EVALUATION OF CIVIL CASE MANAGEMENT IN THE TORONTO REGION

A Report on the Implementation of the Toronto Practice Direction and Rule 78

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Submitted to:
The Honourable Chief Justice Heather Smith
Chief Justice, Superior Court of Justice
The Honourable Chris Bentley
Attorney General for Ontario
The Civil Rules Committee

Submitted by:
The Honourable Chief Justice Warren K. Winkler
Chief Justice of Ontario

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Executive Summary

The Toronto Region has been described as the engine of the civil justice system in Canada. In 2001, Rule 77 was applied to almost all of the civil cases commenced each year in the Toronto Region, under which, each case was to be aggressively and intensively case managed. By mid-2003, it was widely accepted that the civil justice system in Toronto was in a state of crisis, caused in large part by problems which had arisen in the implementation and operation of Rule 77. In response to the crisis, a modified form of case management was introduced by the Toronto Practice Direction and Rule 78 as a three-year pilot project. The operating theory was that instead of universal and intensive management of every case, there would be "case management where necessary, not necessarily case management". There was optimism that the reforms would provide for affordable resolution of disputes without compromising the need for the timely disposition of cases.

The reforms have proven to be largely successful. While the number of civil cases in the Toronto system continues to grow, both the costs to litigants and delays in obtaining motion and trial dates are down.

In some cases, such as masters' motions and trials under 10 days, the reductions are dramatic. Dates for trials under 10 days are now available within less than three months. In cases of trials lasting 5 days or less, which formerly had a six to twelve month waiting period, trial dates are available immediately. Even for long trials (i.e. trials lasting more than 10 days), the waiting time has been reduced from approximately three years to approximately twelve months.

Because case management masters are no longer presiding over scheduling matters in all cases, their time has been freed up to deal with more important practice motions, pre-trials in simplified procedure cases, and status hearings. This in turn has freed up more judges to conduct trials, which shortens the waiting times and reduces the number of motions. The earlier availability of masters and judges to deal with motions and trials has a favourable compounding effect; because matters can be reached for hearing more quickly, there are earlier negotiated settlements. Since the timelines have been extended, the success rate for mandatory mediations has also improved.

The Toronto Region's civil justice system is, by all accounts, working well. The delays that plagued the system in the spring of 2004 have been abated, and the system is now able to handle the volume of new cases being commenced, and should be able to do so for the foreseeable future, provided that the resources which are provided remains consistent relative to the growing case load.

Access to justice is, and continues to be, the challenge for the civil justice system. A great deal remains to be done if civil justice is to become truly accessible for the average Ontarian. Together, we must learn from our recent successes and re-double our efforts to dismantle the barriers which still exist and block true 'access to justice'.

For these reasons, it is submitted that Rule 78 should be made permanent.

Part I: Overview of the Civil Justice System in the Toronto Region

> *The Ontario courts have survived because they have always adapted themselves to the needs of the people.*
>
> *- The Honourable T.G. Zuber*

Case management is a process in which courts play a major role in determining the pace of litigation and the movement of cases through the justice system. There has been extensive study of case management over the years, and it has been extensively modified from time to time in the jurisdictions in which it has been introduced.

Traditional Approach to Case Management

Historically, in the Canadian civil justice system, litigants and their counsel controlled the pace of litigation. Litigants filed a statement of claim with the court and worked through the steps of the litigation process – including pleadings, disclosure, examinations for discovery, and the trial itself – at their own pace. The court would only become involved if the parties expressed concern with their case's progress. This traditional approach to case management provided great flexibility to litigants and their counsel; however cases tended to drag on, with corresponding increased costs to the parties.

Joint Committee on Court Reform

The current case management regime of Ontario has its origins in the work of the Joint Committee on Court Reform, which in 1988, called for the implementation of a system of caseflow management to address problems of delay in the court system. Pilot projects were established in three cities – Sault Ste Marie, Windsor and Toronto – selected to represent small, mid-size and large urban centres, respectively.

In 1993, the Ministry of the Attorney General ("MAG") commissioned a study of the three Ontario pilot projects. In general, the pilot projects appeared to demonstrate that case managed cases were resolved more quickly than non-case managed cases. Specifically, in the Toronto Region, 88% of the case managed cases initiated in the first 6 months of the project (December 1, 1991 to May 1, 1992) were disposed of as at April 24, 1994, compared to only 41% of the non-case managed cases initiated during the same period.[1] The results from the Sault Ste Marie and Windsor pilot projects were similar.

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[1] Ontario, Ministry of the Attorney General, *Case Flow Management: An Assessment of the Ontario Pilot Projects in the Ontario Court of Justice, A Report to the Courts Administration Division* (Toronto: Queen's Printer for Ontario, November 1993) at 10-11 [hereinafter *MAG Study*].

The MAG study concluded that employing case management in a committed fashion significantly reduced costs and delays. Specifically, the study found that, *inter alia*:[2]

- Case management had reduced the delay between the various stages in proceedings and substantially reduced the overall passage of time from commencement to resolution;
- Lawyers spent less time on case managed files, resulting in lower overall costs; and
- The cost per file for the court's administration of case managed cases was lower than that of administering non-case managed files.

In 1994, the Joint Committee on Court Reform employed the QUINDECA Corporation to conduct an independent review of the three pilot projects, in an attempt to verify the results of the MAG Study. The QUINDECA Report concluded that the case management experiences of Toronto, Sault Ste Marie, and Windsor warranted a continuation of the system.[3]

Simplified Rules of Civil Procedure Subcommittee

In 1993, the Simplified Rules of Civil Procedure Subcommittee of the Civil Rules Committee ("Simplified Rules Subcommittee") was formed at the request of the Chief Justice of the Ontario Court (General Division) and the Deputy Attorney General. Many felt that lawyers and clients were discouraged from pursuing litigation involving smaller amounts because the costs of the litigation made it unprofitable for lawyers and impractical for clients.

The Simplified Rules Subcommittee examined a representative group of files in six different court centres, and concluded that it was usually impossible to pursue smaller claims on a cost effective basis and that a more economical means of resolving such disputes was necessary.

In a Draft Report dated December 1994, the Simplified Rules Subcommittee concluded:

> To find a way to make litigation more affordable, we were guided by two principles. The first was that it is the procedure and not the lawyers that should be regulated… The second was a proportionality principle; that there should be a relationship between the procedures available to pursue or defend a claim and the magnitude of that claim. We tried to reduce the costs by striking a balance between the expense of procedures before trial and the value of the potential outcome. We concluded that there should be a simplified procedure, perhaps more accurately, a truncated procedure, for the lower range of monetary and property claims.[4]

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[2] Ibid.

[3] QUINDECA Corporation, *Ontario: A change of Pace - Evaluation of the Case Management Pilot Projects* (Toronto: QUINDECA, October 1994) [hereinafter *QUINDECA Report*].

[4] Ontario Civil Justice Review, *First Report* (Toronto: Ontario Civil Justice Review, March 1995) c. 14 [hereinafter *First Report*].

The Simplified Rules Subcommittee proposed changes for claims involving less than $40,000, that eliminated oral examinations for discovery, cross-examinations on affidavits in interlocutory proceedings, and improved trial scheduling, pre-trials, and modified summary judgment procedures.[5]

ADR Pilot Project

In 1994, the ADR Centre of the Ontario Court (General Division) was introduced for the purpose of testing whether the availability of alternative dispute resolution programmes improved the conduct of civil cases. The primary objective of the ADR Centre was to ensure enhanced, more timely and cost-effective access to justice for both defendants and plaintiffs.

Under the ADR Pilot Project, four in every ten cases filed at the General Division court in Toronto were referred to the ADR Centre.[6] Two hour mediation sessions were then scheduled within two or three months of the filing of the statement of defence.

The results of the ADR Pilot Project were evaluated by an external team. A report released on November 30, 1995 concluded that the ADR Pilot Project had provided cheaper, faster and more satisfactory results for many of the cases which had been referred to it.[7] Statistics revealed that 40% of the cases referred to mediation resulted in settlement in the very early stages of the case and that lawyers reported that costs were reduced, even for cases that did not settle, as parties were forced at an early stage to evaluate the merits of their case.

Civil Justice Review

In 1994, the Civil Justice Review was established as a joint initiative of the Chief Justice of the Ontario Court (General Division) and the Attorney General for Ontario.

Its mandate was "to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice".[8] A number of benchmarks were identified as the foundation of a modern civil justice system: fairness, affordability, accessibility, timeliness, accountability, efficiency and cost-effectiveness, and a streamlined process and administration.[9]

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[5] Ibid.

[6] The exceptions include applications, family matters, motor vehicle claims, and construction liens.

[7] Dr. Julie Macfarlane, *Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (Toronto: Queen's Printer for Ontario, November 1995) at 71-73 [hereinafter *Macfarlane Evaluation*].

