility, not take it away: "I suspect people are interested in a resolution, not a litigation, and their confidence in the system is related to the delivery of that interest in a timely and affordable way regardless of the method of its delivery." It was observed that the confidence of litigants in the system is likely enhanced if the proceeding is concluded in their favour.

Ultimately, it is likely that public confidence lies in transparency and in the public's trust in the judiciary to settle disputes by decision or intervention. The system itself needs to maintain a balance between encouraging settlements and facilitating decisions. In the Manitoba family law case management situation, the parties generally have expressed satisfaction with this process. However,

> [w]hile public may appreciate the goal of case management of family proceedings – to settle issues and avoid the cost of trial and the often emotional toll on the parties – and thereby have confidence in a system that is designed to achieve such goals, at the same time, the openness and accountability of the court process for its decision in resolving disputes may tend to leave the public questioning the propriety of its decisions in a particular case.

As for reform, many jurisdictions already offer a range of dispute resolution options of the sort described in the statement in 38(a). Where judges have a role, the options are often in open court but some are conducted in private sessions. It would be helpful if the courts were to produce a report each year with information on matters heard and general outcomes (*eg.*, statistics on cases settled before trial, taken to trial, appealed; whether one or both parties were represented or unrepresented).

39. TRIALS

(a) The number of actions being filed in court is dropping.

(b) The number of actions filed in court that go to trial is lower now than in 1996.

(c) The trials that are taking place are longer and more complex than the trials that took place in 1996.

(a)

Total Responses	46
Strongly Agree	28%
Somewhat Agree	13%
Somewhat Disagree	11%
Strongly Disagree	2%
Don't Know	43%
No Answer	2%

(b)

Total Responses	45
Strongly Agree	18%
Somewhat Agree	16%
Somewhat Disagree	4%
Strongly Disagree	7%
Don't Know	53%
No Answer	2%

(c)

Total Responses	45
Strongly Agree	24%
Somewhat Agree	33%
Somewhat Disagree	7%
Strongly Disagree	2%
Don't Know	27%
No Answer	7%

These statements received moderately strong support from the respondents who felt knowledgeable enough to give their opinion.

With respect to the statement in 39(a), the experience varies from jurisdiction to jurisdiction and for different levels of court. In Alberta, statistics over the last three years show that the number of actions commenced has declined. In British Columbia, civil filings have declined from 58,189 in 1996 to 48,404 in 2005. In contrast, in Ontario, the 2004/05 Annual of the Court Services Division shows that there has been an increase in the number of civil cases commenced between the years 2000/01 and 2004/05 (*see* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_05.asp). In Québec, a decline in the number of civil actions (excluding family law matters, where numbers have remained relatively constant) has been observed since the 1970s. Since 2003, the number of actions appears to have stabilized. Altogether, around 40% of the public give up their right to take legal proceedings. The experience in provincial small claims courts is somewhat different. In British Columbia, small claims actions have remained constant since 1991, the year that province began keeping records. In Québec, small claims actions continue to decline despite an increased jurisdiction. Similarly, in Newfoundland and Labrador, the number of small claims action has dropped considerably.

With respect to the statement in 39(b), the experience also varies from province to province and court to court. In Québec, the number of actions that reach trial is increasing despite the fact that the number of actions brought is on the decline:

> In the Court of Québec, in 1996, 71,711 files were opened and 1,487 trials (2%) were held; in the last five years, an average of 62,595 files has been opened and 2,377 trials (3.8%) have been held. In Superior Court, in 1996, 41,433 files were opened and 1,429 trials (3.4%) were held; in the last five years, an average of 21,319 files have been opened and 1,275 trials (6%) have been held.

The "vanishing trial phenomenon" is apparent in British Columbia and Manitoba. In British Columbia, Supreme Court Statistics show that over the past decade the number of trials has decreased by half:

Our civil filings have declined from 58,189 in 1996 to 48,404 in 2005. In 1996, there were 812 trials (157 scheduled trials were bumped). In 2005, there were 389 trials (6 were bumped).

