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Comparative Study of Judicial Administration

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Comparative Study of Judicial Administration (1)

International Project
directed by Takeshi Kojima

I PROJECT OUTLINE : COMPARATIVE STUDY OF JUDICIAL ADMINISTRATION IN CIVIL MATTERS

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II JUDICIAL ADMINISTRATION IN CANADA

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Takeshi KOJIMA*

1. General purpose of project

A. To collect statistics and other data relative to the judicial systems and resolution of legal disputes within the countries under study.

B. To analyze the collected data on an individual and comparative basis.

Note : It is anticipated that the proposed analysis shall include, but not be confined to assessment of (1) attitudes within each country regarding resort to litigation for settlement of disputes, and (2) relative assessibility to justice within the various judicial systems under study.

2. Scope of date collection

A. Areas of inquiry

1. demographics

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2. size and composition of legal profession
3. courts and judicial officers
4. legal disputes including adversarial and non-adversarial proceedings, arbitration, concialiation, and mediation.
5. case filings, litigation delay and settlements, appeal rate, etc.

B. Time period covered
1. Current data is needed to facilitate an up-to-date comparison.
2. Historical data (from World II or earlier if available) is desirable to provide a basis for identifying trends and significant changes and developments.

C. National data is of primary importance but local data may be furnished where effective for demonstrating contrasts within a country or special circumstances prevailing in areas within a country.

D. If national data is unavailable, local data should be complied and evaluated.

3. Suggested composition of national surveys

A. Collected data should be accompanied with sufficient explanation to be comprehensible to foreigners unfamiliar with the country's judicial system and procedures.

B. A brief description of the structure and critical procedure of the country's judicial system should be provided.

C. Factors affecting resort to judicial processes within each country should be analyzed.

D. Collected data should be analyzed to identify :
1. significant trends
2. inferences and conclusions explanatory of the data.

4. Project phases

A. First phase : Submission of national surveys initially each national reporter shall be afforded maximum freedom in collecting and analyzing within the scope of project's general objectives in accordance with his individual judgment regarding what matters are relevant.

B. Second phase : Following analysis of initial surveys national reporters may be requested to submit additional data or information where necessary for project purposes.

C. Third phase : National reporters will be requested to complete detailed questionnaires prepared following careful review of the initial surveys and consultation with several of the project participants.

D. Fourth phase : Subject to securing the necessary funding, it is proposed that an international conference be held in Tokyo attended by several of the national reporters to evalutae the overall results of the study and prepare a final report.

5. Project languages

A. All reports should be written in either English,

French or German.

B. To the extent practicable, English will be the preferred language, particularly during conferences.

C. Where reports are submitted in English, important technical or legal terms should be provided parenthetically in the country's native language. Reports written in French or German should provide parenthetically an English translation of important technical or legal terms.

D. It is anticipated that the translation of the national surveys will be published in a Japanese legal journal.

II JUDICIAL ADMINISTRATION IN CANADA

Frederick H. ZEMANS*

This paper addresses the use of the courts by Canadians and the extent to which going to law, which in most common law countries is synonymous with going to court, has varied during the last two decades. I will also address the growth of the legal profession and the extent to which the increasing supply of lawyers has affected Canadian litigation patterns. By emphasizing the courts, I give the reader only a partial view of Canadian dispute resolution habits. In common with citizens of many modern states, Canadians are able to assert many rights and obtain significant benefits from other citizens and from the state by asserting claims before numerous administrative tribunals created by the federal and provincial governments. Workers' compensation, labour relations, human rights, consumer complaints, environmental protection, refugee status and social security are among the claims that are determined initially by administrative tribunals and not by Canadian courts. Tribunals are required to determine matters of considerable economic and social significance to individual Canadians as well as to Canadian corporations. The ability of land developers to build housing or commercial structures in certain locations requires the approval of municipal councils

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and various provincial tribunals. Although the buildings may potentially involve the expenditure of millions of dollars, it is quite common that the issues surrounding the construction of the buildings will often not come before the courts. Similarly if a divorced mother is unable to support herself, she may either apply to the courts to assist her in obtaining support from her legal or common law husband or she may, in certain circumstances, apply to the state for social assistance. If she is denied social assistance she may appeal to an administrative tribunal — the Social Assistance Review Board. Only at the second level of appeal will the social assistance applicant come before the Canadian courts where the issues for determination will be severely restricted. Porfessor Kojima's study requires us to focus on the court system with limited discussion of the informal and often the more effective mechanisms of dispute resolution. This paper is therefore circumscribed in its analysis of the role of the state in establishing official mechanisms for dispute resolution.

1. Demographics

Canada is a large geographic land mass (9,220,974 square kms) with a relatively small population of just over 24 million people (24,343,180).[1] The major centres of population remain along Canada's southern border with the United States, with largest concentration of people being

1) Canadian Centre for Justice Statistics, *Manpower, Resources and Costs of Courts and Criminal Prosecution in Canada 1980-82* (1983) at 17.

along the St. Lawrence River and the Great Lakes. The provinces of Quebec and Ontario contain approximately two-thirds of the Canadian population. The bilingual and multicultural aspect of Canada cannot be ignored in any discussion of Canadian legal institutions. Although the majority of Quebec citizens are French-speaking, there are also enclaves of French-speaking Canadians in other regions of the country — particularly Manitoba, Ontario, and New Brunswick.

Responsibility for the administration of courts in Canada is divided between the federal and provincial or territorial levels of government by the Canadian constitution. Specifically section 92 (14) of the *Constitution Act, 1867* gives each province exclusive powers over "The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts ..... " This authority enables provincial legislatures to establish Supreme Courts, District Courts, and Provincial Courts of civil, criminal and family jurisdictions. Additionally, the provinces of Quebec and Nova Scotia have delegated some of their authority to their municipalities ; hence Municipal Courts are found in these two provinces.

As well, section 101 of the *Constitution Act, 1867* allows the Parliament of Canada to "provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada". It is under this authority that the Supreme Court of Canada, the Federal Court of Canada and the Court

Martial Appeal Court of Canada were created. Section 96 of the *Constitution Act, 1867* states that "the Governor General shall appoint the Judges of Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick". Section 100 carries this provision one step further and stipulates that the salaries, allowances and pensions of these judges are to be fixed and provided by the Parliament of Canada. As a consequence of these two sections, the provincially-constituted courts in each province can be divided into two groups — those whose judges are appointed and paid by the federal government, and those whose judges are appointed and paid by the province. In Canada, the courts that are funded and appointed by the federal government are known as the "superior" courts while courts whose judges are appointed by the province or territory are referred to as provincial or territorial courts.

The federal-provincial division of power with respect to justice is further apparent in the area of criminal law. While section 91 (27) of the *Constitution Act, 1867* vests "exclusive Legislative Authority" over "The Criminal Law" in the Parliament of Canada, the previously-mentioned provincial power over "The Administration of Justice in the Province" (section 92 (14)) includes the maintenance and organization of criminal courts.

Although in recent years, the number of provincially and federally appointed judges has been increasing, Canada has a relatively low ratio of judges to population. In

1981-82 there were 6.9 judges per 100,000 Canadians with 4.1 per 100,000 being provincially appointed and 2.8 per 100,000 being federally appointed.[2]

Provincial courts are much more accessible and are located in six hundred more Canadian commmunities than federal and superior courts.[3] This proliferation of provincial courts is due to the existence of small claims courts which serve neighbourhoods or urban districts. Their presence can most readily be perceived in a province such as Ontario where there are 99 superior courts and 179 provincial courts (serving a total of 278 communities in that province.) The superior courts is generally a more expensive, more remote and more formal tribunal which is a partial explanation for the discrepancy in numbers between the 289 superior courts and the 883 provincial courts located across Canada.[4]

2) *Id.* at 37,39. For example, Manitoba had 6.3, Ontario 6.2, Quebec 6.7 and New Brunswick 6.7 judges per 100,000 population in 1981-82. Ontario and Quebec have virtually the same number of Federal judges per 100,000 population, (2.5), while Quebec has slightly more provincially appointed judges than Ontario, (4.2 compared to 3.8 per 100,000 population).

3) *Id.* at 21.

4) *Id.* at 57, 75, 91, 109, 125, 143, 163, 181, 199, 209, 227, 245.