[8] *First Report*, supra, note 4, c. 1.1.

[9] Ibid.

1995 – First Report of the Civil Justice Review issued.

In March 1995, the Civil Justice Review issued its *First Report* with respect to what it believed was a blueprint for a new civil justice system.

Caseflow Management

With respect to caseflow management, the Civil Justice Review examined the results of the three pilot projects, as well as the MAG and QUINCEDA studies of these projects. In its *First Report*, the Civil Justice Review recommended the establishment of caseflow management on a province-wide basis, consistent with the QUINCEDA and MAG reports:

> The results of the three pilot projects in Windsor, Sault Ste Marie and Toronto have demonstrated that case management works ***if it is properly resourced***, effectively planned, and the people working within the system are adequately trained. It promotes the earlier resolution and disposition of cases, reduces delay and backlog, ultimately lowers the cost of litigation, and consequently, adds to the satisfaction of litigants.[10] [Emphasis added.]

Specifically, the *First Report* recommended that Ontario adopt general time standards for the disposition of cases in the system from the date of filing, and that a case-flow management system be implemented on a province-wide basis in Ontario over a period of the next 4-5 years.[11]

While the *First Report* did not specify the exact nature and form of the system of caseflow management to be introduced, it did identify a few key features:[12]

- Principal responsibility for management of the flow of cases by the judiciary;
- Judicial and administrative teams, including judicial support officers and case management/administrative co-ordinators;
- Screening and evaluation mechanisms to move cases into appropriate streams;
- The processing of cases in accordance with given time parameters, which would be enforced;
- Integration of the various dispute resolution techniques and case management mechanisms into a co-ordinated whole;

[10] Ibid., c. 1.7.

[11] Ibid., c. 13.1.

[12] Ibid.

- Case conferences (to deal with the logistics and processing of cases), settlement conferences (before which a case will not be listed for trial) and trial management conferences (before which a case will not be given a trial date);

- Training for staff, judiciary and the bar; and

- Adequate resources.

Simplified Rules Proposal

With respect to the Simplified Rules Proposal, the Civil Justice Review examined the work of the Simplified Rules Subcommittee, and recommended adopting its proposal applicable to all cases in which the claim did not exceed $40,000. Noting that the most controversial of the proposal was the elimination of oral examinations for discovery, the *First Report* nevertheless concluded:

> The elimination of discovery may mean that some litigants will be less well-prepared to establish their own or to meet their opponent's case at trial; it would be idle to suggest otherwise. But that circumstance must be measured against the cost of the discovery and the magnitude of the money or property in issue. And it must be measured against the standard of whether justice can be done without discovery. We are satisfied that, for the defined range of claims, the simplified procedure will be adequate and that the usual and more elaborate procedure is not necessary to do justice.[13]

Towards a *Supplemental and Final Report*

The *First Report* was to form the foundation and basis for further recommendations to be contained in a *Supplemental and Final Report*. However, the Civil Justice Review team felt strongly that the implementation process recommended in the *First Report* should begin immediately, as the task ahead was enormous. As such, further consultation and dialogue was undertaken during this period with members of the judiciary, the Bar and court administrators across the province. Working Groups were established to develop implementation plans relating to the recommendations put forth in the *First Report*.

1996 – Civil Justice Review Supplemental and Final Report issued.

In November 1996, the Civil Justice Review issued its *Supplemental and Final Report.*

The essential features of the case management regime that the Working Group and Civil Justice Review recommended included:[14]

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[13] Ibid, c. 14.

[14] Ontario Civil Justice Review, *Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, November 1996) c. 5.1 [hereinafter *Supplemental and Final Report*].

- Case Management Teams, consisting of Judges, Case Management Masters and Case Management Co-ordinators;

- Two "tracks" of cases, namely a "fast" track and a "standard" track, with flexibility for dealing with cases requiring more intensive case management built into the system through the case conference mechanism;

- The streamlining of time guidelines through the provision of only two mandated time limits, namely,

    - an ADR Session within 2 months of the filing of a first response; and

    - a Settlement Conference within 3 months of the close of pleadings for fast track cases and within 8 months for standard track cases;

- Sanctions for failure to comply with case management timelines, including the imposition of costs, the dismissal of actions and the striking out of pleadings and affidavits;

- The integration of ADR and mandatory referral of all civil (non-family) cases to mediation after the close of pleadings;

- Three types of conferences, namely a case conference, a settlement conference, and a trial management conference;

- Automatic dismissal of proceedings for cases where no defence was filed or steps taken by the initiating party to obtain judgment within 6 months of initiation of the proceedings; and

- Fast track treatment for Simplified Rules cases.

Rule 77 Civil Case Management (1996 and beyond)

Rule 77 of the *Rules of Civil Procedure* established civil case management in Ontario. A central premise was that "the more times one can build into the system an occasion when counsel has to pick up his or her file and think about it, the more likely it is that there will be an earlier resolution of the case".[15] Therefore, and as a deliberate and intended consequence of Rule 77, strict deadlines were imposed for specific events, and parties were admonished to settle, narrow or consolidate issues in order to streamline their proceedings. The theory was that with early and active intervention of the court, and with the frequent attention of counsel, proceedings would be more streamlined; judicial resources would be focused where they were most needed; and cases would either settle earlier, or if they could not settle, would be brought on for trial more quickly and with the issues more focused.

[15] *First Report*, supra, note 4, c. 13.1.

The key elements to Rule 77 were:[16]

- All case-managed actions were subject to mandatory mediation under Rule 24.1;
- Cases were streamed to either a 'fast track' or a 'standard track';
- Timelines were established for the completion of key events;
- Parties ordinarily had to attend a mandatory mediation session within 90 days of the filing of the first defence;
- Parties had to file detailed timetables with the court;
- Parties had to attend settlement conferences within 240 (or less) after the first defence was filed;
- The registrar made orders dismissing proceedings as abandoned if a defence had not been filed or the case had not proceeded to judgment 6 months after it was commenced; and
- Judicial intervention was accomplished by three types of conferences with the parties, namely Case Conferences, Settlement Conferences and Trial Management Conferences, each with their own stated purposes and forms.

Case management under Rule 77 was introduced in Ottawa in 1996 and in stages in Toronto between 1997 and 2001. As of January 2003, Rule 77 also applied to all civil actions commenced in Windsor. It was anticipated that following the implementation of case management at the three sites, all of Ontario would move into the Rule 77 case management regime at some later date.

Simplified Procedure (1996 and beyond)

Rule 76 was introduced to the *Rules of Civil Procedure* in March 1996 as a pilot project. The problems of cost and delay for civil cases involving relatively smaller claims led to the establishment of this pilot project, based on the recommendations of the Simplified Rules Subcommittee and the Civil Justice Review, relating to cases involving claims of up to $25,000.

The streamlined procedure under Rule 76 reduces the number of pre-trial procedures, uses mandatory timelines and eliminates oral and written examinations for discovery. A review of Rule 76 conducted in 2001 found that “Rule 76 resulted in more cost-efficient litigation, promoted the faster resolution of disputes, and resulted in the more economical use of judicial

[16] Ontario, Ministry of the Attorney General, *Fact Sheet: Civil Case Management: Rule 77* (Toronto: Queen’s Printer for Ontario).

time in cases involving smaller monetary claims."[17] In January 2001, Rule 76 became a permanent fixture in the *Rules of Civil Procedure*. As of January 1, 2002, the monetary limit of Rule 76 was increased to $50,000.

Mandatory Mediation (1996 and beyond)

Rule 24.1 of the *Rules of Civil Procedure* established mandatory mediation for civil, non-family, case managed actions. The rule was designed to help litigants settle their cases early in the litigation process.

The key features of Rule 24.1 were as follows:[18]

- Mediation had to take place within 90 days after the first defence was filed, unless the parties obtained a court order abridging or extending the time. For standard track cases, parties may consent to a postponement of up to 60 days;
- Parties could opt out of mediation only by obtaining a court order; and
- If the parties did not select a mediator within 30 days after the first defence, the court would appoint one.

Rule 24.1 was made permanent in Toronto and Ottawa as of July 2001. As of January 2003, the mandatory mediation program was expanded to Windsor.

Case Management Implementation Review Committee (2004)

The Case Management Implementation Review Committee was established, as a subcommittee of the Toronto Case Management Expansion Steering Committee. The mandate of the committee was to review all aspects of the case management process in the Toronto Region, identify the best practices and problems with the existing process and make recommendations for reform.[19] In its 2004 Report, the Committee noted that although Rule 77 had been beneficial for some cases, the timelines were not realistic for the large number of cases being managed in the Toronto Region.[20]

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[17] Ontario, Ministry of the Attorney General, *Fact Sheet - Simplified Procedure Rule 76* (Toronto: Queen's Printer for Ontario).

