

WORKING TOWARD A COST-EFFECTIVE TRIAL ADVOCACY SYSTEM

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Thank you for asking me to participate in this discussion about the future opportunities for advocacy in Canada. In my view, this initiative by The Advocates' Society is a very important one. As advocates, we need to continually examine whether the advocacy system we treasure is valuable to the public, and if not, why not. I commend Jeff Leon and the Executive of The Advocates' Society for placing this issue at the top of their agenda.

I understand that today's discussion will form the basis for ongoing analysis by The Advocates' Society, hopefully leading to a report on this issue by June 2004. By that time, The Advocates' Society may just have touched the surface of the subject and the analysis will continue.

For reasons which I will explain, I will be focusing primarily on the opportunities for trial advocacy. I will also focus primarily on the civil justice system in the Superior Court, with which I am most familiar. No doubt, the criminal justice system and the civil justice system outside the Superior Court are also important to the public and to advocates. But the commencement of criminal proceedings and the decision to proceed to trial is entirely influenced by the prosecution. And the economics of the defence of a criminal prosecution, and the conduct of cases in the provincial court, are very different than in a

superior court civil action. So I would prefer that someone more knowledgeable than me address the trial situation in the criminal and provincial courts.

The purpose of the discussion today is to consider the following three questions:

Is the number of civil trials in the Superior Court of Justice decreasing in Ontario?

If the answer to this question is yes, why is this so?

And what can or should we as advocates do about it?

It is this last question with which I am most concerned. We may believe that the legislature, the Law Society or our clients should do something about trial advocacy. But today's discussion should focus on what WE can do about it.

OVERVIEW

Each of us in this room has our own personal experience in the reform of the justice system and as advocates. We each bring our own personal views about whether the number of trials is decreasing or not, and if so, how the civil justice system could be improved to address that situation.

Some might say that our views are little more than *ad hoc* conclusions by those with a vested interest. But we do have a lot of experience in this Society about the trial system. No doubt we should seek from others all the assistance we can find, and we should be encouraging the development of better data, to answer these questions. But in the meantime, let's put our heads together to search for some of the answers.

My own overall views are as follows:

The best evidence is that the use of the trial system in common law countries is on the decline. Here in Ontario, the absence of good statistics makes the study of the justice system very difficult, and data often appears inconsistent or erratic.¹ Data from the Strategic Planning Information Unit of the Ontario Government show that between 1998/99 and 2002/2003, civil trials in the Superior Court of Justice fell from 2,280 to 1,321 per year or 42%.²

The statistics of Carl Baar and his fellow authors prepared for the Ontario Civil Justice Review show that the number of civil trials dropped from 1,309 in 1973-74 to 1,151 in 1993-94, or 10 percent.³

Professor Gerry Watson has tracked statistics showing that the number of non-motor vehicle civil actions commenced in Toronto fell from 43,034 in 1992 to 14,884 in 2000, or 65%; and in Ontario fell from 107,518 to 41,336, or 52%. However, the recent statistical data of the Courts shows that in the five year period between 1998/1999 and 2002/2003, "civil events heard"⁴ remained about constant. This is due to a 53% rise in Toronto, and a decline ranging from 20% to 51% in other regions.⁵

¹ Roderick Macdonald, "A Study on the Prospects for civil Justice", (1995) Ontario Law Reform Commission; prepared for the Ontario Civil Justice Review.

² Strategic Planning and Information Unit, Corporate Planning Branch, October 17, 2003. Family law trials in the Superior Court rose from 1,285 to 1,836 trial per year (42%); Criminal law trials fell from 1,372 to 963 trials per year (30%); and Criminal trials in the Ontario Court of Justice fell from 25,590 to 22,150 trials per year (13%).

³ The Landscape of Civil Disputing in Ontario: What do we know; Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto, 1973-1994 by John Twohig, Carl Baar, Anna Myers and Anne Marie Predko, page 84, Table 2.2 and Para 4.2.2, Table 4.5; in Rethinking Civil Justice: Research for the Ontario Civil Justice Review (1996). At pages 57-74 of the Ontario Court Justice Review, a variety of statistics relating to the commencement of civil proceedings, the addition or disposition of civil cases from trial lists and pre-trials of civil cases, but not on the number of trials.