The Supreme Court's Annual Reports are available at www.courts.gov.bc.ca. In Manitoba, a decline has been seen in the number of family and civil trials in the Winnipeg Centre. The decline is attributed to case management in the Family Division of the Manitoba Court of Queen's Bench and the availability of Judicially Assisted Dispute Resolution in the General Division. Other explanations offered by respondents for a declining use of trials include: the cost of litigation, especially in complex cases; fewer areas of ambiguity due to clear direction on issues from appellate courts; a variety of dispute resolution processes so that fewer matters capable of easy resolution go to trial; the uncertainty of outcome associated with litigation; the negative impact of litigation on personal and business relationships; and a more educated public.

With respect to the statement in 39(c), the anecdotal evidence and available statistics both point to longer trials. In Québec, the consultation carried out in the 2003 reform assessment process indicates that trials are becoming longer and often more complex. In British Columbia, the average length of trials has doubled over the past decade. In New Brunswick, anecdotal evidence indicates that trials are taking more time. In Alberta, anecdotal evidence suggests that when the monetary jurisdiction of the provincial small claims court increased to $25,000, the number of lengthy and complex trials heard in that court also increased. Newfoundland and Labrador have not experienced much change. One explanation for longer trial times is that the cases that go to trial are ones with complex legal issues that require resolution through court adjudication.

40. SATISFACTION OF MONETARY JUDGMENTS

(a) The need for new approaches to the satisfaction of monetary judgments is receiving growing recognition.

(b) Canada should explore the new approaches being taken in other countries (e.g., South Australia enforcement agencies that bring creditors and debtors together and include assistance with financial planning for debtors).

(a)

Total Responses	44
Strongly Agree	11%
Somewhat Agree	36%
Somewhat Disagree	7%
Strongly Disagree	0%
Don't Know	41%
No Answer	5%

(b)

Total Responses	44
Strongly Agree	27%
Somewhat Agree	41%
Somewhat Disagree	2%
Strongly Disagree	2%
Don't Know	27%
No Answer	0%

From those who gave an opinion, the statement in 40(a) received support with considerable reservation. The statement in 40(b) received strong, but qualified, support.

With respect to the statement in 40(a), few reasons for the reservation were given. Some respondents did not perceive the need for new approaches to the satisfaction of monetary judgments as a growing focus. Others agreed that the need is being felt, but questioned whether it is widespread. Some jurisdictions find the current remedies for enforcing judgments and orders of the court to be effective. In other jurisdictions, being able to enforce judgments in an effective timely manner is a major issue with litigants and a particular source of frustration to judgment creditors with claims that are lower in monetary value. Different enforcement processes may exist for different types of assets and some methods of enforcement may be cumbersome. To quote one respondent:

> For each method of enforcement there are numerous cumbersome technical requirements that must be satisfied to collect money from the assets of debtors. As these technical requirements require court supervision they unnecessarily increase the cost of enforcing judgements without a corresponding benefit either to debtors or creditors. As well, the law does not reflect current realities of holding and dealing with property.

Litigants lose satisfaction with the system and their belief in its fairness when judgments cannot be given effect, or where additional complex, costly legal procedures are required to realize a judgment. In these jurisdictions, reform is a priority. New approaches hold the potential to achieve greater client satisfaction, understanding and belief in the fairness of the system.

With respect to the statement in 40(b), respondents commented that there is always room for improvement and we can always learn from other countries with similar legal systems. Governments regularly research reform initiatives in other jurisdictions in the course of undertaking civil justice reform initiatives. One respondent cautioned that while assisting debtors with financial planning as part of enforcement is a laudable objective, it could give rise to a number of questions regarding the role of enforcement agencies.

The revision of court Rules was mentioned as a current reform being taken that would affect this area. In British Columbia, the Justice Ministry has provided funding to the British Columbia Law Institute (BCLI) to prepare recommendations on the civil enforcement of judgments. The government is currently reviewing the BCLI's report and recommendations: see *Report on the Uniform Civil Enforcement of Money Judgments Act* (March 2005).

41. COURT STRUCTURE

(a) Specialized courts are being created for cases dealing with particular subject matter (e.g., Commercial List of the Ontario Superior Court of Justice; the Criminal, Family and Youth Divisions of the Alberta Provincial Court).

(b) Unified courts are being created to handle specialized jurisdictions (e.g., Unified Family Court).