Table 1.1

NUMBER OF COMMUNITIES SERVED BY SUPERIOR (s.96) COURT AND PROVINCIAL COURTS, 1981—82, BY PROVINCE [5]

Province	Superior (s.96) Courts			Provincial Courts		
	Perm.	Circuit	Total	Perm.	Circuit	Total
Alberta	2	18	20	23	76	99
B.C.	25	12	37	68	33	101
Manitoba	16	0	16	18	54	72
New Brunswick	8	3	11	14	22	36
Newfoundland	6	5	11	15	42	57
Nova Scotia [6]	1	23	24	14	24	38
Ontario	52	47	99	64	115	179
P.E.I.	1	2	3	2	3	5
Quebec [7]	41	4	45	81	34	115
Saskatchewan	18	3	21	15	104	119
Yukon	1	0	1	1	13	14
N.W.T.	1	[8]	1 [8]	2	46	48
			289			883

The Canadian judiciary has grown both in number and in relationship to population during the last several decades. The ratio of federally appointed judges to population grew from 2.14 per 100,000 in 1952 to 2.34 judges per 100,000 of population in 1975. This rose to 2.8 federally appointed judges per 100,000 population in 1981-82. This represents a considerable increase in the actual number of judges.

[5] *Id.*

[6] Does not include 1 Municipal Court, serving different communities.

[7] Does not include 154 Municipal Court, serving different communities.

[8] Many other communities are served on an "as needed basis".

Table 2.1

NUMBER OF JUDGES [9]

Fiscal Year 1977—1978	Superior (Supernumeraries (s))	Provincial/ Territorial	Total Judiciary
Canada	577 (50)	868	1495
Newfoundland	16 (1)	35	52
Prince Edward Island	7 (0)	3	10
Nova Scotia	21 (1)	34	56
New Brunswick	18 (1)	25	44
Quebec	126 (22)	279	427
Ontario	188 (10)	203	395
Manitoba	27 (2)	47	76
Saskatchewan	33 (1)	43	77
Alberta	43 (5)	87	140
British Columbia	72 (7)	108	187
Yukon	1 (0)	1	2
Northwest Territories	1 (0)	3	4
Supreme Ct. of Canada	9	—	9
Federal Ct. of Canada	16	—	16

[9] National Task Force on the Administration of Justice, *Justice Services in Canada 1977—78* (1979), at 87. Provincially appointed judges sat in 600 more communities than did s.96 judges. Only 602 of the country's 1,470 sitting judges were appointed pursuant to s.96; thus, 59 % of all sitting judges were provincial rather than federal appointees. Note from the figures for 1981—82 that the ratio of provincial to federal judges has remained relatively constant.

Table 2.2

NUMBER OF JUDGES [10]

Fiscal Year 1981—1982	Superior (Supernumeraries (s))	Provincial/ Territorial	Total Judiciary
Canada	602 (80)	996	1678
Newfoundland	18	32	50
Prince Edward Island	7	3	10
Nova Scotia	23 (3)	36	62
New Brunswick	19 (2)	25	46
Quebec	132 (22)	270 [11]	42
Ontario	187 (22)	326 [12]	535
Manitoba	27 (4)	33	64
Saskatchewan	33 (5)	50 [13]	88
Alberta	53 (9)	102	164
British Columbia	76 (13)	114	203
Yukon	1	2	3
Northwest Territories	1	3	4
Supreme Ct. of Canada	9	—	9
Federal Ct. of Canada	16	—	16

2. *Size and Composition of the Legal Profession*

The Canadian legal profession has paralleled many of the developments of the American and British legal professions and is similar to other common law countries in its emphasis on the private practioner as the normative model of the legal profession. Despite the presence of the civil law system in Quebec, which has been influenced by the French Napoleonic Code, the common law dominates in all other provinces and within the common law dominates in all other provinces and within the federal government. Little significant research has been under-

10) *Supra* note 4.
11) Includes 17 Municipal Court Judges.
12) Includes 89 Justices of the Peace.
13) Includes 4 Justices of the Peace.

taken comparing the Quebec legal profession with lawyers in the rest of Canada, but there are few differences.[14] The vast majority of Canadian lawyers are in private practice. The numbers have increased at a rapid rate — as recently as 1977-78 there were 26,775 legal professionals in private practice in Canada, composed of 24,810 lawyers and 1,945 notaries.[15]

By 1979-1980 there were approximately 30,998 lawyers, and by 1982 there were some 39,000 lawyers in Canada. In Ontario alone in May, 1985, the 17,680 lawyers represented more than a 100% increase between 1971 and 1985. These figures represent a significant growth in absolute numbers since the mid-1960's as well as a significant increase in the ratio of lawyers to population. Again, using the example of Ontario, the ratio of lawyers to population halved in the two decades between 1960 and 1981 from 1 : 1147 to 1 : 574.[16] There are considerable disparities in the distribution of lawyers throughout the Country. In general terms, lawers are clustered in the most economically advanced and densely populated parts of the country, and in government centres. For example, Toronto, which is the provincial

14) There are few significant distinctions between lawyers in Quebec and legal professionals in the common law provinces.
15) *The Canadian Law List* (1983) (Canada Law Book Inc ; Ontario).
16) "The Report of the Special Committee on Numbers of Lawyers" (1983), 17 *L.S.U.C. Gazette* 222 at 227-8. For example, in Ontario, the ratio of lawyers to population was as follows :

1960	1 : 1142	1965	1 : 1143
1970	1 : 1043	1975	1 : 817
1980	1 : 599	1981	1 : 574

capital of Ontario and the commercial centre of Canada, located in the midst of the industrial heartland, contains about 10% of the total population of the country, but about 25% of its lawyers.[17] Conversely, small towns in remote areas often have few lawyers, and almost certainly a much smaller proportion of lawyers to the general population than is found in the major metropolises.

It must be noted that the career patterns of the expanding Canadian legal profession are also changing. For example, in Ontario, the most populous province, the number of graduate lawyers entering private practice has declined from 86% to 70% during the last decade.[18] While there were only some 40 law teachers in all of Canada as recently as 1950, the number has grown to over 650.[19] Government lawyers working at the similar dramatic increase in numbers. For example, the Province of Ontario employed approximately 6 lawyers in the Ministry of the Attorney General in 1945. By 1981, 150 were employed

17) E.Berger Ltd., *Demographic Survey of the Canadian Bar* (1979), at 32.

18) D.Stager, "The Markket for Lawyers in Ontario : 1931 to 1981 (1984), 7 *Canada - U.S.L.J.* 214, at 227. Although a significant number of lawyers continue to practice in the traditional fashion, the figures show a substantial decline in the percentage of lawyers in private practice. In 1971, of the 7,666 lawyers in Ontario, 86% were in private practice and the number rose to 93% in the following year. The majority of lawyers in private practice tend to work in two and three person firms, while a growing number are employed by the government (See *Infra* note 20).

19) Report of the Consultative Group on Research and Education in Law, Social Sciences, and Humanities Research Council, *Law and Learning* (1983), at 30.

in the Ministry's head office, and a further 500 in local crown attorneys' offices.[20] In the same year, of 15,001 members of the Ontario legal profession, 1,098 were employed by various levels of government.[21] In May 1985, there were 17,680 members of the Ontario legal profession, of whom 69.5% were in private practice.[22]

3. *Legal Aid*

Other significant changes in the Canadian legal profession and the use of the court system have resulted from

20) H.A.Leal, "Are there too Many Lawyers?" (1982), 6 *Canada-U.S.L.J.* 166, at 171.

21) *Supra* note 18. For example, a breakdown of lawyers in Ontario in 1981, 1983 and 1985 illustrates the following :

	1981	(%)	1983**	(%)	1985**	(%)
Private Practice	10,803	72	11,477	70.5	12,295	69.5
(solo)	(3,466)	(23)	(3,652)	(22.4)	(3,823)	(21.5)
(non-solo)	(7,337)	(49)	(7,825)	(48.1)	(8,472)	(48)
Education	177	1.2	191	1.2	189	1.1
Government	1,089	7.3	1,306	8.0	1,431	8.1
Other*	1,166	7.7	1,366	8.4	1,558	8.8
Total, Active	13,244	88.2	14,340	88.1	15,473	87.5
Retired	1,064	7.1	1,233	7.6	1,488	8.4
Not in Ontario	703	4.7	705	4.3	719	4.1
Total Membership	15,011		16,278		17,680	
% Annual Increase	6.3		3.4		4.9	

* "Other" refers to those not employed in the legal field.