⁴ Includes trials, pre-trials, settlement conferences, motions, case conferences, assessment hearings, status hearings, references before Masters, passing of accounts and appeal hearings.

⁵ Appendix to Ministry of the Attorney General Court Services Division Annual Report 2002-03, Five-Year Trends in the Court Statistical Data 1998/99-2002/03.

Data about the American trial system is much more available and organized. The data was examined and analyzed in the recent Symposium on *The Vanishing Trial* held by the Civil Litigation Section of the American Bar Association in San Francisco in December 2003. No serious discussion of the state of the trial system should be undertaken without a review of the materials arising from that conference.

The American data tends to show that, even in that litigious country:

1. Civil trials per year in the Federal Courts have declined from 12,529 in 1985 to 4,569 in 2002, or over 63%.⁶
2. Civil jury trials per year in State Courts remained constant at about 23,000-25,000 from 1976 through 1998, but then fell by 28% to less than 18,000 between 1988 and 2002. During the same time the number of cases disposed of went up from 1.5 million to more than 3 million. Accordingly, as a percentage of total dispositions, civil jury trials fell nearly two thirds, from about 1.8% in 1976 to 0.6% in 2002. The number of civil non-jury trials was about 500,000 in 1976, rose to a high of 700,000 in about 1991, but has since fallen to 470,000 in 2002. In a similar fashion to

⁶ Supply Side Explanations for Vanishing Trials, A New Look at Fundamentals, by Shari Seidman Diamond and Jessica Bina, footnote 1; prepared for the Symposium on The Vanishing Trial sponsored by the Litigation Section of the American Bar Association, San Francisco, December 12-14, 2003. In another paper presented at the Symposium – The Vanishing Trial from a Bargaining perspective by Robert Mnookin – it was reported that in the last forty years, the number of filings in the Federal Courts have gone up by 50%, but the number of tried cases has declined by 20%.

jury cases, as a proportion of total dispositions, non-jury trials have declined by more than half, from 34% to 15% between 1976 and 2002.⁷

3. American commentators believe that the trial rate has dropped “from about one in five civil cases at the start of the 20th century to about one in fifty cases at the start of the 21st century.”⁸

Information was presented to the ABA Symposium on The Vanishing Trial about the state of trials in the High Court in the United Kingdom. There, the number of trial ranged from about 2,500 to 3,200 per year from 1958 to 1983, but has since fallen from 3,189 in that year to 600 in 1998, a decrease of almost 80%. In the U.K, there has been a dramatic decrease in the number of civil cases initiated, and set down for trial, and in trials as a percentage of cases either initiated or set down for trial, to the point that, by 1996, trials were less than one percent of cases set down for trial and about 0.5% of cases initiated.⁹

These statistics have to be put in context to understand their impact on the opportunities for advocacy, particularly for younger advocates. The number of advocates has risen dramatically during the very period that the number of trials has fallen. When I joined McCarthy & McCarthy in 1968, there were 10 of us in the litigation department, including three of us who joined that year. We put in about 1200 to 1400 hours per year. Now there are over 100 advocates in the department. And we put in about 1800 hours per

⁷ Examining Trial Trends in State Courts: 1976-2002, by Brian J. Ostrom, Shauna Strickland and Paula Hannaford, p. 16; prepared for the ABA Symposium on The Vanishing Trial.

⁸ The Vanishing Civil Trial: Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got? By Stephen C. Yeazell, prepared for the ABA Symposium on the Vanishing Trial, p. 1.

⁹ Disappearing Trials? A Comparative Perspective, by Herbert M. Kritzer, presented to the ABA Symposium on the Vanishing Trial, at pp. 4-6, Figures 1-3.

year, at least. So the number of hours we are devoting to advocacy is now about fourteen times the number we devoted in 1968. The same trend, I am sure, exists across the profession. So the competition for those declining number of trials is much greater, and the opportunity to try a case is that much smaller, than it was in 1968.

Clearly, there are other forms of advocacy than trials. There has been an increase in other sorts of proceedings: CCAA re-structuring applications,¹⁰ class action certification motions, and in proceedings before the Securities Commission, professional discipline bodies and other tribunals. And the complexity of business life has led to more complex litigation and therefore more pre-trial preparation. We have few statistics to help us understand the extent to which these proceedings offer advocacy opportunities.