[18] Ontario, Ministry of the Attorney General, *Fact Sheet - Rules 24.1 and 75.1* (Toronto: Queen's Printer for Ontario).

[19] Superior Court of Justice, *Report of the Case Management Implementation Review Committee* (February 2004) [unpublished], p. 10 [hereinafter *Report of the CMIRC*].

[20] Ibid.

The Osborne Report (2007)

In June 2006, the Honourable Coulter Osborne was asked to lead the Civil Justice Reform Project ("CJRP"), which was asked to make recommendations on how to make the civil justice system in Ontario more accessible and affordable. While access to justice was the overarching theme of the review, another important principle was that the time and expense of any proceeding should be proportionate to the amount in dispute and the importance of the issues at stake.

In November 2007, the *Summary of Findings and Recommendations* for this project was released and over eighty recommendations were made to enhance the civil justice system. While most of the recommendations, if adopted, will have an impact on civil litigation in the Toronto Region, of particular importance to this report is the view expressed by the Honourable Coulter Osborne following his extensive consultations and literature review that rule-based judicial case management, which is referred to as "full-blown" case management, is too costly and is needed only for some cases.

The CJRP also noted that consideration should be given to amending Rule 78.12 to make the process and test to have a case subject to case management consistent with the recommended process and test to have a case subject to individualized management under Rule 37.15. This recommendation, which raises a fundamental issue around the threshold for transferring cases into the resource-intensive Rule 77 regime, is now being appropriately studied by the Attorney General and the Civil Rules Committee. It is an important question which requires careful analysis, since such a change could have an impact on the judicial resources required to manage the workload in Toronto Region.

Part II: Case Management in the Toronto Region (2001- 2004)

Rule 77 came into effect for all civil cases in the Toronto Region in 2001 in an attempt to address the costs, delays and backlogs which plagued the civil justice system. In the months leading up to its full implementation in the Toronto Region, there was great optimism that it would bring meaningful improvements there as well. Yet, despite the considerable research and extensive consultation that went into the reforms of the late 1980s and 1990s – and despite the success of Rule 77 in Ottawa and Windsor – significant problems arose under the Rule 77 regime in the Toronto Region almost immediately after it was imposed.

Mandatory Mediation

Case managed cases were subject to mandatory mediation under Rule 24.1, which prescribed extremely short deadlines for conducting mediations. In practice, the parties would frequently not communicate or cooperate in scheduling the mediation session, would not agree on a mediator, or did not agree about what steps, if any, should be taken in advance of the mediation. In serious casualty cases, parties could be required to attend mediation before the plaintiff's injuries had stabilized. The rule was designed to encourage mediation before examinations for discovery could occur. In some cases, parties would not have provided full documentary disclosure. In cases with multiple defendants, it was possible for the mediation deadline to expire before all the parties had been served, and thus were not even aware of the lawsuit.

As reported by the Case Management Implementation Review Committee, the early mediation prescribed in Rule 24.1 created problems for Toronto litigants because many felt that they did not have sufficient information at this stage in the process to make an informed decision about resolving their case.[21] In 2003, the 60-day consent for the postponement of mediation in Rule 24.1.09 was obtained in approximately 53% of cases.[22] Similarly, orders for extension of time to complete mediation beyond the 60-day consent period were made in approximately 40% of cases in 2003.[23] Although the extensions and consents were ordinarily not contested, the paperwork to process the requests consumed vast amounts of time in the court office.

The parties' failure to conduct the mediation within the time limits set out in the rule resulted in court staff assigning a mediator to the case from a roster of mediators. The mediator, who was often unknown to the parties, would not necessarily have expertise in the subject of the dispute

[21] *Report of the CMIRC*, supra, note 19.

[22] Ibid.

[23] Ibid.

and would be left with the unenviable task of bringing the reluctant parties to the table. Not surprisingly, the majority of these mandated early mediations did not result in settlement.

In the Toronto Region, there was an emerging consensus amongst litigators that mediation had become an unavoidable, costly, untimely and unproductive obstacle in the path of the party who wanted to move the lawsuit forward.

Civil Case Management

Another important feature of case management under Rule 77 was the establishment of timetables for completing the steps required to advance the proceeding. Timetables had to be filed by the parties within 30 days after the mandatory mediation session, if it had not resulted in a settlement. Thereafter, case conferences were convened in which judges and masters were asked to fix or vary timetables, where parties could not or would not agree on deadlines, or where they later failed to live up to them. Once again, these case conferences ate up costs and slowed cases down, as the booking dates for case conferences stretched further and further into the future because of the backlog of cases. Many questioned whether the best use of judicial resources was to schedule, hear, and process requests for deadline extensions.[24]

Another example of the unintended strain that arose under this regime in the Toronto Region relates to trial scheduling. As part of the philosophy of case management, trial dates were fixed regardless of whether or not any of the parties had set the action down for trial. Fewer than 4% of the civil cases which are started in Ontario actually go all the way through to trial. Most are either not defended at all, or settle at some stage before trial. For non-case managed cases, a trial date is assigned only if the case has not settled and one of the parties indicates that he or she is ready for trial and does not want to take any further pre-trial steps (e.g. discoveries). Because the vast majority of cases settle before this happens, trial dates are ordinarily only given out in a small number of cases.

Under Rule 77, a trial date was assigned for every lawsuit at trial scheduling court even though the majority of the cases were not ready for trial and would probably never go to trial. It did not take long for the trial schedules to fill up for months, and then years, into the future. The waiting times for trial dates mushroomed. In response, lawyers attempted to secure future trial dates years in advance for cases that were not ready to proceed, on the assumption that they would be ready for trial by the time the trial dates were reached. In addition, because of the nature of the time frames, counsel would often arrive at trial scheduling court and would not be in a position to set a trial date because either the discoveries were not concluded or they were still waiting for further productions. In those circumstances, the set date would be adjourned to a further trial scheduling court. The numerous adjournments resulted in further appearances for counsel and also increased the amount of judicial resources having to be allocated to trial scheduling court.

By the time trial scheduling court was terminated in June 2005 (the Practice Direction provided for a six month phase-out of the court), that court was scheduling more than 14,000 appearances

[24] Ibid.

on an annual basis. More than one half of those set dates were second or third appearances on the same file.

Long Trials

Long trials (cases projected to last more than 10 days) also created their own set of challenges. In the spring of 2004, 38 long trial dates were missed because there were no judges available to hear the cases. As the number of long trials which were not being reached on their appointed dates increased, the settlement rate decreased. This compounded the backlog.

Motions

As noted above, the diversion of significant amounts of judicial resources to manage cases necessarily meant that judges and masters had less time to actually adjudicate cases. The greatest impact of this re-assignment of resources was most pronounced in relation to motions. Moreover, as the number of motions to be heard expanded, parties found that they could not get before the court to have interlocutory motions dealt with in a reasonable time.

Simplified Procedure

More than 25% of the cases commenced each year in the Toronto Region are filed under the simplified procedure set out in Rule 76. The provisions of this rule were designed to keep the pre-trial steps as simple and inexpensive as possible. However, in the Toronto Region, counsel often conducted the equivalent of a discovery during the trial, thereby consuming excessive amounts of valuable court time. More generally, there was a lack of proportionality and trials involving $20,000 or $30,000 were dragging on for four or five days.

Part III: Implementation of the Toronto Practice Direction and Rule 78

Need for Action

Toronto is the commercial and financial engine of the country, as the home to many head offices, insurance companies, banks, manufacturing concerns and as the primary centre of the Canadian securities industry. The ability to attract and retain business depends in part on access to fair and timely dispute resolution. A properly functioning civil justice system in Toronto is integral to the success of Ontario's economy.

The Toronto Region of the Superior Court of Justice is the largest civil trial court in Canada. It is composed of more than one hundred judges and masters, who are supported in their work by over five hundred court services employees.

The drafters of Rule 77 had shown great insight about the need to address the problems facing the civil justice system (especially in Toronto) and about the need to come up with tangible solutions. Indeed, the theories behind Rule 77 were unassailable. It is very important for parties to know that real, fixed trial dates await them. It is reasonable to insist that parties attempt to resolve their case at mediation before they consume the significant public and private resources involved in the conduct of a trial. Moreover, it is in the parties' and the public's interest for the court to assume some control over pending cases to ensure that they are not languishing because of inattentive lawyers, or because the case has taken on a life of its own.

Yet, by mid-2004 in Toronto, dates for routine motions were being set more than six months out. Long trials were being scheduled more than three years into the future and the waiting times for shorter trials were increasing to over a year. As a consequence of the delays in getting cases on to trial, the number of interlocutory motions was increasing exponentially. In June of that year, it emerged that the court had not managed to reach 38 long trials because there were no judges to hear the cases. The simplified procedure for claims under $50,000, a then recent innovation, was generating multi-day trials, thereby defeating its very purpose and using up valuable judicial resources in the process.