(c) The concept of a single unified trial court for matters that fall under federal or provincial jurisdiction is gaining support.

(a) Specialized Courts

Total Responses	44
Strongly Agree	27%
Somewhat Agree	41%
Somewhat Disagree	7%
Strongly Disagree	2%
Don't Know	18%
No Answer	5%

(b) Unified Courts

Total Responses	44
Strongly Agree	18%
Somewhat Agree	41%
Somewhat Disagree	11%
Strongly Disagree	2%
Don't Know	20%
No Answer	7%

(c) Single Unified Trial Court

Total Responses	45
Strongly Agree	7%
Somewhat Agree	11%
Somewhat Disagree	9%
Strongly Disagree	11%
Don't Know	53%
No Answer	9%

The statements in 41(a) and (b) received strong support, largely with qualification. The few respondents who gave an opinion on the statement in 41(c) were divided.

With respect to the statement in 41(a), the situation differs from one jurisdiction to another. One respondent noted that the specialized courts listed in the statement have not been created recently. Another respondent agreed that specialized courts are being created, but not in areas where substantive expertise is required such as commerce or construction disputes. Still another respondent commented that the use of specialized courts tends to be more limited in small jurisdictions. A possibility is that a shift to a focus on services rather than systems has occurred. The effectiveness of specialized courts was said to depend on resource availability, not necessarily on court structure. Likely, the public recognizes that certain judges have specialties (*eg.*, in family law matters) and should therefore sit on specialized courts. The public may find specialized courts less confusing in that the processes and results may be more consistent than in courts exercising general jurisdiction.

With respect to the statement in 41(b), some jurisdictions have some specialized and unified courts, but respondents did not recognize a general trend toward increased support for such initiatives. Specialization within courts is not new. It may be a positive thing but it should not be carried too far. At least two jurisdictions (British Columbia and Alberta) have rejected the concept of a unified family court. After exploring this approach, it was determined that many of the same benefits could be achieved without the need to combine the courts (*eg.*, Alberta's Family Justice Strategy).

With respect to the statement in 41(c), support for the concept of a unified trial court is growing in Québec: see *A Judicial Reform Based on the Needs of Citizen: Report of the Reflection and Orientation Committee on Courts of First Instance in Québec* (April 2005). In 2003, Alberta presented the concept of a single trial court to the justice community as a starting point to initiate thought and discussion. The consultant to the initiative concluded that Alberta Justice and the justice community were "on parallel paths to providing what Albertans are looking for in a justice system – accessibility, speed, lower costs, and simpler processes." For various reasons, some organizations resist the idea of a unified trial court. In support of a single unified trial court, it was observed that the public are beginning to demand more accountability for the expenditure of tax dollars (whether it is for health care, education or the administration of justice) and, as money gets tighter and budgets get cut, administrators and governments are seeing the benefits of reduced duplication and overlap.

42. PROCEDURAL PROPORTIONALITY

(a) The concept of procedural proportionality is receiving greater attention now than in 1996.

Total Responses	44
Strongly Agree	25%
Somewhat Agree	25%
Somewhat Disagree	0%
Strongly Disagree	0%
Don't Know	50%
No Answer	0%

This statement received unanimous support from the 50% of the respondents who gave an opinion. In Québec, the *Code of Civil Procedure*, section 4.2 already implements the concept of proportionality:

> In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.

British Columbia has specifically incorporated this principle in procedural rules that are currently being piloted (*eg.*, Rule 68 on expedited litigation for matters less than $100,000; Rule 66 fast tracking litigation for cases where the trial time is estimated at 2 days or less). Both British Columbia and Ontario are using the principle of proportionality to guide civil justice reforms. It is being considered in Alberta's Rules revision process. In favour of proportionality, it is said that "[t]hose matters that could have or should have been resolved can run into great costs where there is little likelihood of parties being satisfied with outcomes or confident in the fairness of the procedures".

(b) Procedural requirements relating to time and costs should be proportional to the dollar amount of claims for damages or compensation (e.g., British Columbia's Simplified Proceedings).

(c) Procedural requirements relating to time and costs in cases that do not involve monetary claims should be proportional to the importance of the issue(s) in dispute
(i) to the parties;
(ii) to the public.