** These figures provided by Mr. Barnette, The Law Society of Upper Canada, June 18, 1985.

Another area in which lawyers are increasingly employed is in public services. Community Groups, trade unions, legal aid or legal services schemes and advocacy organizations today employ hundreds of practioners across the country. See H.W.Arthurs, R.Weisman, F.H.Zemans, "The Canadian Legal Profession", prepared for the Working Group for Comparative Study of Legal Professions, unpublished (1984) at 5.

22) Mr. Barnette, The Law Society of Upper Canada, June 18, 1985.

the 19th century the actual training given to lawyers appears to have been minimal. Some lectures were provided, but attendance was not compulsory. There was an examination, but it appears to have been elementary. Eating dinners was (and still is !) all important.

I do not know whether the Japanese visitors of 100 years ago were actually called to the bar in England. It does not appear that this was the case, and of course there would have been little point in their case, since they wished to return to Japan and practice here. But surely, as members of the Honourable Society of the Middle Temple they would have attended many of these dinners, and partaken of the social life of the Middle Temple, along with the English, Scottish, and occasional Indian and other students.

The Hall is very impressive. The walls are panelled with the coats of arms of succeeding Treasurers of the Middle Temple — an annual and prestigious office. At the top are seven great oil paintings of English monarchs : Queen Elizabeth (one of the few contemporary portraits), Charles the First a portrait (1684) by Vandyke, Charles II (by Godfrey Kneller), James II, William of Orange, Queen Anne. These portraits symbolise the connection between the law and the state in Britain. Specimens of ancient armour of great rarity and antiquity, are on display. The whole building is extremely impressive.

But the Inns of Court, and especially the two Temples, are also linked closely with English literary history. Exactly opposite the Temple church is the Dr. Johnson Building, named after the great lexicographer, who had rooms here

> counsel with their own resources have become a standard feature of Canada's system of justice. Such services, once totally dependent on the generosity of individual lawyers, are now available to all eligible persons due to the cooperation of lawyers and government.[23]

There has been a steady increase in the use of legal aid services by Canadians. In 1977, 199,233 persons attended legal aid offices across Ontario compared to 239,161 in 1984-1985. While 76,649 certificates were issued in 1977, 87,531 were issued in 1984-85. The breakdown between criminal and civil cases has remained relatively constant, with approximately 55% of the certificates going to criminal and 45% going to civil cases. Of the completed civil cases in all years, approximately 80% involve domestic matters. The total cost of the plan during the fiscal year ending March 31, 1985 was $70.4 million as compared to $46.5 million in 1981.[24] Quebec legal aid statistics indicate a similar trend towards a higher demand for service. In 1983-84, 227,570 applications were accepted and this figure is expected to reach 263,000 in 1985. The cost of the plan in the reported year was $52.7 million and is estimated at $54.6 million for 1985.[25]

As the access to justice movement gains strength, the

23) National Legal Aid Resarch Center, *Justice Information Report: Legal Aid Services in Canada* (1981).

24) The Law Society of Upper Canada, *Ontario Legal Aid Plan Annual Reports*, 1977-84 ; 1985 Statistics provided by John Boefoy, Information Officer, The Law Society of Upper Canada.

25) Commission des Services Juridique, *12th Annual Report* (Mar. 31, 1984).

allocation of public resources to legal aid grows. There is presently much debate concerning the type of legal service model that best meets the needs of the poor. As a result, many legal services programmes provide some community organizing, legal education and law reform to supplement their casework and summary advice services. Recent attempts to curtail government spending generally (and specifically to restrict legal services budgets) have jeopardized the expansion and, to some extent, the very existence of legal aid services.

> By the beginning of the 1980's, it had become evident that public funding for legal aid was being curtailed in the wake of the economic recession. Legal aid as a standard feature of the administration of justice is now being tailored to the (decreasing) amount of public funds available to pay for it.[26]

As growth in the demand for legal aid continues, it is hoped that the effectiveness of the various service models will develop both to sustain and enhance reform-oriented services and to attract the wake of the economic recession proper funding.

4. The Administration of Justice in Ontario

We shall consider in some detail the administration of justice in the province of Ontario. Unfortunately, there are no national statistics in Canada on the administration of civil justice and despite the author's attempts to

[26] H.W.Arthurs, R.Weisman, F.H.Zemans, "The Canadian Legal Profession", Prepared for the Working Group for Comparative Study of Legal Professions, unpublished (1984), at 55.

collect data from the ten Canadian provinces, as well as the northern territories, it has proven to be impossible to undertake a significant analysis of civil litigation in all Canadian jurisdictions. As Ontario is populated by approximately one-third of the Canadian people, we believe that many of the developments in the administration of justice that are noted in Ontario are representative of the developments in the remainder of Canada. But deference must be paid to Canadian regionalism and therefore the analyses of case-load herein can be taken no further than the geographic boundaries of the province of Ontario.

In 1978, the then Chief Justice of Ontario spoke on the occasion of the opening of the courts and enumerated four principal problems affecting the administration of justice in Ontario as follows : [27]

1. Extremely heavy case-loads at all court levels ;
2. Delays in bringing proceedings to trial ;
3. Lack of adequate courtroom facilities "in many of the larger cities" especially Ottawa, St.Catharines, Sudbury and Metropolitan Toronto ;
4. The rising cost of litigation.

The Chief Justice indicated that a number of steps were being taken to attempt to reduce the delays and backlog of cases including : the use of pre-trial conferences ; the use of commissioners (non judges) to decide matters in the field of family law ; the development of

[27] "Reports on the Administration of Justice in Ontario on the Opening of the Courts for 1978", (1978), 12 *L.S.U.C. Gazette* 48.

a Unified Family Court in one major city with jurisdiction to hear all types of domestic disputes ; and the scheduling of cases to minimize the time that counsel wait in the court.

It is helpful to describe the search for a comprehensive court administrative policy that was undertaken by the Ontario Government during the last decade so that one can appreciate the comments of the Chief Justice and assess developments.

In the late 1960's and early 1970's, the Ontario Government found itself under increasing public pressure to respond to the case-load crisis that was plaguing most courts in the larger urban centres. The *McRuer Report* of 1968 recommended that the Provincial Government take over responsibility for financing all Magistrate's Courts and all County and District Courts. The Government acted on this advice, renaming the Magistrate's Courts "Provincial Courts" in the process, but this initiative did little to solve the serious problems of congestion in the urban courts.

The Government's concern was that it now had financial responsibility for the courts at all levels within the province, but nevertheless lacked control over court management. Over the years, the different levels of courts in different areas had produced their own idiosyncratic patterns of administration. In some cases, the judges exercised overall control, while in other areas, the court administrator had taken charge. In yet other areas, such as in the criminal courts, the crown

attorneys or the police had assumed responsibility for case-scheduling. It was difficult for the Government to comprehend the behemoth it was now responsible for, let alone devise a solution to the case-load problem.

It is clear that there were major shortcomings in the Ontario courts in the early 1970's. A study by the Ontario Law Reform Commission[28] confirmed that the most critical weakness lay in the area of efficiency. Because of the Government's lack of ability to control the courts, they also received a low rating on accountability. During this period, the courts received a good deal of criticism in the press for their shortcomings. Because there were no formal channels through which public concern could be expressed, the courts could also be criticized for their lack of responsiveness. Some writers indicated that the improvement of court administration should emphasize increasing efficiency, accountability and responsiveness, while maintaining or improving the level of fairness and support staff morale.

In 1970, the Government requested the Ontario Law Reform Commission to examine the administration of courts. In 1973, after a concentrated and thorough study, the Commission returned a detailed report.[29] One recommendation of the Commission overshadowed all others in its far-reaching implications : a single official, responsible to the Attorney General, should be appointed to take

[28] Ontario Law Reform Commission, *Report on Administration of Ontario Courts*, 1973, (1973).

[29] *Id.*

overall responsibility for the administration of all Ontario courts with regard to all matters not directly affecting adjudication. This official, to be known as the Provincial Director of Court Administration, would be aided by six Regional Directros. Another important recommendation was that an advisory committee on court administration should be established to aid in planning, to improve communication among various groups in the courts, and to provide input into court administration policy by the lay public and the legal profession. The Report recommended that membership on the advisory committee should include all Chief Judges, the Deputy Attorney General, the Deputy Minister of Government Services, the Provincial Director of Court Administration, four members of the legal profession, and an unspecified number of lay representatives.