Notwithstanding its success in Ottawa and Windsor, universal case management was not working in the Toronto Region. This was largely due to the volume of cases and the resources available to meet the demands of the regime. The bulk of the case management work for the almost 20,000 cases filed per year at the civil counter in Toronto fell to the case management masters who could not continue to sustain the case management system as it was currently configured in Toronto.

In addition to the problems faced by the court, the litigants also bore the cost of the numerous procedural steps that Rule 77 added to all cases at the outset of the civil litigation process. The

various case conferences, filings, extensions and mandatory mediations more often than not, did very little to move the cases along. Regrettably, clients were paying their lawyers for what were frequently premature or unproductive steps.

It was apparent that if a solution was not found and implemented immediately, and the mounting backlog was not addressed, the Toronto civil lists would be unmanageable.

The Toronto Practice Direction/Rule 78 (2005)

Although the seriousness of the problems was known to those involved, any solutions had to incorporate three fundamental principles: access to justice, judicial economy, and proportionality. The solutions had to be capable of speedy implementation and based on the input of a range of participants from across the civil justice system in the Toronto Region.

Policy Development and Consultation Process

Through the summer and early fall of 2004, then Regional Senior Justice Winkler of the Toronto Region held extensive consultations with lawyers, judges, masters, mediators and court administrators both inside and outside of Toronto. An *ad hoc* advisory committee was set up by the Regional Senior Justice with members of the Bench, masters, Bar organization representatives, mediators and court administrators to assist in the consultations and drafting of the reform proposals. Those consulted included: The Advocate's Society, Toronto Lawyers Association, Ontario Bar Association, The Law Society of Upper Canada, Canadian Defence Lawyers, various mediation associations, judges and masters, and representatives from the Court Services Division of the Ministry of the Attorney General.

A number of key themes emerged from the 2004 consultations about the state of the civil justice system in the Toronto Region:

- The volume of cases in Toronto had made it impossible to transfer the successes and flexible practices from Ottawa and Windsor to the unique challenges present in the Toronto Region.

- Successful case management requires a degree of flexibility for the parties that cannot be achieved when the court is so intimately involved in such a vast number of cases.

- Universal case management had to be reworked to allow the application of limited resources to the cases that "needed" case management.

- The court-overseen timetabling requirements were unachievable and vast court resources were being eaten up arranging and rearranging lawyers' schedules.

- The escalation of case conferences was imposing considerable and unnecessary costs on the parties, and draining limited court resources.

- The work required of the masters had to be reduced to fit the available personnel.

- Imposing mediation at the very outset of each and every case, before the parties and their counsel were properly informed, was proving to be costly, untimely and unproductive.

- The delays in getting cases on to trial were unacceptable and were creating its own host of problems.

- The "one size fits all" concept resulted in too many cases receiving unnecessary case management.

- Simplified procedures were not working as well as expected and were tying up critical judicial resources, in part, due to lack of discoveries and mediation.

- Toronto was locally known as the "motions capital of the world", likely as a response to other problems developing in the case-managed system.

- Court staff, judges, and in particular, the case management masters were more dedicated and diligent than anyone had a right to expect. They were given an impossible task, and worked under what ultimately proved to be impossible circumstances.

- Negative stereotypes about Toronto lawyers, cited in some corridors, have no basis in fact. The Toronto Bar is as courteous and civil as lawyers elsewhere in the province.

The Regional Senior Justice of the Toronto Region insisted that aggressive timelines were needed to prevent a crisis. A decision was made to introduce the most urgently needed changes by means of a Practice Direction, in which such changes could be mandated and made effective almost immediately. A deadline was set for December 31, 2004, for identifying the causes of the problems, designing the solutions, and drafting, publishing and implementing the Practice Direction.

While countless consultation meetings were held through September and October, the *ad hoc* advisory committee turned its attention to the detailed work of figuring out and drafting the solutions, which would form the basis of the Practice Direction, and later, Rule 78. The Practice Direction was finalized in November 2004 and was approved by the Honourable Chief Justice Heather Smith of the Superior Court of Justice, and came into effect on December 31, 2004.

As events unfolded, it was ultimately possible to enact a new rule on an expedited basis, and Rule 78 was enacted to codify some of the reforms. By January 1, 2005, sweeping changes were introduced in the civil justice system in the Toronto Region, for the second time in less than four years.

Toronto Practice Direction and Rule 78

Case management was not eliminated as a result of the Toronto Practice Direction and the Rule 78 reforms. Rather, there was to be "case management as necessary, but not necessarily case management". The reforms eliminated "universal case management" in the Toronto Region; instead, providing effective, flexible and targeted case management by only case managing the cases that truly required court intervention. The intention was that there would be a reduction in

the number of unnecessary attendances by counsel, and therefore, reduced costs to parties. At the same time, judicial (and administrative) resources would be freed up to address more substantive issues. Mediation became the centrepiece.

The key features of the Toronto Practice Direction and Rule 78 are:

- Mandatory mediation remains an integral component of the Ontario case management regime. Mediation continues to be mandatory for all cases but the timeframes for conducting them have been significantly extended, reflecting the adage that mediation is about "timing, timing, timing". Parties are expected to conduct their mediations at the earliest stage in the proceeding at which it is likely to be effective, and in any event, no later than 90 days after the action is set down for trial by any party.

- Mandatory mediation is expanded to encompass simplified procedure actions (claims for $50,000 or less).

- In simplified procedure cases and in wrongful dismissal cases, mediation is to occur within 150 days after the close of the pleadings.

- Informal recommendation to the parties in simplified procedure cases to submit to 1 hour of discovery.

- Court overseen timetabling was eliminated.

- Litigants have two years from the filing of the statement of defence to set the actions down for trial to allow parties sufficient time to exchange documents, conduct discoveries and mediate.

- Under Rule 78.12, case management may be provided in actions which meet certain criteria.

- Undefended actions will be dismissed administratively on 45 days notice after two years (rather than six months).

- A defended action should be set down for trial within two years after the statement of defence is filed, failing which the registrar will serve a status notice on all of the parties. Ninety days after the status notice is served, the registrar will dismiss the action for delay unless (a) either a party has set the action down for trial, or (b) the action is dismissed on consent, or (c) at a judicial status hearing the court has extended the time frame for the parties to set the action down for trial. At the status hearing, the court will target cases that are not moving forward at an appropriate pace and may impose a range of orders including the imposition of deadlines, timetabling, costs, or setting a trial date. The procedures governing status hearings, which were first introduced in the early 1980s, were modified so that counsel could avoid attending if they took concrete steps to move their action forward, for example by filing a timetable.

- Trial dates will be scheduled only after one of the parties has set the action down for trial by filing a trial record pursuant to Rule 48.02. Under Rule 48.04, once a party sets an action down for trial, he or she cannot initiate or continue any form of discovery or interlocutory motion without leave of the court. Leave will only be granted in the rarest of circumstances.

- Once the trial record has been filed, the court administrative office will send a certification form to all counsel that must be returned to the court certifying that the case is ready for trial. The form sets out counsel's forecast of the length of the trial and outlines the number of witnesses to be called by both sides. A tentative trial date is then provided to counsel through the court office. That trial date can be confirmed or vacated at the subsequent judicial pre-trial. The purpose of this is to enable the parties and the court to better estimate the length of trial and to facilitate the shortening of the trial through better trial preparation.

- Trial scheduling court was discontinued. Rather, the current system now specifies that trial dates will only be given out after one of the parties signifies that he or she is ready to proceed to trial and has conducted or booked a mediation. Steps were taken to ensure that trials actually proceed on their fixed date. A strict 'no adjournment' policy was put in place.

- At the pre-trial, the trial date is only confirmed if a judge or master is satisfied that the trial estimate by counsel is accurate, that mediation has taken place (unless the judge orders otherwise), and that the parties are ready to proceed. A detailed pre-trial memorandum has to be completed by all of the parties including the provision of a witness list. The pre-trial conference has two central principles: (1) to explore settlement options; and (2) to ensure that the trial will proceed efficiently and on time.

- The jurisdiction of case management masters was expanded to provide that they could preside at pre-trials in cases involving more than $50,000.

- In addition to the mandatory mediation and the pre-trial, a third form of mediation was introduced known as "designated hitter" mediations, which are conducted by handpicked judges with expertise both as mediators and in the area of law involved in the dispute. This is done immediately prior to trial.

Part IV: The Impact in the Toronto Region of the Practice Direction and Rule 78 Reforms

The objectives of the Toronto Practice Direction and Rule 78 reforms were to: improve the time to disposition of civil cases, reduce the number of appearances and hence the cost to the litigants, more effectively manage and allocate judicial resources, increase the effectiveness of mediation, and ensure that the time and expense of the lawsuit is proportional to the amount in issue.