(b)

Total Responses	44
Strongly Agree	30%
Somewhat Agree	39%
Somewhat Disagree	16%
Strongly Disagree	0%
Don't Know	11%
No Answer	5%

(c)(i)

Total Responses	44
Strongly Agree	20%
Somewhat Agree	39%
Somewhat Disagree	14%
Strongly Disagree	2%
Don't Know	20%
No Answer	5%

(c)(ii)

Total Responses	44
Strongly Agree	20%
Somewhat Agree	36%
Somewhat Disagree	14%
Strongly Disagree	0%
Don't Know	20%
No Answer	9%

The statement in 42(b) was strongly supported, both with and without qualification. The statements in 42(c) received a high level of support, more with qualification than without.

With respect to the statement in 42(b), some respondents saw proportionality to the dollar amount of claims as an approach that is transparent, fair and promotes early resolution. Many respondents felt that the dollar amount should not be the only criterion used to determine proportionality. Generally, procedural requirements should be proportional to the dollar amount at issue, but there should be flexibility to deal with exceptions to the rule (*eg.*, complex cases involving small amounts or simple cases involving large amounts). Cases involving important issues of principle should not be prevented from being dealt with at a high level. Proportionality should relate to the nature of the allegations, the dollar value involved, the complexity of the issues and their significance to the public or to other cases. One respondent took the position that "[t]he procedure itself should be neutral and proportionality should come into play in the implementation of the rules on procedure and means of evidence and management controls." Another did not like "tiers".

With respect to the statement in 42(c), as the responses to the statement in 42(b) indicate, respondents favoured a concept of proportionality that would be measured by more criteria than the amount at stake in the lawsuit. In Ontario, the Terms of Reference for the Civil Justice Reform Project take a broader view of proportionality:

> Recommendations should reflect the principle that the time and expense devoted to civil proceedings should be proportionate to the amount in dispute and/or the importance of the issues at stake.

Thought needs to be given to the question of how questions of party or public importance would be determined. As one respondent noted, "[i]t is largely impossible to accurately gauge the importance of an issue to each party, nor is that a decision making factor under the law." Another respondent reminds us that family law issues are enormously important for all concerned but a long drawn out process is not wanted. In the view of another respondent, "[d]isputes that do not involve money are

often of greatest importance to the parties, but there should be some discretion to limit the [number] of such disputes, particularly if their resolution would not benefit the public, or a significant number of individuals." Yet another respondent warns that public confidence could be further undermined if only cases of a certain magnitude, financially or socially, were seen to receive comprehensive treatment.

As for reform, several jurisdictions have expedited action rules for claims within specified monetary limits (*eg.*, in Manitoba, for matters involving amounts between the small claims court limit of $7500.00 and $50,000.00). In Alberta, the issue of proportionality is being looked at in the Rules of Court Project.

43. OTHER CHANGES

Describe any other changes since 1996 that you have observed in the civil justice environment in your jurisdiction and tell us about any related reforms.

In Québec, some provincial jurisdictions have been integrated into the Court of Québec (*eg.*, Labour Court); the jurisdiction of the Court of Québec has been increased from $15,000 to $70,000; and the Administrative Tribunal of Québec has a greater role in administrative matters and appeals from its decisions are heard by the Court of Québec regardless of the monetary value of the dispute. British Columbia has experienced an increase in *pro bono* assistance from the Bar. Also, the hearing time for certain appeals has been reduced, allowing for the scheduling of more appeals than was previously possible. In the Yukon, small claims limits have increased, collaborative law has been introduced; information (especially in family law) has been made more accessible; and current judges are more willing to engage in dispute resolution outside the courtroom.

I. THE VISION FOR A MULTI-OPTION CIVIL JUSTICE SYSTEM

The 1996 Task Force envisaged a multi-option civil justice system reflecting the four elements of fundamental change identified in heading G: responsiveness to the needs of users and encouragement of public involvement; the provision of many options for dispute resolution; a framework managed by the courts; and an incentive structure that rewards early settlement and values trials as a last resort. Respondents were asked to answer questions 44 to 50.

