M E M O R A N D U M

TO: Litigation Management Committee

FROM: Mr. Justice Burnyeat

DATE: August 10, 2000

RE: **Preliminary Report regarding Rule 66 Trials**

After extensive study by the Litigation Management Committee, the Fast Track Rule (Rule 66) came in to operation on September 1, 1998. The Rule applied to actions filed after September 1, 1998 and before September 1, 2000. The Rules Revision Committee recommended to the Attorney General that the September 1, 2000 conclusion of the program be extended for a further year and that extension is now in place.

With the assistance of Shihong Mu, Brent Messenger and Sue Smolen, a preliminary evaluation of those trials that have been set pursuant to Rule 66 has been undertaken. The methodology followed can be summarized as follows:

1. A representative sample of 200 trials which took two days to hear prior to September 1, 1998 was compared against 250 actions where a party had elected to have the action heard pursuant to Rule 66 and 168 actions commenced after September 1, 1998 where no party had elected to have the matter heard pursuant to Rule 66 but where the time estimated for trial was one or two days. While there was a total of 250 actions where a party had elected to have the action heard pursuant to Rule 66, only 77 of those actions had actually been set for trial and only the statistics for the 77 actions were reviewed. Accordingly, the comparability of the statistics is subject to the obvious flaw that there are a number of actions where the parties had elected to have the

action heard pursuant to Rule 66 which were not set for trial so that the statistics relating to the time between the commencement of the action and the day it was set for trial and the time between the commencement of the action and the first day set for trial do not include a number of Rule 66 Actions were an election has been made but where no trial date has been set. By only reviewing 77 matters which were set for trial, the impression that matters are heard more quickly pursuant to Rule 66 may well be misleading.

2. Of the 77 matters which were set to be heard pursuant to Rule 66, only 7 trials actually commenced to April 4, 2000. Separate statistics were reviewed relating to the 7 actions which were actually heard.

3. For each of the 3 groups of actions which were reviewed, the statistics where then obtained for the following:
   (a) length of time between the commencement of the action and the day it was set for trial;
   (b) length of time between the commencement of the action and the first day set for trial;
   (c) length of time between the commencement of the action and the first day of the actual trial;
   (d) the number of chambers applications on actions where notices of trial had been filed;
   (e) the number of parties on average;
   (f) the category of the claims;
   (g) the number of settlements where advice was received that settlements had been reached; and
   (h) the number of trials that had actually commenced.

4. A total of 200 pre-Rule 66 actions were reviewed by staff physically reviewing the file contents. From the statistics now kept, a total of 250 post-Rule 66 Fast Track actions were reviewed as were 168 post-Rule Non-Fast Track actions.

The findings of this study are of assistance in gauging the acceptance of the Rule 66 program and whether the program has actually assisted litigants in having their matters heard more quickly, efficiently and economically.

For the purposes of this review, it was assumed that the introduction of Rule 66 was undertaken to achieve two goals:

1. to provide litigants with a simplified, less expensive and quicker means of having a decision rendered; and
2. to allow litigants to have matters that might ordinarily take 3, 4 or 5 days of court time to be heard in 2 days.

While the evaluation methods give some insight into the first reason for the introduction of Rule 66, it has not been possible to assess whether or not the parties have taken more lengthy trials and decided to have them heard under Rule 66 in 2 days or whether it is possible for matters which would ordinarily take 3 to 5 days to be heard in 2 days.

The statistics obtained are set out on the attached tables. A review of those statistics allows the following preliminary observations to be made.

1. ARE MATTERS BEING SET FOR TRIALS EARLIER?

   In reviewing the length of time between the commencement of the action and the day that the matter is set for trial, there is a wide disparity between the 3 categories. For pre-Rule 66 actions ("Pre-Rule Actions"), the mean time was 257 days, for post-Rule 66 actions set pursuant to Rule 66 ("Rule 66 Actions") the mean number of days was 129 and for post-Rule 66 which did not use Rule 66 actions ("Non-Rule 66 Actions"), the mean was 168. The statistics for "Standard Deviation" relate to how far on either side of the "mean" it is necessary to go statistically before the included group is roughly 65% to 75% of all of those reviewed. In the case of Pre-Rule 66 Actions, the standard deviation is 162. Accordingly, two-thirds of these 200 actions were set for trial between 95 days and 419 days after the action was commenced. For Rule 66 Actions, two-thirds of the actions were set for trial between 43 and 215 days after the actions were commenced and for Non-Rule 66 Actions two-thirds of the actions were set for trial between 68 and 268 days after the action was commenced.

All actions after September 1, 1998, are being set for trial at an earlier date than Pre-Rule Actions. Rule 66 Actions are being set for trial significantly more quickly than Non-Rule 66 Actions.