The Law Reform Commission not only brought forward a significant new form of court administration, but recognized that the administration of justice was an issue in which the public legitimately had the right to expect a voice. As well, the Commission recommended that the proposed Directorate adopt a "systems approach" in administering the courts. This implied that the entire judicial-legal system would be regarded as "an assembly of interdependent parts forming an integrated whole". The various participants (judges, lawyers, administrators, clerks, crown attorneys, juries, witnesses, and litigants) would be viewed according to the effect they had on each other, and according to the constraints

placed on them collectively by finances, courtroom space, the public demand for service, and important legal principles. The hope was that the activities of the various participants in the adjudicative process would thereby receive clear coordination and direction with regard to minimum costs to litigants, reasonably speedy disposition of cases, and, in effect, convenience to all. Innocuous as this recommendation sounds, it was considered by many to be radical in the context of the Ontario court system — or rather, the Ontario court "non-system." Each level of court in each city or town seemed to operate as an independent institution.

The Commission's recommendations, if implemented, would have resulted in a transfer of power from some judges and crown attorneys to court administrators responsible to the Attorney General. The different levels of courts would share the same administrative hierarchy as the upper echelons, no longer existing as institutions entirely separate from each other. The Commission implied its opinion that the judiciary would not be opposed to having some of their administrative duties transferred from them. Indeed, the Report indicated that the judges would be happy to no longer have to "borrow adjudicative time for administrative duties", duties which had befallen them "more by default than design".

The Report of the Ontario Law Reform Commission was generally accepted by the Government of Ontario which indicated that it felt it necessary, through professional administrators, to play an even greater role in super-

vising court administration than proposed by the Commission. The Attorney General, in introducing the Report, indicated that it was the Government and not the judges which had responsibility to the people of Ontario for the proper administration of the courts. It was anticipated that the Government's new responsibilities in court administration would "free" the judges from the "stress" of administrative duties, thus giving them more time for adjudication, while enhancing their independence by removing them from the politics of court administration.

Contrary to the belief of the Attorney General, some judges felt that their independence could be better preserved if they were given a greater, not smaller role in court administration. These judges made strong protests to the Attorney General, and the Government began to pursue a more cautious approach in implementing its courts' administration policy.

The opposition of the judiciary stemmed from a fear that increased efficiency and accountability would mean decreased fairness, in that judicial independence in relation to the adjudicative-administrative sphere might suffer. The Attorney General's remarks on this subject did little to allay the concerns of the judiciary. Judges also feared being directed by a new and relatively unknown group of professional court administrators who had not previously existed.

In light of the deficiencies of the existing court system, the Law Reform Commission's approach appeared to go far towards recommending needed improvements. Its

major defect was a failure to take into account the fears of some judges about decreased judicial independence and less favourable working conditions.

In an effort to determine the feasibility of the Law Reform Commission's approach, an experimental project was undertaken in ten counties and judicial districts in central Ontario. Under the supervision of an Advisory Committee composed of four nominees of the bench, two lawyers, and one representative of the Government, a Court Management Team of professional administrators planned a number of administrative reforms. The most significant aspect of the experiment was devoted to case-flow management — scheduling of cases, assignment of cases to judges and courtrooms and formulation of policy dealing with the setting of trail dates, trial times, and adjournments. The case management experiment was restricted to one judicial district and only at the provincial court (criminal division) level. The case management scheme which resulted from the experiment encountered considerable difficulties and was in fact never implemented. Fear of change thwarted the actual implementation of the pilot project. The Government terminated the project before it was actually launched.

After the conclusion of the "Central Ontario Experiment" the Government revised its court administration policy. It accepted concerns of judges expressed during the experiment that judicial independence included responsibility by the judges for the adjudicative as well as the administrative aspect of the courts. It further

accepted that "the responsibility for case-flow management should rest with the judiciary". The Ontario Government abandoned the idea of establishing a Directorate of Courts Administration responsible to the Attorney General, and adopted the idea of court management under the supervision of a proposed judicial council. The new policy was described in the *White Paper on Courts Administration* which was tabled in the legislature in October, 1976.[30]

The proposed Judicial Council, composed of four senior High Court Judges and the two Provincial Court Judges, would be given responsibility for the "overall direction" of the entire Ontario court system. A proposed Director of Court Administration would report to the Judicial Council rather than to the Attorney General, and would hold office during good behaviour. Unfortunately for the Government, what seemed to be a promising route out of the court administration policy jungle resulted in yet another dead end. Opposition to the *White Paper* came from a number of sources, including trial lawyers, court administrators and crown attorneys. These groups tended to be skeptical about the propriety of members of the judiciary being assigned such an extensive role in court administration. Some members of these groups also expressed concern that their occupational role might be detrimentally affected by a greater judicial role in court administration. It was reported that several Attorneys General from other provinces had expressed the fear that the Ontario *White*

30) Ministry of the Attorney General, *White Paper on Courts Administration* (1976).

Paper would give too much power to the judges, thus dangerously diminishing the force of the principle of ministerial responsibility. These leaders from other Canadian jurisdictions did not wish to be pressured by their own judges to follow Ontario's lead.

Further opposition to the 1976 *White Paper* came from the judiciary itself which seemed to be almost equally divided in its opinion about the question of whether the principle of judicial independence gives the judges the right to control case-flow management. The *White Paper* was, however, definitely more popular among the judiciary than among the other groups : almost two-thirds of the judges interviewed in a random sample survey supported its proposals. Sixty-four percent of the judges supported the *White Paper* while only 35% of the private bar and 48% of the Crown Attorneys supported the scheme. Sixty-six percent of the lawyers and 52% of the Crown Attorneys, as compared to 36% of the judges, had reservations or were opposed to the *White Paper*. Once again, the Government found itself without sufficient support to proceed with the implementation of a new policy without risking severe political embarrassment. The *White Paper* proposals were never enacted.

The pressures of the case-load crisis had continued to put a strain on the court system. The Government was unable to respond in a comprehensive fashion because of criticism of its wide-ranging policy initiatives, the Law Reform Commission approach and its *White Paper*. Yet, the case-load crisis had begun to ease, and both

the judges and the court administrators claimed that their professions were the most deserving of the ultimate reward : formal Government recognition of overall responsibility for case-flow management. That ultimate allocation of overall responsibility has yet to be made in Ontario.

In 1978, two bodies were formed which, although less powerful than the Judicial Council recommended in the *White Paper*, have demonstrated some capacity to formulate solutions to case-flow problems to the satisfaction of many interested parties. They are the Ontario Courts Advisory Council, formed by the Chief Justice of the Supreme Court of Ontario at the request of the Government, and the Bench and Bar Committee. The Bench and Bar Committee was an enlarged body (composed of most of the persons on the Court Advisory Council) to deal with the concerns and suggestions of the professions. It is important to note that in neither of these bodies is the public involved nor its opinions elicited. Representation from the Law Society, the Bar Association, the Advocates Society and the Criminal Lawyers Association all advise the judiciary but there is no representation from the Consumers Association of Canada, or for that matter, from the Ontario Association of Legal Clinics.

The significant reform produced by this new informal system was a practice Direction issued in 1979 by the Chief Justice of the Supreme Court stating that counsel who had agreed to a trial date in the Provincial Court would not be allowed an adjournment on account of a

conflicting trial in another court unless they applied to the court in advance of the trial date. This practice direction has allegedly alleviated one source of delay in larger cities and has effectively established the supremacy of the Chief Justice of the Supreme Court of Ontario over both the lower courts and the legal profession.

At present, the courts in the province of Ontario are administered by the Ministry of the Attorney General, specifically the Assistant Deputy Attorney General of Courts Administration, the Director of Small Claims Courts, the Director of the Supreme and District Court Offices and the Director of Provincial Court Offices. As previously discussed, the role of government and specifically that of the court administrators has been limited in face of strong judicial opposition.

5. *Ontario Court Structure*

In 1982, Ontario had a population of 8,625,110 living in an area of 917,434 sq.km. The province had 209 federally appointed and 326 provincially appointed judges. The provincial budget for the administration of justice was close to $130 million ($128,769,452). This was allocated almost equally between the superior courts (45.2% — $58 million) and the provincial courts (51.6% — $66.5 million).[31] As we shall see, however, the allocation of workload is heavily weighted in favour of the provincial courts.