44. *Is the 1996 vision still appropriate?*

Total Responses	48
Yes	83%
No	10%
No Answer	6%

Respondents strongly supported the continuing appropriateness of the 1996 vision. Pursuing the objectives was seen to have resulted in improvements to the civil justice system although "[p]erhaps we have not yet attained all we expected from this vision". Respondents found the 1996 objectives to be still relevant in that many of the precipitating concerns that led to the Task Force recommendations remain: "[a]s the number of self-represented litigants continues to rise, these elements become even more critical". There is room for more improvement: "the solutions discussed do not appear to be sufficiently comprehensive"; the "options may have changed"; "[t]he vision is a good one to strive for but the steps to getting there need to be more clearly defined and measured"; "[the vision] needs

practical funding and initiative, with follow-up to an authoritative body". One respondent commented that the legal profession and the courts are generally slow to adopt change.

A number of comments qualified this support. With respect to the availability of trials, respondents commented that "[t]rials ought not be considered failures" and "[t]he trial should not be considered to be a last-resort mechanism because there is room for timely trials at reasonable cost". Some respondents did not want the courts to "monopolise each step in dispute resolution". In the view of these respondents, the courts have insufficient resources and expertise to manage every case, judges have too much experience to be spending their time this way, and lawyers are there to manage the progress of cases. Other respondents felt that the courts should have a greater degree of responsibility in the conduct of proceedings than was envisaged in the 1996 recommendations and that the use of "many options for dispute resolution" should be mitigated.

Concern was expressed about introducing an incentive structure on the basis that incentives undermine consent, and about imposing an alternative dispute resolution process in the absence of the consent of at least one party to the dispute.

45. *In creating a vision for the civil justice system in 2006 and beyond, what alterations, if any, would you make to the 1996 vision?*

Respondents specifically suggested the following alterations to the 1996 vision for the civil justice system in 2006 and beyond:

- increasing the responsibility of litigants and the courts in the application of the proportionality rule and the efficient conduct of proceedings;
- simplifying procedural rules;
- making better use of the means of evidence (examinations and opinion evidence);
- consolidating settlement conferences and management conferences; and
- making greater use of information technology in the presentation of cases.

46. *Do you see benefits accruing from the creation of a national vision for civil justice systems in Canada in relation to:*
(a) gathering data on Canada's civil justice systems;

(b) conducting research;

(c) undertaking court reform projects;

(d) establishing evaluative criteria;

(e) developing policy;

(f) enhancing public confidence in the civil justice system;

(g) attracting funding for civil justice reform.

(a) gathering data

Total Responses	48
Yes	83%
No	6%
No Answer	10%

(b) conducting research

Total Responses	48
Yes	79%
No	8%
No Answer	13%

(c) court-reform projects

Total Responses	48
Yes	77%
No	10%
No Answer	13%

(d) evaluating criteria

Total Responses	48
Yes	79%
No	10%
No Answer	10%

(e) developing policy

Total Responses	48
Yes	79%
No	6%
No Answer	15%

(f) enhancing public confidence

Total Responses	48
Yes	90%
No	2%
No Answer	8%

(g) attracting reform funding

Total Responses	48
Yes	79%
No	6%
No Answer	15%

Respondents registered strong agreement that benefits would accrue from the creation of a shared vision for civil justice systems in Canada in relation to each of the items named in 46(a)-(g).

Respondents felt that creating a national vision "makes sense". While recognizing the need for each jurisdiction to determine its own policies and goals, they identified several advantages of a shared vision. These included:

- establishing common goals and minimum standards acceptable for Canadian courts;
- through a degree of harmonization, promoting a clearer understanding of the system and its benefits to stakeholders;
- avoiding disparities in research and implementation based on jurisdictional wealth;
- providing opportunities to partner, pool resources and cost share;
- reflecting the goal of equal access for all;
- sharing ideas and information (*eg.*, statistical data, the use of best practices);
- collaborating to help progress toward the achievement of the vision in all jurisdictions;
- compiling baseline information that is reliable and comparable;
- evaluating reforms that have taken place ("[d]ata is crucial for evaluation"; "in order to attract funding for civil justice reform, desired outcomes must be shown to be attainable").

Respondents commented that, in coming up with a shared vision for improvement, it will be important to keep in mind the basic tenets of law and the civil justice system. The basic legal principles and quality of decisions should not be compromised for "simplicity", "acceptance" or "efficiency".