2. IS THE TIME BETWEEN THE COMMENCEMENT OF THE ACTION AND THE FIRST DAY OF THE ACTUAL TRIAL ANY LESS?

There is a wide difference in the length of time between the commencement of the action and the first day set for trial. However, when comparing Rule 66 Actions against Non-Rule 66 Actions, there is no major difference between the length of time between the commencement of the action and the first day of the actual trial. However, some caution must be exercised in reviewing the difference as only seven Rule 66 Actions have actually been heard. Prior to the introduction of Rule 66, the mean time between the commencement of the action and the first day set for trial was 508 days with two-thirds of the trials being set between 318 and 698 days after the action was commenced. When comparing Rule 66 Actions and Non-Rule 66 Actions, there is a considerable difference between the length of time between the commencement of the action and the first day set for trial as set out in the Notice of Trial. The mean time for Rule 66 Actions is 217 whereas the mean time for Non-Rule 66 Actions is 312 days. As well, two-thirds of the Rule 66 Actions are to go to trial between 137 to 297 days, whereas two-thirds of the Non-Rule 66 Actions are to go to trial between 152 days and 472 days after the action was commenced. However, for all three groups, the length of time between the commencement of the action and the actual first day of trial drops considerably. This considerable drop reflects the ability of the Registry staff to schedule two day trials much more easily than longer trials. For Pre-Rule 66 Actions, the mean drops from 508 to 431, for Rule 66 Actions, the mean drops from 217 to 202 and for Non-Rule 66 Actions, the mean drops from 312 to 236. In comparing the two post-Rule 66 types of action, it is apparent that there is no major difference between the length of time between the commencement of the action and the first day of the actual trial. For Rule 66 Actions, the mean is 202 days and two-thirds of the actions are heard within between 131 days and 273 days. For Non-Rule 66 Actions, the mean is 236 days with two-thirds of the actions being heard between 153 days and 319 days. Accordingly, Rule 66 Actions are heard about one month

earlier than Non-Rule 66 Actions (6.7 months v. 7.9 months on average).

3. NUMBER OF CHAMBERS APPLICATIONS

The statistics available are not particularly helpful to analyze the question of whether or not the number of chambers applications drops as a result of the use of Rule 66. Notices of motion were only counted in those cases where there had been a filed Notice of Trial.

Accordingly, where no Notice of Trial has been filed there are no statistics available as it is not possible to ascertain whether an action was capable of being heard pursuant to Rule 66. An attempt was made to total the number of applications but no analysis was made of whether the applications were evenly spread within the three groups reviewed or whether applications were more likely to come at a particular point in the litigation. As well, time did not permit a review of the type of motion being heard and, in particular, how many applications involved summary trials under Rule 18A. On a percentage basis, however, the largest percentage of chambers applications (44%) was on Rule 66 Actions and the lowest (32%) was on Non-Rule 66 Actions. The percentage for Pre-Rule 66 Actions was 38%. Any fuller examination of this question should review the nature of the applications and whether they are evenly distributed or whether there is a grouping of either the type of application or of the applications on particular files. The higher percentage of applications on Rule 66 Actions is of particular concern if the increased percentage represents a need for the parties to seek clarification of Rule 66 or a transference of trial time to chambers time. In this regard, the additional waiting time associated with applications in chambers may well make any such transference a more lengthy and costly result for the litigants.

4. NUMBER OF PARTIES

Surprisingly, the number of parties on Rule 66 Actions (3.23 parties) exceeds the number of parties on Non-Rule Actions (3.13) and on Pre-Rule 66 Actions (3.18). While no attempt was made to analyze the standard deviation for this statistic, the fact that the number of parties on Rule 66 Actions was slightly above the number of parties on the other two classifications may well indicate an

ability to compact an action that ordinarily would take more than two days into a two day period.

5. CATEGORY OF CLAIMS

There is no major difference between the Pre-Rule 66 and post-Rule actions statistics relating to the type of claim actions except there appears to be a considerable reduction in the number of percentage of motor vehicle actions in which the parties elect Rule 66. This reduction may well relate to the inability to have a jury trial under Rule 66 and the desire of parties to schedule jury trials for certain accident claims.

6. NUMBER OF SETTLEMENTS

Litigants are notoriously bad in advising the Registry that a matter has been settled. However, the statistics indicate about half as many settlements for Rule 66 Actions than for Non-Rule 66 Actions. Until parties can be forced to advise the Registry regarding settlements and until we are in a position to question the parties about the settlements, no meaningful conclusions can be drawn from these statistics.

7. NUMBER OF TRIALS ACTUALLY COMMENCED

Of the Rule 66 Actions, 30.8% were actually set for trial and 2.8% actually went to trial. These statistics can be compared to the Non-Rule 66 Actions where 9.5% of the matters set for trial actually went to trial. At this time, there is no way of knowing whether there is any statistical difference between the Rule 66 Actions and the Non-Rule 66 Actions as the 168 Non-Rule 66 Actions are only reviewed if they are set for trial and the time estimate is two days or less. However, a preliminary observation is that fewer Rule 66 Actions actually go to trial and this may be an encouraging statistic if Rule 66 contributes to the settlement of matters.