31) *Supra* note 1, at 143.

The Supreme Court of Ontario, constituted by provincial statute, has one court for the entire province which is divided into two branches : The Court of Appeal for Ontario and the The High Court of Justice for Ontario of which the Divisional Court forms a part. The judges of the Supreme Court of Ontario are appointed by the Government of Canada by order of the Governor in Council (the Prime Minister and Cabinet). Judicial appointments tend to be made to members of the governing party.

The Court of Appeal has a Chief Justice, an Associate Chief Justice and 14 judges all appointed by the Federal Government. They are also *ex officio* judges of the Divisional Court and the High Court of Justice. There is one court for the entire province and it sits permanently in Toronto. The court has appellate jurisdiction in both criminal and civil cases from the High Court of Justice, the District Courts and Provincial Courts.

The High Court of Justice is composed of a Chief Justice, an Associate Chief Justice and 44 other judges, all federally appointed. The Court sits permanently in Toronto and on circuit in 47 locations. High Court Justices are also *ex officio* judges of the Court of Appeal. The court hears all indictable offences under the *Criminal Code* and civil matters not excluded by statute.

The Divisional Court, which is a division of the High Court of Justice, consists of the Chief Justice of the High Court and designated High Court Justices. The

Court sits permanently in Toronto and periodically in other locations. It has appellate jurisdiction from the District Courts and from the High Court but primarily hears appeals from decisions of statutory tribunals and appeals from Small Claims Courts where the claim exceeds $500, excluding costs.[32]

The District Court is constituted by provincial statute and established throughout the province in each county and district. District Court judges are appointed federally with little or no input from the region in which they eventually preside. The civil jurisdiction of the District Court is specified by the *Courts of Justice Act, 1984* currently at $25,000 having gradually increased from $1,000 in 1960.[33] The increase in the monetary jurisdiction of the District Court and lower civil courts has attempted to overcome delays in the upper echelon courts. Under *The Divorce Act of Canada*[34], the District Court and the High Court have concurrent jurisdiction in divorce matters although the majority of divorce hearings are held on an undefended basis in the District Court.

The District Court, as constituted by the *Courts of*

32) See *Courts of Justice Act*, S.O. 1984, c. 11 s.83.

33) See *Courts of Justice Act*, S.O. 1984, c.11 p.32. The following table illustrates the increase in monetary jurisdiction of the county courts in Ontario :

1961 :	$ 3,000	1970 :	$ 7,500
1981 :	$15,000	1984 :	$25,000

It should be noted that if all parties to an action in the District Court agree, a case may be tried with amounts in excess of $25,000.

34) R.S.C. 1970, c. D-8.

Justice Act, 1984[35] has a Chief Judge, an Associate Chief Judge, senior Judges for each designated county or district, and 123 other judges all appointed by the Federal Government. The District Court judges sit permanently in 8 regions comprising 52 localities. District Court judges act as *ex officio* judges of the Surrogate and Probate Courts and also as local judges of the High Court in matrimonial matters. The Court has jurisdiction in criminal matters where the accused chooses trial by judge and jury or by judge alone. It also hears civil actions where, as previously mentioned, the disputed amount does not exceed $25,000 (or higher amounts where there is no objection to its jurisdiction from the defendant). Appeals in minor criminal matters from the Provincial Court are also heard in the District Court.

The Unified Family Court was established in the late 1970's as an experiment in dispute resolution. The Court is located only in the city of Hamilton and has allowed litigants with domestic disputes to have all aspects of their disputes, (divorce, custody, support and reconciliation counselling) dealt with in one location. Constitutional difficulties associated with the model have not allowed its spread beyond the one community.

The Provincial Courts are composed of the Criminal Division, the Civil Division and the Family Division. The Criminal Division consists of a Chief Judge and 160 provincially appointed judges. This court hears summary conviction offences under the *Criminal Code of*

35) S.O. 1984, c.11, ss.25-31.

Canada and under Provincial statutes, and certain more serious offences where the accused elects trial by judge at the provincial court level. (Nine of these judges also acts as judges under the Family Division.) The Court also conducts preliminary hearings with respect to more serious criminal matters and processes traffic and municipal by-law infractions.

The Provincial Court (Civil Division) or the "Small Claims Courts" (127 in number)[36] are generally presided over by provincially-appointed judges but in some instances by deputy judges or District Court judges. The court has jurisdiction in civil disputes not exceeding $1,000 with the exception of Metropolitan Toronto where civil matters up to $3,000 may be heard.

Small Claims Court Referees have been appointed in several areas of the province. The object of the Referee's Office is to provide an informal hearing process for litigants in an attempt to obtain settlements without the need for formal trials ; to conduct judgment debtor examinations ; and to propose payments on account of judgments to assure a continuing and flexible programme of debt payment with a minimum burden on judicial mechanisms.

The Provincial Court (Family Division) consists of a Chief Judge and 72 provincially-appointed judges. The Court may hear all family matters except divorce, as well as matters under the federal *Young Offenders Act*[37], *The*

36) As of 1984.
37) S.O. 1984, c.19.

Child and Family Services Act[38], *Children's Law Reform Act*[39], *Family Law Reform Act*[40], *Reciprocal Enforcement of Maintenance Orders Act*[41], and some cases arising out of domestic disputes.

6. *Case-load and Delay*

The two most significant administration of justice issues in Canada are case-load levels and delay within the courts. The question of case-load levels can first be addressed by comparing the three civil courts.

Table 3.1

CIVIL ACTIONS COMMENCED IN ONTARIO[42]

	77/78	78/79	79/80	80/81	81/82	82/83	83/84
Supreme Court	47,438 19.44%	50,925 19.79%	53,388 20.19%	55,707 20.46%	57,062 20.80%	57,229 20.20%	49,271 20.10%
District Courts	70,031 28.70%	53,732 20.88%	58,440 22.10%	57,228 21.02%	60,776 22.15%	65,361 23.07%	56,350 22.99%
Small Claims	126,572 51.87%	152,732 59.3%	152,613 57.7%	159,321 58.5%	156,503 57.04%	160,754 56.71%	139,457 56.90%

The number of cases commenced in the Small Claims Courts has increased from 126,572 in 1977 to 160,754 in 1982-83. This increase in volume of case-load in seven years is approximately 27% in absolute numbers but has meant an increase of only 5% of the total case-load of the ju-

38) S.O. 1984, c.55.
39) R.S.O. 1980, c.68.
40) R.S.O. 1980, c.152.
41) R.S.O. 1980, c.433.
42) Ministry of the Attorney General, *Court Statistics Annual Report (Ontario)* for the following years : 1977-78 ; 1980-81 ; 1983-84.

risdiction. The most significant increase in the case-load of the Small Claims Courts has come from the District Courts with no variation whatsoever in the percentage of the total case-load of the province handled by the Supreme Court of Ontario. The increase in case-load of the Small Claims Court can be attributed to the increase in its monetary jurisdiction. In 1977 the monetary jurisdiction of the Small Claims Courts was increased from $400 to $1,000 and its case-load increased to 152,732. It is of some significance that, despite the experimental expansion of the Small Claims Courts' monetary jurisdiction in Toronto, between 1981 and 1983, the total case-load of the Small Claims Courts did not increase significantly nor had the number of cases brought in the District Courts drop until 1983/84. The severe recession and the general economic decline in Canada may be a partial explanation for the imited initial impact of the Toronto project.

Table 3.2

ACTION COMMENCED IN THE DISTRICT COURT[43]

Year	General Writs		Specially Endorsed		Total	
	Ontario	York[44]	Ontario	York[44]	Ontario	York[44]
75/76	28,564	12,384	40,241	20,002	68,825	32,336
76/77	23,456	10,166	47,691	22,670	71,147	32,836
77/78	22,796	10,009	47,235	22,236	70,031	32,245
78/79	20,678	8,815	33,054	14,997	53,737	23,812
79/80	22,994	9,599	35,446	16,103	58,440	25,702
80/81	23,328	8,764	33,900	13,648	57,228	22,412
81/82	26,856	10,358	33,910	12,341	60,766	22,699
82/83	29,986	12,076	35,375	14,870	65,361	26,946
83/84	29,268	12,232	27,082	11,295	56,350	23,527

43) *Id.*
44) District Court of York — Metropolitan Toronto.