But still, a trial is a very special opportunity for the advocate. It is the only time that an advocate examines a witness before a judge or jury. And the expertise in doing so, and judgment learned in the process, is the bed rock upon which the decisions and advise to the client are made in the entire pre-trial and settlement process.¹¹ The ability of advocates to effectively negotiate pre-trial settlements may be prejudiced if trials become a rarity.¹²

¹⁰ Interestingly, in the U.S.A., between 1985 and 2002, total bankruptcy filings rose from four fold from 400,000 to 1.6 million, but trials in bankruptcy proceedings fell from over 10,000 to less than 4,000. In 1985, 22 out of each 1000 bankruptcy cases ended up in a trial; by 2002, that number was about 2 per 100: Vanishing Trials, The Bankruptcy Experience, pp. 11-14, prepared for the ABA Symposium on The Vanishing Trial.

¹¹ See The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers, by Kevin C. McMunigal, (1990) 37 UCLA Rev. 833, submitted to the ABA Symposium on The Vanishing Trial, at p. 856: "If the adjudicatory process and its results suffer from an inadequate supply of skilled advocates, both the adjudicated cases and those settled in their "shadow" suffer." See also: The Vanishing Trial from a Bargaining Perspective, infra footnote 3, in relation to settling cases in the "Law's Shadow."

¹² Thus, it may be that pre-trial settlements are dropping in the USA, that more dispositions are being forced out of the system altogether or are occurring early in the action, and that the economically powerful are benefiting from this trend: See, Most Cases Don't Settle, There's More (Non-Trial) Adjudication Than Ever and The "Haves" may Be Coming Out Ahead: Some Preliminary Observations on the Characteristics and Determinants of the "Vanishing

I don't think any of us are surprised by this trend. Indeed, it's ironic if we are concerned. After all, we have been witnesses to the rising costs of litigation. More importantly, we have been willing proponents of the settlement process. We have helped engineer the pre-trial process to maximize the opportunities for settlement through a discovery process that is intended to maximize the knowledge of the opponent's case. And we have encouraged mediation to the point of making it mandatory, and have transformed mediation into a very cost-competitive alternative to the trial process.¹³ In all of this, judges and lawyers "have been increasingly successful in the pursuit of their explicit goal of avoiding trials...If we view a decrease in trials as a measure of increased efficiency in litigation, the change over the past 20 years may simply be part and parcel of a larger economic pattern."¹⁴

The questions we have before us today are: Have skewed the system so that those people who want and need a trial do not have a fair opportunity to get one? Are the very kind of disputes which are most suited to trials getting one? Are the cards now stacked against the advocacy system? Are we advocates in part to blame for that result? And can we do anything about it?

Those questions require us to examine what it takes for a person to use the trial advocacy process, rather than folding up his or her cards, or settling or using another way to resolve the dispute. I think it takes three things:

Trial" and Changing Disposition of Federal Civil Cases, by Gillian K. Hadfield, prepared for the ABA Symposium on The Vanishing Trial.

¹³ There are now many mechanisms, besides mediation, to avoid trials. Examples that come to mind are computerized settlement systems; and the Uniform Domain name Dispute Resolution System (UDRP) which settles disputes over Internet domain names. A UDRP dispute involves a \$1,500 filing fee, and legal costs (if a lawyer is involved) are in the range of \$15,000, and there are no "loser pay" rules. See ICANN. Org.

¹⁴ Samuel Gross, comments for the ABA Symposium on Vanishing Trial, p.3-4.

- A trial process that is reasonably cost-effective compared to other alternatives;
- A trial process that produces a result in a time period that is not unreasonable;
- and
- A trial process in which the parties have confidence in the decision rendered by the court.

In my view, many disputes which are suitable for trial and which ought to go to trial, do not. This gap in advocacy opportunities arises because members of the public believe that the trial advocacy alternative is not cost-effective, takes too long and the result is unpredictable. It is this gap, the lost trial advocacy opportunities, which I will address today. We may not be able to reverse the trend in trials held in Ontario, but at least we can try not to be part of the problem and work toward making the system as good as it can be.