Specific suggestions included: consolidating the civil jurisdictions into a single trial court; giving more consideration to partnerships between the users, courts, not for profit organizations and other agencies; and focusing on making affordable lawyers available to people within the middle class ("[s]ignificant time is spent on the issue of self-represented litigants and that is a dangerous area, as judges will always be put in a position of being advocates for self-represented litigants which upsets the adversarial process").

47. *What obstacles do you see to the creation of a national vision for civil justice systems in Canada?*

Respondents identified several obstacles to the creation of a shared vision for civil justice systems in Canada. A one-size fits all approach may not be appropriate, given the multi-jurisdictional nature of Canada, the widespread diversity (*eg.*, history, culture) that exists among jurisdictions, and the differences in existing procedures and civil justice system developments across the country (*eg.*, common law vs. civil law procedural rules; "some jurisdictions are seen as being more progressive, some more advanced than others"). The diversity includes: different circumstances and needs (*eg.*, challenges of transportation costs, large geographic entities and thinly populated historical "fiefdoms"); different visions of the judiciary, government, Bar and public; different concepts of the justice that is desired; different legislation and policies; different government agendas, goals and priorities; different economic realities ("financial barriers will have an impact in some jurisdictions"); different funding choices; different jurisdictions in both superior and provincial courts; and different IT architecture.

Respondents viewed as a major obstacle the fact that the administration of justice is a provincial jurisdiction that is jealously guarded: "[p]rimary responsibility for civil justice rests with the provinces and must remain so"; "[a] vision is fine, much implementation is necessarily provincial"; "we tend to operate as separate countries within Canada"; "business/governments/judiciaries think they do it best or have the best ideas"; "[a]nd of course, 'ego' ... [n]eed a mediator or someone to manage cooperation"; "[w]hile interprovincial mechanisms for exchanging information and visions and interprovincial mutual assistance may be desirable, each province's specificity must be preserved, in particular in Québec where procedural choices are bound by the civil law system and fall under the jurisdiction of the National Assembly".

Other obstacles were seen to be:

- lack of political attention to civil justice;
- resistance to change;
- funding;
- travel and time commitments for those involved; and
- inertia.

In Nunavut, the problems are more fundamental than having a vision of civil justice – lawyers are needed: "[l]awyers are an integral part of the process of civil justice, and lawyers must be encouraged in law schools to be involved with civil law areas and northern jurisdictions".

One respondent saw the problems with the civil justice system as “more fundamental then just looking at the court system that is provided to deal with civil justice”. To this respondent, “[i]t really is about lawyers providing proper service for the public” – we must be cautious about changing the civil justice system because “lawyers charge too much money for their services, and ... people can not afford them”.

48. *Do you think that multi-jurisdictional cooperation is important?*

Respondents overwhelmingly agreed that multi-jurisdiction cooperation is important. They commented that: “[multi-jurisdiction cooperation] will further a shared vision for Canada and may contribute to achieving greater access”; “[e]xchanges and mutual assistance between jurisdictions are important and inevitable in an increasingly integrated world”; “[j]urisdictions should be able to benefit from each other’s experience, successes and failures”; “we should take advantage of synergies, multiple ideas notwithstanding the obstacles”; “[i]t is always of benefit to have cooperation as much as possible but it is also important to recognize that what works in one jurisdiction may not in another”; “families today are very mobile”; and “[w]e can all learn from each other's experience”. Nevertheless, one respondent foresaw that “court systems in each jurisdiction will continue to be unique due to their own sets of rules and particular challenges, which may limit applicability of some initiatives”.

49. *What mechanism(s) would you use to achieve multi-jurisdictional cooperation?*

Respondents suggested a variety of mechanisms that could be used to achieve multi-jurisdictional cooperation.

One idea was the creation of an umbrella organization (*eg.*, the Federation of Law Societies of Canada, the Canadian Association of Provincial Court Judges, or the Canadian Judicial Council) or a cross-country follow-up committee to monitor development in Canadian civil justice reforms. Several respondents mentioned the role of the Canadian Forum on Civil Justice and supported its continuation. Some saw it as well positioned to play a key role is facilitating communication and the “development of key or foundation policies and initiatives across jurisdictions”.