At the request of the Honourable Chief Justice Heather Smith, Superior Court of Justice, and to meet the requirements set out both in the Practice Direction and Rule 78, the former Regional Senior Justice of Toronto embarked on an evaluation of the new regime in the Toronto Region. To fulfill this mandate, interviews were conducted with various stakeholders to ascertain their experiences, insights and recommendations. Statistics on various aspects of civil case management under both Rule 77 and Rule 78 were also gathered and analyzed.

The following discussion sets out the highlights of the anecdotal and statistical information gathered from this review.

Mandatory Mediation (Rule 24.1)

One of the key aspects of the reforms was to eliminate *early* mandatory mediation. Successful mediation depends on its timing. Mandatory mediation is now to be scheduled when it is most likely to be effective. The theory is that under the tight time requirements of Rule 77, parties were not using mediation effectively, as many were not realistically in a position to mediate at the time they were required to do so. It was anticipated that removing the 'early' aspect to mandatory mediation would result in parties mediating more successfully, at a time when they were more appropriately prepared for the mediation process, and when settlement is more likely to result. This new flexibility in the timing of mandatory mediation was expected to cause significant improvements in the settlement rate and reduce the time required to resolve disputes.

The overwhelming perception of surveyed mediators and counsel regarding the extended timing for mandatory mediation under the Rule 78 regime was that the flexible, party-driven approach to mediation was working better. Counsel advised that they were, far more often than not, in a better position to negotiate a mediated settlement because they had more time to meaningfully evaluate the strengths and weaknesses of their case. It was noted that while there may be some cases that could have settled at an earlier date had they been required to mediate sooner, handing back control and timing of the case to counsel is more conducive to their practice and has led to better results for more of their clients.

As compared with Rule 78, the Mediation Office appointed mediators under Rule 77 much more frequently because counsel would often not choose their own mediators within the required 90 day limit. However, with the extended time period for mandatory mediation under Rule 78,

parties are generally agreeing to a mediator without any involvement of the court-based Mediation Office. It was suggested by the mediators that settlement rates seem to be higher in cases where parties choose their own mediator, as opposed to having a mediator appointed, since parties are more likely to listen to someone who they have selected themselves.

Under the regime of Rule 77, available statistics report that only 40% of cases reached settlement at the mandatory mediation stage.[25] It has been suggested that the reason for the high proportion of unsettled cases under the Rule 77 regime was in large part due to the fact that the mandatory mediation was too early in the process. Unfortunately, there is no mechanism to collect data regarding the timing or settlement rates regarding the Rule 78 mediation reforms because parties are just not reporting the results to the court. Notwithstanding the lack of statistics, the overwhelming consensus of all participants is that the flexible timelines have resulted in a large increase in settlements at mediation.

Simplified Procedure (Rule 76)

The goal of the amendments relating to simplified procedure cases was to improve procedures for cases under Rule 76 in order to achieve the efficiencies that were originally intended by the rule. The reforms to Rule 76 concentrated on a few mechanisms. First, mandatory mediation was introduced so that there might be a strong incentive for parties to consider their position early on in the litigation and before their investment in the process became too great. It was anticipated that there should be an increased number of cases settling after attending either mediation or a pre-trial. Second, pre-trial conferences were given a more important role in the litigation process. Additionally, the use of summary trials were encouraged.

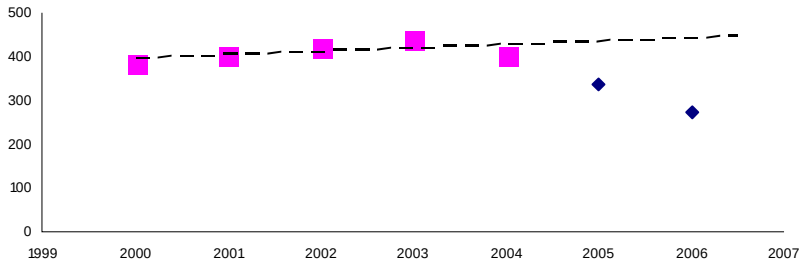
The expansion of mediation in simplified procedure cases under Rule 78 has successfully reduced the time to resolution. The following bar graph, showing the mean age in days of simplified procedure claims at the time of resolution by year initiated, demonstrates that claims are being resolved faster for cases initiated after the reforms were introduced:

Figure - The Mean Age in Days of Simplified Procedure Claims at the Time of Resolution By Year Initiated

[25] Hann, Robert G., and Carl Baar. *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report - The First 23 Months* (Queen's Printer, March 2001) at 2.

The scatter plot below more clearly sets out that, prior to the reforms, the days for resolution were increasing at a steady rate. After the implementation of the reforms, simplified procedure claims are being resolved much more quickly.

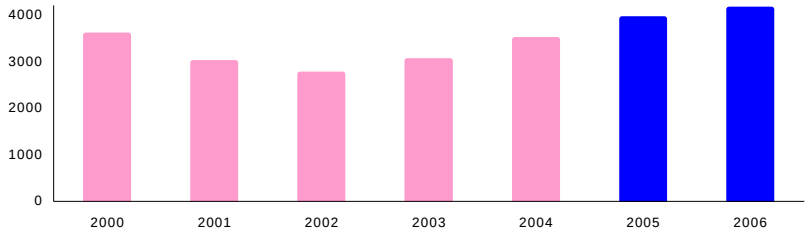
Figure - The Mean Age in Days of Simplified Procedure Claims at the Time of Resolution By Year Initiated



The bar graph and scatter plot above also supports the contention that the reforms to the simplified procedures are working to meet the goals of reducing the time (and ultimately the cost) of litigating cases of lower value, and to ensuring that the time and expense devoted to a proceeding is more proportionate to what is at stake.

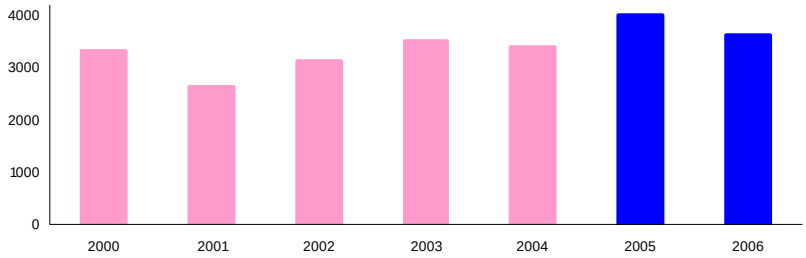
In the period since the reforms, there has also been an improvement in the speed in which cases are settling. The following figure shows the number of cases recorded as resolved each year:

Figure - The Number of Cases Resolved Before Trial (By Year Resolved)



More cases were resolved in each of 2005 and 2006 than in any of the previous years. The following figure shows the number of cases reported resolved by the year in which the case was initiated:

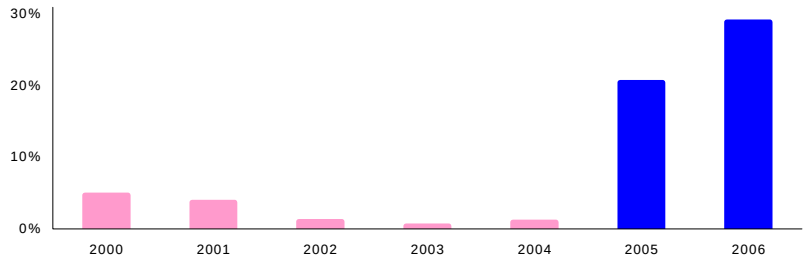
Figure - The Number of Cases Resovled Before Trial
(By Year Initiated)



Again, more claims initiated in 2005 and 2006 have been resolved before reaching the trial stage than cases initiated in the previous years.

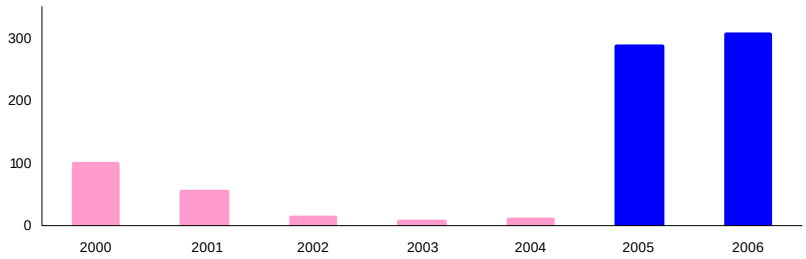
Prior to the reforms, a mere 2.0% of matters reaching the trial stage opted for summary trials. Since the reforms, that figure has increased to 23.5%. This statistical and systemic turn around toward a more proportional case track is set out in the figure below:

Figure - The Proportion of Summary Trials under Rule 76
(by Year Scheduled)



As shown in the figure below, this same trend is observed in the absolute number of summary trials each year under the simplified procedure:

Figure - The Number of Summary Trials Scheduled
(by Year Scheduled)



The most important of all the measures applied to Rule 76 by the Practice Direction was to introduce mandatory mediation for all simplified procedure cases which are to take place within 150 days of the close of pleadings. As mediators would suggest from experience, less complex cases are generally more conducive to settlement, and therefore, greatly benefit from mandatory mediation.