Although the total number of cases commenced in District Courts dropped appreciably from 1977/78 to 1978/79 (approximately 25%) there has been no comparable change since 1980. The number of summary judgment proceedings has declined considerably in the District Courts during the last decade. Much of this litigation was in Metropolitan Toronto, where the number of summary judgment proceedings has dropped by nearly fifty percent. Much of this litigation has been taken over by the Toronto Small Claims Court, where we noted 13,318 claims in excess of $1,000.00 in 1981/82; 16,139 in 1982/83 and 14,979 in 1983/84.[45]

The declining case-load of the District Courts has not appreciably affected the percentage of cases that actually go to trial. Table 3.3 of non-divorce cases disposed of by trial gives the reader a limited vantage point as the percentages are obtained by comparing the number of actions commenced in a given year against the number of cases that actually go to trial. Nevertheless this systematic approach shows that the absolute number of trials dropped during this period of time.

Table 3.3

CIVIL NON DIVORCE CASES DISPOSED OF BY TRIAL : DISTRICT COURT [46]

	1977/78	1980/81	1982/83	1983/84
Jury Trials	.17 %	.307%	.236%	.26 %
Non-Jury	5.5 %	5.2 %	4.2 %	4.87 %
Total	5.67 %	5.507%	4.44 %	5.13 %

45) Clerk of Provincial Court (Civil Division)

46) *Supra* Note 42.

From a high of over 4,000 non-jury trials in 1976/77, the number of trials declined to 2,741 in 1982/83 and 2,746 in 1983/84. Similarly jury trials have also dropped nearly 50%. There were 291 jury trials in 1976/77 and only 146 in 1983/84.[47] Only divorce trials have increased and continue to remain high.[48] As a spouse could not, prior to 1983, be divorced without obtaining a court ordered decree of divorce, the divorce statistics are of little value to a student of dispute resolution.

Table 3.4

ONTARIO SUPREME COURT — ACTIONS COMMENCED [49]

	75/76	76/77	77/78	78/79	79/80	80/81	81/82	82/83	83/84
General	8,586	8,742	10,002	10,311	11,736	13,900	14,975	14,887	14,158
Writs [50]	4,436	4,643	5,281	5,497	5,995	6,831	7,534	7,383	6,835
Divorce	4,945	3,735	3,444	2,573	1,781	1,103	1,022	806	729
High Court [50]	4,296	3,104	2,781	2,057	1,210	651	548	483	394
Divorce	17,036	19,043	18,864	20,672	21,902	22,447	2,605	24,011	22,778
M.C.A. [50]	3,593	4,716	5,359	6,298	7,184	7,448	7,807	7,608	7,272
Special	6,607	8,435	11,313	12,813	13,682	14,444	13,493	14,004	9,093
Endorsement [50]	3,407	4,213	5,642	6,419	6,480	6,793	5,874	6,476	4,419
Mechanics	2,598	3,347	3,815	3,815	4,556	4,287	3,813	3,963	3,521
Liens [50]	711	813	905	1,155	1,177	950	1,021	924	675
Total	39,772	43,302	47,438	50,925	53,388	55,707	57,062	57,229	49,271
Total [50]	16,443	17,489	19,968	21,426	22,046	22,673	22,784	22,874	19,595

The number of actions commenced in the Supreme Court of Ontario increased from 1975 to 1982 by approximately 44%

47) *Id.* In 1981/82 there were 163 jury trials and 154 in 1982/83.

48) *Id.* 1976/77 saw the District Court hear over 16,000 divorce applications. This increased to 18,000 in 1978/79 and to 22,184 in 1982/83.

49) *Supra* note 42.

50) District Court of York — Metropolitan Toronto.

and experienced a drop of about 16% in 1983/84. This drop coincided with the increase in District Court jurisdiction to $25,000. The general increase was greater in areas outside of Toronto. For example, the number of generally endorsed writs increased by approximately 70% in Ontario as a whole while only by about 50% in the Judicial District of York. Similarly, the number of summary judgment cases increased approximately 110% more in the province than in Metropolitan Toronto. It was the general writs which usually led to seriously contested litigation because a very high percentage of specially endorsed writs resulted in default judgment.[51]

There were 4,945 High Court divorce petitions in 1975/76 compared to only 729 in 1983/84. This decline illustrates the trend for litigants to proceed pursuant to the *Matrimonial Causes Act*[52] ("M.C.A.") where a petition may be heard before a District Court Judge who is authorized to sit as a local judge of the Supreme Court.[53] This also explains the 34% increase in High Court actions commenced between 1975 and 1984 under *M.C.A.* divorce actions.

7. *Delay*

One of the first major studies of the length of time consumed in civil litigation in Canada was undertaken

51) G.Killeen, "An Analysis of Ontario High Court and County Court Civil and Criminal Statistics : 1976/77—1978/79" (1980), *16 Rep. Fam. L.* (2d) 351, at 353.
52) R.S.O. 1970, c.265.
53) Courts of Justice Act, 1984 s.s.12 (3).

in British Columbia in 1974 when over 13,000 civil cases were reviewed.[54] The findings of this study are instructive and the data are still applicable to the administration of justice in Canada. For example, the mean and median lapse times for 298 motor vehicle cases filed in the Supreme Court of British Columbia in 1979 indicates as follows :[55]

Events	*Lapse Times*	
	mean no.[56] of days	median no. of days
From issuance of writ to notice of trial [N=87]	352	312
From notice of trial to trial [N=26]	283	267

The British Columbia study reveals a lapse of approximately two years from the commencement of an action to trial. It is important to note that more than half of the lapses of time occurred before the court itself was given notice of a trial by the litigant's counsel. This is in all likelihood typical of superior courts across the nation.

In British Columbia, the Chief Justice of the Supreme Court, Trial Division reduced the time lapse from the point of trial readiness to the date of trial. But delay difficulties remained at the beginning of the process — the year from the issuance of the writ until

54) *Supra* note 9 at 206.
55) *Id.*
56) The mean number is higher than the median because a few excessively delayed cases raise the mean more sharply (see *Id.*).

it was placed on the ready list for trial. This time lapse is within the control of the litigation bar and has received limited judicial scrutiny.

It is important to note that of the 298 cases that were monitored, only 87 were placed on the trial list and of these only 26 or less than 9% actually came on for trial.[57]

These figures are comparable to a recent analysis undertaken by the author of cases added and cases disposed from the Supreme Court of Ontario's trial list during a nine-year period from 1975 to 1984.

Table 3.5

SUPREME COURT OF ONTARIO
CASES ADDED — CASES DISPOSED[58]

	1975	1976	1977	1978	1979	1980	1981	1982	1983
Cases Added[59]	7,829	7,914	7,026	6,539	6,333	6,106	5,947	6,249	6,139
	5,363	5,202	4,515	3,868	3,403	2,836	2,741	2,859	2,875
Cases Disposed[59]	6,833	8,334	6,969	6,859	5,882	5,462	5,549	5,352	5,985
	4,629	5,725	4,399	3,933	3,113	2,673	2,614	2,194	2,629
Carried Forward[59]	996	− 420	57	− 320	451	644	398	942	154
	634	− 523	116	65	270	163	127	665	249

Table 3.5 indicates that in each of these years from 1979 onward more cases were added to the trial list each year than were disposed of from the trial list (see table 3.5 and 3.6).

57) *Id.* at 427, note 9.
58) *Supra*, note 42.
59) District Court of York — Metropolitan Toronto.