FINDING ADVOCACY OPPORTUNITIES IN THE PRESENT SYSTEM

Before I do so, let me talk for a moment about the opportunities for advocacy within the existing system. In my view, there is absolutely no doubt that there are huge opportunities for trial advocates in the present system that are going unaddressed. But almost by definition, they are opportunities that are not cost-effective for lawyers to undertake.

Here I am talking about clients who go to court unrepresented, or who simply never go to court to assert their rights because they believe that they cannot afford to hire an advocate. We know that there are hundreds of people in the criminal or civil division of the provincial court who are there without a lawyer. Individuals, small businesses and charities believe they can't go to court with a lawyer, and don't go to court at all, because of the cost. Community legal service clinics can't properly service their communities. There is lots of trial work to be done, but this work is not economic for most advocates, or is not thought by them to be economic.

I believe that the Advocates' Society can fulfill a finder's function in searching out the courts that need trial lawyers. The Society could, for instance, establish a relationship with each court that needs advocates and approach trial lawyers with the advocacy opportunities available in that court. Just like the "Adopt-a-Road" Program for Ontario highways, the Advocates' Society should institute an "Adopt-a-Court" Program, to see if it works.

Small, medium and large law firms will likely not take the initiative to establish a relationship with a court and provide counsel to the court for clients. A law firm, small or large, does not have the institutional ability or incentive to do so, and would be concerned that establishing a relationship might involve a commitment that could not be limited or terminated.

But a trial lawyer might well become involved if the administrative work was done by the Advocates' Society. The trial lawyer might well be willing to provide this valuable public service, while at the same time giving courtroom experience to a young lawyer in his or

her office. This sort of arrangement could allow a law firm to take on the responsibility for a court for one year, or share it with another firm, and turn it over to another law firm for the next year.

I understand that the Advocates' Society has promoted such relationships with charities. Michael Barrack of our firm recently appeared in the Supreme Court of Canada as part of this program. Adopt-a-Charity for trial advocacy is a great idea. Similarly, Pro Bono Ontario has become the adoption agency, and the lightning rod, for *pro bono* legal services in Ontario, and the Advocates' Society has been a real promoter of that initiative. Expanding the role of the Advocates' Society to include the "Adopt a Court" program would, I feel, provide a public service to the unrepresented public, while at the same time finding advocacy training opportunities for law firms.

American lawyers have established programs to help courts find advocates for needy litigants, usually for the purpose of providing young lawyers with advocacy experience. The Report on the Task Force on Training the Trial Lawyer of the ABA's Section on Litigation sets forth a wide variety of these programs. Thus, Federal courts around the U.S. appoint volunteer attorneys to both civil and criminal matters, through a panel procedure. In California, lawyers are appointed through the Federal Indigent Defence Panel to represent defendants in criminal cases where a public defender is not available. In the Ninth federal circuit, one particular law firm participates in a program in which associates handle appeals by individual litigants. In a law firm in Washington, D.C. first year associates take on at least one adoption dispute.¹⁵ The Advocates'

¹⁵ Report on the Task Force on Training the Trial Lawyer, ABA Section of Litigation, June 2003, and pp. 5-7.

Society, or Pro Bon Ontario, can be the promotion and administration agency for this activity in Canada.

IMPROVING THE SYSTEM

Let me turn then to the opportunities for changing and enhancing the justice system to foster the use of advocacy. How do we change the system so that the public will want to have their disputes settled through trials or hearings?

Before answering that question, let's put the question in context.

First, we have to recognize that the overwhelming percentage of cases, likely about 90 to 95% of cases, will not be decided by adjudications, but rather, by settlement or the action or defence being abandoned. People generally do not like to go to trial. They do not like confrontation. They will settle most cases, and not go to trial, if they are given a reasonable opportunity to do so.

There is nothing wrong with this fact. It is just what experience tells us. It does not mean that the system has failed if the action does not get settled. Nor does it mean that the parties are right or wrong in proceeding to trial. But it does mean that the market for disputes which are suitable for trial is limited. This is a good reason to ensure that the cards are not stacked against those who do have the need or desire for a hearing to resolve their dispute.