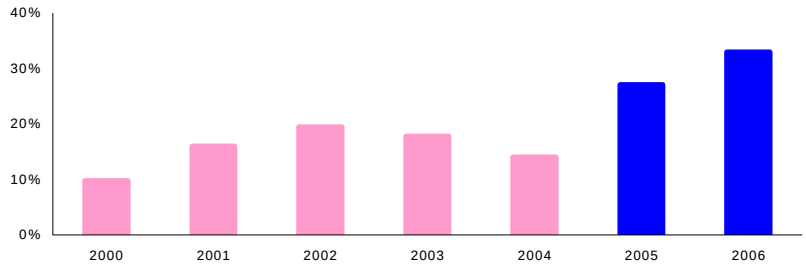
Unfortunately, there is no systematic record of the effectiveness of mandatory mediation for achieving full or partial settlement of cases governed by Rule 76, as parties are not reporting their settlements to the court. There are, however, other indicators that strongly suggest that mediation has indeed had a significant and positive impact on the flow of simplified procedure claims.

Anecdotally, it was reported that the successful expansion of mediation into simplified procedure cases under Rule 78 has resulted in a reduction in the number of pre-trials and trials for these actions, indicating that cases are settling earlier, in part, due to mandatory mediation.

In addition to the mandatory mediation step, pre-trial conferences (now presided over by masters) are also playing an increasingly important role in bringing cases to settlement whether it is by directly resolving the dispute or by getting the parties to the point where they are in a better position to settle independently.

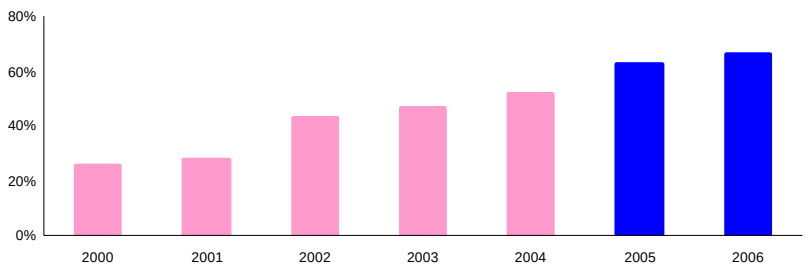
The figure below, showing the proportion of resolved simplified procedure claims that settled pre-trial, demonstrates that pre-trial conferences play an important role in the caseflow of matters under the simplified rules:

Figure - The Proportion of Resolved Simplified Procedure Claims that Settled at Pre-Trial (By Year Initiated)



Of those cases initiated in 2005 and 2006, a much greater proportion has settled prior to the time of the pre-trial conference than had been the case for matters initiated in the years previous. This result is also confirmed by the figure below, which shows the number of cases that were resolved before reaching trial as a function of the number of cases that reached the pre-trial conference stage:

Figure - Proportion of Matters Resolved Without Trial Following Pre-Trial (By Year of Pre-Trial Hearing)



Whereas in the period before the reforms, only 38.8% of cases that reached pre-trial were resolved before reaching the trial; in 2005 and 2006, this was true of 66.0% and 66.6% of cases respectively.

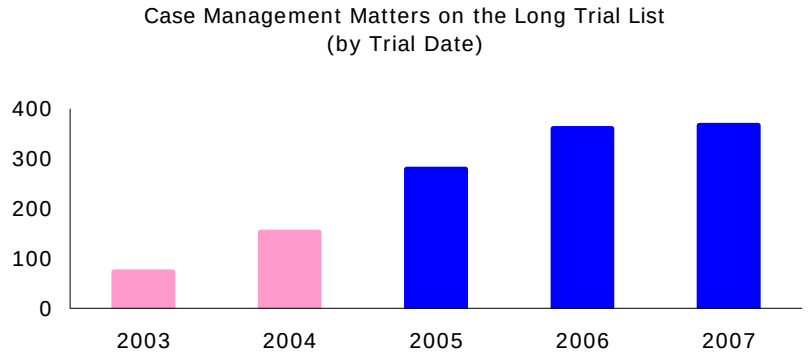
The introduction of mandatory mediation and the redesign of pre-trial conferences for simplified procedures have resulted in great improvements in the flow of cases through the system. There is good evidence that cases are being resolved in shorter time periods. This is matched by a real increase in the number and proportion of cases that settle before trial, attributed to the increased effectiveness of pre-trial conferences and mandatory mediation. For those matters that do go to trial, there has been an impressive ten-fold jump in the preference for summary trials over ordinary trials. All of these data represent great strides towards reducing the costs to litigants and to the civil justice system, and hence, go a long way towards the goals of access to justice (reduced costs to litigants), judicial economy and proportionality.

Long Trials

The very serious backlog in the long trial list was one of the main indicators that the case management system was in crisis under Rule 77. With the implementation of a requirement that in order to get a trial date the parties had to certify that they were ready for trial, combined with a strict 'no adjournment policy', it was expected that there would be a decrease in the number of long trial dates that are missed per month. It was also anticipated that the reforms would result in a significant reduction in the wait time to obtain a long trial date.

Under the Rule 77 regime, lawyers would request trial dates prior to being ready for trial, anticipating ample time to prepare knowing that there was a backlog in long trials. This meant that more cases than anticipated or appropriate were requesting trial dates, and fewer were settling. Furthermore, as judicial resourcing was based on a known settlement rate, this increase in cases requesting trial dates compounded the backlog, increased waiting time for a trial, and further taxed judicial resources.

The data show that the reforms resulted in a decrease in the backlog while dealing with a greater number of matters set down for trial. The figure below shows the number of case on the long trial list:



In the summer of 2004, there were 38 missed trial dates on the long trial list. In 2007, there was only 1 missed trial date. Thus, the 38 missed trials in 2004 represent 24.8% of the 153 cases on the long trial list that year. The one missed trial in 2007 represents only 0.27% of the 367 trials scheduled – this is nearly a hundred times better than the performance in 2004! The virtual elimination of the number of missed trial dates in the Long Trial list shows a huge gain in efficiency.

However, one problem reported by the court staff is that the changes under Rule 78 have created much more work for the Long Trial List Office. It was anecdotally reported that counsel are setting trial records down early to avoid being served with status notices and are doing so even when they are not trial-ready. This means that they are then setting mediation dates far into the future and trial dates are pushed back as a result. This results in the Long Trial List Coordinator having to send multiple notices to the parties, and trying to track them down to set dates.

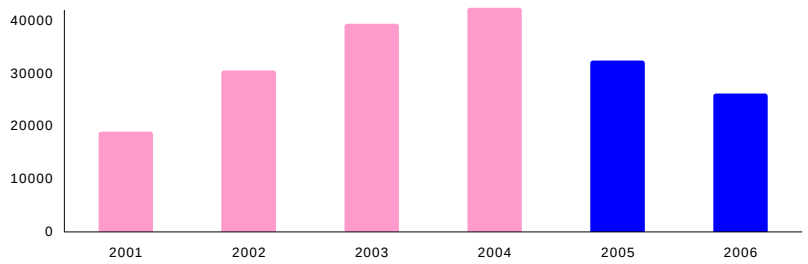
Case Management (Rule 78)

The rigid approach to case management that existed under Rule 77 meant that all cases had to go through a number of steps before reaching trial regardless of the likely effectiveness of those steps. The principal purpose of the reforms, as noted above, was to introduce flexibility into the case management system by returning the control of the flow of the litigation to the parties. It is only when there has been a clear breakdown in the relationship between the litigants, or when the case is unduly complex and/or involves multi-parties, that the court will intervene directly in the flow of the case. Alternatively, the parties can request case management directly on consent. The added flexibility was intended to re-align judicial, master and support resources to allow the Toronto Region to better handle the caseload volume within an acceptable timeline and to reduce delays and costs for litigants.

As trial scheduling court accounted for an average of 8,195 events per year from 2001 to 2004, the elimination of this step represents enormous savings to the administration of the civil courts and the parties.