Table 3.6

SUPREME COURT OF ONTARIO - PROVINCE - WIDE AND TORONTO CASES ADDED TO TRIAL LIST[60]

	75/76	76/77	77/78	78/79	79/80	80/81	81/82	82/83	83/84
Jury	736	749	798	790	890	1,051	1,068	1,430	1,332
Actions[61]	346	398	408	375	422	506	549	658	642
Motor Vehicle	2,257	2,572	2,607	2,729	3,162	3,567	3,787	4,064	4,109
Actions[61]	840	942	1,073	1,117	1,255	1,394	1,529	1,697	1,773
High Court	4,836	4,593	3,621	3,020	2,281	1,488	1,092	800	698
Divorces[61]	4,177	3,862	3,034	2,376	1,726	936	663	504	460
Total	7,093	7,165	6,228	5,749	5,443	5,055	4,879	4,864	4,807
Non-Jury[61]	5,017	4,804	4,107	3,493	2,981	2,330	2,192	2,201	2,233
Total of	7,829	7,914	7,026	6,534	6,333	6,106	5,947	6,294	6,139
All Actions[61]	5,363	5,202	4,515	3,868	3,403	2,836	2,741	2,854	2,875

Table 3.7

SUPREME COURT OF ONTARIO — CASES DISPOSED FROM LISTS[62]

		75/76	76/77	77/78	78/79	79/80	80/81	81/82	82/83	83/84
	Trial[63]	151	123	124	125	82	81	101	138	122
Total Jury Actions	[63]	69	50	55	48	25	33	30	39	42
	Total	659	644	818	777	805	874	1,009	1,127	1,214
	[63]	333	252	430	370	353	399	482	428	575
Non-Jury Motor Vehicle & Other Actions	Trial	798	921	760	924	859	841	913	938	849
	[63]	255	354	251	295	305	327	346	339	318
	Total	1,922	2,639	2,436	2,981	2,968	3,002	3,479	3,358	4,001
	[63]	692	1,054	914	1,159	1,205	1,196	1,503	1,250	1,533
Non-Jury High Court Divorce Actions	Trial	3,762	4,097	2,922	2,483	1,545	1,180	783	613	457
	[63]	3,172	3,551	2,358	1,891	1,096	738	416	310	256
	Total	4,252	5,051	3,715	3,101	2,109	1,586	1,061	867	770
	[63]	3,604	4,419	3,055	2,404	1,575	1,078	629	516	521
Total Non-Jury Actions	Trial	4,560	5,018	3,683	3,407	2,404	2,021	1,696	1,551	130
	[63]	3,472	3,905	2,682	2,186	1,401	1,065	762	649	574
	Total	6,174	7,690	6,151	6,082	5,077	4,588	4,540	4,225	4,771
	[63]	4,296	5,473	3,969	3,563	2,780	2,274	2,132	1,766	2,054
Total of All Actions	Trial	4,711	5,241	3,806	3,532	2,486	2,102	1,797	1,689	1,428
	[63]	3,496	3,955	2,664	2,234	1,426	1,098	792	688	616
	Total	6,833	8,334	6,969	6,859	5,882	5,462	5,549	5,352	5,985
		4,629	5,725	4,399	3,933	3,133	2,673	2,614	2,194	2,629

60) *Supra*, note 42.
61) District Court of York — Metropolitan Toronto.
62) *Supra*, note 42.
63) District Court of York — Metropolitan Toronto.

It is interesting to note the number of cases added to the trial list in the Judicial District of York (Toronto) for those years. Again, the primary cause of this decrease has been the movement of divorce litigation from the responsibility of Supreme Court judges to local judges which has removed nearly 3,000 cases a year from the Supreme Court's trial docket.

We have established in our formal Anglo-Canadian legal system the belief that every member of society is entitled to justice, or in the colloquial restatement, that every member of society must be given an opportunity to "have his or her day in court". In addition the *Canadian Charter of Rights and Freedoms* now guarantees a trial "within a reasonable time" to any person charged with an offence (s.11(b)). Canadian courts are presently faced with a case volume which is severely taxing their ability to administratively and substantively cope with the volume in an adequate, let alone expeditious fashion. The increased volume can be attributed to a number of factors including : the maturation of the post-war baby boom ; a shift from rural to urban living ; the expanded functions of the judiciary ; the shortage of judges ; the shortage of auxillary personnel ; and ineffective court administration.

One of the more undesirable ramifications of delay in the administration of justice is the heavy financial burden which is imposed upon litigants when the administration of justice is stretched over a lengthy period of time. Increased costs related to protracted litigation will,

in the extreme, deny some persons their rights to a day in court simply because they cannot afford it. The issue of increased costs has been partially addressed through legal aid programmes. However these programmes in turn have added new pressures to the system. In other words, financial and other pressures are putting Canadian justice in direct conflict with the expectations of the Canadian public, and the justice system is no longer able to hold itself out as potentially available for efficient dispute resolution or as able to provide the rule of law as required. This article has already indicated that much of the Canadian critique is concentrated on the question of efficiency in the courts. The discussion tends to focus on the period between the time a case is set down for trial and when the case actually comes on for trial. Even if this period is shortened, as was done in British Columbia, there still is a considerable delay in the period between the commencement of an action and its placement on the trial list. This pre-trial period in civil litigation has been gradually turned over to the legal profession and in most jurisdictions the judiciary has virtually lost control of litigation during the pleading and discovery stages. Various writers have asserted that if litigation is to be expedited then the status of cases must be monitored from the initiation of the proceedings until their determination by settlement or trial. Although the rate at which a case proceeds from the time it is commenced to the time it is set down for trial has largely been controlled by the lawyers, in the

eyes of the public it is the court system that is held accountable. Judge Perry S. Millar and his co-author Professor Carl Baar in their book *Judicial Administration in Canada*[64] have recommended that the Canadian judiciary must develop its administrative expertise to allow it to implement a systems approach to case-flow management and court administration to allow it to be in a position to deal with the complex problems of present-day case volumes. The Millar and Baar systems approach to case-flow management would mean that Canadian courts would be in a position to monitor litigation from the point that an action is commenced. This would be a radical departure from the traditional passive or inactive role of Canadian courts in civil actions. This approach assumes, in effect, that in the past lawyers themselves have been the administrators of the courts since they only came forward with cases that were ready for trial. Millar and Baar have put the proposition as follows :

> ... regardless of the effectiveness or ineffectiveness of leaving case-flow management to the Bar, that method is necessarily incremental and idiosyncratic ; it relies on the responsibility of the individual lawyer, provides no way of assessing the state of the court's backlog or the time lapses for different classes of cases. In short, the approach is unsystematic. To develop a systems approach therefore means making the judiciary less dependent of the Bar in the area of case-flow management.[65]

64) Perry S. Millar and Carl Baar, *Judicial Administration in Canada*, the Institute of Public Administration of Canada.

65) *Id.* at 392.

Canadian academics and lawyers as well as judges have come to recognize that it is the pre-trial stage, not the trial itself, which consumes the bulk of the time spent in litigation and thus defeats expeditious justice. The period during which a case is being prepared for trial by the lawyers is particularly important because the delay has, for the most part, been outside the control of the courts and (as we have seen) because 90% of all cases areterminated short of trial, usually by settlement or default judgment.[66]

While the benefits of achieving settlement prior to trial are obvious, typically Canadian civil procedure rules of practice contained few procedures specifically directed to achieving or encouraging this goal. Adjudication was viewed as the sole function of the courts with settlement being essentially a by-product. Civil litigation was believed to be a process of going to court to resolve disputes despite the very small number of cases that in fact went to trial. However, in the last decade various parts of the country have experimented with the concept of the court as a conciliator, as well as an adjudicator.

The pre-trial conference (which is an American import first developed in the 1938 amendments to the Federal Rules of Procedure) is a more informal conference most often between the counsel, without clients, and a judge held after the case has been placed on the trial list

66) G.D.Watson, "Civil Procedure and Expeditious Justice" (1979), *Expeditious Justice* 125, at 126.

and relatively close to the date of trial. At the pre-trial conference the possibility of settlement is explored and if this is not possible the presiding judge will attempt to narrow the factual and legal issues to shorten the trial. In Ontario, an experiment was undertaken by the Supreme Court of Ontario in conjunction with the Canadian Institute for the Administration of Justice in the use of settlement-oriented, pre-trial conferences in a mixed group of cases (including both personal injury and other types of civil litigation, but excluding divorce cases).[67] The experiment involved something in excess of 900 cases which was the total of all cases on the trial list in April, 1976. Using a random sampling technique, cases were placed in a test or control group with the test cases being put through a settlement-oriented, pre-trial conference several weeks before trial, while their paired control cases proceeded without a pre-trial conference. Data was then collected in all test and control cases with respect to the time and manner of ultimate disposition as well as the length of trial, if any. The principal objectives of the experiment were to measure the impact of pre-trial conference on settlement rates, length of trial, the timing of settlement and the overall productivity of the court. Preliminary findings were quite optimistic despite the fact that they were

67) H.M.Stevenson, G.D.Watson, E.J.Weissman, "The Impact of Pre-Trial Conferences : An Interim Report on the Ontario Pre-Trial Conference Experiment" (1977), 15 *O.H.L.J.* 591. The cases used were from the non-jury list in Toronto in the Supreme Court of Ontario.

based on a relatively small number of cases that used the pre-trial conference (approximately 160). It was concluded that where the judge played an active role as the conciliator-mediator there was a positive impact on delay in the court through increasing settlements, leaving fewer cases to be tried. This lead to an increase in judicial productivity — the speed with which the court could reach the reduced number of cases requiring trial.