Second, while the statistics across the common law world appear to show a dramatic decrease in the number of trials, the public perception is entirely to the contrary. I note that a major workshop at the upcoming spring meeting of the Canadian Corporate Counsel Association (CCCA) is devoted to “The Iceberg Effect: Canadian Litigation Expands and Extends”. Topics to be addressed include “U.S. Style Litigating Drifts North”; “Class Action Litigation as a New Business Reality”; and “Why an Increase in Litigation”. The clients, and in particular, members of the business community, perceive that Canadian Courts are clogged. Since the message is reality so far as the clients are concerned, there is a real perception problem to be overcome if the advocacy route is to be presented as an attractive one.¹⁶

Third, the cases that deserve to go to trial are of a limited kind. The first kind is those where the parties, rightly or wrongly, are simply so far apart on the facts that they want an opportunity to have some independent person determine their rights. As long as the parties are properly advised, there is nothing wrong with this. Differing recollections, credibility, or a scientific or technical dispute may all justify a trial.

The second kind of disputes which may deserve a trial are those which, by their nature, are suitable to such a definitive and public resolution: A constitutional issue, a shareholder contest, a patent or other intellectual property dispute, a mining case, a contractual interpretation case. These are all cases for which this party should have an opportunity for a trial.

¹⁶ “Whether or not these complaints are accurate [“our litigation system is too costly, too painful, too destructive, too inefficient for a civilized people”], the belief that they are often spooks clients into either accepting early settlements or opting out of the court system altogether and embracing alternative dispute resolution.” Report of the Task Force on Training the Trial Lawyer, ABA Section of Litigation, June 2003, p. vi.

I believe that parties with these sorts of cases will go to a hearing in which advocacy skill will be used if it is reasonably cost-effective and timely to do so, and if there is confidence in the judicial process. But they will not do so if there is a huge gap between their *perception* of the *present value* of these ingredients (cost, time and confidence in the result) in relation to what can be accomplished by mediating, abandoning the case, or adopting some other alternative available to them. The challenge for the advocacy choice is to keep the time, cost and confidence in that choice within shouting range of other alternatives.

What, then, could be done to provide easier access to hearings and trials? If I had my way, there would be five things I would examine. In the tradition of “physician, heal thyself,” let’s first examine the length of trial and the time to get to trial.

1. Length of Trial

The Society should investigate why trials are taking so long. We no longer have two-day trials. I remember, shortly after my call to the Bar, doing a two-day trial with Doug Laidlaw over \$15,000. That does not happen any more.

Trial lawyers seem to be less and less capable of being concise. At the very time that appellant lawyers are being forced to present their arguments in the Supreme Court of Canada in an hour, trial lawyers are taking days and weeks to present their evidence. Obviously, the exercises are very different, but the discipline at the trial level seems to be lacking.

One of our former lawyers, Larry West, now is a barrister in England. He tells me that trials there are often done in two or three days, even in significant commercial cases.

Examinations in chief are abridged, with written statements being tendered beforehand. Cross-examinations are short and to the point.¹⁷

Clients can't stand long trials, not just because of the cost, which is huge in a long trial. A long trial takes longer to prepare, and longer to get onto the trial list. A long trial is a disruption to a client's business. For many reasons, the prospect of a long trial dissuades the client from using the trial option.

Surely, the time at trial is entirely an advocacy issue. If excessive time is being spent at trial, the "fault" is that of advocates. If excessive trial time is a real disincentive for clients adopting the advocacy solution, then it is up to the advocates to solve the problem. If it is not a problem, then advocates should find this out and proclaim it to the public so that the public will know that a trial in Canada is an efficient and effective exercise.

There is another reason why we need shorter trials. At least in the short term, we are not going to get more trial judges. And we are not going to get more trial courts and trial resources.¹⁸ If we want more trials, and if we want to make more trials available to the

¹⁷ Simply reducing the length of trials will not necessarily stem the trend toward fewer trials. In the USA, there has been a sharp decrease in the number of federal civil trials of every length: trials of on day or less have decreased by 60% (from 6263 to 2527); trials of 20 days or more have decreased by 50% (from 81 to 40): Samuel R. Gross, comments for the ABA Symposium on The Vanishing Trial, page 3; note 8 above. However, the number of short trials lost to the system (3736 per year) is 90 times greater than the number of long trials (41). If excessive costs and time are driving economically smaller cases out of the system, and if those cases usually involve shorter trials, then it is not surprising that shorter trials are decreasing at least as fast as longer trials.