The figure below shows the number of events (motions, case conferences, pre-trial conferences, and settlement conferences) heard each year from 2001 to 2006 in connection with cases under either Rule 77 or Rule 78:

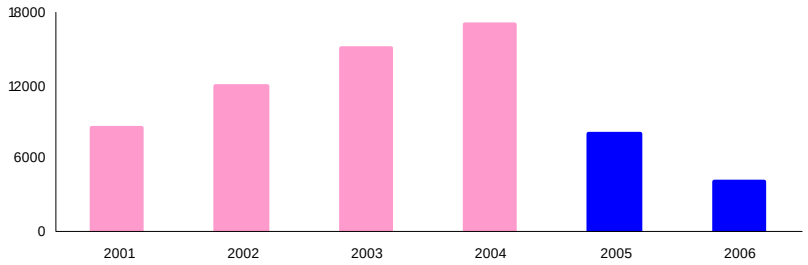
Figure - The Total Number of Events Heard in Rule 77 and 78 Cases (By Year Heard)



As indicated by the graph above, there has been a significant decrease in the number of events since the passage of Rule 78. In fact, the average number of events on a Rule 78 file is 1.5, as compared with 4.8 on a Rule 77 file! Counsel interviewed felt strongly that Rule 78 provides flexibility without imposing a layer of administrative work in cases that do not require it as was the case under Rule 77. Now that parties have the flexibility to determine for themselves the appearances that are necessary to effect resolution of the dispute, they have overwhelmingly opted for many fewer formal events with great savings to both the administration of the civil justice system and to the litigants themselves.

The figure below shows the total number of case conferences held pre and post reforms:

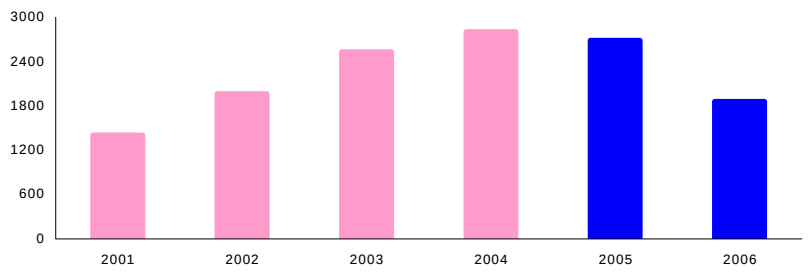
Figure - The Total Number of Case Conferences Held under Rules 77 and 78 (by Year Heard)



The figure above shows that there has been a dramatic decrease in the number of case conferences in recent years.

As the reforms also gave mandatory pre-trial conferences a much more significant role in a civil law suit, it was hoped that the pre-trial conference would serve to bring about either partial or complete settlement of the issues between the parties for matters that proceeded to this stage. In the figure below, showing the number of pre-trial conferences heard each year, there is evidence of a change in the number of pre-trial conferences from 2001 to 2006:

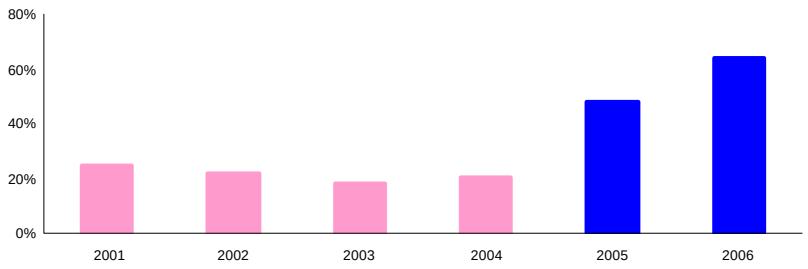
Figure - The Number of Pre-Trial Conferences Heard Each Year



As the data for the post-reform period show, the decreased number of pre-trial conferences during a time at which the number of new cases was increasing at a constant rate suggests that parties are resolving their disputes before reaching the pre-trial stage to a greater degree than before.

Despite the dramatic increase in settlements prior to pre-trial, there has also been an increase in the settlement rate between the pre-trial and the commencement of the trial. The figure below shows the number of claims that continued through the pre-trial conference stage and yet settled before trial:

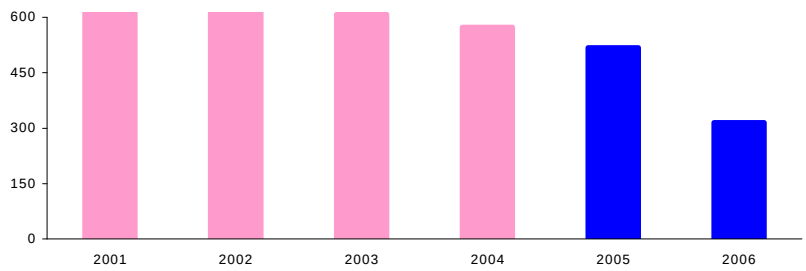
Figure - The Proportion of Cases Settling Between Pre-Trial and Trial



Therefore, the use of pre-trial conferences in settling cases seems to be much more effective in the post-reform period, as compared to the pre-reform period.

The figure below shows the average age of cases at the time at which they are recorded as resolved:

Figure - The Average Age of Claims at the Time of Disposition (in Days)



It appears that cases initiated since 2005 settle much earlier than those that were governed by Rule 77 because of the revision to the timing of the mandatory mediation and the increase of the effectiveness of pre-trials.

Scheduling

The table below shows the progression in how long parties must wait for trial once they have declared their readiness for trial:

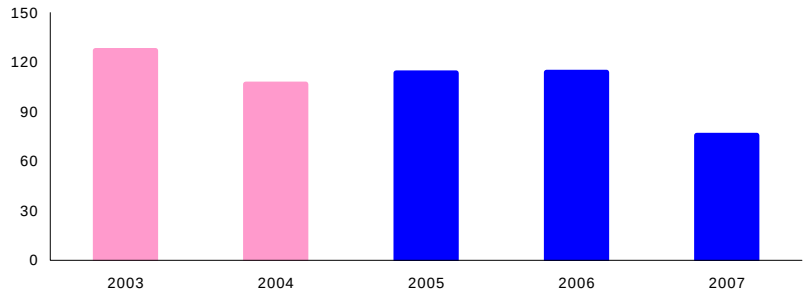
Table – Waiting Times for Trials

Trial Length	Pre-Reform Period	Summer 2007	October 2007
>10 days	37 months	14 months	12 months
6 to 10 days	24 months	5 months	3 months
1 to 5 days	6-12 months	immediate	immediate

The progression that this table shows is dramatic, particularly noting that this improvement in the waiting time has been achieved while clearing an enormous backlog of cases and at the same time as new cases were being filed at a constantly increasing rate.

The change in the waiting times for judges and master's motions is shown below:

Figure - The Average Waiting Time for All Motions (in Days)



Although there seems to be a delayed reaction, with the real improvement only showing in 2007, this is explained by the distribution of motions from 2004 to 2006:

Table – The Relative Numbers of Motions under Rules 77 and 78

Year Heard	Rule 77 Motions	Rule 78 Motions[26]
2004	11723	34
2005	8236	2372
2006	4205	5550

As the civil justice system was still handling a vast number of motions under Rule 77 in 2005 and 2006, this explains why there was such a lag in the reduction of waiting times for motions.

The removal of the trial scheduling court step in the litigation process has also resulted in eliminating approximately 14,000 appearances annually. In turn, this has allowed the court to re-allocate judicial resources to hear trials. The discontinuance of the trial scheduling court has also resulted in the elimination of a recurring problem for the civil intake office staff, that being, whether to allow a party to pass an incorrect or incomplete trial record or jeopardize the commencement of the trial on the fixed date.

[26] Some matters that were commenced prior to the implementation of Rule 78 (i.e. in 2004) have since been ordered to proceed under Rule 78.

Court Resources

While case management under Rule 77 was intended to improve the backlog already forming in the Superior Court at the time, there is general consensus that in practice it compounded the problem by using up judicial resources on cases that did not require it. Case management work for masters took up approximately half of their time. This had the benefit of allowing masters to better understand the details and the cases before them, but at the cost of increasing backlogs and decreasing timely access to justice for cases that needed the courts attention. With the implementation of Rule 78, masters reported that they are now doing less direct case management. They are spending less time dealing with minor procedural and timetabling compliance issues, and are available for more complex motions, pre-trials and status hearings. For example, between January and June of 2006, the masters heard 18 long motions (over two hours). In 2007, for the same period, the masters heard 100 long motions.

Rule 78 has also importantly freed up judges to be re-assigned to help with other areas in need, such as: family, criminal and estates. The reduction in the number of events before the courts allows judicial and master resources to focus on higher priority matters in a timelier manner. The great change in the waiting times in motions and trials shows unambiguously that the reforms have meant that judicial resources are being used much more effectively throughout the Toronto region of the Superior Court of Justice.

Rule 78 also had a positive effect on the administrative workload of the court staff. Staff suggested that one of the most palpable changes associated with Rule 78 is the decrease in the volume of materials being filed with the court due to the decrease in the number of events per file. This decrease in activity, translates into less scheduling, less material filed at the counter, less preparing of files for hearings, and less material that has to be packed up and stored for twenty years. (While an unintended consequence, some might say that Rule 78 has proven to be environmentally friendly, too!) Similarly, the changes under Rule 78 have led to a decrease in the volume of calls received and returned by the office. By reducing the number of events that take place in the life of a file, the cost to administration has been reduced concurrently with the reduction in cost to the parties.

Under Rule 77, parties would often try and file documents with the court the day before the trial which caused numerous problems from an administrative perspective. Rule 78 now requires that parties file a trial record before a trial date will be assigned, thus avoiding many of the "paper-management" issues arising under Rule 77 regarding late filings.

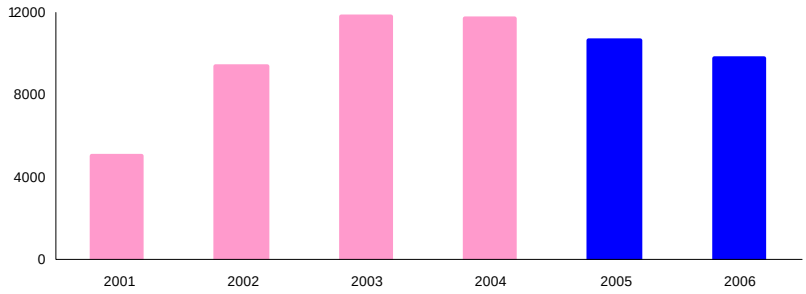
Motions

Motions were not part of the mandate of the Toronto Practice Direction and Rule 78 reforms and were not the subject of review of this study. However, certain observations are apposite because of the effect of the reforms on motion activity (which constitutes a significant strain on the resources of the judiciary and litigants). With the reforms, it was anticipated that more flexible mediation timelines together with the elimination of court over-seen timetabling, there would be a reduction in the number of motions being brought in the Toronto courts. Specifically, an expected impact of Rule 78 was to support motions that are designed to eliminate or narrow the

issues in a way that will ultimately shorten the overall length of a proceeding and deter unproductive interlocutory events that use up judicial resources and increase costs to parties.

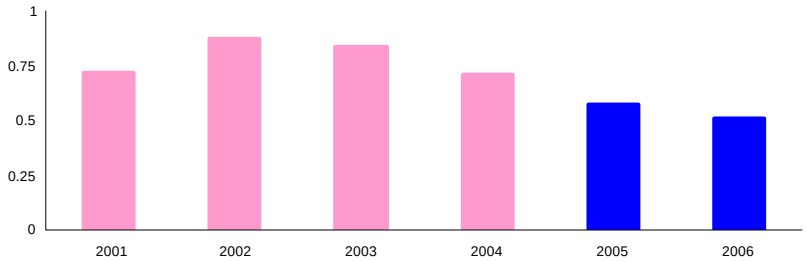
There has been a decrease in the absolute number of motions heard over the last few years in Toronto Region, Superior Court. The figure below illustrates this overall reduction in the number of motions heard by judges and masters in the post-reform period:

Figure - The Number of Motions Heard per Year



The figure below shows the average number of motions heard per active file in each of the given years:

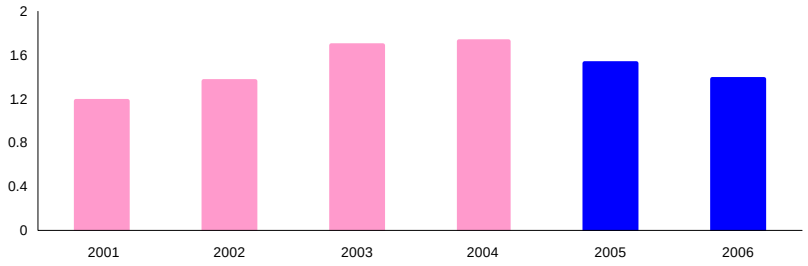
Figure - The Ratio of Motions to Active Claims Under Rules 77 & 78 (by Year Heard)



The clear decrease in the number of motions per file since the implementation of the reforms is an important indicator of the reduction in resources required, for both the court and litigants, as a result of the changes.

Finally, the figure below shows the number of motions heard in proportion to the number of cases initiated each year:

Figure - The Proprotion of Motions Heard to Claims Initiated under Rules 77 and 78



Again, the evidence substantiates that there has been a decrease in the number of motions per file, indicative of the other savings that have resulted within the system.

As expected, the reforms have had the effect of reducing, to some extent, the motion activity in Toronto Region. This is an area where further improvements may well be achievable.

Part V: Conclusion

The Toronto Practice Direction and Rule 78 reforms were borne of necessity and were the culmination of a great deal of input from a wide variety of people. They were designed by an *ad hoc* committee made up of mediators, lawyers, masters, judges, and government. They were implemented by the assiduous efforts of the court staff, masters and judges of the Superior Court Justice in Toronto Region. Implementation was then overseen by another committed group within the Toronto Region. Equally important, the Bar rose to the challenge, and with the assistance of the Law Society CLE programmes, effectively embraced working with the re-designed practices and procedures. Most importantly, these efforts significantly improved access to justice, judicial economy and proportionality for all participants in the Toronto Region of the Superior Court of Justice.

The Toronto Region's civil justice system is, by all accounts, working well. The delays that were experienced in the spring of 2004 no longer exist, and the system, based on its current level of resources, seems better able to handle the volume of cases that are commenced each month. While there are, no doubt, aspects of Rule 78 that will need to be assessed and perhaps adjusted in the future, the overarching findings from this review are that:

- The unacceptable delays and missed dates on the long trial list have been eliminated.
- Both short and long trial waiting times have reduced dramatically.
- The settlement rate of cases within simplified procedures has increased radically and trials are now being conducted on a timeframe that is proportionate to the issue.
- The flexibility in the timing of mandatory mediation has greatly increased its effectiveness (which directly influences the case inventory in the court and reduces costs to the parties).
- With the three levels of mediation – mandatory, pre-trial and "designated-hitter" – the resolution rate before trial has increased significantly (which has a direct impact on the manageability of the trial list and the time to trial wait-times).
- The reforms have resulted in a reduction of motion activity in Toronto Region.
- Rule 78 changes have freed up master and judicial resources to be realigned to meet other needs within the system (e.g. family and criminal matters).

For these reasons, it is submitted that Rule 78 should be made permanent.

In addition to this recommendation, there are some overarching observations derived from the most recent civil justice reforms in Toronto worth noting as Ontario embarks on more civil reform initiatives arising out of the Osborne Report:

- First, every step which is added to a proceeding must be presumed to be an impediment to justice, unless the benefits of the proposed added step are empirically demonstrable. If the added steps are not in fact moving cases towards resolution, they will drain away resources that litigants could otherwise use on steps that will have greater value in the long-run.

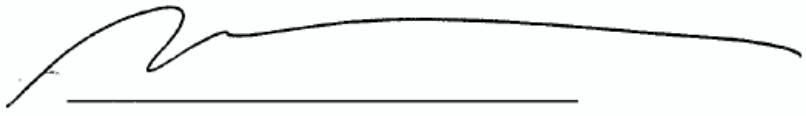
- Second, procedure should be the servant of substantive justice, and not *vice versa*. There is the temptation because of our training as judges and lawyers to become focused on procedural points to the exclusion of the substantive rights of parties. If a procedural code or provision is ornate and intricate, the chances are that it will be expensive and cumbersome to administer for both lawyers and courts, and that it will thus detract from substantive justice. Keep it simple.

- Third, mediation has become an integral part of our justice system. Yet, not every type of case is amenable to mediation. An untimely or inappropriate mediation is an added cost to the litigants and may have other serious negative effects on the case.

- Finally, there is nothing more effective in the court system than a "day of reckoning", the prospect of an early and 'real' trial date. The most constructive thing that our trial courts can provide to assist parties in resolving their disputes is to ensure that a judge is available to try the case if it cannot be settled and that a trial date is available within as short a time as possible after the case is ready for trial. In short, a fair and just system of justice requires a courtroom, a judge and a non-adjournment policy which in turn will produce settlements or timely adjudication, and be less costly to the litigants.

Access to justice is, and continues to be, the challenge for the civil justice system. There have been many positive initiatives in Ontario that have meaningfully reduced some of the costs and delays of dispute resolution. We should take great pride in all of these achievements. However, despite these successes, a great deal remains to be done if civil justice is to become truly accessible for the average Ontarian. Ontario's justice system is well served by dedicated and capable judges, lawyers and administrators. Together, we must learn from our recent successes and re-double our efforts to dismantle the barriers which still exist and block true 'access to justice'.

All of which is respectfully submitted this 19th day of February, 2008.



The Honourable Chief Justice Warren K. Winkler

Chief Justice of Ontario