Much emphasis was placed on opportunities to share information, learn from other jurisdictions and discuss reform options. National organizations that already exist and share information have a significant role to play (*eg.*, Association of Canadian Court Administrators, Canadian Bar Association, Canadian Judicial Council, Canadian Forum on Civil Justice and Canadian Institute for the Administration of Justice). The suggestions about ways to achieve communication included: annual meetings; conferences such as "Into the Future"; teleconference calls; electronic information sharing; “think tank type events to get the civil justice community together to share ideas and brainstorm new ones”; and task forces with cross country membership. These opportunities should include all stakeholders.

Another mechanism would be participation in Canada-wide studies and research.

Leadership from the top (government and the judiciary) was seen to be important. Ideas here included: “multi-level/multi-sectoral cross-fertilization of ideas and discussion leading to senior level resolution”; existing forums for meetings between ministers, deputy ministers and judges; existing forums for meetings between senior officials (*eg.*, Uniform Law Conference of Canada – a body

comprised of members appointed by Attorneys-General across Canada, federal/provincial/territorial committees such as the Coordinating Council of Senior Officials–Family Justice); and trial judge organizations.

An over-arching suggestion was to "increase public demand for change in order to secure the critical mass of political support needed for the development of consensus among the provinces, territories and federal government".

50. *What role do you see for the Canadian Forum on Civil Justice with respect to the coordination of a national agenda for civil justice reform?*

Respondents agreed that the Canadian Forum on Civil Justice should have a role with respect to the coordination of a shared agenda for civil justice reform in Canada. They viewed the Forum as a proven and respected body and praised it for the work it does.

Some respondents thought that the Forum should play a leading role in coordinating a shared agenda: "[the Forum] is already pursuing civil justice reform, and should continue to do so"; "[i]t is to me the most effective agency for this purpose, as it has established great credibility"; "[i]t can provide research, information, recommendations and the opportunities for dialogue among the stakeholders".

Other respondents expressed a closely-associated view. They thought that the Forum should continue to be involved as it has been to date. The Forum's roles were seen to include:

- advocating for civil justice reform;
- keeping the issue of civil justice reform on the agenda;
- serving as an information clearinghouse (*eg.*, "your current role, as a clearinghouse of justice reform information and your ability to gather empirical evidence is very useful"; "[t]o pursue its work and continue to share it with all the actors in our civil justice system");
- generating ideas for reform;
- bringing key players together (*eg.*, "[c]o-ordinating national meetings"; "I see it as a means to bring the various jurisdictions together to avoid re-inventing the wheel and to build on successes and learn from mistakes"; organizing conferences, meetings and other opportunities for information sharing and discussion); and
- conducting research (e.g., "research so we have hard data"; "[t]he gathering of data as to what initiatives are being tried in jurisdictions; what reforms have been successful; trends in civil justice reform"; "providing research support for regional civil justice reform initiatives".

One respondent indicated that a key area where research is required is in the cost of civil litigation: "[t]his information is held by lawyers, and a study on the cost of bringing or defending a civil action would be very helpful in assisting with the analysis of future reform options". Another respondent suggested that the Forum "should look at the smaller pieces of the puzzle and do it in manageable bits":

> For example, instead of saying we need more legal aid money in civil cases we should be addressing the issue of how the courts and the governments can make it easier for unrepresented litigants in family cases to settle their personal affairs. Access to justice does not mean access to lawyers or courts.

Still other respondents wanted a body having a Canada-wide mandate to act "as a resource for civil justice reform initiatives such as developing model policies, collecting data from various jurisdictions about results of reform initiatives". The Forum "could play a key role as an advisor" to a committee made up of judges, the Bar and federal and provincial government representatives having a mandate

to implement a [shared] vision of the civil justice system in Canada”. To ensure the effectiveness of such a committee, “representation, even though important, should be limited to avoid problems of availability and efficiency”. The committee should have a permanent officer to coordinate its activities. This officer (possibly a judge) could be appointed and remunerated by the federal government. Those who opposed this idea saw little utility in charging such a body with implementing reforms “given that each province is given the authority to deal with property and civil rights within its boundaries”.