¹⁸ The cost to the public of funding the civil justice system is not large. Only 9-10% of the publicly funded costs of the administration of justice is allocated to the civil justice system: Report of the Systems of Civil Justice Task Force, (August 1996, The Canadian Bar Association), footnote 11. The Chief Justice of the Trial Division of the Supreme Court of Newfoundland and Labrador has recently stated that the cost of the courts in that province is only .8% of the total budget of the provincial government, and 2.6% of the total Justice Budget: Address of Chief Justice J. Derek Green to the Newfoundland Branch of the Canadian Bar Association: January 29, 2004. There is evidence that the "supply side of the equation, that is, the ability of the courts to provide civil trials" is causing the loss of trials. In Supply Side Explanations for Vanishing Trials: A New Look at the Fundamentals, footnote 3 above, the authors argue that the failure of judicial resources, including the appointment of judges, to keep pace with new court

public, then they have to be shorter. There may not be any more advocacy, if you add up the hours, but there will be more trials and more opportunities for trial advocacy. Just like there used to be.

2. The Time to Get to Trial

The time to get to trial is a huge impediment to resolution of the dispute through advocacy. In fact, the Systems of Civil Justice Task Force of the Canadian Bar Association found that the speed with which disputes are resolved was the Number One complaint about the civil justice system.¹⁹

In my view, the time to get to trial is more of an impediment than excessive discovery or motions during that time. Absent an interlocutory cost award, the cost of motions or discovery is a lawyer cost, about which there can be bargaining between the lawyer and the client. But time is the real cost to the client. The economic fortunes of the client may be so precarious that unless the dispute is resolved quickly, that client will be insolvent or unable to fight any longer, no matter how meritorious the claim is. Technology and business conditions can change so fast that, unless the dispute is settled quickly, it becomes irrelevant. While in *Bleak House*, a law suit could go on for generations, now a technology generation may last five months. And as always, it is the perception of the

filings, and the press of criminal prosecutions on the justice system, have been at least in part responsible for the drop in civil trial rates. Similarly, the absence of adequate courtrooms may also be resulting in fewer trials: Migrating, Morphing and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in courts, by Judith Resnik, prepared for the ABA Symposium on The Vanishing Trial, p. 31.

¹⁹ Systems of Civil Justice Task Force Report, footnote 15 above, p. 12.

lengthy time to get to trial that drives clients to ignore the civil litigation system, or settle early.²⁰

Time is not an issue where “one size fits all”. It is no use saying that every action must be tried in one year. If both parties agree that it should be tried in six months, or six years, then time is not a problem. Time becomes a problem when one party needs to have the action tried in, say, one year, and the other party says that that amounts to a “rush to judgment”, and that he or she cannot be ready for trial for three years. The problem is that either party may be acting from ulterior motives, seeking to use the element of time to impair or destroy the other party economically, technically or otherwise. Living in their relatively controlled environment, judges find it difficult to see how urgent it is to resolve the dispute. Somehow, they need to be helped to appreciate the need for an expeditious result and that time may be the most important element in the procedural equation.

The time to get to trial involves both court resources, and advocacy practices. If pre-trial advocacy practices are taking too much time and money, they are then dissuading clients from proceeding to the ultimate advocacy exercise, the trial. The Advocates’ Society should carefully consider whether advocacy practices before trial are having this affect. In this regard, I hope the Advocates’ Society will enthusiastically join in the study of Best Practices for examinations for discovery and other pre-trial procedures as

²⁰ Interestingly, if American data is applicable, organizational plaintiffs are more likely to settle, and settle early, while individual plaintiffs are much more likely to go to trial – but with hazardous results- than organizations. However, both organizational and individual plaintiffs are now much more likely to settle only after the court has taken some action, whereas in 1970 their actions were much more likely to be terminated before such court action: Most Cases Don’t Settle, etc, footnote 9 above.

recommended by Justice Colin Campbell on his recent report on examinations for discovery.

There are no easy answers to the issue of time. Perhaps we do need some standard time for an action to reach trial, not for a “one size fits all” purpose, but to place some reasonable expectation of trial time before the public, with the party seeking a longer time required to justify an extension. I do think that the Society should grapple with the issue of time.

I would encourage the Advocates’ Society to “think Canadian” on this issue. We should devise a Canadian solution which takes into account the divided constitutional responsibilities for courts in Canada. The federal government pays the judges, but the provincial government pays for and administers the court. The problem with this divided responsibility is that it does not encourage efficiencies between the appointment and use of judges, and the use of court resources.

Statistics I have seen show that judges in the U.S.A. conduct more trial and other business than Canadian judges do, because they have far greater resources, in terms of law clerk and other assistance, than do Canadian judges. At present, there is no incentive or ability for the federal government to provide funding to the court system with a view to reducing the number of judges and make them more efficient. Somehow, between the two levels of government and the bar, a solution has to be found to improve court efficiency, as efficiency will lead to shorter pre-trial and trial times.

3. Expertise of Trial Judges

Another sacred cow which I think the Advocates' Society should examine is whether we should have trial judges who specialize in an area of law or practice. With the many sub-specialties in the law today, no judge can be equipped to deal with all of them. An efficient adjudication is difficult for a judge who has no previous experience or expertise in a highly specialized legal subject, such as intellectual property, construction law or securities. We have recognized that fact in the establishment of the Commercial List. I think we should look at it throughout the judicial system. If we really want to convince the public to use the trial process, we have to recognize, as the rest of the world does, that specialization leads to greater confidence in the result, and greater efficiency.

4. The “Loser Pay” Rule

If we could start with a clean slate, and if a primary objective was to design a system that encourages parties to go to a trial, would we have the rule that costs follow the event on a substantial indemnity basis? When I have discussed the “loser pay” rule in the U.S.A. or in civil law countries, they are astounded that we have such a rule, and say that it would be unconstitutional in their countries as a bar to access to justice. Indeed, we have the “loser pay” rule not to encourage, but to *dissuade*, parties from going to trial. The idea is that the rule compensates the winning party for a needless action.

But when an action goes to trial, it is usually, and hopefully always, because the lawyers for each side advised the client to go to trial. In these circumstances, should the unsuccessful party be required to pay?

I doubt that the prospect of recovering costs in a successful action is the deciding factor in deciding to proceed to trial, but I believe that it is often a large factor in deciding not to proceed to trial. If the economically weaker party has a disincentive to go to trial in any event, the prospect of an adverse cost award is the *coup de grace*.

Do we think that eliminating “the loser pay” rule would open the flood gates? I doubt that this would occur. We don’t have a “loser pay” rule in mediations. We don’t have a “loser pay” rule in arbitrations, unless the parties so agree in that arbitration agreement. We don’t speak of open floodgates in relation to mediation or arbitration. We don’t have a “loser pay” rule in criminal cases. So why should we have such a rule in civil cases when it ups the *ante* even more against a person for whom going to trial may present a serious economic hazard? Doesn’t that stack the deck against the trial system?

We think of contingency fees as the answer from the plaintiff’s side for overcoming the costs of getting to trial. But the “loser pay” rule is a huge disincentive to plaintiffs proceeding to trial under a contingency arrangement.

Bill Lerach, the well-known American class action lawyer, came to a conference on Canadian class actions in which I was involved. I think he came because he thought that he’d like to become the king of class actions in Canada. When he heard about the “loser pay” rule, he turned tail and went home. He said he would never try a class action in Canada with that rule.

The “loser pay” can also cause a real barrier to getting to trial due to cost awards in interlocutory decisions. In one case I know of, a charity sued a dismissed employee for \$200,000 based on alleged fraud. On the first motion, a \$20,000.00 award of costs was

made against the charity, payable forthwith. Those sorts of orders are now common under the new cost regime.

Interlocutory orders may be a real barrier where the statute requires a motion to be brought early in the action. Thus, under the *Class Proceedings Act*, 1992, an order is required before the action can be certified as a class action. Under section 246 of the *Ontario Business Corporation Act*, a complainant wishing to bring a derivative action must obtain an order from the court for permission to do so. Under the proposed amendments to the *Securities Act*, which will permit an action to be brought in respect of representation made in the secondary market for securities, section 138.8 will provide that no such proceeding can be commenced without leave of the court. Section 138.11 will provide that “despite the *Courts of Justice Act*, and the *Class Proceedings Act*, 1992, the prevailing party in a proceeding under section 138.8 is entitled to costs.”

When legislation requires such a motion to proceed with an action, the importance of a winning or losing the motion is obviously of great significance, and the cost consequences are huge. Those consequences may be a severe impediment to the ultimate advocacy process at trial. Should costs follow the event when a party is required to bring the motion to effectively start a proceeding?

Even if the “loser pay” rule is sacrosanct, in my view, it ought to be tailored to the size of the case. Right now, it is possible to have a \$100,000 case and have a claim for costs by the winning party of \$200,000 on a partial indemnity basis. The recent change in the cost rule has only made the prospect of paying party and party costs even more fearful.

Some recent decisions have held that a cost order must bear a reasonable proportion to the amount in issue. In my view, this principle should be instituted as the rule to be applied in all cases, except extraordinary ones. The parties ought to be required before trial to state what they say is the amount in issue. A party should not be obliged to pay more than a percentage, say 35%, of what he or she says is the amount in issue, absent extraordinary circumstances. In that way, a cost award will not be a disproportionate burden on the losing party.

In civil law countries, I believe that costs are awarded on the basis of a percentage of the award. Perhaps this is the reason that litigants in those countries appear to be far more willing to go to trial than even the litigious Americans.²¹

5. Solicitor and Client Costs

Similarly, the amount charged to the client by the trial lawyer can often be hugely disproportionate to the amount in issue. Judges tell me that on pre-trials, they find that the lawyers often have far more into the file than the client. In such a case, the dice are loaded against the client so far as a free choice as to whether to settle or go to trial.

There is great pressure on the client to settle at any cost.

The whole question of the amount of costs in relation to the amount in issue was one of the major concerns of both the Ontario Civil Justice Review and the Woolf Report in the United Kingdom. The Ontario Report estimated that the combined legal costs of disputes in Ontario were about three-quarters of the amount of the judgment obtained.

²¹ The Vanishing Civil Trial: Getting what we asked for, Getting what we paid for, and Not liking what we got? by Stephen C. Weazell, footnote 27., prepared for the ABA Symposium on The Vanishing Trial. It is reported that Germany, Sweden, Israel and Austria have per capita litigation rates significantly higher than the United States. Germany apparently employs five times more judicial officers per one thousand population than does the USA.

Lord Woolf concluded that in half the lowest value claims, the costs on side alone were close to or exceeded the total value of the claim.²²

Absent express authority to the contrary, I think that the amount to be charged by the lawyer to his own client should not exceed some relationship to the amount in issue, let's say 50 per cent. The client may well wish to blow his or her pocket book by proceeding with the action, and be prepared to agree otherwise, but his or her agreement to do so should be up front, express and in writing.

There are real problems in administering a regime which ties solicitor client costs to a percentage of the award. The consequences of a lawsuit may not be limited to the particular dispute. A claim in respect of one bank account may influence the rules relating to many. A medical case about a particular operation may influence the result of many other cases. The institutional party may therefore be justified in spending an amount far in excess of the value of the particular dispute in order to defend itself, and the opposing party cannot fairly be confined to a lesser amount. Nevertheless, in my view, an informed consent ought to be granted before a party is deprived of the right to proceed to a trial with an expenditure that bears some reasonable relationship to the amount in issue.

CONCLUSION

These five issues concern institutional practices which are at the heart of the advocacy system. For this reason, the Advocates' Society is well placed to examine them and tell

²² Ontario Civil Justice Review, First Report, (1995), p. 146; Access to Justice – Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales by the Right Honourable the Lord Woolf, June 1995, at p. 255.

us whether they are stacking the card against the trial system. I look forward to hearing about the many other views which you have about how we can make the advocacy system a more attractive alternative for dispute resolution.

Once again, I commend The Advocates' Society for addressing this important issue. The future of our profession as advocates depends upon us continually re-examining the craft that we practise. I would be very pleased to assist The Advocates' Society in its further efforts.