The utility and effectiveness of pre-trial conferences is a matter of disagreement. Perhaps the majority of judges and lawyers in the United States feel that trials are shortened and settlement rates increase by the use of pre-trial conferences. American research data does not necessarily support these opinions. For example, Rosenberg concluded in his study[68] that a mandatory pre-trial conference did not lead to any increase in the number of cases settled, nor reduce the length of the trial. Indeed, the use of such conferences had an adverse effect upon the courts' efficiency, since additional judicial time was expended on pre-trial conferences without any improvement in the disposition rate. However, the study did conclude that pre-trial conferences led to improvement in quality of the trials in that, in pre-tried cases, counsel were found to be better prepared, a clear presentation of the opposing theories of counsel was more common, gaps or repetition of the evidence were reduced and tactical surprises curbed.

68) Rosenberg, *The Pre-Trial Conference and Effective Justice* (Columbia University Press : 1964).

8. *Conclusion*

As this paper illustrates, there is presently much debate concerning the most effective means for the administration of justice in Canada. As the case-loads at each court level increase, the problem of finding a workable case-flow management system becomes more pressing. The current debate is focused around the issue of judicial independence and necessarily raises questions about the appropriateness of the adversarial system itself. Neil Brooks defines the adversary system as,

> ...a procedural system in which the parties and not the judge have the primary responsibility for defining issues in dispute and for carrying the dispute forward through the system.[69]

In contrast to this is the inquisitorial system where the decision-maker assumes the primary proof-taking role. Many scholars agree that the choice of systems lies in the political and economic ideologies of the particular country. As one writer found,

> Little effort seems to have been spent on the study of how broad ideological orientations determine the choice of procedural arrangements. However , whether the issue of rival ideologies has squarely been faced, collectivistic values and benevolent paternalism were isolated as preconceptions of the non-adversary model, while traditional Lockean liberal values, with distrust of the state and freedom from its restraints were found to be the ideological matrix of the adversary model.[70]

69) Neil Brooks, "The Judge and the Adversary System", *The Canadian Judiciary*, A.M.Linden, ed. (Toronto, 1976) 89, at 91.
70) Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure" (1973) 12 *U.Pa.L.Rev.* 506, at 565.

Brooks illustrates how the adversary system reflects the political and economic ideologies of classic laissez-faire liberalism :

> ...by its emphasis upon self-interest and individual initiative ; by its apparent distrust of the state ; and by the significance it attaches to the participation of the parties.[71]

As society increases its awareness of the built-in inequities of this system (its denial of access to many ; the problems of backlog ; and the high costs of litigation), Ontario's Rules of Civil Procedure continue to change.

Regarding the pre-trial conference system, the encouragement of settlement is now expressly recognized as function of the process.[72] This complements the lawyer's ethical duty to "advise and encourage" settlement in appropriate cases.[73] Furthermore, judges are empowered to order costs of a pre-trial and the profession has been instructed that adverse cost consequences will apply to those who fail to prepare, fail to produce relevant documents or otherwise abuse the spirit of the pre-trial process.[74]

The rules relating to oral and documentary "discovery" or disclosure have also been broadened. The obligation to make documentary disclosure is now automatic, and both documentary and oral disclosures are subject to the duty

71) *Supra* note 69 at 99.
72) *Rules of Civil Procedure*, O.Reg. 560/84, clause 50.01(a).
73) The Law Society of Upper Canada. *Professional Conduct Handbook*, Rule 3, commentary 5 ; Rule 8, commentary 6.
74) *Supra*, note 72, rule 50.06, subrule 58.07(1).

of continuing discovery — that is, there is an obligation to correct any omissions or inaccuracies and to disclose subsequently acquired documents and information.[75]

Parties to litigation may now also request any other party to admit the truth of a fact or the authenticity of a document.[76] If such truth or authenticity is, without reason, not admitted, then the offending party is deemed to admit them.[77] Furthermore, where a party denies or refuses to admit such truth or authenticity upon request and the fact or document is subsequently proved at the hearing, the court may take the denial or refusal into account in exercising its discretion respecting costs.[78]

Rules respecting "Offers to Settle" are another major innovation aimed at encouraging and facilitating dispute resolution. A written offer to settle may be made at any time in the course of litigation but, provided it is made and remains in place at least seven days before the commencement of the hearing, certain cost consequences automatically follow from its non-acceptance by the other party. In short, where such an offer proves accurate (i. e. the plaintiff succeeds at trial to the extent of his or her offer to the defendant or the defendant only loses to the extent of his or her offer to the plaintiff), the party is entitled to costs determined on a higher

75) *Supra*, note 72, rules 30.07, 31.09.
76) *Supra*, note 72, subrule 51.02(1).
77) *Supra*, note 72, subrule 51.03(3).
78) *Supra*, note 72, rule 51.04.

scale from the time the offer was made.[79]

Despite the seven day time limit on offers to settle, the desire to facilitate settlement is further evidenced by an overriding rule which allows the court to take *any* written offer to settle into account in exercising its discretion with respect to costs.[80]

Co-defendants have a similar incentive to seek settlement in the form of the "Offer to Contribute". Where two or more defendants are jointly liable to a plaintiff, any one defendant may make an offer to any other defendant to contribute toward the settlement of the claim. The court is then empowered to take such an offer to contribute into account in determining whether the offering defendant should be compensated for his or her costs by the co-defendant who did not act appropriately to settle the matter.[81]

In addition to the various cost incentives for settlement already mentioned, the rules provide for a controversial cost penalty against lawyers personally. Where a court determines that a lawyer has caused costs to be "incurred without reasonable cause" or to be "wasted by undue delay, negligence or other default", the court may order the lawyer to repay his client money paid on account of costs or direct the lawyer to reimburse the client for any costs that the client might be ordered to pay another party. Furthermore, the lawyer may be required to *personally*

79) *Supra*, note 72, subrule 49.02(1), rule 49.03, rule 49.10.
80) *Supra*, note 72, rule 49.13.
81) *Supra*, note 72, rule 49.12.

pay the costs of *any* party.[82] Again, these rules reinforce the lawyer's ethical duties : 1) to encourage dispute settlement ;[83] 2) to avoid and discourage frivolous or vexatious tactics that do not go the real merits of a case or tactics which will merely delay or harass the other party ;[84] 3) to encourage public respect for and try to improve the administration of justice ;[85] and 4) to withdraw his or her services if a client persists with instructions for the lawyer to act in any way inconsistent with the lawyer's Rules of Professional Conduct or if the client is taking a position "solely to harass or maliciously injure another".[86]

Ontario's Rules of Civil Procedure have also been boldly amended in an effort to address the case-flow problems which threaten the judicial system. Millar and Baar would undoubtedly be pleased by Rule 48.14. This Rule requires a "status hearing" to be held before a judge whenever a defended action has not been placed on a trial list or terminated within a minimum of 15 months from the filing of the statement of defence. At the status hearing, the plaintiff must demonstrate why the action should not be dismissed for delay and the judge may set time periods for the completion of the remaining steps necessary to place the action on a trial list, order the action to be placed on the trial list within

82) *Supra*, note 72, rule 57.07.
83) *Supra*, note 73.
84) *Supra*, note 73, rule 8, commentary 5.
85) *Supra*, note 73, rule 12.
86) *Supra*, note 73, rule 11, commentary 3.

a specified time, or dismiss the action for delay. Although as yet untested, this initiative promises to place firm control over the pre-trial litigation period with the courts and to streamline the administration of justice.

In sum, the efforts to streamline Ontario's litigation process is probably indicative of nation-wide dissatisfaction with an often cumbersome and expensive judicial system. It would seem that, as with most institutions in society, the Canadian court system is a reflection of the values of the nation. Change will be and has been precipitated and determined by changes in the values of Canadians themselves.