8. STATISTICS RELATING TO RULE 66 ACTIONS

It is clear that the endorsement under Form 137 is almost always filed by the plaintiff (229 times as opposed to 4 times for the defendant). It is almost invariably the case that the endorsement under Form 137 is filed shortly after the action is filed as it should be noted that in 202 cases, the Form 137 was filed on the same day the action was commenced. Methods of drawing Rule 66 to the attention of defendants should be considered as it should

not be assumed that plaintiffs are the only party who perceive the advantages of Rule 66.

The statistics for a number of Notices of Trial filed each year are also set out. A review of the statistics for the years 1995 through 1999 indicates that the number of trials set for two days or less has fallen considerably as has the percentage of two day or less trials. While there is no certainty of explanation regarding these trends, the following may account for the trend:

(a) on "simpler" matters, parties may not be litigating or may be accessing A.D.R. and/or the Small Claims Division of the Provincial Court;
(b) the cost of a two day trial for matters which can be heard in two days or less may well have reached the stage where it is prohibitive to proceed to a two day trial;
(c) the simplification thought to have been brought about by Rule 66 may not have succeeded;
(d) the concept of a two day trial at the Supreme Court level may well have been virtually eliminated for various reasons so that the continued extension of the provisions of Rule 66 may not be warranted.

CONCLUSIONS

Other than a commitment to gather further statistics to allow the Litigation Management Committee and the Rules Committee to make a final recommendation to the Attorney General whether Rule 66 should be further extended, no particular conclusions can be drawn from the statistics which have been gathered to date. It is recommended that further examination of all year 2000 actions be undertaken so that the Litigation Management Committee can consider the effectiveness of the Rule 66 experiment early in the year 2001.

Attached is also an article from the Winter 1998-1999 publication of the Canadian Forum on Civil Justice setting out comparisons of what is present in a number of Canadian courts. To the extent that statistics are available elsewhere it would

be helpful to review those statistics to examine the experience in other Courts.

Mr. Justice Burnyeat

attach.

Statistics Relating to Rule 66 Actions

(a) Number entered under Rule 66;	250
(b) Number which went to trial;	7
(c) Number where trial dates were set;	77
(d) Number where you were advised of settlement;	15
(e) Number where the plaintiff endorses under Form 137;	229
(f) Number where the defendant endorses under Form 137;	4
(g) Time between the filing of an action and when the Form 137 is filed;	Average: 15 days Standard deviation: 47 days Count: 250 202 cases filed Form 137 on the same day as the action was filed

Number of Notice of Trials Filed Each Year (estimated length of trials being two days or less).

YEAR	ALL NOTICE OF TRIALS FILED	TWO-DAY OR LESS	PERCENTAGE OF ALL TRIALS
1995	7533	1207	16.02%
1996	7603	911	11.98%
1997	6574	577	8.47%
1998	6405	299	4.66%
1999	6910	270	3.91%

	Pre-Rule 66 Actions	Rule 66 Actions	Non-Rule 66 Actions
(a) Length of time between commencement of action and the day that it was set for trial (filing dates of writs and Notice of Trial)	Count: 200 Mean: 257 Standard Deviation: 162	Count: 77 Mean: 129 Standard Deviation: 86	Count: 168 Mean: 168 Standard Deviation: 100
(b) Length of time between commencement of action and the first day set for trial;	Count: 194 Mean: 508 Standard Deviation: 190	Count: 77 Mean: 217 Standard Deviation: 80	Count: 166 Mean: 312 Standard Deviation: 160
(c) Length of time between commencement of action and the first day of the actual trial;	Count: 29 Mean: 431 Standard Deviation: 165	Count: 7 Mean: 202 Standard Deviation: 71	Count: 16 Mean: 236 Standard Deviation: 83
(d) Number of Chambers application (Notice of motions filed. Only included those cases that have filed notices of trial.)	76/200 38%	34/77 44%	55/168 32%
(e) Hours taken with Chambers applications;	Not available		
(f) Number of Parties	3.18 per case (636/200)	3.23 (807/250)	3.13 525/168
(g) Category of claims;	Legislated Statutes: 10 (5%) MVA: 69 (34.5%) Other Civil: 121 (60.5%)	12 (4.8%) 45 (18.0%) 193 (77%)	14 (8.3%) 60 (35.7%) 94 (55.9%)
(h) Number of settlements (where that advice has been received);	43/200 (21.5%)	15/250 (6%)	22/168 (13.1%)
(i) Number where trial dates set;	200	77/250 (30.8%)	168
(j) Number where trials actually commenced;	29	7/250 (2.8%)	16/168 (9.5%)
(k) Total number in the category.	200	250	168

Separate statistics for actions under Rule 66: