Ontario

REPORT

on

ADMINISTRATION OF ONTARIO COURTS

ONTARIO LAW REFORM COMMISSION

PART I

MINISTRY OF THE ATTORNEY GENERAL **1973**

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1973

PART I

MINISTRY OF THE ATTORNEY GENERAL

The Ontario Law Reform Commission was established by section 1 of *The Ontario Law Reform Commission Act, 1964*, for the purpose of promoting the reform of the law and legal institutions. The Commissioners are:

H. ALLAN LEAL, Q.C., LL.M., LL.D., *Chairman*
HONOURABLE JAMES C. MCRUER, O.C., LL.D., D.C.L.
HONOURABLE RICHARD A. BELL, P.C., Q.C.
W. GIBSON GRAY, Q.C.
WILLIAM R. POOLE, Q.C.

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To The Honourable Dalton A. Bales, Q.C.,
Attorney General for Ontario,
18 King Street East,
Toronto, Ontario.

Dear Mr. Attorney:

We have the honour to submit herewith Part I of the Report on Administration of Ontario Courts.

FOREWORD

The Minister of Justice and Attorney General by letter dated September 30, 1970, requested the Commission to undertake a study and review of the administration of Ontario courts and where necessary to recommend reforms for the more convenient, economic and efficient disposal of the civil and criminal business at present dealt with by these courts.

The reference came at a time of changing philosophical attitudes towards many matters affecting the provision of judicial services. The Province had only recently assumed full financial responsibility for the administration of justice in the provision, maintenance and operation of its courts of justice, the offices of clerks of the peace and Crown attorneys. The provincial scheme for regionalization and decentralization of government services was evolving slowly. A new division of the High Court of Justice was about to be created and a number of significant jurisdictional changes in the various courts were being made. During the course of our investigations a complete reorganization of the executive structure of the government was made with the aim of improving its policy-making and operational functions. As a result there was a redefinition of the responsibilities of those within the newly created Ministry of the Attorney General for the various tasks within the court system.

It was in this atmosphere that the Commission sought to conduct its research to analyze existing institutions and practices and to formulate its recommendations for the types of reforms considered necessary. In order to obtain as much assistance as possible, we published the terms of reference in the major daily newspapers in Ontario and sent them to representative groups and individuals inviting written and oral briefs; we conducted public hearings at which there was an exchange of views on a wide range of topics; we held meetings in Toronto, Kitchener, Guelph, Windsor, London, Ottawa, Thunder Bay, Brantford, Hamilton, St. Catharines, Niagara Falls, Sault Ste. Marie and Sudbury. Representations and briefs were received from groups and individuals representing the judges, masters, Crown attorneys, the legal profession, sheriffs and court registrars, special examiners, court reporters, clerks and bailiffs. We conducted comparative research formally and informally in the United States and England. We received assistance and advice from officials in government departments, including the Ministry of the Attorney General, the Ministry of Government Services, the Ministry of Treasury, Economics and Intergovernmental Affairs and the Management Board. We have had the benefit of valuable research done both by members of the active bar and those engaged in academic pursuits, specially selected for their expertise in particular aspects of the matters considered.

We have made every effort to present a full and timely report on the whole range of matters under review. Because of the pressing nature of some of the problems we have encountered and the breadth of our inquiry, we have concluded that we can make a more effective contribution by submitting our Report in three Parts. In this first Part we consider and deal with the following subjects: a philosophy of court administration; a new structure for court administration; a proposal for merger of the High Court of Justice of the Supreme Court of Ontario with the County and District

Courts; the Court of Appeal for Ontario; the Divisional Court of the High Court of Justice for Ontario; the High Court of Justice for Ontario; the County and District Courts; motions in court and chambers; court vacations; case scheduling and trial lists in the High Court and County and District Courts; trial by jury in civil cases; the usefulness of the grand jury; and proposals concerning the Family Courts.

In Part II we will discuss the Provincial Courts (Criminal Division) and the office of Crown attorney. It is anticipated that the second Part will be submitted in the spring of this year.

In Part III we will discuss: the functions and duties of the Master of the Supreme Court; the functions and duties of the Rules Committee under *The Judicature Act*; the Small Claims Courts; the impact of legal aid; the role of the legal profession; court interpreters; court reporting; special examiners; pre-trial procedure in civil cases; court accommodation; selection of jurors for jury service; and law reports. This Part will conclude our study and review of the administration of Ontario courts.

Throughout the Report we make frequent reference to statistical data. The source usually will be indicated in each instance together with explanations and remarks where appropriate. We wish here to warn the reader that our use of statistics is mainly illustrative and that there may be some errors incapable of reconciliation. The Systems Development Branch of the Ministry of Justice has asked us to point out that although its reports referred to in this Report are generally accurate in demonstrating trends, they are not precise in every detail. The data collecting programme of the Ministry is still in its infancy and is undergoing revision as experience is gained. In the meantime, it provides a valuable service in supplying information on certain aspects of the operations of the courts. We have endeavoured throughout to employ the most current data available at the time of writing but recognize that there may be fluctuations in trends pending publication.

CHAPTER 1

A PHILOSOPHY OF COURT ADMINISTRATION

SUMMARY

A. The Role of the Courts in Our System of Government

The basic function of a court system in a civilized society is the impartial adjudication of disputes without resort to violence. As part of the institutional framework for the peaceful settlement of conflicting interests, the courts of law stand at the pivotal point of the scales of justice, ready to apply the rule of law to the issue between the parties coming before them. Thus, they represent the substitution of the authoritative power of reason, knowledge, wisdom and experience for the naked power of force.

The courts form the heart of the legal system in Canada. The legislatures are the primary policy-makers, but the courts have both an adjudicative role in determining facts and declaring the legal consequences of such facts and also a limited policy role in interpreting the broad rules established by the legislatures. The combination of these roles is what is usually termed the exercise of judicial power, and the end product is what is referred to as "justice". The quality of justice is dependent on both the quality of the persons appointed to be judges who perform these combined roles and the legal institutions called courts in which they function.

Some aspects of our legal system do not involve the courts directly. Many civil disputes are settled by negotiation without the intervention of the courts. In addition, the legislatures have, in certain situations, delegated to administrative tribunals the authority to exercise adjudicative power. But, when negotiations fail, or when an administrative tribunal exceeds its defined powers, the position of the courts as the ultimate decision-making body puts them in the predominant position in the legal hierarchy. The past pattern of court decisions usually provides a basis for predictability which enables pre-court settlements to be made.

Most recent efforts at reforming the courts in Canada have been directed at only one part of the institution, namely the judges. The literature on judicial appointments, status, tenure of office, salaries, pensions and removal is substantial,[1] and it is a tribute to those persons who have promoted such reforms that progress has been made.[2] We have no hesitation in asserting that the calibre of judges at all levels in Ontario today is at least equal to that of any other country in the western world.

What has been noticeably lacking is any real concern for the reform of the administrative processes of the courts. The study of court administration has come into fashion only recently with the Report of the Royal Commission on Assizes and Quarter Sessions (hereinafter referred to as the Beeching Commission Report),[3] the McRuer Commission Report in Ontario,[4] the movement in the United States begun by Roscoe Pound[5] and Arthur Vanderbilt[6] (and now being fostered by Chief Justice Burger) and such institutions as the Federal Judicial Center in Washington, the National Center for State Courts in Washington, the N.Y.U. Institute of Judicial Administration and the Denver Institute for Court Management.

This concern for proper court administration has not developed through any grand design. It has been a reaction to the shortcomings of administration revealed by a massive caseload crisis. This crisis, in turn, is attributable to a number of factors. These factors include population increases, the advent of the automobile and its inevitable share of accidents, the intricacies of modern business, the trend towards lawlessness caused by economic and social deprivation in an urbanized society, the growing recog-

[1]Lederman, "The Independence of the Judiciary" (1956), 34 Can. Bar. Rev. 1139; McWhinney, "Judicial Independence" (1954), 32 Can. Bar Rev. 94; McWhinney, "Criteria for Appointments to the Bench in Canada" (1955), 33 Can. Bar Rev. 979; Angus, "Judicial Selection in Canada: The Historical Perspective" (1967), 1 Can. Leg. Studies 220; Porter, *The Vertical Mosaic* 415–416 (1965); *Report of the Royal Commission Inquiry into Civil Rights* (referred to in this Report as "McRuer Commission Report") 526–546 (Report No. 1, Vol. 2, 1968).

[2]See *The Provincial Courts Act*, R.S.O. 1970, c. 369, which was first enacted in 1968 by S.O. 1968, c. 103; also *An Act to Amend the Judges Act*, Bill C-243, s. 11 (1971).

[3]Cmnd. 4153 (1969).

[4]McRuer Commission Report (Report No. 1, Vol. 2, 1968).

[5]See Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (1937), 20 J. Am. Jud. Soc'y 178 (an address delivered at the annual meeting of the American Bar Association in 1906).

[6]Chief Justice Arthur T. Vanderbilt organized the Institute of Judicial Administration at New York University in 1952 and edited *Minimum Standards of Judicial Administration*, a well-known U.S. reference work, in 1949.

nition of individual rights in labour and social matters, the continued expansion of the regulatory powers of government, and the decline of the family and the church as social institutions capable of resolving disputes. The courts in Ontario, like those of most other jurisdictions of the western world, have not escaped this caseload crisis.

B. The Changing Nature of Society and the Future Response of the Court System

Conflict is a major by-product of modern society. In the foreseeable future it will increase rather than diminish. This is true whether there is an adequate court system or not, because a court, at best, can only provide the remedy for conflict and not a prevention. Reforms aimed at the elimination of the root causes of conflict lie elsewhere.

The issue before us is simply whether the remedy for conflict which a court system provides can be made more effective. If the system is ineffective the parties in conflict will drift towards other mechanisms of dispute settlement. One direction the drift towards alternative mechanisms might take is to the technique of arbitration. This has already achieved a high degree of sophistication in the field of labour relations and commercial contracts. To the extent that the technique of arbitration is accepted by the parties to a dispute as a valid means of conflict resolution, it represents a valuable alternative to the courts. The more likely drift in the face of ineffective courts will be towards arbitrariness and lawlessness.

As long as there is conflict in society there is no realistic alternative to the courts in any rational system of law. Arbitration and similar techniques have limited scope because they depend on the existence of a range of agreement between disputing parties as a condition of their invocation. There are many forms of societal conflict where such agreement is not present. Courts may be supplemented by administrative tribunals which rely to a lesser extent on the adversary system, but these tribunals are limited in their ability to resolve conflict by the statutory powers which created them and the extent to which the disputing parties are engaging in conduct within the tribunal's specialized jurisdiction. The main reason why courts are now, and will continue to form, the central core of the legal system is that the judges of the courts are constitutionally independent and not subject to the control or influence of either the executive or the legislature in arriving at their decisions. Therefore, more than any other public functionary, the judges are in a position to adjudicate objectively and impartially in a process of conflict resolution which is based on reason, knowledge, wisdom and experience rather than emotion, passion and impulse. An independent judiciary is one of the basic principles of the rule of law. It is this feature, above all, that makes the courts the necessary and valuable institutions that they are.

How then does one set about the task of making the court system more responsive to the demands of a conflict-ridden society? It is no longer sufficient to say that we can be assured of high quality justice as long as the judges appointed to the courts are able, fair and diligent. For the most

part we have achieved a high level of judicial competence in Ontario, yet there are still serious problems of inefficiency and delay. The time has come to view the courts not merely as a collection of talented judicial minds dispensing justice to the best of their abilities, but as a complex institutional process involving lawyers, court clerks, juries, reporters, litigants, witnesses, etc., in a framework influenced by such administrative factors as financial constraints, limited courtroom space, pressures for greater service, and the availability of qualified supporting personnel. What is needed, in short, is a sound managerial approach to court administration based on a concept of the courts as an assembly of interdependent parts forming an integrated whole, and not based exclusively on the traditional judicial model which emphasizes a judicial hierarchy, and establishes authority and lines of communication accordingly.

A "systems" approach to the administration of courts, that is, the orderly and rational processes of efficient management, is not free from difficulty. While there are many effective management techniques which can be borrowed from business and government generally, they must be adapted specially for the operation of an institution that is typical of neither a business nor a government agency. Judicial independence and the delicate relations that exist between the courts and the government or among the various levels of courts are matters that must be thoroughly understood before the application of conventional institutional solutions is attempted. Above all, it must be remembered that the intended product of the court system is justice, of which efficiency, convenience and cost are only constituent parts and do not together comprise the whole.

C. Premises Underlying Our Approach

The approach which we recommend is based on several premises. First is the notion that the primary role of the judges in our court system is to adjudicate. By their training, professional background, salaries, levels of competence and independence, judges are best equipped for adjudication. They are neither appointed nor trained to administer.

The *British North America Act* stipulates that the constitution, maintenance and organization of provincial courts at all levels is the responsibility of the legislature and the executive to which it delegates its authority. This constitutional jurisdiction is limited by the concept of judicial independence and by virtue of the fact that judges of the Supreme Court and of the County and District Courts are appointed by the Governor General under section 96 of the *British North America Act*, have their salaries fixed and provided by the Parliament of Canada under section 100 of that Act and judges of the Supreme Court have their tenure secured under section 99 of that Act. Apart from these important limitations, the primary responsibility for court administration falls on the provincial government and is a function of that government.

Our second premise is that the primary goal of the court system should be to serve the public. This involves both qualitative and quantitative factors. Not only must the decisions of the court be fair and rendered in

accordance with the law (which can be achieved for the most part through the appointment of competent judges), but decisions must be available without delay and at reasonable cost and convenience to the parties. The maxim "justice delayed is justice denied" should not require constant repetition. More damage is done to the quality of justice in Ontario by managerial inefficiencies generated by outdated practices and systems than is done by incorrect decisions of particular judges. It is the needs of the public that are of paramount concern and not the needs of the judges or the lawyers or the court clerks or the government charged with the responsibility of administration.

A third premise is that sound administration requires adequate resources. Justice dispensed in the courtroom is not something that is spun out of thin air. In addition to judges, it requires competent lawyers, justices of the peace, masters, court administrators, court reporters, clerks, special examiners, sheriffs, adequate courtrooms, interview rooms, jury rooms, detention facilities, probation services and a host of other facilities all operating under a sound system of management. Prompt and adequate justice costs a great deal of money. Historically the Ministry of the Attorney General in this jurisdiction has been relegated to the status of the poor cousin when it comes to laying claim to a share of provincial budgetary funds. In the estimates for the fiscal year 1972–73, the Ministry of the Attorney General was allocated $54,911,500 or 0.781% of a total provincial budget of $7,071,413,000, while the Ministry of Health received 29% of the total budget, the Ministry of Education 18%, the Ministry of Colleges and Universities 12% and the Ministry of Transportation and Communications 8%. In the two preceding budget years, the situation was little different. In the fiscal year 1971–72, the Ministry of the Attorney General was allocated only 0.776% of the total budget and in 1970–71, 0.726%.

The annual report of the Inspector of Legal Offices for 1971 shows revenue obtained through the administration of justice as follows:

Provincial Courts (Criminal Division) Fines and Fees	$29,573,686.85
Provincial Courts (Family Division) Fines	25,016.04
Local Registrars S.C.O. Fees	1,710,211.24
Surrogate Registrars Fees	4,907,363.44
County and District Court Clerks Fees	2,570,473.41
Sheriffs Fees	1,759,794.03
Small Claims Courts Clerks and Bailiffs Fees	224,920.34
Crown Attorneys and Clerks of the Peace Miscellaneous	4,735.48
Estreated Bail	106,540.82
Sundry Fines	49,664.35
	$40,932,406.00

The outgoing expenses incurred by the Province of Ontario for the administration of courts for the year 1972 amounted to approximately $25,000,000. There are other expenses incurred relative to the receipts through the administration of justice such as salaries paid to the judges of the Supreme, County and District Courts by the federal government and

some of the costs of policing the province. We are not attempting to create a balance sheet but we point out that there are credits to be taken into account when discussing the cost of the administration of justice.

While our examination of the above estimates may be an over-simplified approach, what is revealed is a confirmation of our view that the administration of justice in Ontario ranks very low in the scale of financial priorities when it comes to providing governmental services to the public. It would appear that health services, schools, universities and roads are regarded as the most important services to be provided by the provincial government. Health services, schools, universities and roads are vitally important provincial services but the system of justice unquestionably requires a larger share of resources if the courts and related agencies are to provide the quality of service to the public that it deserves.

The nature of the response by government in this area is extremely critical. The proper synthesis of freedom and order is a perennially difficult problem involving changing societal needs and aspirations and an evolving sense of what constitutes justice. It is clear, however, that the provision of a readily accessible, adequate, and efficient system of courts and related agencies is basic for the continued existence of a civilized society. There is no room for complacency in facing the problems that lie ahead of us. Mere patching and improvisation are not equal to the task of restructuring the administrative processes of our court system to meet the challenges that are already upon us. A little more money would merely give rise to false hopes, and postpone the day of reckoning. What is required is a substantial reorientation of our thinking about the financial needs.

It has been demonstrated in the past that the government and people of this province are capable of responding immediately and willingly to felt needs such as that required for educational expenditures in the face of skyrocketing enrolment prejections following World War II. The whole of the western world was galvanized into making massive infusions of money, and the committal of other resources to the advancement of the physical sciences following Sputnik! Science has taught us that survival is possible; we must also ensure that it is desirable. The proper administration of the courts is an important factor in that equation.

We have been encouraged to find that the Cronyn Committee Report on Government Productivity led to the ascendancy of Justice as one of the provincial policy fields. Regrettably there is still little evidence of any similar major change in the financial support which ought to accompany this decision on organization. The decision in monetary matters cannot be delayed much longer if the system is to be improved. It is equally important, as we hope will be demonstrated by this Report, that the infusion of money will take place giving much more regard to the bottom of the pyramid of justice than to the top.

D. Independence of the Judiciary and the Role of Government

One of the most difficult tasks in achieving an effective "systems" approach to court administration is to determine the extent to which the

accepted principle of judicial independence places a very real restraint on the government's power to constitute, organize and maintain the courts. While the power of the legislature theoretically is supreme in any of the areas assigned to it by the constitution, that supremacy is limited in practice and in law when it comes to the courts. An independent judiciary is an essential part of the constitution of Canada and of England, whence our system was derived. It is a principle which has been regarded as a cornerstone of freedom ever since the *Act of Settlement* of 1701.

The great English legal historian Sir William Holdsworth described the concept as follows:

> The judges hold an office to which is annexed the function of guarding the supremacy of the law. It is because they are the holders of an office to which the guardianship of this fundamental constitutional principle is entrusted, that the judiciary forms one of the three great divisions into which the power of the State is divided. The Judiciary has separate and autonomous powers just as truly as the King or Parliament; and, in the exercise of those powers, its members are no more in the position of servants than the King or Parliament in the exercise of their powers. . . . It is quite beside the mark to say that modern legislation often bestows undivided executive, legislative and judicial powers on the same person or body of persons. The separation of powers in the British Constitution has never been complete. But some of the powers in the constitution were, and still are, so separated that their holders have autonomous powers, that is, powers which they can exercise independently, subject only to the law enacted or unenacted. The judges have powers of this nature because, being entrusted with the maintenance of the supremacy of the law, they are and always have been regarded as a separate and independent part of the constitution. It is true that this view of the law was contested by the Stuart kings; but the result of the Great Rebellion and the Revolution was to affirm it.[7]

In a Canadian context, the late Honourable Ivan C. Rand, a retired justice of the Supreme Court of Canada, described the concept in these words:

> [The principle of] independence of judges . . . rightly conceived . . . admits of no limitations. It enables the guarantee of security to the weak against the strong and to the individual against the community; it presents a shield against the tyranny of power and arrogance and against the irresponsibility and irrationality of popular action, whether of opinion or of violence; it enables the voice of sanity to rise above the turbulence of passions; and it is to be preserved inviolate.[8]

Professor W. R. Lederman, Q.C., after tracing the history of judicial independence in Canada, concluded:

[7] Sir W. S. Holdsworth, "His Majesty's Judges" (1932), 173 Law Times 336, at pp. 336–377.

[8] Hon. I. C. Rand, *Report of the Inquiry into the Alleged Misconduct of Mr. Justice Landreville* 95–96 (Can. 1966).

> . . . historical evidence suggests that judicial independence is a distinct governmental virtue of great importance worthy of cultivation in its own right.[9]

The classic rationale for pursuing the virtue of judicial independence in Canada has been articulated by Dr. R. MacGregor Dawson:

> Such independence is unquestionably dangerous, and if this freedom and power were indiscriminately granted the results would certainly prove to be disastrous. The desired protection is found by picking with especial care the men who are to be entrusted with these responsibilities, and then paradoxically heaping more privileges upon them to stimulate their sense of moral responsibility, which is called in as a substitute for the political responsibility which has been removed. The judge is placed in a position where he has nothing to lose by doing what is right and little to gain by doing what is wrong; and there is therefore every reason to hope that his best efforts will be devoted to the conscientious performance of his duty.[10]

The constitutional source of judicial independence in Canada has often been said to lie in sections 96 (appointment), 99 (tenure) and 100 (fixed salaries) of the *British North America Act*, as the "three principal pillars in the temple of justice".[11] However, it has also been suggested that these sections merely provide the basis for the conclusion that the superior court judges in the province are in a similar position respecting appointment, tenure, removal and security of salaries to that of the judges of the historic English superior courts after the *Act of Settlement*.[12] Certainly this latter view is reinforced by the preamble in the *British North America Act* to the effect that Canada is to have a constitution "similar in principle to that of the United Kingdom".

The County Court judges and the Provincial judges (in both the Criminal and Family Divisions) theoretically do not have the same constitutional base of independence as the Supreme Court judges. But a functional equivalent of this independence has been virtually guaranteed for the County Court judges by the federal *Judges Act*,[13] and for the Provincial judges by *The Provincial Courts Act*.[14] While technically there is no constitutional limitation on the respective legislatures in depriving the judges of these courts of their independence, the principle of judicial independence is so firmly established in Canada at all levels that such a proposal would be unthinkable.

How does one reconcile the principle of an independent judiciary with the need for a "systems" approach to court management administered by the government? We have already asserted the premise that the function of a judge is to adjudicate, and not to administer. Clearly the government has

[9]Lederman, "The Independence of the Judiciary" (1956), 34 Can. Bar Rev. 769; 1139, at p. 1158.
[10]Dawson, *The Government of Canada* 486 (Wade rev. 1970).
[11]*Toronto* v. *York*, [1938] 1 D.L.R. 593 (P.C.), per Lord Atkin at p. 594.
[12]See Lederman, *op. cit. supra* n. 1, at p. 1160.
[13]R.S.C. 1970, c. J-1, ss. 31 (as re-enacted by Bill C-243, s. 11), 34.
[14]R.S.O. 1970, c. 369, s. 4.

no right to interfere with or attempt to influence in any way the adjudicative functions of a judge, whether it likes his decisions or not. Neither in our view does the government have the right to assign individual judges to hear particular cases, or the right to organize the work of the judges in such a way as to influence the course of adjudication. There is a further limitation applicable only to Supreme and County Court judges to the effect that a provincial legislature may not unilaterally assign such judges from one division of a court to another without complementary federal action under section 96 of the *British North America Act*.[15]

However, even the fullest recognition of the principle of judicial independence does not dictate that the courts must be left to operate independently of reasonable management constraints. Neither should the principle of judicial independence be used to support the misconception that the only management constraints that can be imposed on the courts are those imposed by the judges themselves, and that the only role of the government is to provide the money each year for the judges to run the system.

We repeat our earlier premise that the primary professional duty of the judges is to adjudicate. Both our constitution and our history in Canada have recognized that court administration is the primary responsibility of government. The two roles on occasion may appear to come into conflict. The resolution of the issues may well have to be in favour of the judges to the extent that they honestly believe their freedom of adjudication is involved. The purpose of modern court management is to provide the judges with more time to devote to adjudication, and thus provide better service to the people.

Illustrations may be helpful in making clear the type of division of functions we envisage. It will be admitted readily that decisions on motions, assignment of judges to case lists, issues at trial, sentence and damages are all within the sphere of adjudication. But, equally clearly, decisions on placement and order of cases on the trial lists, the assignment of courtrooms, the time of commencement of court sittings and the hiring and assignment of court reporters and clerks are within the sphere of administration, at least to the extent that such decisions do not adversely affect the adjudicative process. Because many adjudicative and administrative functions are interrelated, court administrative personnel will have to work very closely and maintain a special relationship with the judges, particularly the Chief Justice or Chief Judge of the respective courts.

If, for example, it were considered desirable to group classes of cases into separate lists for hearing (e.g., motor vehicle cases, commercial cases), this would be within the sphere of administration. But assignment of judges to hear these various groups of cases would be within the sphere of adjudication. Realistically, such a proposal would be expected to evolve out of continuing discussions between senior administrative personnel and the Chief Justice or Chief Judge, and its ongoing administration would be

[15]See *Re Judicature Act, 1924* (1924), 56 O.L.R. 1 (C.A.), aff'd [1925] A.C. 750 (P.C.).

worked out between them so that the distinction between administration and adjudication would not be apparent to the casual observer. It is clear that the decision to group classes of cases into separate lists could not be taken without the concurrence of the Chief Justice or Chief Judge because of the interdependence of administrative and adjudicative functions.

All this does not mean that the judges should be totally excluded from administration. For example, the granting of an adjournment involves both adjudicative and administrative elements, but should *prima facie* be the responsibility of a judge except to the extent that he may delegate it to an administrator when the adjudicative element is minimal. Also, one would not expect that the judges should give up their position either on the Rules Committee or the Judicial Council merely because some of the functions performed by these bodies are administrative in nature.

But there are many administrative duties which involve such matters as personnel, space allocation, statistical and cost analysis which judges in Ontario perform today and which should be transferred to a modern management system. The judges in former times could perform these duties together with their adjudicative duties because caseloads were not as great, individual cases not as complex and the size and complexity of the system was such that administration could be accommodated within the judicial hierarchy for each level of court. But the situation today has changed dramatically. The demands of heavy caseloads mean that judges can no longer borrow adjudicative time for administrative duties if they are to serve the public properly in their professional role as judges.

What is required then is a blending of a management approach to all court levels with the indispensable concept of judicial independence to create an efficient professionally-sensitive atmosphere in which judges have the maximum opportunity to adjudicate fairly and wisely. This then is our general prescription for justice in the court system.

E. The Goals of Court Administration

As a first step towards the application of modern management techniques in reforming the court system, it is necessary to identify and articulate the goals of such system. It is not enough merely to say that the system should provide "justice", because as we have already seen this term involves a dual concept embodying both fair adjudication and efficient administration.

The principal focus of this project is on administration and our initial task is to establish management goals, keeping in mind that adequacy of administration is achieved only if it permits fair adjudication. Efficiency without fairness is not justice. A speedy decision made without due regard to the legal rights of the parties is worse than no decision at all for it can breed disrespect for the law. Therefore management goals at best involve the creation of a framework within which judges can adjudicate to the best of their ability. If administrative and adjudicative goals come into conflict, the former must give way.

1. *Criminal Cases*

The first goal of court administration which we recommend relates to criminal cases. Briefly stated, every accused charged with an offence should normally be brought to trial within 90 days of arrest or summons regardless of the court to which he is committed for trial. This goal is seldom met with respect to trials of provincial offences and is often not met in the trial of offences under the *Criminal Code* in the Provincial Courts (Criminal Division). The goal is not being met in the large majority of cases in the General Sessions of the Peace, the County Court Judges' Criminal Courts and the High Court.

There is no single reason for this state of affairs. In some cases lawyers may deliberately try to delay the case since they may feel that it may be in their clients' interests to do so. For example, an accused charged with careless driving may be just below the maximum point level at which he will lose his licence, and a delay may allow sufficient time to pass to wipe out offences committed more than three years previously, thus allowing the accused to plead guilty eventually without the prospect of losing his licence. The defence lawyer or the Crown attorney may need extra time to prepare a case because of its complexity. In some situations the accused himself may precipitate the delay merely to put off the inevitable. The inflexibility of the circuit system is a cause of delay in the High Court. Long vacation and the assembling of a grand jury also contribute to delay in the higher courts. Non-availability of key witnesses can also be a contributing factor. Differing systems of trial scheduling and varying practices in granting remands add yet another dimension.

Before recommending changes in some of the above matters, a goal as to time should be established. In our view, 90 days should be sufficient time for the state to prepare and present its case against an accused, and sufficient time for the accused to retain and instruct counsel who will in turn prepare the defence. There will always be exceptions, of course, but at least those responsible for managing the system will have a clear and definable goal to guide them in administration.

The 90 day time limit is intended to be a balanced guide in the interests of both the individual accused and the community. Where the accused is in custody, this goal identifies the right to a speedy trial to determine guilt, and the freedom or specific sentence that will follow as a result of such determination. If the accused is not in custody, it is a right to a speedy trial either to remove the stigma of a pending prosecution or to learn the ultimate consequences of an offence having been committed. For the community, it is an assurance that wrong-doers will be punished promptly as a deterrent to others who might be inclined to engage in similar conduct as well as a protection against inefficiency and lethargy in the law enforcement activities of the police and Crown attorneys.

The Beeching Commission Report recommended a similar goal except that the trial was to be "within four weeks of committal". Also, legislation

was introduced in the U.S. Senate in 1971 requiring that "criminal cases must be tried within 60 days of committal for trial, or dismissed".[16]

We do not favour either the Beeching or the U.S. Senate approach because time runs from committal for trial after a preliminary hearing which under our system as now operating may take place many months following arrest or summons. In some situations the most serious delays take place prior to committal. A further difficulty with the approach of the U.S. Senate is the sanction of dismissal of the charge if the goal is not achieved. That an accused person should automatically go free, just because the system was not able to dispose of his case within a certain time, is too arbitrary a step to take in view of the likely prospect of such a rule being exploited regularly by guilty persons who may themselves contribute to delay.

In our view a general goal of 90 days from arrest or summons, but without such a drastic sanction, is the most useful approach that can be taken under present conditions in Ontario. It may be that lesser sanctions could be adopted such as permitting one party who is ready to proceed to trial requiring the other party, after 90 days, to show cause why the case should not be brought on peremptorily, or permitting the court administrator or registrar to schedule the case notwithstanding that both parties appear to be reluctant to proceed. Management techniques such as these will be discussed in chapter 10.

The State of New York, where there are some of the most serious delays in criminal trials in the western world, adopted effective May 1, 1972, a goal of six months, running from the date of arrest or summons. Similar measures ranging from 60 to 180 days have been adopted in California, Illinois, New Mexico, Florida and the District of Columbia. It may be that in Ontario an initial goal of six months with the gradual reduction to three months would be the most realistic standard capable of achievement here, particularly where the accused elects to be tried or the offence is one that must be tried in the High Court or the General Sessions of the Peace. Certainly to meet a 90 day goal, the sittings of the General Sessions of the Peace (in every county or district) and of the High Court (in every High Court trial centre) would have to be held for a combined total of at least four times a year, unless cases were to be transferred conveniently to neighbouring counties or trial centres. The sittings of the High Court as a "Court of General Gaol Delivery" would be particularly important in implementing this goal as related to accused persons in custody.

[16]The *Speedy Trial Act*, S-895, was introduced by Senator Sam J. Ervin Jr. (D.N.C.) in 1971. It has not been greeted with enthusiasm by the Nixon administration. The dismissal sanction does not apply "where there are exceptional and compelling reasons for delay", and the time limit will not apply until each federal district court has had an opportunity to formulate a plan for complying with the time limit through procedural and administrative measures, and added personnel if necessary. The Bill is unique in that it recognizes three major, but integrated themes: fixed time limits, better cour. management, and increased system resources. Previous controversy in the U.S. had centred around which approach was best, or should come first, but the Bill accords primacy to all three. The Bill died with the 92nd Congress. The Federal Court's rule 50b went into effect Oct. 1, 1972. It requires that cases go to trial within 60 days following indictment, but imposes no penalty if the provision is not met.

2. *Civil Cases*

On the civil side, slightly different considerations arise in the attempt to set management goals. Traditionally, a controversy between individuals has been regarded as their own business, even after a court action has been commenced. Subject to an occasional "purging" of the list, the judges and those responsible for court administration traditionally have assumed a passive role even up to the day of trial unless moved at the instance of one of the parties or their counsel. Rules as to time limitation have been set in operation only if a non-delinquent party chooses to invoke them. Where both counsel agree that a case should not proceed, the commonly held view among lawyers is that the court should have no right to force the matter on for trial or other disposition.[17]

In our view this traditional approach to civil litigation has been one of the major contributing factors to delays in the court system. While on occasion there are good reasons for delay, we believe that the Courts generally should have the right to intervene in the management of the flow of civil litigation coming before them to ensure in the public interest that cases are properly and speedily brought to trial. If management of litigation is left to the lawyers alone, the adversary system occasionally puts them in conflict with the public interest, for delays and procrastination may in certain cases be in the best interests of their private clients.

Specifically, we recommend two management goals. First, every civil case should normally be disposed of within one year of the issuing and serving of the writ of summons, petition or claim.

There is evidence that this goal is not now being met in Ontario, particularly in the higher courts. As an example, we investigated all Supreme Court cases in Toronto on the weekly trial lists for the week of November 15, 1971, excluding undefended divorces. Of the 45 non-jury cases (see Appendix I) and 63 jury cases (see Appendix II) scheduled to be tried that week, only two non-jury cases (4%) and two jury cases (3%) were scheduled to be tried within a year of issuance of the writ. There were 11% of non-jury cases and 54% of jury cases that were scheduled to be tried between one year and two years of issuance of the writ, 45% and 24% between two years and three years, 27% and 9.5% between three years and four years, and 13% and 9.5% over four years, respectively.[18]

Taking the *average* time between the date of issuance of the writ and the placing on the weekly trial list, the 45 non-jury cases averaged three years seventeen days, while the jury cases averaged two years seventy-five days (see Appendix III).

[17]This view was articulated most vigorously by representatives of the County of York Law Association at the Commission's public hearings on March 29, 1971.

[18]It should be noted that virtually all these cases were brought to trial before the 1971 amendments to Rule 246 were in force. These amendments altered the standard Supreme Court practice of setting an action down for trial and later delivering a certificate of readiness when all discoveries and other preliminary proceedings were completed, by requiring delivery of the certificate of readiness *before* setting down. Thus, the period of time covered by column 2 in each of Appendices I, II and III would be eliminated under the new amendments, although it is reasonable to assume that a portion of it would be added to the time period covered by column 3.

Like the 90 day goal for criminal cases, there should not be an inflexible sanction if the civil case is not tried within a year. But this factor does not detract from its acceptability as a management goal to guide judges and court management personnel in the application of techniques, manpower and resources to achieve speedier adjudication. Certainly it is a goal which can and should give rise to certain presumptions in the Rules of Practice militating against adjournments or other delays.

As a second management goal involving civil cases, we recommend that the courts should assume the supervisory responsibility for the management of litigation after the case has been placed on the list for trial,[19] and that this goal should be formally recognized in legislation. To a certain extent this goal is reflected in the 1971 amendments[20] to Rule 246 of the Supreme Court Rules of Practice which now requires that a certificate of readiness (implying that a party has completed all preliminary matters and is ready to proceed to trial) must be delivered *before* the action can be set down for trial.

This is a compromise position between the polar positions of retention of absolute control by counsel on the one hand, and by courts on the other, since it retains the right of counsel to manage the flow of cases for the period between issuance of the writ and setting down for trial, but provides that once a case is set down the court's management processes take over. This initial freedom of action for lawyers is necessary to facilitate such matters as the long-term assessment of damages in personal injury cases or to enable adequate preparation where the complex nature of the evidence and the legal issues necessitate a longer time than the normal one year period.

3. *Cost of Litigation*

An oft-neglected subject of judicial administration is the convenience with which a member of the public is able to resort to the courts. We do not refer only to the problems of delay which we have discussed above, but also to the financial cost to accused persons or civil litigants when subjected to or when invoking the courts' processes.

The high cost of court proceedings, particularly on the civil side, is not the result of the fixed sum charged by the government for issuing a writ or taking any other step in the process, but the result of the fees charged by lawyers in representing their clients properly in the manner dictated by the system. In civil proceedings in Ontario, court costs including lawyers' fees are usually awarded to the successful party in the action at the expense of the losing party. But in most cases the scale of costs awarded to the victor is substantially lower than the actual costs to the client of lawyers' fees and court costs. It is understandable, then, that the potential costs of court proceedings play an important role in determining whether a civil case is settled or litigated.

[19]Two of the Commissioners, the Chairman and Mr. Bell, believe this supervisory responsibility should be assumed by the courts from the time a proceeding is commenced.

[20]O. Reg. 520/71, s. 5.

Ontario has a comprehensive legal aid plan under which an accused or litigant who is unable to pay all or part of these costs may qualify for a legal aid certificate which entitles him to retain the lawyer of his choice who will accept payment at 75% of a tariff of fees negotiated by the representatives of the legal profession and the government. We do not propose to deal here with the impact of legal aid; neither do we propose to deal with the legal profession and its role in the courts since these matters will be dealt with in a subsequent Part of this Report. The largest share of the blame for the high cost of litigation must lie with the nature of the organization and the inefficiency of the system. The time wasted by lawyers, litigants and witnesses because of inefficient or uncertain scheduling of cases and unnecessarily complicated procedures is by far the largest contributor to cost. Because of high overhead, a lawyer today must charge for his services on an hourly basis throughout his working day. To a lesser extent this is also true of many witnesses. The traditional management assumption in our court system has been that the judge's time is to be fully utilized, even if it means that lawyers, witnesses and litigants must be kept waiting. While we do not suggest that judges should be idle for any length of time, we do advocate a sounder management rationalization by which the cost of judge time is balanced against the cost of lawyer, witness and litigant time in order to achieve the lowest net cost within the operation of the system.

Therefore, together with the goals of dispensing justice within 90 days in criminal cases and one year in civil cases, we would recommend a further management goal of substantially reducing costs to the parties who use the courts. This goal is designed to promote management and jurisdictional techniques in all levels of courts which will ensure that the productive time of judges, lawyers, witnesses and litigants is fully utilized by the system. Whether these techniques involve such matters as fixed trial dates, pre-trial negotiations, monitoring and assignment systems will depend on the level of court and the county or trial centre involved. Many of these will be discussed and considered in subsequent chapters. In the lower levels of court such as the Small Claims Court, it may even involve a policy of minimizing the use of lawyers in the interests of less expensive and, in these circumstances, more ample justice.

In sum, while the potential cost of litigation is often a useful element in forcing court settlements, it should never constitute an impenetrable barrier to the extent of denying a person the right to seek the court's assistance in legitimately defending a criminal charge or pursuing or defending a civil claim.

4. *The Need to Simplify*

As a final goal of court management, we would recommend that wherever possible the court system be simplified so that it could be better understood, utilized and accepted by the lay members of the public. We refer specifically to court structure, procedures and terminology. While we make detailed reference to these matters in dealing with specific courts (for example in chapter 5), we can cite certain matters here.

We may well ask ourselves whether it is necessary to have County Court judges sitting in three different courts of record — the General Sessions of the Peace (criminal cases tried by a judge with a jury), the County Court Judges' Criminal Court (criminal cases without a jury), and the County Court (civil cases with or without a jury) — when they could just as easily sit in one court, the County Court, to deal with all types of cases. There are historical reasons for the distinctions, of course, but how relevant are they to the lay public today and how necessary are they to the better administration of justice and the more efficient management of these courts?[21]

In the High Court some motions are returnable in weekly court where the judges and lawyers appear formally robed while other applications, similar in nature, are brought in chambers where matters are dealt with more informally.[22] The matter, however, involves much more than outward appearances and goes to the root of justice being administered in open court. The task is to draw distinctions on such matters of substance and not only on matters of form.

Our procedures may have become so complex that only the most highly skilled and specialized members of the litigation bar and the judges understand them fully. We will discuss in a subsequent Part of this Report whether a committee should be established to commence a complete overhaul of the civil rules of practice with a view to their simplification. Criminal procedure, of course, is a matter of federal jurisdiction but we strongly endorse the actions of the federal government in authorizing and encouraging the Law Reform Commission of Canada to propose reforms simplifying the law in this area.

Finally we turn to the ancient and anachronistic terminology of the courts. While the very soul of the common law and the courts in which it has evolved are the product of history and experience, what useful public purpose is served today by the retention of such names as *puisne* judge, *subpoena duces tecum*, *praecipe*, taxing officer, General Sessions of the Peace, Assizes, writ of *fieri facias*, petit jury and similar terminology? They may only tend to intimidate and alienate members of the lay public who do not understand them and are therefore less willing to accept what the courts are meant to do substantively.

Perhaps it should be stressed here that the courts are not the private domain of judges and lawyers. They exist for the people and in a very real sense belong to the people. That their functions should be clearly understood and accepted by the people and that they should be managed in the best interests of the people is surely beyond dispute.

F. Summary of Recommendations

1. Ontario should adopt a "systems" approach to court administration based on sound management principles consonant with the administration of justice and not on the traditional judicial model which focuses on the judicial hierarchy and structures authority and lines of communication accordingly. The courts must be regarded as an assembly of interdependent parts forming a complex but unitary whole.

2. The premises underlying a sound approach to court administration are as follows:

   (*a*) the primary role of judges in our court system is to adjudicate, not to administer.

   (*b*) the primary goal of the court system is to serve the public; this involves adjudicative decisions which are not only fair and just but made without delay and at reasonable cost and convenience.

   (*c*) sound court management in Ontario requires a fairer share of financial resources than has been accorded to the Ministry of the Attorney General to date.

3. The principle of an independent judiciary must be preserved but it should not be regarded as justification for the operation of the courts independently of reasonable management constraints in the public interest.

4. Court administration should be the primary responsibility of government in order to provide the judges with more time to devote to adjudication. However, administrative decisions of government should never adversely affect the judges' adjudicative processes.

5. Because of the interrelationship of many adjudicative and administrative functions in the court system, court administrative personnel will have to work very closely and maintain a special relationship with the judges. This requires a blending of a management "systems" approach with an indispensable concept of judicial independence to create an efficient professionally-sensitive atmosphere in which judges have the maximum opportunity to adjudicate fairly and wisely.

6. As a management goal, every accused person charged with an offence should be brought to trial within 90 days of arrest or summons, regardless of the court to which he is committed for trial.

7. As a further management goal, every civil case should normally be disposed of within one year of the issuing and serving of the writ of summons, petition or claim.

8. Attempts should be made to reduce the cost of court proceedings through the application of management and jurisdictional techniques and the more efficient scheduling of cases to maximize the productive time of judges, lawyers, litigants and witnesses in the system.

9. Court structures, procedures and terminology should be simplified so that the court system will be better understood, utilized and accepted by the members of the lay public.

[21]These matters are discussed in detail elsewhere in this Report.
[22]The distinction and its proposed abolition is discussed in chapter 6.

APPENDIX I

TORONTO — SUPREME COURT
45 Non Jury Cases on Weekly List Examined
Week of November 15, 1971

Time Between:	(1) Issue of writ to setting down	(2) Setting down to placing on ready list	(3) Placing on ready list to weekly trial list	(4) (Combination of 1, 2 & 3) Issue of writ to weekly trial list	
0 – 49 days	2 cases	3 cases	2 cases	cases	
50 – 99	6	11			
100 – 149	5	7			
150 – 199	4	2			4%
200 – 249	5	2	1		
250 – 299	7	6			
300 – 349		2	1	1	
350 – 399	3	1	1	1	
400 – 449	2	1	1		
450 – 499	1	3	34		
500 – 549			5		
550 – 599	2	2			11%
600 – 649	1			2	
650 – 699		2		1	
700 – 749	1			2	
750 – 799	2			3	
800 – 849	1			4	
850 – 899				1	
900 – 949				4	45%
950 – 999		2		4	
1,000 – 1,049				3	
1,050 – 1,099				1	
1,100 – 1,149				3	
1,150 – 1,199				2	
1,200 – 1,249				1	27%
1,250 – 1,299	1			1	
1,300 – 1,349	1			4	
1,350 – 1,399				1	
1,400 – 1,449	1				
1,450 – 1,499					
1,500 – 1,549					
1,550 – 1,599				1	
1,600 – 1,649				1	
1,650 – 1,699				1	13%
1,700 – 1,749					
1,750 – 1,799					
1,800 – 1,849					
1,850 – 1,899				2	
(other) – 2,451		1			
– 4,395				1	
	45	45	45	45	

APPENDIX II

TORONTO — SUPREME COURT
63 Jury Cases on Weekly List Examined
Week of November 15, 1971

Time Between:	(1) Issue of writ to setting down	(2) Setting down to placing on ready list	(3) Placing on ready list to weekly trial list	(4) (Combination of 1, 2 & 3) Issue of writ to weekly trial list	
0 – 49 days	1 cases	cases	cases	cases	
50 – 99	11	9			
100 – 149	7	10	9		
150 – 199	9	13	32		3%
200 – 249	6	5	12		
250 – 299	4	6	4		
300 – 349	1	7	2		
350 – 399	3	3		2	
400 – 449	5	2	1	3	
450 – 499	1	2	2	5	
500 – 549	2			7	
550 – 599	2	2	1	5	
600 – 649				3	54%
650 – 699	2	1	1	5	
700 – 749	2			6	
750 – 799	2	2		3	
800 – 849				4	
850 – 899	1			1	
900 – 949	1				24%
950 – 999	1			3	
1,000 – 1,049	1			3	
1,050 – 1,099		1		1	
1,100 – 1,149	1			2	
1,150 – 1,199					
1,200 – 1,249					
1,250 – 1,299				1	9.5%
1,300 – 1,349				1	
1,350 – 1,399				1	
1,400 – 1,449					
1,450 – 1,499				3	
1,500 – 1,549				2	
1,550 – 1,599					9.5%
1,600 – 1,649					
1,650 – 1,699				1	
1,700 – 1,749					
1,750 – 1,799					
1,800 – 1,849					
1,850 – 1,899					
	63	63	63	63	

APPENDIX III

TORONTO — SUPREME COURT
Cases on the Weekly Trial List
For the Week of November 15, 1971

(excluding undefended divorce)

Nature	No. of cases	(1) Average time between issue of writ to setting down	(2) Average time from setting down to placing on ready list	(3) Average time from placing on ready list to weekly trial list	(4) Average time from issue of writ to placing on weekly trial list
1. non jury	45	363.2 days	306.6 days	442.9 days	3 years, 17 days
2. jury	63	336.6 days	261.8 days	206.8 days	2 years, 75 days
3. combined	108	347.7 days	280.5 days	305.2 days	2 years, 203 days

CHAPTER 2

A NEW STRUCTURE FOR COURT ADMINISTRATION

SUMMARY

Notwithstanding that many dedicated people have been engaged in the administration of the courts of Ontario, certain defects inherent in the present system have transcended individual effort. We believe that a new administrative structure for the courts is required to overcome these defects.

A. THE DEFICIENCIES OF THE PRESENT ADMINISTRATIVE STRUCTURES

The major defects in the present system are (a) the lack of clear definition of responsibility for the administration of the courts; (b) the lack of professional administrative personnel within the system; (c) the lack of an integrated approach to administering all aspects of the system:

(d) the lack of persons or institutions charged with responsibility for long term planning and innovation, as opposed to day-to-day operations. These matters are to a large extent closely interrelated.

1. *The Lack of Clear Definition of Responsibility for the Administration of the Courts*

To date there has been little or no clear definition of responsibility for the operations of the courts, beyond the function of adjudication. Many aspects of administration are carried out by the government through the Ministry of the Attorney General, but much of the administrative work has been left to the judges except the day-to-day administration carried out by the courts' staff. It is even often unclear to whom the court staff are responsible for the performance of their tasks (e.g., to whom are registrars and court clerks responsible for the performance of their various duties?). The lack of definition of administrative responsibility appears to be the result of the evolutionary nature of the present court administrative structure and a failure to attempt to define responsibility for the various aspects of a system as unique as the courts of justice. If we are to have maximum efficiency in the administration of justice an earnest attempt must be made to find satisfactory solutions to the relevant problems.

As indicated in chapter 1, under the *British North America Act*[1] the Provincial Government is made responsible for the administration of the courts, as distinct from adjudication within the courts.

2. *The Lack of Professional Administrative Personnel*

By the second half of the twentieth century our courts have become a vast organization, employing over 2,000 persons,[1a] administering an annual budget of approximately $30,000,000 and confronted with an extremely large and ever increasing caseload. The courts deal annually with hundreds of thousands of citizens, directly or indirectly, as employees, litigants, accused persons, witnesses, jurymen or as lawyers. Yet they do this almost entirely without the aid of trained, professional administrators. It can be said with confidence that no business organization that approaches the courts in size or complexity attempts to function under such a handicap.

Much of the responsibility for court administration has fallen on the judges. This has occurred more by default than design. The judges have been required to cope with a great many administrative problems. Judges are not trained to be administrators nor appointed to be administrators.

Most of the management functions in the court system that have not been performed by the judges have fallen on the Inspector of Legal Offices. These responsibilities have increased since the Province took over

[1]B.N.A. s. .92(14) – The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

[1a]This figure includes only those full-time employees receiving a salary from the Province of Ontario who are employed in the Court offices. It does not include Crown attorneys and their staff, persons employed on a fee basis, approximately 500 to 1,000 casual employees or Departmental personnel.

the entire financial responsibility for the administration of justice (e.g., courthouses, court reporters, etc.) from the municipalities in 1968. Despite his impressive energies, ability and devotion to his task, he has been unable to do much more than meet the day-to-day crises that arise. He has neither the legislative mandate[2] nor sufficient personnel or other resources. With a few exceptions,[3] resources have not been available to permit the Inspector of Legal Offices to engage in any comprehensive management planning, and there seems to have been a general assumption that each class of court must be treated as a separate administrative unit.

The local registrars, county court clerks and local Provincial Court administrators in each county perform certain administrative functions in

[2]The following sections of *The Judicature Act*, R.S.O. 1970, c. 228 constitute the only formal instructions to the Inspector of Legal Offices:

105(1) The Lieutenant Governor in Council may appoint an officer, to be called the Inspector of Legal Offices, to inspect the offices of the Supreme Court, of local courts, of Crown attorneys, and such other offices connected with the administration of justice as the Lieutenant Governor in Council may direct.

(2) The Lieutenant Governor in Council may appoint a barrister or solicitor to be the Assistant Inspector of Legal Offices, and, in the absence of the Inspector or if the office of Inspector is vacant or if directed by the Inspector, the Assistant Inspector of Legal Offices has the powers and may perform the duties of the Inspector under this or any other Act.

106(1) In addition to any other duties assigned to him by any Act of the Legislature or by the Lieutenant Governor in Council, the Inspector shall,

(a) make a personal inspection of the offices mentioned in subsection (1) of section 105 and of the books and court papers belonging to them;

(b) see that proper books are provided, that they are in good order and condition, that the proper entries and records are made therein in a proper manner, at proper times and in proper form and order, and that the court papers and documents are properly classified and preserved;

(c) ascertain that the duties of the officers are duly and efficiently performed;

(d) see that proper costs and charges only are allowed or exacted;

(e) ascertain whether uniformity of practice prevails in the offices; and

(f) report upon all such matters to the Lieutenant Governor.

(2) Where the Inspector has occasion to inquire into the conduct of any officer in relation to his official duties or acts, he may require the officer or any other person to give evidence before him on oath, and for that purpose he has the same power to summon the officer or other person to attend as a witness, to enforce his attendance and to compel him to produce books and documents and to give evidence, as any court has in civil cases.

(3) The officers shall, when and as often as required by the Inspector, produce for examination and inspection all books and documents that are required to be kept by them, and shall report to the Inspector all such matters relating to any cause or proceeding as the Inspector requires.

(4) Where books, documents, papers or other material have been preserved in the Supreme Court or in a county or district court for so long that it appears they need not be preserved any longer, an order authorizing the Inspector to cause their destruction or other disposition may be made,

(a) in the Supreme Court by the Chief Justice of Ontario; and

(b) in other courts, by the Chief Judge of the County and District Courts.

[3]In 1969, a Systems Development Branch was set up in the Department of the Attorney General with duties which involved planning management systems for the various courts. This Branch was instrumental in 1971 in setting up and operating the statistical reporting system for the Courts. Also the Inspector of Legal Offices was instrumental in instituting the use of electronic court reporting equipment in some 40 locations.

their respective courts. But there has been little central direction of their activities, and the practices and procedures have varied from county to county depending on the individual office holders and the extent to which the judges have attempted to guide the administrative process. The Registrar of the Supreme Court of Ontario performs many of the administrative functions in the operation of the High Court in Toronto, and also in the operation of the circuit system around the Province. But he has no statutory mandate to do things or to compel them to be done outside of Toronto, and hence the full force of his competency and efficiency have not been used. On an informal basis he has acted as a respected and knowledgeable advisor to local registrars of the Supreme Court throughout Ontario. Assistant registrars of the Supreme Court have performed most of the administrative functions involved in the operation of the Court of Appeal, the Divisional Court and Weekly Court and Chambers in Toronto.

The recommendation that we make that professional court administrators be introduced into the system, is in no way to be construed as a criticism of these officials. Rather it is a recognition of the fact that our court system has now grown to a size and complexity that demands the skills and techniques that only trained professional administrators can provide.

We recommend the appointment of a Provincial Director of Court Administration and the appointment of five or six Regional Directors of Court Administration. The number has been arrived at by analogy to the number of administrative and planning regions being considered by the government at present.[4] We recommend also that the Chief Justices and Chief Judges be given executive assistants to assist them in their liaison with the court administrators and to assist with other administrative duties which the judges will still be required to perform.

3. *The Lack of an Integrated Approach to Administering all Aspects of the Court System*

At present the courts at each level operate largely as detached administrative units with little overall integration or central direction. Yet the different courts face common or similar problems, and some share common facilities (e.g., courtrooms) and common personnel (e.g., registrars, clerks). Administratively the courts have not been viewed as a single system requiring overall planning and management. Rather there has been a general acceptance of the assumption that the respective courts should even be treated as separate administrative units for all purposes.

We believe that the new administrative structure of the courts should recognize all the courts as a unit for certain administrative purposes.

We hope that several important consequences will flow from this approach. First, that a more effective use will be made of facilities and personnel that could be shared by the courts. Secondly, that administrative relationships between the courts will be improved and that information regarding experiments and successful innovations in one court will be more

[4]The Commission appreciates that some modification of these boundaries may be dictated for the purposes of court administration but in general terms the division of the Province into five or six regions for the purposes of court administration approximates the size of the administrative regions we have in mind.

readily available to others. Thirdly, that all courts will in the future receive the same administrative attention together with equally suitable facilities and competent personnel. There has been a distinct tendency in the past to discriminate against the Provincial Courts in making adequate provision for essentials.

It is to be remembered that many more people are affected by the operations of the Provincial Courts (Criminal Division) than by any other court, and because of their massive caseloads the Provincial Courts face the most serious administrative problems. By integrating court administration under a Provincial Director we hope to reverse this trend.

4. *The Lack of Persons Charged with Responsibility for Long Term Planning and Innovation*

We believe the lack of long term planning to be a serious defect in the existing administrative structure of the courts. At present there are many people within the court structure who are concerned with day-to-day operations of the courts. Most of them perform their functions well, given the limitations of the system. But what is almost completely lacking[5] from our present structure are people or institutions with the clear responsibility, time and the capacity for long term planning, monitoring and innovation.

In the second half of the twentieth century an efficient and workable system of court administration cannot be built solely around persons whose responsibilities are limited to day-to-day operations. With the problems now confronting our courts much more emphasis must be placed on long term planning and innovation. New techniques must be continually developed, investigated, tested and implemented where appropriate. Similarly, difficulties will continue to be encountered unless more attention is paid to long term planning through the use of such techniques as court impact studies (designed to project *in advance* the likely impact on court administration of legislation such as divorce and bail reforms), the development of court systems models and more sophisticated information systems, continuous studies to project accommodation, judicial and other manpower needs[6] and the overall monitoring of the operations of the court system,

[5]Some of the functions performed by the Inspector of Legal Offices and the Systems Development Branch represent an exception. See also the work described in the following footnote.

[6]For example, the Provincial Courts (Family Division) have recently completed a Study which, *inter alia* contains projections drawn to show the expected workload of each court to 1978, assuming no major change is made in the jurisdiction of the court; and projections to show the impact of an expanded jurisdiction on the present family court structure, its staff, its facilities, and its judges, over a similar period. This Study was initiated by his Honour Chief Judge H. T. G. Andrews, and its continuance to completion was due chiefly to his leadership. The Study itself was put together during the summer of 1972 by four law students, but the data basis for the research had been established some years previously chiefly by means of a redesigned and improved statistical reporting system for each Provincial Court (Family Division) which had been developed by Chief Judge Andrews' office in conjunction with the Systems Development Branch of the Ministry of the Attorney General. The Study was funded by the Ministry, and the costs principally consisted of the student's salaries and their expenses. There is a need for continuing studies of this nature in all the courts since long range planning for future development depends on them.

and the developments in other jurisdictions. All of this can be achieved only through building into our court system those structures that will guarantee that there are capable persons whose major or sole responsibility is not day-to-day operations but rather long term planning and innovation.

We envisage that under our proposals the professional court administrators will devote a major proportion of their time and effort to these tasks. While they should be in constant contact with day-to-day operations, they will fail to fulfill their roles if they become totally consumed by them. They must have sufficient trained staff to permit them to discharge adequately their responsibilities for both day-to-day operations and also long term planning and innovation. To further ensure, *inter alia*, that long term planning and innovation are not neglected, we recommend below, the establishment of an Advisory Committee on Court Administration and of an educational and research facility devoted to court administration.

B. A New Court Administration Structure

1. *Structure*

The Provincial Director of Court Administration should report directly to the Attorney General on all administrative aspects of the court system throughout the Province. We shall discuss later in detail what we think his duties and responsibilities should be as well as those of the Regional Directors. The proposed new administrative structure is illustrated diagrammatically in Table I.

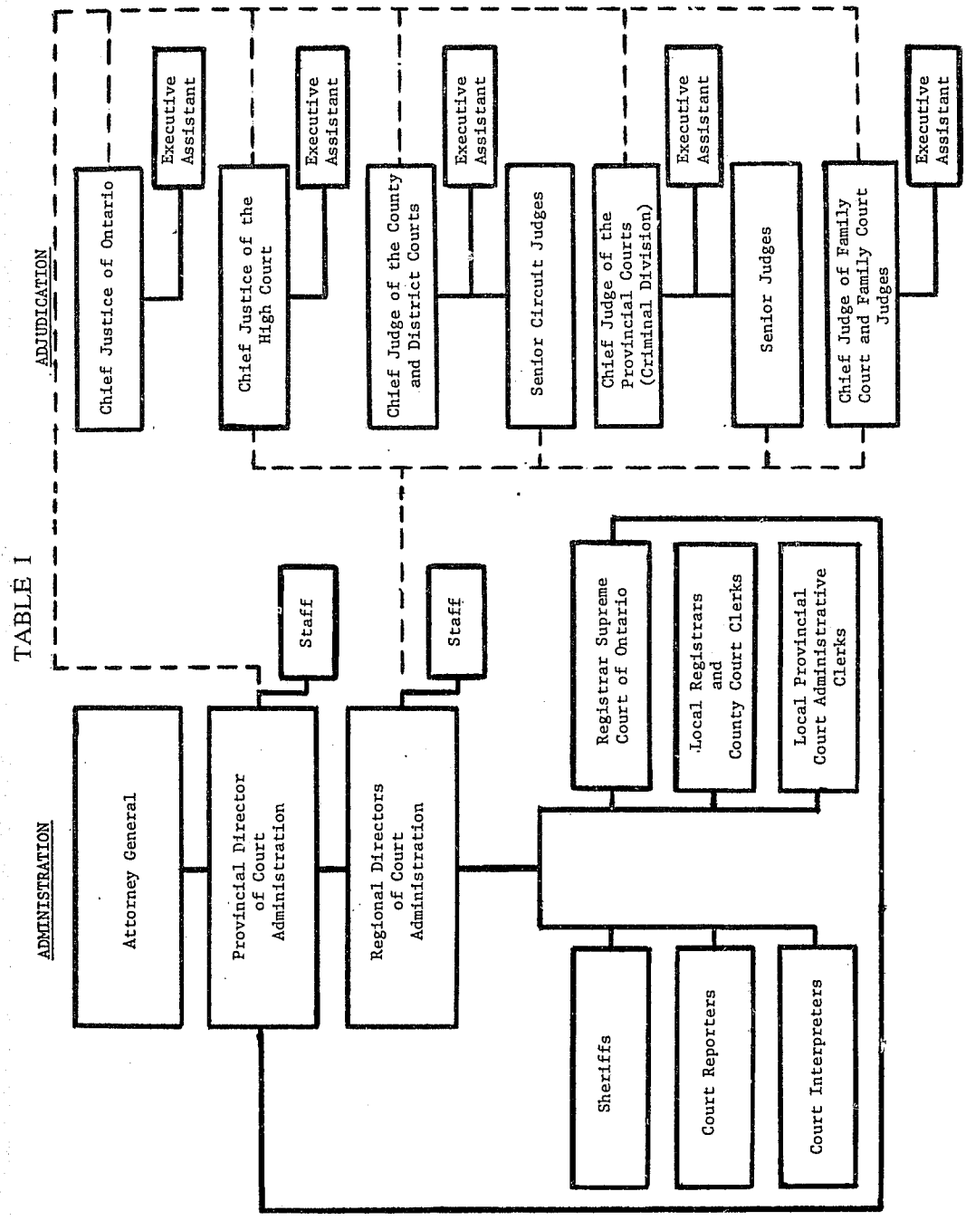
2. *Lines of Communication and Limits of Responsibility*

The Provincial Director's responsibility will be for the overall supervision and direction of all non-adjudicative, administrative aspects of the courts. Answering directly to him will be the Regional Directors of Court Administration and, where circumstances dictate, such other officials as the Registrar of the Supreme Court of Ontario. The Provincial Director will establish and maintain liaison directly with the Chief Justices or Chief Judges of the various courts.

Each Regional Director should have responsibility for the administration of all courts operating in his region including the Supreme Court, the County and District Courts and the Provincial Courts. The Regional Director would have liaison with the Chief Justice of the High Court and his staff in respect of sittings of the High Court and the Divisional Court in his region, with the Senior County or District Court Judges in his region, with the Senior Judges of the Provincial Court (Criminal Division) in his region and with the Family Court judges in his region.[7] Answering directly

[7]For our recommendation relating to the establishment of new Family Courts with integrated jurisdiction over all family law matters see chapter 13. The detailed description of the organization of the Family Courts including the designation of judges for the purposes of liaison with the Regional Directors will be dealt with in the Commission's Report on Family Courts.

TABLE I



to the Regional Directors will be the appropriate, existing administrative personnel.[8]

In addition to these lines of authority and the utilization of existing personnel, the Provincial Director and the Regional Directors should develop their own staffs to the extent that this is necessary. Such staff might include accountants, trial coordinators, data analysts and research officers, where existing personnel are not adequate to enable the Directors to fulfill their various tasks.

The most delicate and important relationship of the Provincial Director and the Regional Directors will be with the judges. We strongly recommend that the administrative framework be structured so that it is perfectly clear that on matters of adjudication, including administrative matters which are regarded by the judges to bear directly on adjudication, the Directors would be required to abide by the wishes of the judges. No other alternative is possible if the principle of an independent judiciary is to be preserved. This means that there is a unique constraint on the power of the professional court administrator which would not exist if he were performing a similar management role in a business organization. It is not always clear in the operation of a court system which functions are adjudicative and which are administrative, although we have attempted to draw some distinctions in chapter 1. But if there is legitimate doubt about a particular function, it would have to be resolved in favour of the judges. Thus the Directors of Court Administration would be expected to develop and maintain a very special relationship with the judges, a relationship in which the judges would have the utmost confidence in the Directors in the exercise of their administrative functions. In recognition of this most important constraint, and to ensure that highly qualified men fill the positions at all times we recommend that the Provincial Director and the Regional Directors be appointed to their posts on a contract basis for a fixed term, renewable on the advice of a Committee comprised of the Deputy Attorney General, all of the Chief Justices and Chief Judges and the Chairman of the Civil Service Commission. Arrangements could be made in the contract of employment for the provision of pension, medical and other employment benefits on the same basis as those provided for public servants appointed under *The Public Service Act*.[9]

While we believe that the Provincial and Regional Directors of Court Administration should carry the primary responsibility for court administration, we recognize that the Chief Justices and Chief Judges of the respective levels of courts will still be required to perform a number of administrative duties which are interrelated with the court's adjudicative processes. This is particularly true in respect of the assignment or reassignment of judges to case lists or circuits throughout the Province, and the organizing of judges' meetings of various sorts. In addition, it may be

[8]The Registrar, the assistant registrars and the local registrars of the Supreme Court and the County and District Court clerks and the local court administrators of the Provincial Courts will all report to the Regional Director of Court Administration for their particular area.

[9]R.S.O. 1970, c. 386, and see *The Public Service Superannuation Act*, R.S.O. 1970, c. 387.

necessary for them to have administrative personnel on their personal staff to assist in dealing with the Provincial and Regional Directors of Court Administration, particularly in the receiving and interpretation of statistical reports concerning the operation of their particular court level.

The Chief Justice of the High Court has probably the greatest need for direct administrative assistance in the organization and operation of the circuit system, particularly if the recommendations in chapter 4 on the assignment of judges are implemented.

In our view it is desirable that the Chief Justices and Chief Judges of the respective courts take a regular and active part in the adjudicative processes of their courts. To the extent that they are heavily engaged in administrative duties, they are unable to preside over court sittings and are thereby prevented from providing the type of judicial leadership which is implied from the title of their office.

Therefore as a supplement to the administrative structure we recommend, we propose that highly qualified executive assistants be made available to the Chief Justice of Ontario, the Chief Justice of the High Court, the Chief Judge of the County and District Courts, and the Chief Judges of the Provincial Courts (both Criminal and Family Divisions[9a]). The salaries and status should be such as will attract and retain persons of very high administrative talent. They should be appointed by the Chief Justice or Chief Judge whom they are to assist and should be responsible only to them to ensure independence of the judiciary.

3. *The Role and Duties of the Court Administrators*

Before outlining in some detail the duties to be undertaken by the Court Administrators we wish to make two general points regarding the introduction of these officers into the system.

A major purpose of our recommendations is to facilitate a clear allocation of responsibility for many aspects of the administration of the courts under the Attorney General. Determining what aspects of the operation of the courts fall into the category of administration is in some instances quite simple (e.g., responsibility for physical facilities, budgets, supplies, staff, paper systems and statistical reporting), while other aspects are more difficult to define (e.g., the scheduling of cases). As we explain in this chapter and elsewhere, so far as is possible case scheduling should be left to the administrators (though it should be carried out in consultation with the Chief Justice or Chief Judge) but the assigning of judges to cases must remain a judicial function.

Secondly, we wish to make it clear that we do not intend that the Court Administrators should be viewed as executive assistants of the

[9a]The Chief Judge of the Provincial Courts (Family Division) should be provided with an executive assistant pending the implementation of our Report on Family Courts. For a summary of the proposed new structure for the Family Courts see chapter 13 of this Report.

judiciary. While there must be constant consultation and liaison between the Court Administrators and the judges, particularly the Chief Justice and the Chief Judges, the Court Administrators are ultimately responsible in purely administrative matters to the Attorney General. In relation to the Ministry of the Attorney General, the Court Administrators should not be a part of that department. We regard them as persons filling a new and unique role in the field of government and court administration, reporting directly to the Attorney General.

The duties of the Provincial Director of Court Administration should include the following:

(1) He should develop, organize and direct administrative systems for each class of court in the Province.

(2) He should evaluate the administrative requirements in each class of court and after consultation with the Chief Justice or Chief Judge respectively of the court affected make recommendations for change or improvements to the Attorney General.

(3) He should investigate all complaints regarding the administrative operations of each class of court.

(4) He should consult on a regular basis with the Chief Justice or Chief Judge of each class of court with respect to such matters as the judicial manpower needs, changes in jurisdiction, and methods of scheduling and arranging sittings, and should transmit any recommendations the judges wish to make on these matters to the Attorney General.

(5) He should be responsible for court facilities, particularly courtrooms.[10]

(6) He should oversee the development and operation of a comprehensive statistical reporting system for each class of court throughout the Province and ensure the availability of current management reports on both a province-wide and regional basis.

(7) He should oversee the development revision and distribution of instruction manuals for use of registrars, court clerks, court administrative clerks, special examiners, court reporters, court interpreters and court statisticians throughout the Province, and should standardize and keep general oversight of all paper and manpower systems in court offices throughout the Province.

(8) He should develop training programs for local registrars, county court clerks, court administrative clerks and court reporters, and should arrange for the administration of these programs.

[10]Conflicts arise from time to time between the sittings of the High Court, the County and District Courts and other courts. It should be the responsibility of the Provincial Director to assist in the resolution of such conflicts.

(9) In consultation with the respective Chief Justices and Chief Judges he should develop policies and standards regarding hours of court sittings throughout the Province.

(10) He should prepare budgets for the operation and maintenance of the various classes of court in the Province after consultation with the respective Chief Justices and Chief Judges, and should oversee the maintenance of budgetary and fiscal control.

(11) He should conduct a continuing examination and evaluation of court facilities and equipment and stay abreast of technological improvements in court and office equipment for potential application in the system.

(12) He should develop a public information facility so that the public might be better informed about the operation of the courts.

(13) He should be responsible for court reporting in all courts throughout the Province, directing the work of court reporters and keeping abreast of developments in electronic reporting techniques.

(14) He should oversee the hiring, employment and job assignment of all court personnel.

(15) He should evaluate on a continuous basis the administrative operations of the courts, and oversee the conduct of studies to project the likely impact on the courts of legislative changes, and develop new administrative procedures and keep abreast of developments in court administration in other jurisdictions.

The duties of each of the Regional Directors of Court Administration would, to a large extent, be delegated by the Provincial Director. In addition, however, there would be the following:

(1) He should consult with the Chief Justice of the High Court and his staff with respect to providing all necessary facilities for High Court sittings in his region.

(2) He should assist the Senior County Court Judges in his region in the rotation and reassignment of County Court judges in the region, and consult with respect to providing all necessary facilities for County Court sittings in the region.

(3) He should assist the Senior Provincial Court Judges in his region in the reassignment of judges in the region, and consult with respect to providing all necessary facilities for the Provincial Court sittings in the region.

(4) He should investigate all complaints regarding the administrative operations of all courts in the region and report to the Provincial Director with recommendations.

(5) He should attend periodic meetings with the Provincial Director to assist in the development, organization and coordination of administrative systems for the courts generally.

(6) He should oversee the employment and job assignment of all court personnel in the region, but according to the procedures and standards determined by the Provincial Director of Court Administration and his staff.

Here we wish again to draw a distinction, made elsewhere in this Report, between the scheduling of cases and the assignment of judges. The latter we view as being a judicial function, but obviously the Regional Directors and their staff will work closely with the Chief Justices, the Chief Judge or Senior Judges in performing these functions. If there should develop a difference of views as between the Court Administrators and the judiciary concerning the scheduling of cases (and we doubt if this will often arise) we believe that a final resolution of such matters should lie with the judiciary.

The Provincial Director should, in addition to his other duties, prepare and submit to the Attorney General quarterly reports on the operations of the court and his office. In addition he should prepare a comprehensive annual report to the Attorney General which should by statute be required to be tabled in the Legislature. This annual report should include the following:

(1) A survey of the work of each class of court in the preceding calendar year, including proceedings commenced, dispositions, backlog, delay and weighted caseloads.[11]

(2) A general report on the condition of the courts including a description of any recent changes or innovations, and any recommendations that the Director may have for improvements therein.

(3) A survey of studies undertaken in the preceding year relative to the administration of the courts, and the results and implications of such studies.

(4) Financial statements indicating the cost of operating the court system, taking into account both revenues and expenditures.

4. *Qualifications*

By the nature of the above duties it should be apparent that the Provincial Director of Court Administration and his Regional Directors must

[11]Weighted caseload analysis involves analyzing a court's workload in terms of the average judge time involved in disposing of cases of various types. It is much more informative, and administratively more useful, than an analysis simply in terms of the increase in the number of actions commenced or disposed. For descriptions of weighted caseload systems see *Judicial Council of California*, 1968 Report 103-106; *Annual Report of the Administrative Office of the United States Courts*, 1971, 167 *et seq.*

possess extraordinary qualifications. By far the strongest and most heavily weighted factor should be their management experience in public administration or in the private sector. They should have experience in modern business and management techniques including the use of automatic data processing and should have a university degree in public administration or business, or equivalent discipline. They should have a demonstrated capability to plan and conduct management studies and to prepare recommendations and reports to appropriate higher authorities and to implement such recommendations when approved.

Above all, they should possess a very high degree of judgment, understanding and tact so that they can maintain a proper relationship with the judges, members of the bar, court officials and the public. Detailed familiarity with court procedures and structures while useful should not be considered mandatory at the time of appointment. The applicants should be prepared to engage in an extensive training program through both a formal course in professional court management and through field observation and experience.

The salary for the Provincial Director of Court Administration should be at the level of a High Court judge and for the Regional Directors at the level of a County Court judge. The Directors chosen must have a high degree of professional stature so that they can command the respect of the judges. The Directors must have only the highest management qualifications and they must be compensated accordingly.

5. *Physical Location of the Provincial Director of Court Administration*

To facilitate the work he will have to carry out and to assure continual close liaison with the judiciary and court staff, we recommend that the offices of the Provincial Director of Court Administration be physically proximate to or located within Osgoode Hall.

6. *Advisory Committee on Court Administration*

We have already indicated the importance we attach to a greater emphasis being placed on long term planning and innovation, and on a comprehensive or integrated approach to administering all the courts as a system. Many of the recommendations made above will go a long way to assuring that these matters are given greater emphasis. But we feel that more is necessary. Consequently we recommend the establishment of an Attorney General's Advisory Committee on Court Administration. Its primary responsibility should be for collating the totality of information becoming available on the facilities and manpower necessary to the operations of the courts and for translating it into intelligent predictions on the future requirements of the courts. This will assure that those who are responsible for the provision of resources may, with some degree of accuracy, know in advance the nature of the resources required and the time in which they will be required in order to maintain the desired standards in the administration of justice. Further the Committee will provide a forum for dialogue among the Chief Justices and Chief Judges of the various courts

on court administration, and for an input into court administration by the legal profession and the lay public.

The Committee should be composed of (a) the two Chief Justices and all the Chief Judges, (b) the Deputy Attorney General, (c) the Deputy Minister of Government Services, (d) the Provincial Director of Court Administration, (e) four members of the legal profession, two active in civil litigation (one from within the Judicial District of York, and one from outside) and two active in criminal litigation (chosen on the same basis), and (f) lay representatives. The Committee should have a permanent secretariat which might conveniently be located within, or might be provided by, the office of Provincial Director of Court Administration.

The Committee's functions should embrace both a monitoring of the present operations of the court system and making recommendations relating to long term planning. To facilitate the performance of these functions the Committee should be empowered to commission studies and research projects. In doing so it should work in close consultation with the office of the Provincial Director of Court Administration to avoid overlapping studies.

The Committee should be required to report annually, and at such other times as the Attorney General should request or the Committee should decide. The Committee's annual report, which by statute should be required to be tabled in the Legislature, might conveniently be submitted along with the annual report of the Provincial Director of Court Administration.

7. *The Need for an Educational and Research Facility Devoted to Court Administration*

The structural changes in court administration that we have recommended, and the existing and future problems and demands of court administration point to the need for an educational and research facility at the university level within the Province. In the United States improvements that have been made in the area of court administration owe much to the work of such establishments as the Institute of Judicial Administration at New York University, the Institute for Court Management at the Law School of the University of Denver, the Project for Effective Justice at Columbia University Law School and the Federal Judicial Center in Washington, D.C.

We believe it is time that a similar facility was developed in Ontario to examine, and aid in the solution of, the problems of court administration in Canada. Such a facility could perform a number of important functions. It could provide for the education and training of professional court administrators. Similarly it could assist in the training and continuing education of court staff including registrars, clerks, sheriffs, etc. Also, working closely with the various courts it could assist in conducting seminars for the judiciary. Finally, it could conduct research into all aspects of court administration. Such research could be both of an independent nature and under contract to the office of the Provincial Director of Court Administration or the Advisory Committee on Court Administration. Since the problems with which such a facility will be dealing are not purely legal it should be interdisciplinary in nature drawing on at least the resources of a law school and a school of public administration or business.

We recommend that such an educational and research facility be established in Ontario, and that the government make available the financial support necessary to its development and maintenance.

C. Management Information Systems and the Courts

The essence of our recommendations in this chapter is the need for improvement in the management of our court system. In part this can be achieved by the establishment of a new administrative structure employing professional administrators. But if the courts are to be managed effectively more than this is necessary. Those who have to make decisions regarding management must have meaningful, accurate and timely information about the courts' workload and performance on which to base their decisions. Consequently the development of a management information system for the courts is essential.

At present we still have imperfect knowledge about the operations of many aspects of our courts in Ontario, though the situation has improved considerably since the McRuer Commission Report. In response to the McRuer Commission's recommendation that better judicial statistics be kept, the Ministry of the Attorney General has through its Systems Development Branch started compiling, on a regular basis, statistics on the basic operations of the courts — the number of actions and prosecutions commenced, actions set down for trial, dispositions, actions remaining untried on the lists by age, etc. This represents an important step in the development of a management information system for the courts, but there is still much relevant data on court operation that is not readily available or being collected. In part this is due to the fact that to date the Systems Development Branch has laboured under the handicap of not having professional court administrators to assist and direct the Branch by formulating the decisions to be taken and indicating the necessary information to be gathered. But it also seems apparent that the financial restraints under which the Branch has operated have seriously limited its output and development.[12] The importance of accurate, up to date and comprehensive information on the operation of the courts, if they are to be effectively administered, can hardly be over-emphasized. Such information is essential to identifying and resolving many of the problems of court administration and adequate financial support must be made available to ensure that the necessary information is collected and analysed.

We are not the appropriate body to specify the design of a management information system for our courts. This is a task much better left

[12] A number of other difficulties appear to have been encountered by the Systems Development Branch in carrying out its work of data collection. On assuming responsibility for development of a management information system for the courts the Provincial Director should make an immediate study of these difficulties and attempt to remedy them.

to the Provincial Director of Court Administration and his staff. But at various points in our report we have indicated the need for certain types of management information, e.g., weighted caseload analysis,[13] basic information that is essential for case scheduling,[14] etc. Also in the course of our work we have gained some insight into the type of information that would seem essential to the sound administration of the courts. Only some of this information is at present being collected.[15] With regard to civil cases the following information, for each court and court location, would appear to be basic: the number of actions commenced and set down for trial (broken down by type of action); the age of cases set down for trial and as yet undisposed of (including both the age of cases from the commencement of proceedings, and from the date of setting down); adjournment rates; age of cases at time of disposition; the method of disposition of cases (i.e., whether settled by the parties, settled after being called before a judge, or terminated by trial); the number of judges sitting to dispose of the cases; and the number of cases not disposed of within the time goals we have recommended. With regard to criminal cases the collection of at least the following information, for each court and court location, appears to be essential: the number of prosecutions commenced (broken down by type of offence); the number of dispositions by trial, guilty plea, dismissal and by charges being withdrawn; the average time taken between each significant step in the criminal process; the average number of appearances and remands and reasons therefor per case disposed of (broken down by type of offence); the number of cases pending (by age and type of offence) the number of criminal cases not disposed of within 90 days (by type of offence); the average age of cases at time of disposition[16] (broken down by type of offence, and by the court in which the case is pending); the rate at which accused persons elect the various forms of trial available to them (broken down by type of case); the number of judges sitting in the particular court; and the monthly disposition rate of criminal cases expressed in terms of judge days spent in court (broken down by courts). While these lists are not intended to be exhaustive, it appears to us that at least the above information must be available if we are to have an accurate picture of the operations and capabilities of our courts.

Possessed of adequate information, those responsible for the administration of the courts will be able to make informed decisions regarding both day-to-day operations and long term planning. Similarly adequate information will be essential in measuring how effectively the courts are meeting the time goals we have recommended. To be useful, management information must be current and delays in compiling data in a form in which it can be used in decision making must be avoided. All data gathered should be presented along with similar data for preceding months and years to permit comparison so that trends and possible problem areas can be identified. Further, when changes to the system are made it is imperative that prior to the introduction of innovations adequate data bases

[13]See n. 11, *supra*.
[14]See chapter 10.
[15]In addition, there is a paucity of information regarding criminal cases in the High Court and generally with regard to the operations of the Small Claims Courts.
[16]It is important that the data collected show both the date of first appearance and the date of the commission of the offence.

be developed so that the future performance can be evaluated. Otherwise, the courts will be limited to making gross assessments as to the impact of new procedures. While we stress the need for a comprehensive information system, care must obviously be taken to see that the data collected is relevant to administering the courts. The production of an avalanche of statistics much of which is not useful in making management decisions must be avoided.

To ensure the development and maintenance of an effective information system we have recommended that this be a major responsibility of the Provincial Director of Court Administration, and that the existing personnel involved in court data collection and analysis be brought under his direction. If the Provincial Director is to carry out this responsibility he must receive the necessary financial support. The development and maintenance of an effective management information system for the courts will require careful planning. Further, the data to be collected must be identified, located, obtained, recorded, stored and retrieved, and processes developed for analysing the information for presentation in a form that is useful to the ultimate users. Adequate trained staff will be required as well as facilities and equipment all of which are expensive. But the development of a management information system for the courts is essential and we recommend the necessary financial support be made available.

D. Summary of Recommendations

1. A Provincial Director of Court Administration should be appointed to be responsible for the overall supervision and direction of all non-adjudicative, administrative aspects of the courts.

2. The Provincial Director of Court Administration should report directly to the Attorney General for purely administrative matters but should establish and maintain liaison with the Chief Justices and Chief Judges of the various courts.

3. Regional Directors of Court Administration should be appointed with responsibility for the administration of all courts operating in their respective regions. Each Regional Director should establish and maintain liaison directly with the Chief Justice of the High Court, the Senior County or District Court Judges in his region, the Senior Judges of the Provincial Court (Criminal Division) in his region and with the Family Court judges in his region.

4. Answering directly to the Provincial Director will be the Regional Directors of Court Administration and, where circumstances dictate, such other officials as the Registrar of the Supreme Court of Ontario.

5. The appropriate existing administrative personnel will report to the Regional Directors.

6. To the extent that it is necessary the Provincial Director and Regional Directors should develop their own staffs.

7. It should be made clear that to preserve the independence of the judiciary on matters of adjudication, including administrative matters which are regarded by the judges as bearing on adjudication, that the judges' wishes must prevail. The Chief Justices and Chief Judges ought to be provided with executive assistants to assist them in the performance of their administrative duties.

8. The Provincial Director and Regional Directors should be appointed on a contract basis for a fixed term, renewable on the advice of a committee composed of the Deputy Attorney General, all the Chief Justices and Chief Judges and the Chairman of the Civil Service Commission. The contract should provide for pension and employment benefits.

9. The duties of the Provincial Director should include the following:

   (1) He should develop, organize and direct administrative systems for each class of court in the province.

   (2) He should evaluate the administrative requirements in each class of court and after consultation with the Chief Justice or Chief Judge respectively of the court affected make recommendations for change or improvements to the Attorney General.

   (3) He should investigate all complaints regarding the administrative operations of each class of court.

   (4) He should consult on a regular basis with the Chief Justice or Chief Judge of each class of court with respect to such matters as the judicial manpower needs, changes in jurisdiction, and methods of scheduling and arranging sittings, and should transmit any recommendations the judges wish to make on these matters to the Attorney General.

   (5) He should be responsible for court facilities, particularly courtrooms.

   (6) He should oversee the development and operation of a comprehensive statistical reporting system for each class of court throughout the province and ensure the availability of current management reports on both a province-wide and regional basis.

   (7) He should oversee the development revision and distribution of instruction manuals for use of registrars, court clerks, local administrators, special examiners, court reporters, court interpreters and court statisticians throughout the province, and should standardize and keep general oversight of all paper and manpower systems in court offices throughout the province.

   (8) He should develop training programs for local registrars, county court clerks, local administrators and court reporters, and should arrange for the administration of these programs.

   (9) In consultation with the respective Chief Justices and Chief Judges he should develop policies and standards regarding hours of court sittings throughout the province.

   (10) He should prepare budgets for the operation and maintenance of the various classes of courts in the Province after consultation with the respective Chief Justices and Chief Judges, and should oversee the maintenance of budgetary and fiscal control.

   (11) He should conduct a continuing examination and evaluation of court facilities and equipment and stay abreast of technological improvements in court and office equipment for potential application in the system.

   (12) He should develop a public information facility so that the public might be better informed about the operation of the courts.

   (13) He should be responsible for court reporting in all courts throughout the province, directing the work of court reporters and keeping abreast of developments in electronic reporting techniques.

   (14) He should oversee the hiring, employment and job assignment of all court personnel.

   (15) He should continually evaluate the administrative operations of the courts, and oversee the conduct of studies to project the likely impact on the courts of legislative changes, and develop new administrative procedures and keep abreast of developments in court administration in other jurisdictions.

10. The duties of each of the Regional Directors would to a large extent be delegated to them by the Provincial Director and would include:

   (1) consulting with the Chief Justice of the Hight Court and his staff with respect to providing all necessary facilities for High Court sittings in his region;

   (2) assisting the Senior County Court Judges in his region in the rotation and reassignment of County Court judges in his region and consulting with respect to providing all necessary facilities for County Court sittings in the region;

   (3) assisting the Senior Provincial Court Judges in his region in the assignment of judges in the region and consulting with respect to providing all necessary facilities for the Provincial Court sittings in the region;

   (4) investigating all complaints regarding the administrative operations of all courts in the region and reporting to the Provincial Director with recommendations;

(5) attending periodic meetings with the Provincial Director to assist in the development, organization and coordination of administrative systems for the courts generally; and

(6) overseeing the employment and job assignment of all court personnel in the region, but according to the procedures and standards determined by the Provincial Director of Court Administration and his staff.

11. The assigning of judges must remain a judicial function.

12. The Provincial Director should submit quarterly reports on the operations of the courts and his office to the Attorney General and a comprehensive annual report to the Attorney General which should by statute be required to be tabled in the Legislature. The annual report should include:

(1) A survey of the work of each class of court in the preceding calendar year, including proceedings commenced, dispositions, backlog, delay and weighted caseloads.

(2) A general report on the condition of the courts including a description of any recent changes or innovations, and any recommendations that the Director may have for improvements therein.

(3) A survey of studies undertaken in the preceding year relative to the administration of the courts, and the results and implications of such studies.

(4) Financial statements indicating the cost of operating the court system, taking into account both revenues and expenditures.

13. The Provincial Director and Regional Directors should have experience in modern business and management techniques. They should have a university degree in public administration or business and have a demonstrated capability to plan and conduct management studies and prepare recommendations and reports to higher authorities and to implement such recommendations when approved. They should possess a high degree of judgment, understanding and tact.

14. The salary for the Provincial Director should be at the level of a High Court judge and that of the Regional Directors at the level of a County Court judge.

15. The offices of the Provincial Director should be in the vicinity of Osgoode Hall.

16. An Attorney General's Advisory Committee on Court Administration should be established composed of:

(a) the two Chief Justices and all the Chief Judges;

(b) the Deputy Attorney General;

(c) the Deputy Minister of Government Services;

(d) the Provincial Director of Court Administration;

(e) four members of the legal profession, two active in civil litigation (one from within the Judicial District of York, and one from outside) and two active in criminal litigation (chosen on the same basis); and

(f) lay representatives.

The Committee should be responsible for monitoring the operations of the courts and making recommendations for long term planning. It should report annually and at such other times as the Attorney General should request or the Committee should decide. The annual report should be required by statute to be tabled in the Legislature.

17. An educational and research facility in court administration should be established in Ontario to provide education and training for professional court administrators and to assist in training court staff. It could assist in conducting seminars for the judiciary and could conduct research into all aspects of court administration. It should be interdisciplinary in nature. The government should make available the necessary financial support for its development and maintenance.

18. A major responsibility of the Provincial Director should be the development and maintenance of an effective management information system. The necessary financial support for such system should be made available by the government.

E. Memorandum of Dissent and Explanation of the Honourable J. C. McRuer

I am in agreement that the administrative structure of the courts should be strengthened by providing an efficient and coherent administrative staff who will understand the court processes and work in harmony with the judges so as to relieve them of as much administrative detail as possible while at the same time maintaining the traditional independence of the judges. It is never to be forgotten that the Act of Settlement, passed in 1701, is part of the law of Ontario and it is one of the corner-stones on which freedom in this Province rests. That Act was not passed for the benefit of or the protection of the judges but as the title states, it is "An Act for the further limitation of the Crown and better securing the rights and liberties of the subject".

Subject to this, it is important that skilled administrative staff be provided to perform those administrative tasks that do not require judicial intervention and to assist in the performance of the administrative tasks that do require judicial intervention. I am in agreement that there should be a Provincial Director of Court Administration.

I respectfully disagree with my colleagues with respect to the administrative structure that should be provided. In place of Regional Directors each of whom would be concerned with the collective administration of the High Court of Justice, the County Courts, the Provincial Courts (Criminal Division), and the Provincial Courts (Family Division) in their respective regions, together with executive assistants for the Chief Justices and the Chief Judges, I would recommend the following structure.

Under the Provincial Director of Court Administration and reporting to him there should be four Deputy Directors of Court Administration, one associated with the Chief Justice of the High Court; one with the Chief Judge of the County and District Courts; one with the Chief Judge of the Provincial Courts (Criminal Division) and one with the Chief Judge of the Provincial Courts (Family Division). The respective Deputy Directors would work in close collaboration with the Chief Justice of the High Court and the Chief Judges of the courts to which they are attached. Their duties, among other things, would be to keep under continuous review the progress and problems of the respective courts throughout the Province, and the statistical returns that are made and to develop improvements in the statistical system. These returns should be studied constantly to forecast difficult situations that are likely to arise in the respective court systems from time to time and in collaboration with the Chief Justice of the High Court and the Chief Judges of the other courts respectively the most efficient use of judicial manpower should be planned as well as new or improved plans of court administration.

The scheduling of cases in the first instance should be the responsibility of the local registrars, the County Court clerks or local administrators or clerks of the different courts. The Deputy Directors should conduct a continuing review of caseloads. They should investigate delays in having cases tried for the purpose of determining the causes for delay and recommend steps to be taken to remove causes of delay. It is of prime importance that each Deputy Director become a specialist in the problems of the particular court system to which he is assigned. The problems of each of the court systems be they of the High Court, the County Courts, the Provincial Courts (Criminal Division) or the Provincial Courts (Family Division) are very different and solutions for these problems are of an entirely different nature because of the different characteristics of the courts.

The structure I recommend would synchronize with the present structure of the courts. For example, the Deputy Director attached to the High Court would co-operate with the Registrar of the Supreme Court and through him with the local registrars. He would be charged with the duty in the first instance of determining the requirements for court sittings in the various trial centres and drawing up the circuit lists for adoption by the judges. He would keep under daily review the day-to-day sittings of the courts and the caseloads and advise the Chief Justice of the High Court of the necessary action to be taken and the assignment of judges necessary to relieve congestion. He would be available to members of the bar to receive suggestions from time to time for solving problems concerning delays and inconveniences that are common in any country where a judicial system similar to ours prevails. Although the ultimate adoption of the circuit

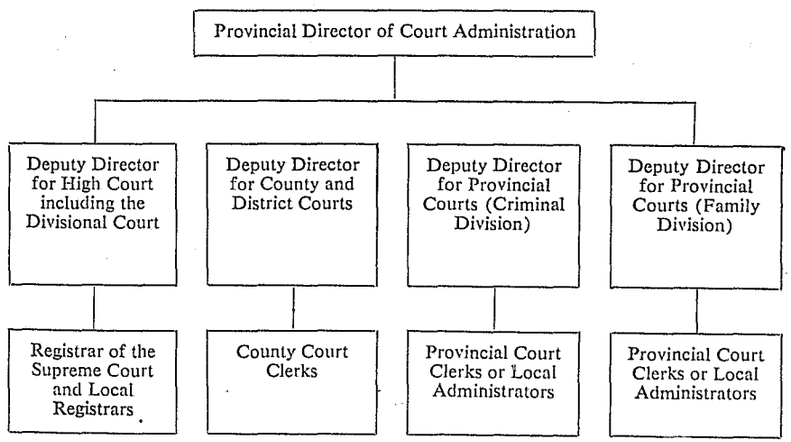
assignment of the judges should rest with the judges and where judicial supervision is required it should be available, the Deputy Director should be given adequate freedom to develop his own administrative talents and ideas.

The Deputy Directors for the court systems, other than the High Court, should likewise be charged with supervising the administration of each of the respective courts according to their particular needs in collaboration with and where necessary, under the direction of the Chief Judges. Their duties would have to be defined according to the requirements of the court system to which they are attached. Those duties can only be defined in close consultation with the respective Chief Judges.

My respectful view is that Regional Directors of Court Administration each having regional duties to perform concerning the High Court, the County Courts, the Provincial Courts (Criminal Division) and the Provincial Courts (Family Division) and taking orders from the Provincial Director of Court Administration would not work satisfactorily. The lines of direct communication respectively between the local registrars, the County Court clerks and the clerks and administrators of the Provincial Courts (Criminal Division) and Provincial Courts (Family Division) with the Chief Justice of the High Court and the Chief Judges of the other courts would be destroyed by interjecting Regional Directors having responsibilities for administering all the different systems of courts in their particular regions. They would report to the Provincial Director of Court Administration who would hold discussions with the Chief Justice or the Chief Judge concerned. This plan in my view would multiply rather than reduce the difficulties in solving day-to-day problems and it would not assist in developing better systems.

The duties of Deputy Directors as I would conceive them to be could not be performed by executive assistants. I do not think the executive assistants would serve any useful purpose.

The diagram for the structure for court administration that I recommend is:



The Deputy Directors should be located so that they may be in immediate contact with the Chief Justice of the High Court or the Chief Judges of the respective courts to discuss matters with which they are mutually concerned and to keep under continuous review how justice is being administered throughout the Province in the respective courts.

I can see no useful purpose in involving the Court of Appeal in the structure for court administration. A good administrative assistant to the Chief Justice of Ontario working under his direction should be adequate for the purpose of the affairs of the Court of Appeal.

In other chapters in this Report there may be implied or specific reference to the functions or duties of Regional Directors of Court Administration concerning matters dealt with in those chapters. It is unnecessary for me to discuss these specifically. It is sufficient to say that because I make no reference to them it is not to be implied that I adopt the concept of Regional Directors for any purpose.

CHAPTER 3

PROPOSAL FOR MERGER OF THE HIGH COURT OF JUSTICE OF THE SUPREME COURT OF ONTARIO WITH THE COUNTY AND DISTRICT COURTS

SUMMARY

A. Introduction to the Proposal

In March 1971, the County and District Court Judges Association of Ontario submitted a detailed brief to the Commission recommending, *inter alia*, that the present High Court of Justice be merged with the County and District Courts into one province-wide Superior Court presided over by superior court judges of equal rank. This brief was given wide publicity by its authors and provoked considerable discussion among judges, lawyers and members of the public, much of which was reflected in subsequent briefs received and in the Commission's meetings with members of the bar throughout the Province.

Because the proposal for merger involved issues fundamental to the structure and administration of the upper levels of the courts in Ontario, we considered it necessary and desirable to devote a separate chapter to a full discussion of all aspects of the proposal. Succeeding chapters relating to

the High Court of Justice and the County and District Courts build on the majority recommendation in this chapter.

Briefly put, the proposal is to create a new Superior Court of Ontario encompassing all present members of both the High Court of Justice and the County and District Courts of Ontario, who would hold office under identical conditions relating to tenure, salaries, retirement age, pensions, etc. Under this proposal the Court of Appeal would become a separate court. All judges of the new Superior Court would also be appointed Surrogate Court judges by the Province and have province-wide jurisdiction. The office of Chief Justice of the Superior Court and Associate Chief Justice of the Superior Court would be created. There would also be a Divisional Court of the Superior Court with jurisdiction virtually identical to that of the present Divisional Court, and every judge of the Superior Court would be a member of the Divisional Court with the Chief Justice of the Superior Court acting as its President.

For Superior Court purposes, the Province would be divided into eight judicial districts similar to those now existing in the county and district court system, but with slight variations to take into account recent demographic trends. The Chief Justice of the Superior Court would name one of the judges in each judicial district who would act as president of the district circuit for a two-year renewable term. The president of each judicial district would have administrative responsibilities under the Chief Justice and Associate Chief Justice to arrange the allocation of work and to deploy the judges within the district of which he had been named president. There would be a court administrator in each judicial district who would be responsible to a senior court administrator for the Province. There would, in addition, be one or more masters appointed to be resident in each judicial district, who would have the same powers in their districts that the Senior Master of the Supreme Court now has in Toronto. They would rotate among court centres in the district, but they would not be responsible for the trial of actions involving mechanics' liens. The district administrator would supervise all registrars and would be responsible for adequate reporting and secretarial services in his district. The registrar would be the taxing officer in each centre. The district administrator would also arrange, in consultation with the senior court administrator for the Province, the place and time and nature of the sittings in each court centre in the district, and the Chief Justice of the Superior Court, in consultation with the district administrator, would arrange the rotation of judges for trial work in each district and also the allocation of chambers and Surrogate Court work in each district.

It was acknowledged that the implementation of this proposal would entail an amendment to the federal *Judges Act*[1] and the issuance of new patents by the Governor General. The County and District Court Judges Association of Ontario also made their proposal conditional on a number of the administrative and minor adjudicative functions of County Court judges being transferred to other functionaries. These matters would include such things as the performance of marriages, revision of the voters' lists, *fiats*

[1]R.S.C. 1970, c. J-1; see also section E *infra*.

under conditional sales contracts and chattel mortgages, appeals from assessment review courts, and presiding over Small Claims Courts.

To appreciate the advantages and disadvantages of this proposal it is essential to understand the history of the jurisdictional overlap and concurrency between the two courts and the earlier proposals for change.

B. History of the Jurisdictional Overlap and Concurrency Between the Two Courts

The Supreme Court of Ontario has always been institutionally separate and apart from the County and District Courts. Even when the first Court of King's Bench was established in Upper Canada in 1794[2] as the functional predecessor to the present Supreme Court of Ontario, it was thought necessary to establish a separate system of district courts with a limited civil jurisdiction in all actions above forty shillings and not exceeding £15.[3] The district courts at that time were modelled in part on the county court system in England but were also considered necessary to overcome the disappearance of the local Courts of Common Pleas which had been swallowed up by the centrally-located Court of King's Bench, thus causing hardship to the residents of outlying districts in the case of small debts.[4] Unlike the County Courts in England, the district court judges acquired their own criminal jurisdiction, but only by virtue of the fact that in 1845 the district court judge was made Chairman of the General Sessions of the Peace in his district.[5] In 1873, he was permitted for the first time to preside alone at the General Sessions,[6] and in the same year a new court of record called the County Court Judges' Criminal Court was established for the trial of accused persons without a jury on their consent.[7] Complementary federal legislation was provided in 1889 by the enactment of the *Speedy Trials Act*.[8]

Notwithstanding the fact that the County and District Courts have remained separate and apart from the Supreme Court in the trial of both civil and criminal matters, there has been a gradual movement towards concurrency of jurisdiction, particularly in civil matters, to the point where the functional distinctions between the two courts are not always perceptible.

For example, on the civil side as early as 1849 it was provided that while the aggregate of sums claimed on different matters might be in excess of the jurisdiction of the County Court, no objection could be taken if the sum awarded was within the jurisdiction.[9] The following year it was provided that the Superior Court had concurrent jurisdiction within the same monetary jurisdiction of the County Courts (£10-100, depending on the

[2]34 Geo. 3, c. 2 (U.C.).
[3]34 Geo. 3, c. 3 (U.C.).
[4]See Riddell, *The Bar and the Courts of the Province of Upper Canada, or Ontario* 93 (1928).
[5]8 Vict., c. 13, s. 3 (Can.).
[6]*The Administration of Justice Act, 1873*, S.O. 1873, c. 8, s. 56.
[7]*Ibid.* s. 57.
[8]S.C. 1889, c. 47, incorporated into the first *Criminal Code*, S.C. 1892, c. 29.
[9]12 Vict., c. 63 (Can.).

subject matter) with the proviso that the plaintiff would be entitled only to County Court costs. All papers in such actions were to be endorsed "inferior jurisdiction".[10] In 1856, the practice and procedure followed in the High Court was extended to the County Court wherever applicable, subject to certain minor exceptions.[11]

There was even a degree of concurrency in respect of equity jurisdiction. The Court of Chancery was established in Upper Canada in 1837 to complement the common law Court of King's Bench, with a jurisdiction in equity similar to that of the Court of Chancery in England. Fifteen years later in 1852 it was thought necessary to confer jurisdiction in equity on the County Courts in specified cases dealing with such matters as accounting, claims against estates, mortgages and injunctions.[12] This jurisdiction was later taken away from the County Courts and given exclusively to the Court of Chancery and remained there until the passage of *The Judicature Act* in 1881, by which the County Courts were given power to grant equitable relief in matters within their jurisdiction to the extent of the power of the High Court of Justice[13] in like cases.

In 1860 it was provided for the first time that actions might be transferred from the Superior Courts of Common Law in Upper Canada to the County Courts for trial where the amount claimed was for debt or ascertained by the signature of the defendant, if a judge of the Superior Court was satisfied that the case could safely be tried in the County Court.[14] In the same year, County Courts were also allowed to share jurisdiction in actions against overholding tenants, but only in cases where the yearly rent did not exceed $200; they were also given the same rights as superior courts in actions for ejectment within their jurisdiction.[15]

At this time it was also made possible, by leave and on terms, to remove an action from the County to the Superior Common Law Courts, where the sum claimed was in excess of $100.[16] *The County Courts Act*[17] of 1896 broadened this provision so that the County Court judge had the power to transfer actions or matters which appeared to be beyond his jurisdiction to the higher court or, in the alternative, so that the plaintiff could abandon the excess and continue his action in the County Court. In certain cases, the County Court judge could entertain a motion and have the action continued in the County Court, notwithstanding the excess of jurisdiction.[18] The same Act for the first time provided that where the parties consented in writing before the issue of the writ, the jurisdiction of the County Court could be extended to any amount without approval of a Supreme Court

[10] 13 Vict., c. 52, s. 1 (Can.).
[11] *The Common Law Procedure Act, 1856*, 19 Vict., c. 91 (Can.).
[12] 15 Vict., c. 119, ss. 1, 2.
[13] S.O. 1881, c. 5, s. 77.
[14] *The Common Law Procedure Act, 1860*, 23 Vict., c. 42, s. 4 (Can.).
[15] *An Act to Extend the Jurisdiction of the County Courts, 1860*, 23 Vict., c. 43, s. 1 (Can.).
[16] *An Act to Regulate the Removal of Causes from County Courts, 1860*, 23 Vict., c. 44, s. 1 (Can.).
[17] S.O. 1896, c. 19, ss. 4, 5.
[18] *Ibid.* s. 11.

judge if the claim was liquidated and ascertained by the signature of the defendant.[19]

The existing basis of concurrent civil jurisdiction in the County Courts and Supreme Court was established in 1909 and 1910 when it was stipulated that the County Court judge was authorized to try any action brought in the County Court regardless of the amount involved if the action was otherwise within the Court's competence, unless the defendant disputed the jurisdiction of the Court in his appearance or statement of defence with reasons. If the defendant did object, the plaintiff could transfer the papers and proceedings to the Supreme Court on *praecipe*, failing which the defendant could apply to a Supreme Court judge to have the case moved up. If the defendant did not dispute the jurisdiction within the time limits prescribed, then the question of lack of jurisdiction could not be raised or brought into question and costs could be awarded by the court on the Supreme Court scale.[20] This, however, still left it open for a defendant to dispute the jurisdiction in his appearance or statement of defence but then do nothing until the time of trial, at which point he might move for dismissal on the grounds of lack of jurisdiction. This course of action was closed to a defendant by an amendment in 1970 to *The County Courts Act*[21] whereby the jurisdiction of the County Court was deemed to be established when the defendant failed to apply to a Supreme Court judge to have the action moved up within the requisite ten-day period. This in effect provides a further inducement to plaintiffs to utilize the concurrent jurisdiction of the County Courts when commencing civil actions, regardless of amount.

Apart from the functional concurrency just described, the maximum monetary jurisdiction of the County and District Courts has continued to increase from $3,000 in 1962 to the present amount of $7,500 as at July 1, 1971.[22] This latest increase in the monetary jurisdiction of the County Court will involve a substantial amount of the civil work which would formerly have been heard by the Supreme Court. Indeed, a review of all Supreme Court judgments entered at Toronto during 1970 revealed that only 186 out of a total of 466 (approximately 40%) involved sums exceeding $7,500.[23]

Jurisdictional concurrency also exists to the extent that County Court judges are local judges of the High Court under section 115 of *The Judicature Act*.[24] One of the most important concurrent functions of the County Court judge in this capacity is in respect of matrimonial causes under the *Divorce Act*. This jurisdiction arose under a 1970 amendment to *The Judicature Act*.[25] Table I which follows indicates that the new juris-

[19] *Ibid.* s. 3.
[20] *The Law Reform Act, 1909*, S.O. 1909, c. 28, s. 21; *The County Courts Act, 1910*, S.O. 1910, c. 30, s. 22.
[21] *The County Courts Amendment Act, 1970*, S.O. 1970, c. 98, s. 3(13).
[22] *Ibid.* s. 3 (1–11).
[23] Information received by the Commission from the Registrar of the Supreme Court of Ontario, May 11, 1972.
[24] R.S.O. 1970, c. 228.
[25] *The Judicature Amendment Act, 1970 (No. 4)*, S.O. 1970, c. 97, s. 11(2).

diction granted to the County Court judges sitting as local judges of the High Court, coupled with the increase of monetary jurisdiction in civil cases to $7,500 in the County Court, has already caused significant increases in the work of County Court judges with a corresponding decrease in the work of the High Court judges.

TABLE I

HIGH COURT OF JUSTICE AND COUNTY AND DISTRICT COURTS

Summary of Writs Issued and Divorce Petitions Filed and Civil Actions Set Down During the Last 6 Months of 1970 and 1971

Writs issued and Divorce Petitions Filed	Outside Judicial District of York			Judicial District of York			Provincial Total		
	1970	1971	Change	1970	1971	Change	1970	1971	Change
Divorce	4,263	4,231	–.7%	2,584	2,670	+3%	6,847	6,901	+.79%
High Court Actions	4,913	3,711	–24%	4,366	3,277	–24%	9,279	6,988	–24%
County Court Actions	11,941	12,972	+8%	11,674	13,255	+13.5%	23,615	26,227	+11%
Actions Set Down									
Divorce	4,140	3,804	–8%	2,406	2,419	+.5%	6,546	6,223	–4.9%
for High Court	4,140	2,151	–48%	2,406	2,017	–20%	6,546	4,168	–36%
for Matrimonial Causes Court		1,653	(new)		402	(new)		2,055	(new)
High Court	1,519	1,032	–32%	936	803	–14%	2,455	1,835	–25%
County Court	1,804	1,953	+8%	1,538	1,677	+9%	3,342	3,630	+8.6%

The jurisdiction of the local judge in chambers has been gradually extended and concurrent jurisdiction now exists in many matters[26] which formerly could be heard only by a High Court judge sitting in Weekly Court or chambers in Toronto. The history of this jurisdiction dates back to 1849 when it was found expedient to authorize and require the judges of the several County Courts in Upper Canada to make orders respecting practice in cases pending in the Superior Courts of Common Law which might conveniently be disposed of in the several counties.[27] The County of York was excluded from this provision in this and subsequent *Judicature Acts* until 1970.[28]

In summary, the civil jurisdiction of the High Court judge and the County Court judge approaches concurrency in many areas, except, for

[26]See *The Rules of Practice and Procedure of the Supreme Court of Ontario* (hereinafter referred to as the *Rules of Practice*), R.R.O. 1970, Reg. 545 as amended, Rule 212.

[27]12 Vict., c. 63, s. 35.

[28]S.O. 1970, c. 97, s. 11(1). The constitutional validity of this amendment was upheld by the Ontario Court of Appeal in *Reference Re Constitutional Validity of Section 11 of The Judicature Amendment Act, 1970 (No. 4)*, [1971] 2 O.R. 521.

instance, in those cases involving more than $7,500 where one or more of the parties may insist on a hearing before a High Court judge or in proceedings by way of *certiorari*, prohibition or *mandamus* (now usually brought as an application for judicial review to the Divisional Court under *The Judicial Review Procedure Act, 1971*).[29]

With respect to criminal jurisdiction, the County Court judges had no authority to hear criminal matters before 1845, and following that date they exercised criminal jurisdiction only because of their position as justices of the peace. There has developed since that time a functional overlap tantamount to concurrent jurisdiction with the Supreme Court on the trial of all indictable offences except those of treason, alarming Her Majesty, intimidating Parliament, inciting to mutiny, sedition, piracy, capital and non-capital murder and attempted murder (over which the Supreme Court has exclusive jurisdiction).[30] This concurrent jurisdiction, with the more serious offences remaining within the exclusive jurisdiction of the higher court, can be traced to the English system which was imported into pre-Confederation Canada in the eighteenth century. Mr. Justice Riddell[31] describes the prevailing arrangement in the colony of Quebec immediately prior to the creation of the Province of Upper Canada in 1791:

> While, ostensibly, the General Sessions of the Peace could try all Felonies, by this time the practice had become universal to send all Capital Felonies to a higher Court — the Court of Oyer and Terminer and General Gaol Delivery, generally called the "Assizes".[32]

This arrangement was continued through Confederation, and in 1869 the Parliament of Canada enacted legislation prohibiting any judge of the General Sessions of the Peace from trying persons for certain types of more serious offences.[33] These offences, which were within the exclusive jurisdiction of the High Court of Justice for Ontario (otherwise termed a "Superior Court of Criminal Jurisdiction" in the federal legislation), were brought together in Canada's first *Criminal Code* of 1892[34] in a form similar to that found in section 427(a) of the Code prior to its amendment in May 1972. The 1892 *Criminal Code* also made it clear for the first time that a County or District Court judge had jurisdiction over any indictable offence except the serious cases listed in the exceptions.

Thus it may be concluded that in criminal matters there has been a functional overlap or concurrency of jurisdiction in the Supreme Court and the County Courts ever since they were established in the part of Canada which is now known as Ontario, with the exception of the more serious indictable offences. Indeed, while the Supreme Court retains concurrent

[29]S.O. 1971, c. 48.

[30]The *Criminal Code*, R.S.C. 1970, c. C-34, s. 427, as amended by Bill C-2 passed by the House of Commons on May 17, 1972.

[31]*Op. cit. supra* n. 4.

[32]*Ibid.* at p. 63.

[33]See *Offences Against the Person Act*, S.C. 1869, c. 20, ss. 12, 43; *Larceny Act*, S.C. 1869, c. 20, s. 92; and *Procedure in Criminal Cases Act*, S.C. 1869, c. 29, s. 12.

[34]S.C. 1892, c. 29, ss. 538–540.

jurisdiction on all indictable offences, it is the County Court judges, with or without a jury, who try most of them.[35] The *Criminal Code*[36] prevents a High Court judge from trying criminal cases without a jury, except in the instance of an offence under the *Combines Investigation Act*.[37] Apart from the serious offences over which the Supreme Court has exclusive jurisdiction the only criminal cases usually heard at the Assizes are those in which the accused person has elected trial by judge and jury but has not been able to raise bail and is brought before the Assizes under the Supreme Court's Commission of General Gaol Delivery when the Assize happens to be held after the committal for trial and earlier than the General Sessions of the Peace. There was an exception to this in the *Criminal Code*[38] under which any person charged with theft did not have to be tried at the Sessions where, by reason of difficulty or importance of the case, it appeared proper to have it disposed of at the Assizes. This exception was seldom invoked, however, and was not included in the 1953-54 revision of the Code. In a sense, then, the County Court judge has powers over the trial of indictable offences that a High Court judge does not have because on the election of the accused he can, in County and District Court Judges' Criminal Court, try all indictable offences *without a jury* with the exception of those in section 427(a) of the *Criminal Code* and offences under the *Combines Investigation Act*.

To sum up current practice in criminal matters, the jurisdiction of the County Courts and Supreme Court is not as overlapping or concurrent as might appear from the language of the statutes, because in recent years there have been few non-section 427(a) indictable offences which are tried at the Supreme Court Assizes, either because of a more liberal granting of bail or because the accused will elect trial before a County or District Court judge without a jury. With the abolition of the death penalty in practically all cases and the narrowing of the range of serious offences, section 427(a) loses much of its significance in the sense that maximum sentences which may be imposed for section 427(a) offences are little different from those which may be imposed for some of those offences, like armed robbery, not included in the section.

Therefore, contrary to historical expectations and the English experience, it seems that the County Court judges in Ontario are carrying a far greater burden of criminal cases than Supreme Court judges. Indeed, the County Court judges probably try four times as many criminal cases as do the Supreme Court judges.[39] These involve serious crimes in our society such as armed robbery, fraud and trafficking in drugs. It has been said that the Supreme Court judges try only the unique crimes of passion while the County Court judges try the professional criminals providing the greatest threat to our society.

[35]See Kinnear, "The County Judge in Ontario" (1954), 32 Can. Bar Rev. 21, at p. 35.
[36]R.S.C. 1970, c. C-34, s. 429.
[37]R.S.C. 1970, c. C-23, s. 44(3).
[38]R.S.C. 1927, c. 36, s. 602.
[39]See Kinnear, *op. cit.* supra n. 35, recounting a statement made by the federal Minister of Justice to the Special Committee of the House of Commons on the revision of the *Criminal Code* in the spring of 1953.

C. Earlier Proposals for Change in Ontario

Recommendations for increased jurisdiction in the County Courts were submitted to the Government of Ontario as early as 1934. The following note from the 1934 Canadian Bar Review is self-explanatory:

> The County Court Judges Association has recommended to the Attorney-General of Ontario the formation of a Superior Court for that province. The proposal of the committee of the Association that waited upon the Attorney-General was that the County Court, the Surrogate Court, the Division Court, the General Sessions of the Peace, and the County Judges' Criminal Court, be merged in one Court, to be called the Superior Court of Ontario; and that this court be given a considerably increased jurisdiction. It was pointed out that the High Court or Trial Division of the Supreme Court of Ontario, is congested with cases, and that the judges of the County Court are prepared to try a number of these, which are now beyond the jurisdiction of that court. This, it would seem, would relieve the Supreme Court and at the same time give a greater convenience in trial to the local litigants.[40]

The late Judge Helen Kinnear, former County Court judge for Haldimand, strongly supported these recommendations in an article written in 1954:

> The county judges themselves suggested a remedy so long ago as 1934 to simplify the machinery of justice at county level. Their solution would recognize the fact that, although the county judge was properly classified as an inferior court judge in 1849, when the court was established, he should no longer be in view of the great increase in his jurisdiction and his many additional duties. Their suggestion was to replace all his present offices by one, that of Superior Court Judge, and I concur heartily with that suggestion. When the Judicature Act was passed in 1881, the idea of including the county court in the superior court structure might have been premature, though I doubt it. Today, serious consideration of the suggestion is overdue. . . .
>
> Here, as in England, there is no logical reason why the dividing line between county and supreme court jurisdiction is drawn where it is. Here, as there, the difference does not lie in the difficulty of the cases heard or the importance of the issues to the litigants. In civil matters it lies in the costs, and it is even less significant here than in England because a county judge in Ontario may award supreme court costs in cases heard by him which are ordinarily within the jurisdiction of the supreme court. The line should be recognized for what it is, an arbitrary one, but intended to result in an equitable division of the work. As already pointed out, there is no money limit now on the claims that fall within the causes of action a county judge may determine, if the writ is issued in the county court and the defendant does not object at the proper time, a strong argument indeed for a further increase in his jurisdiction.

[40]"Current Events" (1934), 12 Can. Bar Rev. 600.

In criminal matters, the line between the two jurisdictions does not lie in the principles on which accused persons are tried or the procedure followed, but in the seriousness with which the state views the crimes listed in section 583 of the Criminal Code. It is easy to see why crimes calling for capital punishment should be within the exclusive jurisdiction of the supreme court, but not so easy to see why crimes for which the maximum penalty is less than life imprisonment should be within it, since the county judge may impose life imprisonment for several crimes. As in civil matters, the dividing line appears to be more or less arbitrary.

Dr. Jackson recommended in 1940 that high courts, both of civil and criminal jurisdiction, and county courts be abolished and replaced by one court with the jurisdiction of both, the judges to go on circuit within each district, as is done by English county judges today. A major drawback to such a change here is the wide jurisdiction of the county judge in his collateral capacities. Little would be gained by a union of the two courts if it were accompanied by the establishment of a completely independent surrogate court.

On the other hand, the solution suggested by the county judges would not interfere with the machinery of justice in the supreme court and at the same time it would give the county judge the standing to which the responsibilities of his office entitle him and facilitate uniformity in procedure. I believe the county judges would be glad to have an increase in their existing jurisdiction. Little objection would be raised to the addition of matters now within the exclusive jurisdiction of the supreme court, such as divorce and matrimonial causes. In England, during recent years, county judges have been given authority to try such cases as temporary judges of the high court. If the additional work proved to be too heavy in the larger centres, the result would be an increase in the number of county or superior court judges rather than of judges of the supreme court. By the same token, costs to the litigant should be reduced.[41]

The 1934 recommendations of the County Court Judges Association with respect to the consolidation of the courts in which the County Court judges exercised jurisdiction were generally supported by F. H. Barlow, K.C., Master of the Supreme Court of Ontario, who in 1939 undertook a survey of the administration of justice on the direction of the Attorney General for Ontario. Master Barlow recommended the following:

1. That the necessary legislation be drafted and passed for a consolidation of the County Court, the Court of General Sessions of the Peace, the County Court Judges' Criminal Court, and the Surrogate Court, into one Court to be known as "The County and Probate Court of the County of . . .", with a provision that in all matters in which a County Court Judge is persona designata that the jurisdiction be conferred upon the Court and that the practice and procedure applicable in such Court shall be followed.

[41] *Op. cit. supra* n. 35, at pp. 151, 154–155.

2. That Rules of Practice and Procedure applicable specially to such consolidated Court be drafted and adopted.[42]

A Select Committee of the Ontario Legislature appointed in 1940 under the chairmanship of the Honourable G. D. Conant, then Attorney General, to consider *inter alia* matters raised by the Barlow Report, saw no advantage to be gained by implementing such a recommendation, as indicated in the following:

> Consolidation of certain of the inferior courts of the Province has been suggested. The proposal would include the county and district courts, the surrogate courts, the courts of general sessions of the peace and the county and district court judges' criminal courts. Advantages would include a reduction in the number of courts in the Province and convenience to the public by reducing the number of court offices. However, as there has been what might be termed a *de facto* consolidation in many counties and districts these advantages have already been partially attained. Although the number of types of books of account would be reduced, the actual saving in books of record, books of account and other items of expense would be small.
>
> While consolidation is desirable, the advantages to be gained do not warrant such a scheme being put into effect at this time, having regard to the great many amendments to statutes and rules of court which would be involved.
>
> THE COMMITTEE THEREFORE RECOMMENDS:
>
> That consolidation of inferior courts be not proceeded with at this time but that hereafter in amending the statutes and rules of court regard should be had to the possibility of consolidation at some future time.[43]

The matter lay dormant for a period of over twenty years until in 1961 a thorough and comprehensive study of the jurisdiction of County and District Courts was undertaken by Eric H. Silk, Q.C., then Assistant Deputy Attorney General. In his report to the Attorney General, Mr. Silk put forth three principal recommendations:

(a) that the present monetary limits of jurisdiction of the county and district courts of $1000 and $1200 be increased to $2500 with a corresponding increase from $4000 to $10,000 where that limitation is prescribed;

(b) that the judges of the county and district courts, except in Toronto and perhaps in Ottawa and London, be vested, as local judges of the Supreme Court, with jurisdiction in all interlocutory (and certain other) matters in proceedings in the Supreme Court; and

[42] Barlow, *Interim and Final Reports on a Survey of the Administration of Justice in the Province of Ontario* B-31 (1939).
[43] *Report of the Select Committee Appointed to Enquire into the Administration of Justice* 17-18 (1941).

(c) that consideration be given to securing such changes in the law as may be necessary to vest in the judges of the county and district courts jurisdiction to try and dispose of actions for divorce.[44]

It will be noted that the first and third of Mr. Silk's recommendations have been substantially implemented. What is perhaps more significant, however, is that while Mr. Silk had occasion to review all aspects of the jurisdiction of the County Court judges, including whether they were competent to try matters of considerable substance and real importance,[45] at no point was there any suggestion in his Report that there should be an outright merger of the functions of the County Courts with those of the Supreme Court. Neither did he have occasion to recommend consolidation of all courts over which County and District Court judges preside.

The High Court and the County and District Courts were mentioned in the McRuer Commission Report which first reported in 1968. In the chapter on the County and District Courts it was implicit throughout, that the County Courts and the High Court should remain institutionally separate and apart, but with a shift of more criminal work into the High Court and more civil work into the County Courts. Mr. McRuer recommended:

1. The involuntary jurisdiction of the county court in personal injury cases should be raised to $10,000, with the right to apply to a Supreme Court judge for an order transferring an action from the county court to the Supreme Court where it is made to appear that by reason of the complexities of the law or facts, the action is one that should be tried in the Supreme Court.

2. As far as possible, without imposing restrictions on the right of the accused to be tried at the first court of competent jurisdiction, all trials of persons charged with the more serious indictable offences should be conducted in the Supreme Court.

3. The Province of Ontario should be divided into areas consisting of groupings of contiguous counties for the purpose of setting up alternate dates for the sittings of the assizes and the General Sessions of the Peace within the respective areas.

4. Administrative arrangements should be made to alternate the jury sittings of the Supreme Court and the General Sessions of the Peace so that there would be a minimum of delay between committal for trial and the actual trial of an accused.

5. Subject to Recommendation number 2, where an accused has been committed for trial, the trial should be proceeded with at the next sittings of an assize court or the General Sessions of the Peace in the area where the trial can most conveniently be held.[46]

[44] *Report of Certain Studies of the Jurisdiction of County and District Courts and Related Matters* 19 (1961).
[45] *Ibid.* at pp. 23–25.
[46] McRuer Commission Report 619 (Report No. 1, Vol. 2, 1968).

Largely in response to the recommendations in the McRuer Commission Report, the County and District Court Judges Association of Ontario formed a committee, chaired by His Honour Judge J. C. Anderson of Belleville, to study the matter. That committee submitted a report to the Attorney General on August 21, 1968 recommending certain measures just short of complete merger of the two levels of courts, as follows:

> As will have been seen earlier in this Report, there does not seem to be any demand, nor do we believe that solicitors or lawyers generally wish the criminal jurisdiction of the County Bench to be decreased.
>
> On the assumption that our jurisdiction will be increased to $10,000.00 in civil matters, and our jurisdiction in criminal matters is not interferred [sic] with, and Divorce jurisdiction is given to our Bench, then for all practical purposes, the jurisdiction of the County Court Bench will equal, and in some respects exceed that of the High Court . . .
>
> We therefore recommend that The Judicature Act be amended to provide for: (1) The Appellate Division, (2) The Assize Division, and (3) The County Division.
>
> In the County Division, in any civil action, the solicitors could enter their action, either in the Assize Division or in the County Division. There would be some Rule developed, that even after the Writ is issued, where any given case might be transferred between these Divisions.
>
> In Quebec, the Queen's Bench is primarily responsible for criminal work, but on an ad hoc basis, the Members of the Superior Court Bench have jurisdiction in all criminal work. As a Rule of Procedure, the Assize Division could still keep, which it would have the right to retain in the first instance anyway, jurisdiction in murder, manslaughter, etc., but the Judges of the County Division of the High Court could arrange assignment between the Divisions as he [sic] might see fit.
>
> If this procedure were followed, our system would not be too different from that presently in force in Quebec, and because Ontario has a larger population than Quebec, the total number of Judges in Ontario, even if all County Court Judges were made Judges of the County Division of the Supreme Court, would not be greatly enlarged.
>
> It would be quite possible, even under present conditions, with the additional work coming about through Legal Aid, if the County Bench were relieved of Division Court work, to carry such additional load as a system such as is suggested, was put into effect.

Judge Anderson provided his own elaboration of the above recommendations in an article published in the following year:

It is not anticipated that any serious difficulty would arise as a result of such a reorganization of the Courts. The County Court Judges could return their patents and new ones be issued to them, appointing them to the County or Regional Division of the Supreme Court. This would simply follow the procedure adopted after the passing of The Judicature Act in 1881 and the amendments to various Acts which flowed therefrom when all Judges from the various Branches of the Court were issued with new patents appointing them to the Supreme Court. Of course, presently the Rules of Practice apply equally to the County Court. (see Rule 770).

When such amendments to The Judicature Act were fully in force, the members of the Supreme Court, County or Regional Division, would continue to reside in the County Town of the County to which they were originally appointed, but as Regional Government gradually was brought into being, the Government might legislate that the Court Offices and Courts might be located solely in the Regional Seat of Government or in such other places as the Province might from time to time determine. Judges then might be appointed to the newly formed Regional area and the Courts would then be centred in the main place of population in such area.

Once such a reorganization had taken place, The Jurors Act would provide for only the selection of one jury panel in each County or Region.

The appointments to the High Court (Assize or Circuit Division), would be made to certain Districts, and for purposes of discussion, it is suggested that the Members of the Assize or Circuit Division would be appointed to any one of the [eight] Districts [roughly corresponding to the existing County Court Districts], where they would live. . . .

A sittings of the Court in each County or Regional Seat of Government, if business warranted, would be held six times a year, at the beginning of every second month (sittings in the long vacation might be dispensed with). The High Court Judge assigned to the District Headquarters would normally preside over the Sittings in the County Seats of Government. He might sit only one week, and then the resident Judge of the County or Region would continue to deal with the cases on the list, whether they were criminal or civil. In this way litigants and their solicitors would be sure that once a case was placed on the list for trial, it would be reached in its order, and that non-jury cases could be fixed for trial by the granting of specific dates for such trials.

It would be possible to summon a jury panel at any time to deal with any important criminal case by appointment, and a jury panel might be summoned to deal with a number of civil jury cases; the jurors selected for these cases, and dates assigned to their trial and the balance of the panel dismissed. This would result in a great saving of time, and in a more orderly and regular disposition of the caseload.

At the same time this was being done, there should be provision to substantially increase the allowance made to jurors, at least to the point that the average juror would not suffer a financial loss by reason of being called for jury service. . . .

All Judges of the Supreme Court would be provided with the same basic salary and pension, but Judges appointed to the Appellate Division, and to the High Court (Assize or Circuit Division) would be paid an additional sum.[47]

D. Recent Developments in Other Jurisdictions

1. *British Columbia*

In 1969, legislation[48] was enacted in this province increasing the number of Supreme Court judges from sixteen to thirty-four and repealing the *County Courts Act*, thus providing what, in effect, was a merger of the County, District and Supreme Courts in that province. This legislation did not prescribe a system of resident Supreme Court judges throughout the province, but made provision for the Chief Justice to assign judges to judicial districts from time to time, and stipulated that at least one judge would be available in each judicial district at all times.[49]

The rationale of this legislation was given by the Honourable Leslie R. Peterson, Q.C., then Attorney General for British Columbia, in the following statement:

> This change should provide for a more efficient management of our judicial resources and better service to the public. We consider this change fair and equitable because the jurisdiction of the present Supreme Court and County Courts is roughly parallel now. In addition, the rules of the County Court were revised a few years ago making, with very few exceptions, the rules of the Supreme Court applicable as the rules of the County Courts.
>
> I would anticipate that a number of judges would be available in different parts of the Province for the regular despatch of judicial business at his level but that, with the flexibility afforded by one court, judges might move from time to time when their judicial load is light into an area where the workload is piling up.
>
> Because the judges of the existing County Courts are appointed by the Governor in Council, under section 96 of the British North America Act, I have advised the Minister of Justice of the steps I am proposing in connection with the reconstitution of the Supreme Court and the County Courts, so that he will be in a position to introduce necessary legislation by way of amendment to the Judges Act, and to make the necessary additional appointments to the Supreme Court of

[47] (1969), 12 Can. Bar J. 72, at pp. 77-80.
[48] *An Act to Amend the Supreme Court Act, 1969*, S.B.C. 1969, c. 38.
[49] *Ibid.* s. 5 (substituting new s. 18(2)(3)).

the Province. I will be proposing that the court be increased by the number of judges presently authorized for the County Courts.[50]

The federal Minister of Justice has not yet introduced the requisite amendment to the federal *Judges Act* so as to be in a position to make the 18 additional appointments to the Supreme Court.

2. *Alberta*

On April 27, 1971 Royal Assent was given to Bill No. 8 of the Legislative Assembly of Alberta, thus bringing into force *An Act to Amend The District Courts Act*. Until this date the maximum jurisdiction of the District Court in civil cases had been $2,000 except on consent, and a District Court judge could not preside over civil or criminal trials by jury. The new legislation removed all limitations with respect to amount or mode of trial, and in effect gave concurrent jurisdiction in all matters except capital offences, prerogative writs and divorce. In introducing Bill No. 8, the Attorney General for Alberta indicated that he had made representations to the federal Minister of Justice to amend the *Divorce Act* to give divorce jurisdiction to District Court judges in Alberta.

The following information concerning the organization of the District Court in Alberta has been provided for the Commission by Chief Judge Bennett of the County and District Courts in Ontario.

When Alberta became a province, the District Court was established by naming one resident District Court Judge to each judicial district. He had jurisdiction only in the district to which he was appointed. These "districts" were about the same size as a good-sized county. In 1933 resident Judges were done away with and the province was then divided into two halves, viz. the District Court of Northern Alberta and the District Court of Southern Alberta. District Court Judges were named to either the one or the other, and had no jurisdiction outside their own half of the province, except on a special warrant from the Attorney General. As "resident Judges" died off, the replacements in Northern Alberta were directed to live at Edmonton and the replacements in Southern Alberta were directed to live either in Calgary or Lethbridge. At the present time there are eight District Court Judges in Northern Alberta, all resident in Edmonton. There are seven in Southern Alberta of whom five reside at Calgary and two at Lethbridge. This is necessary because although there are only six judicial districts in Northern Alberta, District Court Judges there are required to serve twelve centres. There are only six judicial districts in Southern Alberta, but the District Court Judges are required to serve nineteen centres. The arrangement gives the maximum service, but still requires District Court Judges to go out on circuit in much the same way as Supreme Court Trial Judges.[51]

[50]Peterson, "Proposed Reorganisation of the Courts of the Province" (1969), 27 Advocate 25, at p. 26.

[51]Letter to the Chairman of the Commission under date May 13, 1971.

In 1969, during the debate on amendments to the *Judges Act* in the House of Commons, G. Baldwin Esq., M.P. and Honourable P. Mahoney Esq., M.P. both representing Alberta constituencies, urged the Minister of Justice to lend whatever assistance he could to the outright merger of the District and Supreme Courts in Alberta.[52]

3. *Quebec*

The Superior Court of Quebec has been cited on a number of occasions as an example of a merged court system which has existed for many years. While there has been no recent legislation changing the jurisdiction of that Court, it is useful for comparative purposes to explore both the statutory basis of its organization under the *Courts of Justice Act*[53] and the manner of its present administration.

The Superior Court of Quebec is composed of 87 judges, including the Chief Justice and the Associate Chief Justice. For administrative purposes the Court is divided into two appellate districts, the district of Montreal and the district of Quebec. There are 57 judges in the appellate district of Montreal all of whom come under the administration of the Associate Chief Justice, and 30 judges in the appellate district of Quebec all of whom come under the administration of the Chief Justice.

On the civil side, the Superior Court has exclusive jurisdiction in all cases involving amounts in excess of $3,000, as well as divorce and bankruptcy. Civil cases involving less than $3,000 are tried in the provincial courts which also have exclusive jurisdiction over all actions involving municipal or school tax assessment. If any civil cases brought before a provincial court involve a fee of office, a right of the Crown, title to lands, or rent or other matters which may affect future rights of the parties in excess of $3,000, then by a process of "evocation" the case may be removed into the Superior Court. When in a civil case before a provincial court a defendant counterclaims for an amount above $3,000, the entire case must be heard by the Superior Court. With these exceptions, the jurisdictions of the two courts are mutually exclusive[54] and there is no overlapping concurrency of jurisdiction such as exists between the County Courts and the Supreme Court in Ontario. The judges of the provincial courts in Quebec are appointed by the Province and are not judges appointed under section 96 of the *British North America Act*.

On the criminal side, the Superior Court judges, sitting as judges of the Court of Queen's Bench (Crown Side)[55] and sitting with a jury, have exclusive jurisdiction over all offences listed in section 427(a) of the *Criminal Code*. In addition they have exclusive appellate jurisdiction in summary conviction appeals under Part XXIV of the *Criminal Code*, either

[52]House of Commons Debates, Vol. 114, Number 11, November 6, 1969 at pp. 618–619, 621–623.

[53]R.S.Q. 1964, c. 20, ss. 1–2, 21–49, 60–69 (as amended).

[54]See Articles 34–36 of the Quebec *Code of Civil Procedure*.

[55]See *Courts of Justice Act*, R.S.Q. 1964, c. 20, s. 61; amended S.Q. 1969, c. 19, s. 1.

by way of trial *de novo* or by way of stated case. The judges of the Superior Court are also justices of the peace and coroners throughout the Province of Quebec.

In addition to its exclusive jurisdiction over offences listed in section 427(a) of the *Criminal Code* and summary conviction appeals, Superior Court judges have jurisdiction over all other indictable offences where the accused elects to be tried by a court composed of a judge and jury. If the accused elects to be tried by a judge without a jury, he can be tried either by a judge of the provincial court (located throughout the Province) or a judge of the sessions of the peace (located only in Montreal, Quebec, Trois Rivières, Sherbrooke and St. Jerome). When an accused elects trial by a judge without a jury, the provincial judge or sessions judge holds the preliminary hearing and if the accused is committed for trial, he will be tried before another judge of the provincial court or the sessions of the peace. If the accused re-elects under section 490(5) of the Code to go before a court composed of a judge and jury, and if the election is filed in accordance with the requirements of that section, then the accused must be tried by a Superior Court judge with a jury. The Quebec system respecting elections, therefore, is different from that in Ontario, as in Quebec there is little practical difference in electing to be tried by a magistrate without a jury rather than by a judge without a jury, except that in the latter case the accused is given the benefit of a preliminary inquiry. The only way in which the accused can be tried before a federally-appointed judge (except in the case of the offences listed in section 427(a) of the Code) is by electing trial by a court composed of a judge and jury.

Administratively, the Superior Court was originally intended to employ a system of resident judges throughout the Province, with power in the Chief Justice or Associate Chief Justice to move these judges to other districts when required on a temporary basis. In practice, however, there are very few judges who are permanently appointed to and reside in one district. Of the 57 judges in the appellate district of Montreal over which the Associate Chief Justice has jurisdiction, 50 have headquarters in the city of Montreal, four are resident in Sherbrooke and three in Hull. The resident judges in Sherbrooke and Hull from time to time sit in Montreal when the backlog becomes extraordinarily heavy there. Of the 30 judges in the appellate district of Quebec over which the Chief Justice has jurisdiction, 20 have headquarters in Quebec City, two in Chicoutimi, one in Rimouski, three in Trois Rivières, one in Shawinigan Falls, two in Rouyn and one in Amman. The judges with headquarters in Montreal or Quebec City do not always sit there, of course, but are sent out into the various districts for the trial of both civil and criminal cases. The criminal sittings are kept separate and apart from sittings on civil cases, as are divorce sittings. With a few exceptions, the Chief Justice or Associate Chief Justice have full power to assign any of the judges within their respective appellate districts to any districts as required from time to time, and to fix for each district such sittings as "they deem expedient for the proper dispatch of business".[56]

In the appellate district of Montreal, the Associate Chief Justice has jurisdiction over twelve judicial districts, six of which are rural districts out-

[56] *An Act to Amend the Courts of Justice Act*, S.Q. 1965, c. 17, s. 7.

side the metropolitan Montreal area. But since most are within an hour's drive of Montreal on excellent highways, they are easily serviced by the judges with headquarters in Montreal who return home each night. Generally the Associate Chief Justice will assign a different judge to each of the six rural districts one month at a time, although occasionally a judge is sent there for a two-month period. The various judges with headquarters in Montreal also take their turn in bankruptcy work, in practice court and in divorce work. In this sense, the administration of the Superior Court in Quebec is not dissimilar from the circuit system of the High Court in Ontario. The Associate Chief Justice indicated the following as to the assignment of his 50 Montreal judges in the month of September 1971:

Criminal assizes and appeals from summary convictions in Montreal	6
Bankruptcy in Montreal	2
Practice Court Montreal	6
Civil and Criminal work in six rural districts	8
Divorce Division (including practice)	5
On verge of retirement	1
Attending language school	1
Civil cases Montreal	21
Total	50

In the appellate district of Quebec, the distances from Quebec City to the various rural districts are much greater and the roads are not as good. Thus the Chief Justice assigns to certain judges with headquarters in Quebec City the responsibility for outlying districts for periods of up to two years (excluding, of course, those rural districts with resident judges). There is, however, an increasing mobility between the various rural districts in Quebec City to the point where the practice respecting assignments is approaching that followed in Montreal.

In summary, only 17 out of a total of 87 (or 19.5%) Superior Court judges in Quebec are now truly resident judges in a judicial district, apart from Montreal and Quebec City. Most of the remaining judges are assigned from the two headquarters on a type of circuit system, with specific assignments in the districts not having resident judges lasting anywhere from one month to two years, depending on the circumstances.

The Associate Chief Justice indicates that specialization among his 50 judges in Montreal is developing at a substantial rate. For example, he advises that eight of the judges do all of the bankruptcy work, many of them having practised in that field before being called to the bench. Sixteen of the 50 judges do all the criminal work, and there is now a need for even more judges willing to specialize in this field. Special seminars in criminal law have been arranged for these 16 Superior Court judges. The Associate Chief Justice has also developed an improved criminal assignment court. This assignment court sets dates for trial some three weeks in advance and once the date has been set, the judges are loath to grant any further adjournments.

The Associate Chief Justice has wide power to assign judges to specialized types of cases. This is possible because his judges are assigned

to a district for only one month at a time and yet he knows the special types of cases coming up over a longer period.

Article 437(a) of the Quebec *Code of Civil Procedure* gives the Chief Justice or Associate Chief Justice power to transfer a civil case from one district to another for the actual trial, even after issue has been joined. Apparently this power is exercised frequently in order to ensure the prompt disposition of civil cases.

We asked Associate Chief Justice Challies why it was necessary to have as many as 87 Superior Court judges in Quebec when there were only 32 High Court judges in the Supreme Court of Ontario. He replied that many of the matters heard by the Superior Court in Quebec are heard by the County Court judges in Ontario (of which there are 99), sitting either as chairmen of the General Sessions of the Peace or on civil cases involving amounts in excess of $7,500. He tempered this observation by pointing out that the provincial courts in Quebec try all indictable offences without a jury (except offences under the *Combines Investigation Act* and section 427(a) of the *Criminal Code*) and all civil cases with amounts up to $3,000, pointing out also that there is no provision by which cases involving more than $3,000 can be tried in the provincial court on consent.

Associate Chief Justice Challies pointed out that cases seem to take longer to try in Quebec than they do in Ontario, and there is in the civil law system a tradition, followed by the bench in Quebec, of rendering written, as opposed to oral, judgments. In assigning sittings to each of his judges, the Associate Chief Justice follows the practice of assigning 10 or 11 days of sittings per month, which takes up approximately 50% of the total time available. This would seem to be substantially different from the practice of the High Court judges in Ontario of making circuit assignments based on one week free of scheduled court commitments in every five.

4. *England*

The *Courts Act 1971*[57] received Royal Assent on May 12, 1971 and came into force on October 1, 1971.

The Act gives effect, with some modifications, to the Beeching Commission Report.[58] The Commission dealt specifically with proposals to merge or reorganize the jurisdiction of the Supreme Court and County Courts on both civil and criminal cases, and its recommendations on this matter were implemented by the new Act.

A discussion of the Beeching Commission proposals and the new Act must be prefaced by an understanding of a basic jurisdictional change which was recommended and which has now been implemented. The recommendation was that the criminal and civil work of the High Court be separated, with a greater concentration of civil work at a smaller number of centres so as to remove any remaining reason for combining the two forms

[57]20 Eliz. 2, c. 23.
[58]Cmnd. 4153 (1969).

of business in order to produce enough work to justify a High Court judge's visit.[59] Because the County Court judges have never had any jurisdiction over criminal cases (these being tried by recorders and part-time judges below the High Court level), this change means that for the first time there is a functional separation of the criminal and civil work at all levels of the courts in England.

On the criminal side the new Act merges all existing criminal courts above the level of Magistrates' Courts into one new Crown Court, to become a superior court of record in England and Wales. The Crown Court embraces all the jurisdiction formerly exercised by the Assize Courts, the Central Criminal Court, the old Crown Courts presided over by recorders, the County Sessions and the Borough Sessions.

The jurisdiction and powers of the Crown Court are to be shared by what are essentially two tiers of judges: the High Court judges, and the circuit judges (a new class of judges consisting of all former County Court judges and all full-time judges formerly exercising criminal jurisdiction) supplemented and assisted by recorders (the new designation for part-time judges).[60] In addition, any judge of the Court of Appeal may sit as a member of the Crown Court when requested to do so by the Lord Chancellor.[61]

The most important aspect of the new Crown Court, however, is the way in which offences are to be distributed between the two tiers of judges within the court. The Act follows the Beeching recommendations in providing that this shall be done in accordance with practice directions given by or on behalf of the Lord Chief Justice with the concurrence of the Lord Chancellor.[62] The intention in this approach is to introduce a greater degree of administrative flexibility into the allocation of criminal cases, while at the same time preserving the trial of the great bulk of cases at the judicial level previously existing.[63]

The present practice directions of the Lord Chief Justice[64] indicate four classes of offences:

Class one — to be tried only by a High Court judge (includes all capital offences, treason, murder, genocide, spying, etc.).

Class two — to be tried by a High Court judge unless a particular case is released by or on the authority of the presiding High Court judge (includes manslaughter, infanticide, child destruction, abortion, rape, sedition, sexual intercourse with girl under 13, incest with girl under 13, mutiny, piracy, etc.).

[59]*Ibid.* paras. 183–185.
[60]*Courts Act 1971*, 20 Eliz. 2, c. 23, s. 4(2).
[61]*Ibid.* s. 4(3).
[62]*Ibid.* ss. 4(5), 5(4)(5).
[63]See Beeching Commission Report, paras. 190–191.
[64]These directions were received in a letter from A. D. M. Oulton, Esq. of the Lord Chancellor's Office.

Class three — to be tried either by a High Court judge or a circuit judge or recorder (includes all indictable offences other than those in classes one, two and four).

Class four — when tried on indictment, may be tried by a High Court judge, circuit judge or recorder, but generally will be listed for trial by a circuit judge or recorder (includes all offences which may be tried either on indictment or summarily, causing death by reckless or dangerous driving, wounding, burglary, robbery, forgery over £100 etc.).

These classifications depart slightly from the recommendations in the Beeching Commission Report, which called for three classes of offences, but the general intention of the Commission has been implemented.[65]

There are further practice directions concerning the above four classes of offences. For example, the trial of an offence in the second classification is to be released to a circuit judge under the authority of a presiding judge "having regard to all the circumstances". If the prosecution is being undertaken by the Director of Public Prosecutions, the Director's views are to be obtained before the case is considered for release. Offences of the third classification are to be tried by a High Court judge and offences of the fourth classification by a circuit judge or recorder, unless the officer responsible for listing a case decides that it should be listed for trial by a circuit judge or recorder (class three offences) or by a High Court judge (class four offences). The officer responsible for listing may make a decision to move down or up, as the case may be, only after consulting with the presiding judge and after having had regard to the views of the examining justices committing the accused for trial and the following seven considerations:

1. the case involves death or serious risk to life (excluding cases of dangerous driving, or causing death by dangerous driving, having no aggravating features);
2. widespread public concern is involved;
3. the case involves violence or threat of violence of a serious nature;
4. the offence involves dishonesty in respect of a substantial sum of money;
5. the accused or offender holds a public position or is a professional or other person owing a duty to the public;
6. the circumstances are of unusual gravity in some respect other than those indicated above;
7. a novel or difficult issue of law is likely to be involved, or a prosecution for the offence is rare or novel.

[65]See Beeching Commission Report, paras. 109–198.

The examining justices committing an accused for trial for class three or four offences are also required to take these considerations into account in giving their views as to whether the accused should be tried by a High Court judge.

These seven considerations are similar to those recommended by the Beeching Commission Report for inclusion in the practice directions of the Lord Chief Justice.[66]

Additional practice directions are provided by the Lord Chief Justice for the selection of the most convenient location of the Crown Court by the justices committing for trial in respect of each individual accused, having regard to (a) the convenience of the defence, the prosecution and the witnesses; (b) the expedition of the trial; and (c) the locations designated by the presiding judge as the ones to which cases should normally be committed from the committing justice's petty sessions area. Practice directions are also provided for the allocation of certain proceedings to a court comprised of lay justices, and for the transfer of proceedings between locations of the Crown Court.

In summary, the courts on the criminal side have merged in England, but the allocation of offences between two tiers of judges has been retained, depending on the nature of the offence. This allocation is undertaken not by statutory prescription, however, but according to flexible practice directions from the Lord Chief Justice, thus eliminating any unnecessary rigidity in matching case to judge. In practice, the more serious cases will still be tried by High Court judges, and the less serious cases by circuit judges, but there will be greater freedom to move certain cases up or down, as circumstances require.

On the civil side, the Beeching Commission with some reluctance was unable to accept proposals for merger of the High Court and the County Courts, and the new Act reflects this decision. The position of the Beeching Commission is rationalized in the following statement:

A possible merger of the courts

Since we wished to simplify the structure of the courts, to make them more comprehensible and more flexible in use, we were led to consider, as a counterpart to the single criminal court which we recommend, the establishment of a single civil court of wide jurisdiction and uniform procedure in which the only important variable would be the powers of the judge. We also considered a more modest suggestion which was put to us by several witnesses, including The Law Society, that all civil proceedings might be started in common form, and that, at an appropriate stage in the proceedings, an officer of the court after hearing the parties, decide whether the case should be heard by a High Court or a County Court judge. This proposal was not without its attractions because it would provide a straightforward method of deciding by whom cases in the middle range should be

[66]*Ibid.* para. 197.

> tried. We concluded in the end, reluctantly for the most part, that it would be impracticable for us to give effect to either of these possibilities. A partial or total assimilation of the Rules of the Supreme Court and the County Court Rules would have been needed, and this would have involved us in a study for which we are ill-qualified as a body and which would have seriously delayed our report.[67]

In this context, it is important to remember that in Ontario the Rules of Practice are basically the same for the Supreme and County Courts.

The Beeching Commission recommended that the circuit judges and recorders (i.e., the second tier of judges) should have the same jurisdiction as the High Court judges on the civil side in the sense that a High Court judge should have the power to release from his list any case which he considers suitable for trial by a circuit judge who has been invited to sit by the presiding High Court judge.[68] It was also recommended that the County Courts, normally presided over by the circuit judges, should have their jurisdiction increased to £1,000 in order to save the additional High Court judge time.[69] Additional flexibility was recommended by a suggestion that High Court judges help out in County Court cases, including matrimonial work, when required.[70]

The new Act reflects these recommendations but sharpens the distinction between the High Court judges and the circuit judges (and hence between the High Court and the Circuit Court) by permitting a circuit judge or recorder to sit as a judge of the High Court *only* "if requested to do so by or on behalf of the Lord Chancellor . . . for the hearing of such case or cases or at such place and for such time as may be specified by or on behalf of the Lord Chancellor."[71] Thus, on the surface of the statute, it would appear that there will be far less concurrency of civil jurisdiction than contemplated by the Beeching Commission recommendations since it is the Lord Chancellor, and not the presiding High Court judge in an area, who will be issuing the invitation to the circuit judge to move up temporarily.

It is reasonable, however, to expect that the Lord Chancellor will consult the presiding High Court judge in each court centre and that the criteria for releasing any case in the High Court to a circuit judge who has been invited to sit will be much the same as the considerations which the Beeching Commission recommended be taken into account by a High Court judge in reaching a decision that it is undesirable to release a case. They are:

(a) that the damages are likely to be substantial;

(b) that a novel or difficult issue of law is likely to be involved;

(c) that an allegation of fraud or dishonest conduct is involved;

(d) that either party is entitled to claim trial by jury;

[67] *Ibid.* para. 205.
[68] *Ibid.* para. 208.
[69] *Ibid.* para. 211.
[70] *Ibid.*
[71] *Courts Act 1971*, 20 Eliz. 2, c. 23, s. 23(1).

(e) that the decision may affect public rights generally or the rights of third parties;

(f) that the circumstances are of unusual difficulty or importance in some respect other than those indicated above.[72]

The Beeching recommendation that the High Court judges be permitted to help out with County Court cases was implemented by the new Act,[73] although the consent of the High Court judge was made crucial. Indeed, the Act went further in permitting Court of Appeal judges and recorders to sit as judges of any County Court district if they consent, on such occasions as the Lord Chancellor considers desirable. Provision is also contained in the new Act for the temporary appointment of barristers or retired judges to facilitate the disposal of business in the High Court, the Crown Court and the County Courts.[74] During the term of their temporary appointment, such persons hold the position of either a deputy judge of the High Court or a deputy circuit judge, at the pleasure of the Lord Chancellor.

In summary, on the civil side the two tiers of courts have not been merged in England, and neither has there been provision for a broad concurrency of jurisdiction, at least on the surface of the statute. It remains to be seen, however, whether a more flexible use of judge power and a *de facto* overlap of jurisdiction (as recommended by the Beeching Commission Report) results from the extensive use by the Lord Chancellor of his power to request circuit judges or recorders to sit as judges of the High Court to hear certain cases in that Court, as outlined above.

What is most significant for Ontario is the technique in the new Act of distinguishing between the type of court and the type of judge who can exercise powers in that court. The new Act has tended to make the levels of courts distinct from the levels of judges. This technique is intended to provide more efficiency and flexibility in the disposition of cases in any given court by utilizing practice directions of the Lord Chief Justice to cut horizontally across the two levels of judges for the functional allocation of cases. It remains to be proven whether this system will work in practice.

E. The Constitutional Implications

It is beyond dispute that a province can reconstitute or reorganize its provincial courts, both of civil and of criminal jurisdiction. This power is vested in the provincial Legislatures by section 92(14) of the *British North America Act*:

> The administration of Justice in the Province, *including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction*, and including Procedure in Civil Matters in those Courts. [emphasis added]

[72] Beeching Commission Report, para. 208.
[73] *Courts Act 1971*, 20 Eliz. 2, c. 23, s. 20(3).
[74] *Ibid.* s. 24.

However, this power of reconstitution and reorganization is not unlimited. Both section 96, relating to the federal appointment of judges, and section 91(27), giving the Parliament of Canada jurisdiction over criminal law and procedure in criminal matters, provide certain qualifications to provincial legislative powers which may well affect the extent to which Ontario unilaterally can provide for merger or jurisdictional reorganization of its Supreme Court and County Courts.

The following is a review of constitutional authorities relevant to these questions.

1. *Complete Merger*

If the County and District Courts were to be completely merged with the High Court of Justice, and if the present judges of the County and District Courts were to be given the status, salary and tenure equal to that of the judges of the High Court as members of a new Superior Court of Ontario, then the Ontario Legislature would require, as a constitutional matter, the cooperation of both the Parliament of Canada in the form of an amendment to the federal *Judges Act*,[75] and of the Governor General in Council in making the necessary appointments.

The words of section 96 of the *British North America Act* clearly distinguish between the two levels of courts:

> The Governor General shall appoint the Judges of the *Superior*, *District*, and *County Courts* in each Province except those of the Courts of Probate in Nova Scotia and New Brunswick. [emphasis added]

As further evidence that the framers of the *British North America Act* had in mind a clear distinction between the two levels and the judges to preside over them, it should be noted that section 99 provides constitutional security of tenure for the judges of the Superior Courts, but not for the judges of the County and District Courts, whose security in various forms since Confederation has been provided simply by legislative enactment.[76]

Section 96 was enacted for immediate application to courts existing at the time of Confederation. Its primary purpose was to identify such existing courts as came within the federal power of appointment. The words "Superior", "District" and "County" were made part of the names of actual courts in existence in Upper Canada and the other three confederating provinces in 1867. The jurisdiction of the Superior Courts in Upper Canada at that time (the Court of Queen's Bench and the Court of Common Pleas were commonly known as the Superior Courts of Common Law) extended

[75]R.S.C. 1970, c. J-1.

[76]The present security of tenure of County and District Court judges is provided for in the federal *Judges Act*, *ibid.* s. 34. At one point shortly after Confederation the Ontario Legislature purported to give the Lieutenant Governor in Council the power to remove a county court judge for inability, incapacity or misbehaviour, but this legislation was considered *ultra vires* by the Court of Queen's Bench in *Re Squier* (1882), 46 U.C.R. 474. See also Riddell, *op. cit. supra* n. 4 at pp. 223–224.

throughout the province in both civil and criminal matters. On the other hand, the jurisdiction of each of the County and District Courts was limited to a county or district, and to $200 in tort and $400 in debt. In the light of the long history of the clear distinction between superior and inferior courts in England and Upper Canada, it is unlikely that the framers of section 96 would have distinguished between Superior, District and County Courts unless they intended a distinction to apply to the judges appointed to those respective courts existing in 1867.

Quebec was the only province in 1867 with a merged court system and therefore did not have county or district courts. The merged court which existed in Lower Canada at that time, and which still prevails in Quebec today, was the Superior Court, thus indicating explicitly that sections 96 and 99 were to be applied in respect of its members.

It is significant that two years ago, when the Attorney General for British Columbia announced the merger of the County Courts and Supreme Court of that Province, he openly accepted the fact that there would have to be complementary amendments to the federal *Judges Act* and that the Governor General in Council would have to make the new appointments.[77]

It may be concluded, therefore, that if the Province of Ontario were to merge the present County and District Courts with the High Court of Justice into a new Superior Court of Ontario, and also provide the judges of the County and District Courts with the same status, salary and tenure as the judges of the High Court, then federal cooperation would be required in an amendment to the federal *Judges Act* and in the necessary new appointments being made by the Governor General in Council.

2. *Jurisdictional Reorganization*

As an alternative to complete merger, it has been suggested from time to time that Ontario might wish to preserve the distinction between the two levels of courts and the judges thereof, but give each level concurrent jurisdiction on all civil and criminal matters in order to permit the more prompt disposition of cases as they arise. Another alternative suggested is that the jurisdictions should be reorganized so that more civil work should go to one level and more criminal work to the other. A third alternative is that the two levels of courts should be merged as in the new Crown Court in England but that the two levels of judges should be preserved to comply with the distinction in section 96.

Section 92(14) would appear on the surface to give the provinces wide powers to achieve unilaterally any of these abstract alternatives of jurisdictional reorganization. Indeed, provincial legislation which merely purports to extend the jurisdiction of the County and District Courts without interfering with the federal appointing function has generally been upheld. As early as 1892, Mr. Justice Strong in the Supreme Court of Canada, speaking for himself, Gwynne and Patterson, JJ. in *Re County Courts of British Columbia* said:

[77]Peterson, "Proposed Reorganisation of the Courts of the Province" (1969), 27 Advocate 25, at p. 26.

> The powers of the federal government respecting provincial courts are limited to the appointment and payment of the judges of those courts and to the regulation of their procedure in criminal matters. The jurisdiction of parliament to legislate as regards the jurisdiction of provincial courts is, I consider, excluded by subsec. 14 of sec. 92, before referred to, inasmuch as the constitution, maintenance and organization of provincial courts plainly includes the power to define the jurisdiction of such courts territorially *as well as in other respects*. This seems to me too plain to require demonstration.
>
> Then if the jurisdiction of the courts is to be defined by the provincial legislatures that must necessarily also involve the jurisdiction of the judges who constitute such courts.[78] [emphasis added]

While the questions before the Court in that reference were concerned only with the right of the province to authorize a County Court judge to sit in a district other than that for which he was appointed, the words "as well as in other respects" in the passage above would seem to indicate that Strong, J. contemplated a provincial extension of substantive and monetary jurisdiction as well as territorial jurisdiction.

Chief Justice Duff in 1938 confirmed the broad right of the provinces to extend and enlarge the jurisdiction of the County Courts without necessarily interfering with the federal appointing power in section 96, in *Reference Re Adoption Act*:

> Now, the pecuniary limit of claims cognizable by County Court judges has been frequently enlarged since Confederation and nobody has ever suggested so far as I know that the result has been to transform the County Court into a Superior Court and to bring the County Court judges within s. 99. Perhaps the most striking example of these enlargements of jurisdiction was that which occurred in British Columbia when the jurisdiction of the Mining Court, after the judgment of Mr. Justice Drake referred to above, was transferred to the County Court, and the County Court in respect of mines, mining lands and so on was given a jurisdiction unrestricted as to amount or value with all the powers of a court of law or equity.
>
> It has never been suggested, so far as I know, that the effect even of that particular enlargement of the jurisdiction of the County Courts of British Columbia was to deprive the County Court and the County Court judges of their characters as such and to transform them into Superior Courts and Superior Court judges; or that s. 99 has, since these increases took place, been applicable to County Court judges. In point of fact, as everybody knows, the practice has been opposed to this.
>
> If the provinces have no authority to increase the jurisdiction of the County Courts without depriving them of their character as such, then no such jurisdiction exists anywhere.[79]

[78](1893), 21 S.C.R. 446, at p. 453.
[79][1938] S.C.R. 398, at pp. 416-417.

Chief Justice Duff specifically approved the above-quoted words of Strong, J. in *Re County Courts of British Columbia*.

Quite apart from extending the monetary jurisdiction of the County Courts, the Legislature of Ontario has added to their substantive jurisdiction from time to time, although in each case the jurisdiction added has been made concurrent with that of the High Court rather than having been taken away from the High Court. For example, the Province gave equity jurisdiction to the County Courts with the passage of *The Judicature Act* in 1881. In 1896, the County Court was given jurisdiction for the first time in actions where the title to land was in issue, provided its value did not exceed $200;[80] prior to that time only the High Court could decide such matters. In 1952, the County Court judges were given concurrent jurisdiction in their counties to hear applications under *The Vendors and Purchasers Act*.[81] In none of these instances was the constitutional validity of the additional jurisdiction challenged.

Perhaps the most significant substantive grant of new jurisdiction by the provinces, where such jurisdiction had previously belonged exclusively to the Superior Courts, was in the matter of divorce. Indeed, in both British Columbia and Ontario, provincial legislation which attempted to confer jurisdiction in divorce and matrimonial causes upon County Court judges sitting as local judges of the Supreme Court, was brought before the courts for a determination of whether this was a valid exercise of provincial legislative power under section 92(14). In both cases, the validity of the provincial legislation was upheld.

The British Columbia legislation reached the Supreme Court of Canada in *Attorney General of British Columbia* v. *McKenzie* in 1965, after having been declared *ultra vires* the Province by the British Columbia Court of Appeal. In reversing the lower court, Mr. Justice Ritchie, speaking for himself and the seven others on the court, stated:

> With the greatest respect, it appears to me that the present legislation is not concerned with conferring jurisdiction "*upon persons*" but with defining the jurisdiction of courts. The distinction between a provincial legislature conferring jurisdiction upon courts presided over by provincially appointed officials on the one hand and upon courts to which the Governor-General has appointed judges on the other hand, is that in the former case the provincially appointed official is excluded by reason of the origin of his appointment from exercising jurisdiction broadly conforming to the type exercised by superior, district or county courts, . . . whereas it is within the exclusive power of the provincial legislature to define the jurisdiction of provincial courts presided over by federally appointed judges, and as Strong J. observed *In re County Courts of British Columbia*:
>
> . . . if the jurisdiction of the courts is to be defined by the provincial legislatures that must necessarily also involve the jurisdiction of the judges who constitute such courts.[82]

[80]*The County Courts Act, 1896*, S.O. 1896, c. 19, s. 7.
[81]S.O. 1952, c. 110, s. 1.
[82][1965] S.C.R. 490, at p. 497.

While Ritchie, J. was content to support the validity of the provincial legislation because it assigned divorce jurisdiction to the County Court judges sitting as local judges of the Supreme Court, therefore leaving the right to grant a divorce vested in the Supreme Court, Judson, J. in the same case indicated that he would have been prepared to support provincial legislation empowering the County Courts to exercise divorce jurisdiction.[83] It was not, however, necessary for him to decide that question since all County or District Court judges in that province were by terms of their appointment *ex officio* local judges of the Supreme Court of British Columbia.

The Ontario legislation is similar to that in British Columbia in that it confers divorce jurisdiction on local judges of the High Court.[84]

The legislation was submitted by way of reference to the Ontario Court of Appeal and its constitutional validity was upheld. Mr. Justice Arnup, speaking for five members of that Court, adopted the principles followed by Ritchie, J. and seven other members of the Supreme Court of Canada in the *McKenzie* case, and paraphrased one of these principles in the Ontario context as follows:

> The right to grant a divorce in Ontario remains vested in the High Court of Justice as it previously did and the effect of the new (Ontario) legislation is limited to reorganizing the administration of justice in that Court by allocating jurisdiction under the *Divorce Act* to Courts presided over by local Judges of the High Court appointed by the Governor-General.[85]

Arnup, J.A. then adopted and applied the passage from the judgment of Ritchie, J. quoted above, in the determination of the reference before him.[86]

Insofar as the legislation purports to give jurisdiction to the judges of the County Court of the County of York as local judges of the High Court, Arnup, J.A. was of the opinion that this was valid as creating the office of local judge in the County of York, but that the present County Court judges in York County could not occupy that office until they were so appointed by patent of the Governor General, which had not been the case up until that time. However, in His Lordship's opinion, this did not affect the validity of the legislation but only its implementation.

Implicit in the judgment of Arnup, J.A. was the view that the province would not be competent to confer divorce jurisdiction on the judges of the County and District Courts *per se*. This may, however, have been because of the new federal *Divorce Act*[87] of 1967-68, which stipulates that in the case of Ontario the "Court" in which a petition for a divorce is to be

[83] *Ibid.* at p. 502.
[84] *The Judicature Act*, R.S.O. 1970, c. 228, s. 118, as amended by *The Judicature Amendment Act, 1970*, S.O. 1970, c. 97, s. 11.
[85] *Reference re Constitutional Validity of section 11 of The Judicature Act, 1970 (No. 4)*, s. 11, [1971] 2 O.R. 521 at p. 530.
[86] *Ibid.* Arnup J. A. quoting from [1965] S.C.R. 490, at p. 497.
[87] S.C. 1967–68, c. 24, s. 2; R.S.C. 1970, c. D-8, s. 2.

brought is "the trial division or branch of the Supreme Court of the province". The new *Divorce Act* and the stipulation as to the "Court" was not in existence when the British Columbia legislation was before the Supreme Court of Canada in the *McKenzie* case. In British Columbia divorce jurisdiction at that time had been acquired by the Supreme Court as a result of the pre-Confederation adoption of the English divorce legislation of 1857 in that province. This difference between the British Columbia and the Ontario situations may account for the fact that Judson, J. in the *McKenzie* case would have been prepared to uphold the provincial granting of divorce jurisdiction to the British Columbia County Court judges in 1965, while Arnup, J.A. in the recent Ontario reference implied that he would not because it would interfere with the appointing function of the Governor General under section 96 and could conflict with the exclusive jurisdiction of the Parliament of Canada over divorce under section 91(26). In this respect, the views of Arnup, J.A. are instructive:

> In our view an appointment to the office of Judge, whether it be a Judge who is a member of the High Court, or a local Judge, can be made only by the Governor-General under the authority of s. 96 of the *B.N.A. Act, 1867*.
>
> Within the framework of the organization of the High Court, the Legislature may enlarge, restrict or vary the jurisdiction of the Court itself, or of those persons who hold an office within the organization. The Legislature may take jurisdiction away from one class of officer and confer it upon another, subject always to these overriding considerations:
>
> 1. Where the office is that of a Judge, whether as a member of the High Court or as a local Judge, the appointment to that office must be made by the Governor-General.
>
> 2. The provincial legislation must not conflict with or derogate from some positive enactment of Parliament, in relation to a matter over which Parliament has exclusive jurisdiction under s. 91 of the *B.N.A. Act, 1867*, designating the Court or Courts or officers who are to have jurisdiction in relation to that matter.[88]

Thus it seems clear that a province can change the jurisdiction of the High Court as long as it does not interfere with the appointment of the judges to that Court. However, in some respects this begs the very constitutional question involved in a provincial reorganization of jurisdiction, for surely the legal limit to which the province can go is determined by the extent to which "organization" of jurisdiction under section 92(14) becomes "appointment" under section 96.

Virtually all the constitutional cases in this area have involved a reorganization of jurisdiction within the Superior Court (such as in the British Columbia and Ontario divorce jurisdiction cases) or within the County and District Courts (such as in the 1892 British Columbia case

[88] [1971] 2 O.R. 521, at p. 528.

giving rise to the judgment of Strong, J.). There are, however, no cases referring to the validity of provincial legislation which takes away jurisdiction from a Superior Court and gives it exclusively to a County or District Court, or conversely takes away jurisdiction from a County Court and gives it exclusively to a Superior Court. Neither have there been cases determining the validity of provincial legislation giving the County Courts and Superior Courts equal and concurrent jurisdiction on all matters, i.e., a *de facto* merger of jurisdiction.

It is therefore useful to explore some of the possible limitations on the provinces in manipulating jurisdiction as above.

One limitation is that arising where jurisdictional reorganization touches upon the appointing function referred to in section 96. This is what happened when the Legislature of Ontario amended *The Judicature Act* in 1924[89] to reorganize the Supreme Court of Ontario. In so doing, the legislation purported to authorize the Lieutenant-Governor in Council to assign some of the Supreme Court judges to a new Appellate Division of the Supreme Court and to designate one of these judges as President of the Appellate Division, to be called the Chief Justice of Ontario, and also to designate one of the judges of the High Court Division as Chief Justice of the High Court Division. The new legislation was submitted by way of reference to the Appellate Division of the Supreme Court of Ontario where it was declared *ultra vires* by four out of five judges of that Division. The majority opinion was sustained on appeal by the Judicial Committee of the Privy Council[90] on the basis that the legislation was inconsistent with section 96 in that its effect was to transfer the right to appoint the two Chief Justices and the judges of appeal from the Governor General of Canada to the Ontario Lieutenant Governor in Council.

It was the practice at that time for the federal patents of Supreme Court judges to stipulate to which Division of the Supreme Court the judge was appointed (there were three types of patents — appointments to the High Court Division, to the First Divisional Court of the Appellate Division, and to the Second Divisional Court of the Appellate Division) and also to provide that the judge was *ex officio* a judge of any other Division of which he was not a member, although he could not be compelled to sit in any other Division.

That these types of stipulations in the judges' patents by the Governor General in Council constitute a substantial limitation on the legislative power of the Province to reorganize jurisdictionally the Supreme Court at that time is evident from the following passage by Chief Justice Mulock in the 1924 *Reference*:

> The Judges thus appointed to the First Appellate Division constitute a Court as do those appointed to the Second Appellate Division, and as does each Judge appointed to the High Court Division. Each of such Courts exercises the jurisdiction of the Supreme Court, and is,

[89] S.O. 1924, c. 30.
[90] *A-G Ontario* v. *A-G Canada*, [1925] A.C. 750.

> in my opinion, a "superior" court within the meaning of sec. 96 of the British North America Act. There may be more than one "superior" court in the Province. To hold that the Governor-General is not entitled to appoint to a particular Division would, I think, be equivalent to declaring invalid the patent of every Judge of the Supreme Court.
>
> In passing sec. 96 of the British North America Act, Parliament doubtless contemplated every appointment to the Bench by the Governor-General being made with strict regard to the requirements of the particular office to be filled and the qualifications of the one to be selected therefor. Different judicial positions call for different qualifications of those to be selected. If the Governor-General is not entitled to appoint directly to a particular vacancy, but merely to the Supreme Court, it might happen that his appointees to the Supreme Court would not be suitable in respect of the then vacancies, but nevertheless the choice of the Lieutenant-Governor in Council would be limited to such unsuitable appointees. I cannot think that Parliament contemplated prescribing for appointment to the Bench a method fraught with such grave danger to the administration of justice. In my opinion, the power of appointment vested in the Governor-General includes appointment to the particular judicial office, the duties of which such appointee is to discharge; and the Legislature is not entitled to limit or qualify such power of appointment or in any way to declare that he may only exercise it *sub modo*, as, for example, by enacting that he may only appoint to the Supreme Court of Ontario.[91]

The present organization of the Supreme Court of Ontario is likewise subject to the designated appointments contained in the judges' federal patents. In addition to the federal appointment of the Chief Justice of Ontario and the Chief Justice of the High Court, federal patents today will stipulate whether a judge is appointed to the Court of Appeal or to the High Court or as a local judge of the High Court.

It is also instructive to look at the dissenting opinion of Hodgins, J.A. in the 1924 *Reference* to see his understanding of the scope of the federal appointing function as a limitation on provincial legislative power in section 92(14):

> An office, as I understand it, is something generally created by the Crown through executive action (by letters patent in the cases of Judges), and involving an individual status and position, charged with certain duties, and possessing certain powers and rights to be performed and exercised by the occupant. When an individual is appointed thereto by the proper authority, he possesses the office and can exercise it, and is entitled to use its powers and enjoy its emoluments, and is charged with the performance of its duties.
>
> The present legislation proceeds upon the assumption that when the Governor-General appoints a Judge, he appoints him to an office,

[91] *Re Judicature Act, 1924* (1924), 56 O.L.R. 1, at pp. 3–4.

and that by such act the power of appointment is fully exercised. The office recognized under this Act is that of a Judge of the Supreme Court of Ontario, with the powers and duties inherent therein. None of the other offices which have heretofore been created by the Provincial Legislature as part of the constitution of its Courts, and filled by the Governor-General, are established, and, therefore, no appointment can be made to them. . . .

In all the Judicature and Administration of Justice Acts, Judges, *virtute officii*, have been designated by legislative action to be, on occasion, Judges of the Court of Appeal, while election by the Judges from among themselves, pursuant to a statute, has been made sufficient to vest those elected with powers and rights not inherent in the "office" to which they were respectively appointed by federal authority. The "office" itself does not shift by this process: it remains, and is the qualification required for the exercise of new powers conferred solely by virtue of legislative action.[92]

This narrow view of section 96, while perhaps supportable upon a literal reading of this section, was implicitly rejected by Viscount Cave on the appeal in the Judicial Committee of the Privy Council, and is inconsistent with present authority.[93]

Indeed, in the recent Ontario case of *Regina* v. *Moore, Ex parte Brooks*,[94] Mr. Justice Stewart spoke of the legislation contained in the federal *Judges Act* as "clearly ancillary to the power to appoint", in upholding the constitutional validity of the section of the *Judges Act* which prohibits a judge from acting as a commissioner, arbitrator, adjudicator, referee, conciliator, or mediator except when expressly authorized by provincial statute or appointed by the Lieutenant-Governor in Council. As additional support for the constitutional validity of the various controlling provisions in the federal *Judges Act*, Mr. Justice Stewart made a curious reference to the general clause ("Peace, Order and Good Government") of section 91 of the *British North America Act*, and cited a number of the leading authorities on this clause such as the *Johannesson* case[95] and *Munro* v. *National Capital Commission*.[96] This would appear to be a novel application of the general clause with no direct support from higher judicial authority. In our opinion the primary federal interest in the appointment of judges and powers ancillary thereto flows from section 96, unless of course some substantive area of federal jurisdiction such as divorce or criminal law and procedure is involved.

There is one additional case to be considered in attempting to draw the line between what is a valid "organization" of the courts under section 92(14) and what is an invalid interference with the federal appointing func-

[92] *Ibid.* at pp. 20–21, 24–25.
[93] *Toronto Corporation* v. *York Corporation*, [1938] A.C. 415; *A.G. Ontario and Display Services Company Limited* v. *Victoria Medical Building Limited*, [1960] S.C.R. 32.
[94] [1969] 2 O.R. 677.
[95] *Johannesson* v. *Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292.
[96] [1966] S.C.R. 663.

tion under section 96. The case of *Scott* v. *Attorney General for Canada*[97] reached the Judicial Committee of the Privy Council in 1923, two years prior to the appeal from the Ontario *Judicature Act Reference* referred to above. In question was the right of the Honourable Horace Harvey, who had been appointed Chief Justice of the Supreme Court of Alberta in 1910, to hold the office and exercise the functions of Chief Justice and President of the Appellate Division of the Supreme Court of Alberta in the face of the provincial enactment of the 1919 *Judicature Act* and new patents issued by the Governor General in 1921. In 1910, the Supreme Court sat *en banc*, but in 1913 the Court sitting *en banc* became known as the Appellate Division of the Supreme Court by virtue of provincial legislation. The 1919 *Judicature Act* divided the business of the Supreme Court between two branches, the Appellate Division and the Trial Division, the former to be presided over by the Chief Justice of the Court styled as "the Chief Justice of Alberta" and the latter to be presided over by the Chief Justice of the Trial Division. Unlike the 1924 Ontario legislation, the Alberta *Judicature Act* provided that the Governor General in Council should assign the justices of appeal. Every judge of the Supreme Court, whether of the Appellate Division or the Trial Division, was made *ex officio* a judge of the division of which he was not a member.

Chief Justice Harvey was in 1921 given new letters patent by the Governor General, naming him Chief Justice of the Trial Division. At the same time, the Governor General issued letters patent to Mr. Justice Scott naming him Chief Justice and President of the Appellate Division, to be styled "Chief Justice of Alberta". Under the new patents, the Chief Justice of Alberta was to have rank and precedence over the Chief Justice of the Trial Division, although salaries were to be equal.

The new legislation was referred to the Supreme Court of Canada where it was held that Chief Justice Harvey still held the office of Chief Justice of the Supreme Court with the style and title of Chief Justice of Alberta, and that the 1921 letters patent issued by the Governor General to both Mr. Justice Scott and Chief Justice Harvey were wholly ineffective.[98] On appeal, however, Lord Atkinson for the Judicial Committee of the Privy Council reversed this opinion, holding that the new federal patents were effective for both Scott and Harvey, and that the Alberta *Judicature Act* of 1919 was a valid exercise of provincial power under section 92(14). The *ratio* of Lord Atkinson's judgment upon the latter point is given in the following passages:

Much reliance was placed in the Supreme Court of Canada and on argument before their Lordships on the use of the word "continue" in secs. 3 and 5 of the Act of 1919 and also upon the absence of any provision for the transfer of pending litigation to the new Court created by this statute of 1919 as amended. As used in sec. 5, the word "continue" is rather meaningless, since the Appellate and Trial Divisions do not seem to have had any previous existence; but even if it be assumed that the use of the word "continue" in sec. 3 preserves

[97] (1923), 3 W.W.R. 929.
[98] (1922), 64 S.C.R. 135.

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the existence of the old Supreme Court, their Lordships fail to see how that fact could disentitle the Legislature of the province of Alberta, endowed, as it is, with the power and charged with the duty of constituting, maintaining and organizing the provincial Courts, both civil and criminal, including procedure in civil matters, from enacting that this Court shall consist of two branches or divisions and assigning to each branch certain portions of the business. The more so because each one of the Judges is a Judge of the Supreme Court, and each Judge is an *ex officio* member of the Division to which he is not attached. In addition, the term "Judge" is in the definition clause (sec. 2 of the Act of 1919) defined to be a Judge of the Supreme Court and to include a Chief Justice, so that apparently the Chief Justice of one Division may be an *ex officio* Judge of the other Division. The words in sec. 6, "four other Judges of the Court to be assigned to it by His Excellency," are not happily chosen; but the provision of sec. 10 clearly shows this assignment of His Excellency does not involve in any way a withdrawal of a Judge assigned from his membership of both branches of the Supreme Court.

In their Lordships' view the scheme embodied in this sixth section of the Act of 1919, as amended, contemplates and for its working requires the appointment of two Chief Justices, one for each of the two indicated branches or divisions. They do not think that the fact that before this Act of 1919 was passed the Chief Justice was Chief Justice of the Supreme Court prevented the Legislature of Alberta from dividing the business of that Court into two branches, or necessarily entitled him to be or to be appointed Chief Justice of the Appellate Division, nor are they of opinion that his non-appointment to that office, or the appointment to it of the appellant, constituted an infringement or evasion of any legal right which he possessed or to which he was entitled.[99]

There are two major differences between the Alberta scheme of 1919, the validity of which was upheld, and the Ontario scheme of 1924, which was declared *ultra vires*. First, the Alberta legislation in dividing the business of the Supreme Court into Appellate and Trial Divisions stipulated only the number of judges in each, and acknowledged that the appointment of specific judges to be appointed to each new division was the function of the Governor General in Council. The Ontario legislation provided that the specific judges going to the new Appellate Division were to be assigned by the Lieutenant Governor in Council. The second difference was that the Alberta legislation made no attempt to provide for the designation by the Lieutenant Governor in Council of the judges who should be Chief Justice of the Court and Chief Justice of the Trial Division respectively, while the Ontario legislation did. The provincial authorities in Alberta in enacting their new legislation had obviously been successful in securing the agreement of the federal government to their new scheme, as evidenced by the 1921 federal letters patent naming Chief Justice Scott as Chief Justice of the Court and Chief Justice Harvey as Chief Justice of the Trial Division. Ontario sought to avoid the necessity of obtaining federal agreement. In our

[99](1923), 3 W.W.R. 929, at pp. 936–937.

opinion, the distinctions between these two cases provide the clearest indication of the fine line to be drawn between valid provincial power to "organize" the courts under section 92(14) and invalid provincial interference with the appointing function under section 96.

In summary, the first major limitation on a province in reorganizing the jurisdiction of its superior and district courts is that it cannot *assign* a judge to a particular division of one of those courts or to another of those courts, where such assignment would be inconsistent with the terms of that judge's federal patent. Neither can the province designate a certain judge as Chief Justice or the holder of any other office implying certain rank or precedence. The provinces can create new divisions and new offices, but the judges filling them must be appointed by the Governor General in Council. The Province of Ontario, for example, could not by legislation or executive order designate which judges of the High Court were to sit as members of the new Divisional Court. Yet this new court, as a division of the High Court, was created by valid provincial legislation.[100] Apart, however, from designating the Chief Justice of the High Court as president of the Court (the person holding that office is appointed by the Governor General), the provincial legislation merely provides that the Divisional Court is to consist of "such other judges of the Divisional Court as may be designated by [the Chief Justice of the High Court] from time to time", and then goes on to name every judge of the High Court as a judge of the Divisional Court.

Perhaps the most concise judicial statement concerning the distinction between valid jurisdictional reorganization and an invalid encroachment on the federal appointing function was provided by Ritchie, J. in the *McKenzie* case in distinguishing the 1925 Ontario *Reference* appeal decision of Viscount Cave in the Privy Council.[101] This statement was adopted by Arnup, J.A. in the recent Ontario divorce jurisdiction *Reference*:[102]

> In my view there is a fundamental difference between the question dealt with in that case and the one which is raised by the present appeal; it is the difference between the power to designate or appoint individual judges of the Superior and County Courts which is vested in the federal authority and the power to define the jurisdiction of the courts over which those judges are to preside, which in civil matters is exclusively within the provincial field. This is not, in my opinion, a case in which the province has sought to regulate the exercise of the dominion authority in relation to judicial appointments by prescribing the class of persons from whom the appointments to judicial office shall be selected, it is rather a case in which the legislature has sought to regulate the administration of justice within a province by prescribing the jurisdiction to be exercised by provincial courts presided over by federally appointed judges.[103]

The second major limitation on provincial power apart from the provisions of section 96 in reorganizing the jurisdiction of the courts along any

[100]*The Judicature Amendment Act, 1970*, S.O. 1970, c. 97, s. 2, adding ss. 5a and 5b.
[101][1925] A.C. 750.
[102][1971] 2 O.R. 521, at p. 531.
[103][1965] S.C.R. 490, at p. 500.

of the alternative lines discussed earlier, relates to the exclusive jurisdiction of the Parliament of Canada over "the Criminal Law . . . including the procedure in criminal matters" as provided in section 91(27) of the *British North America Act*. This is a substantive limitation on the provincial legislatures to make laws for the "Constitution, Maintenance and Organization of Provincial Courts, both of civil and *of criminal jurisdiction* . . ." as provided in section 92(14). Quite clearly, this limitation would apply if, for example, a province were to attempt to shift all criminal cases into one of its courts in a way which was inconsistent with the federal designation of "courts of criminal jurisdiction" defined in the *Criminal Code*.

The nature and extent of this limitation came before the courts in British Columbia in 1965. In the previous year the British Columbia Legislature had amended the *County Courts Act* to provide, *inter alia*, that a County Court could sit as a Court of General Sessions of the Peace (and thus for the first time take jury trials of indictable offences other than those in the present section 427(a) of the *Criminal Code*).[104] A second part of the legislation provided in effect that each County Court was to have the same criminal jurisdiction as the Supreme Court of British Columbia. The first provision, in essence, merely put the County Court judges in British Columbia in the same jurisdictional position as the County Court judges in Ontario respecting criminal jury trials in the General Sessions of the Peace. The second provision, however, was unique in that it purported to give to the County Court judges criminal jurisdiction in all matters with a jury, including the offences in present section 427(a) of the *Criminal Code*. The provisions granting this new jurisdiction to the County Court read as follows:

Criminal Trials with a Jury

180A(1) Each Court has and shall exercise all the powers, rights, and privileges that pertain to or are exercised by the Supreme Court of British Columbia as a Court of Criminal jurisdiction, and, without restricting the generality of the foregoing, each Court has and shall exercise all the powers, rights, and privileges which the Parliament of Canada gives to the Supreme Court of British Columbia as a Court of criminal jurisdiction in so far as it is within the power of the Legislature to confer those powers, rights, and privileges.

(2) All laws, statutory and otherwise, respecting the administration of justice in criminal cases, and without restricting the generality of the foregoing, all laws, statutory or otherwise, respecting jurors, witnesses, or proceedings of any kind applicable to the Supreme Court of British Columbia when exercising criminal jurisdiction apply to each Court.[105]

The question of the constitutional validity of these amendments of the *County Courts Act* came before Mr. Justice Branca in the Supreme Court of British Columbia in *Ex Parte Smith*.[106] The accused Smith had been con-

[104] *County Courts Amendment Act*, S.B.C. 1964, c. 14, ss. 2A and 9.
[105] *Ibid.* s. 9 (of the amending Act), adding section 180A.
[106] (1966), 1 C.C.C. 1.

victed by a County Court judge, sitting with a jury, of an indictable offence, not among those listed in the present section 427(a) of the *Criminal Code*. He had been sentenced to gaol and brought an application for *habeas corpus*. Because the offence involved was not one of those listed in section 427(a) and therefore was not required to be tried by a "superior court of criminal jurisdiction" (in British Columbia, defined by the Code as the Supreme Court of British Columbia, or the Court of Appeal), it was sufficient for Mr. Justice Branca to direct his attention only to the provision designating a County Court as "Court of General Sessions of the Peace" in the new amendments. He held this provision to be constitutionally valid since a Court of General Sessions of the Peace presided over by a County Court judge came within the definition of a "court of criminal jurisdiction" in the *Criminal Code*. His Lordship, however, by way of *obiter*, made the following observation concerning the section purporting to give the County Courts a criminal jurisdiction concurrent with that of the Supreme Court:

> Considerable argument was directed as to whether s. 180A in the 1964 amendment was within the constitutional competence of the Provincial Legislature. Indeed, I had asked for written submissions on this aspect of the argument. I am of the opinion for many reasons that this section is *ultra vires*, but in view of my conclusion as to the effect of s. 2A of the 1964 amendment [respecting the County Court as a Court of General Sessions of the Peace], it is not necessary for me to further discuss this point.[107]

The same amendments to the *County Courts Act* came before the British Columbia Court of Appeal in *Regina* v. *Carker*[108] later the same year. Again, the accused involved was convicted by a County Court judge and jury of an offence not listed within present section 427(a) of the Code, and therefore was within the proper jurisdiction of the Court of General Sessions of the Peace. Accordingly, the five members of the Court were required to deal only with the simpler issue, and like Branca, J., they held it to be constitutionally valid. Four of the five members of the Court felt it unnecessary to decide as to the validity of section 180A. But of these four, McLean, J.A., with whom Davey and Sheppard, JJ.A. agreed, stated that he agreed with the observations of Branca, J. quoted above and had grave doubts as to the validity of section 180A. The fifth member, Norris, J.A., was alone in dealing directly with the larger issue:

> There is no restriction on the powers which s-s. (1) of s. 180A, particularly in its first three lines, purports to vest in the County Courts. They include all the powers, rights and privileges conferred by the Parliament of Canada on the Supreme Court as a superior Court of criminal jurisdiction. It follows that the Provincial Legislature is purporting to confer on the County Courts jurisdiction to try the offences set out in s. 413(2) [of the *Criminal Code*] which has been expressly taken away from Courts of criminal jurisdiction other than superior Courts. These powers are powers which only the Parliament of Canada can confer. The farthest that the Provincial Legislature may

[107] *Ibid.* at p. 8.
[108] (1965). 52 D.L.R. (2d) 763.

go is to put a Court in the position to receive such powers as the Dominion Parliament may confer. The words in s-s. (1) "in so far as it is within the power of the Legislature to confer those powers, rights, and privileges" do not assist the provincial contention, first, because they are applicable only to the words immediately preceding them in the middle part of the subsection, and secondly, because the subsection itself provides that the last part of the subsection is to be read "without restricting the generality of the foregoing", that is to say, without limiting the broad grant to the County Courts of the powers of a superior Court of criminal jurisdiction.

The powers granted to the respective authorities, Dominion and Provincial, under head 27 of s. 91 and head 14 of s. 92 of the *B.N.A. Act*, are mutually exclusive and the Parliament of Canada, having conferred power under s. 91(27), the Provincial Legislature may not confer any power which would impinge on the power within the sole jurisdiction of the Dominion authority. The exception to head 27 of s. 91 is only as to the "constitution" of the Criminal Courts. Subsection (1) of s. 180A is therefore wholly ineffective.

As to s-s. (2) of s. 180A, this subsection is, because of its sweeping language, "All laws, statutory and otherwise, respecting the administration of justice in criminal cases", which may be taken to include laws of the Parliament of Canada, also *ultra vires*. . . .

> Because of the all-embracing opening words of s-s. (2) of s. 180A and the use of the words "without restricting the generality of the foregoing" the provision as to laws respecting jurors, witnesses and proceedings of any kind applicable to the Supreme Court of British Columbia in its criminal jurisdiction is similarly unconstitutional. These are matters of criminal procedure reserved to the Dominion authority. As to the jurors and witnesses, ss. 534 [am. 1959, c. 41, s. 23] to 553 of the *Cr. Code* of Canada and the *Evidence Act*, R.S.C. 1952, c. 307, of Canada have occupied the field. The "proceedings" referred to are, in view of the broad words of s-s. (2), proceedings in matters under head 27 of s. 91 and are within the exclusive jurisdiction of the Dominion Parliament.[109]

It seems clear from these two British Columbia cases that the courts are unlikely to countenance provincial attempts to give County Court judges criminal jurisdiction over the indictable offences listed in present section 427(a) of the *Criminal Code*, unless there is a corresponding amendment to the Code by the Parliament of Canada.

What is not so clear is whether a provincial legislature could unilaterally extend unlimited criminal jurisdiction to the judges of the County Courts in their capacity as local judges of the High Court, in the same manner as divorce jurisdiction was recently extended in Ontario. The *Criminal Code* defines a "superior court of criminal jurisdiction" in the

[109] *Ibid.* at pp. 765–767.

Province of Ontario as "the Supreme Court". The federal *Divorce Act*[110] defines the court in which a petition for divorce may be brought in Ontario as "the trial division or branch of the Supreme Court of the Province". There is little substantive difference between these two definitions, and since the extension of divorce jurisdiction to local judges of the High Court in 1970 was held to be constitutionally valid by the Ontario Court of Appeal,[111] notwithstanding that the subject "divorce" is an exclusive head of federal jurisdiction under section 91(26), then it may be arguable that the provincial legislature could likewise extend unlimited criminal jurisdiction to local judges of the High Court who would then be exercising jurisdiction as the Supreme Court of Ontario in compliance with the *Criminal Code* definition of "a superior court of criminal jurisdiction". The only possible distinction between divorce jurisdiction and unlimited criminal jurisdiction in respect of local judges of the High Court would be that the federal power over divorce is described in section 91(26) as merely "divorce", while Parliament's jurisdiction over criminal law is defined in section 91(27) as "the Criminal Law . . . including the procedure in criminal matters". Perhaps the federal power over criminal procedure forms a greater limitation on unilateral provincial legislation respecting the criminal jurisdiction of the courts than does the mere term "divorce" on unilateral provincial legislation respecting divorce jurisdiction. Any other impediment causing the criminal jurisdiction of local judges of the High Court to be treated differently from divorce jurisdiction would have to be contained in the patents issued by the Governor General to the local judges of the High Court, and such limitations in the patent do not appear to exist.

It is appropriate here to explore the constitutional implications of possible provincial attempts to place criminal offences within the *exclusive* jurisdiction of the High Court or the County Courts. If the Province wished to give to the High Court exclusive criminal jurisdiction over indictable offences, other than those where the accused elects trial by a Provincial judge, and thereby to take all criminal jurisdiction from the County Court judges presiding over a Court of General Sessions of the Peace or a County Court Judges' Criminal Court, it might attempt to do so merely by repealing *The General Sessions Act*[112] and *The County Court Judges' Criminal Courts Act*,[113] thus leaving the Supreme Court in Ontario as the only court named in the *Criminal Code* with jurisdiction to try indictable offences other than those where the accused elects to be tried by a Provincial judge. This would, however, be tantamount to denying an accused the right to elect to be tried by a judge without a jury on indictable offences since the term "judge" for the Province of Ontario is defined in the Code as "a judge or a junior judge of a County or District Court". Such frustration of the speedy trial procedure set forth in the Code might very well be held to be unconstitutional as a provincial interference with the exclusive federal jurisdiction over criminal procedure. It may, however, be possible for a province to go part of the way and repeal merely *The General Sessions Act*, thus resulting in the transfer to the Supreme Court of all criminal jurisdiction over

[110] R.S.C. 1970, c. D-8, s. 2.

[111] *Reference re Constitutional Validity of section 11 of the Judicature Amendment Act, 1970 (No. 4)*, [1971] 2 O.R. 521.

[112] R.S.O. 1970, c. 191.

[113] R.S.O. 1970, c. 93.

indictable offences to be tried by a jury. Indeed, this is the precise situation which exists in the Province of Quebec.

On the other hand, it is beyond dispute that there is no power in a provincial legislature to take away from the Supreme Court its criminal jurisdiction over offences in section 427(a) of the *Criminal Code*, unless of course there is a corresponding amendment to the *Criminal Code* which in effect amounts to federal permission to do so. Moreover, any unilateral provincial attempt to restrict the trial of indictable offences listed in section 427(a) of the Code to the County Court judges sitting as local judges of the High Court, and thus in effect to take away the present criminal jurisdiction of the High Court judges, would probably be construed as an attempt to do indirectly that which was prohibited directly.

If the Province were to merge the County Courts and the Supreme Court but were at the same time to retain the present distinction between judges of the Supreme Court and judges of the County and District Courts (as is the case with the new Crown Court in England), then an interesting constitutional situation arises. Most of the Canadian cases have construed the jurisdiction of the two levels of *courts* as parallel to the two levels of *judges*. If the Province of Ontario were to merge the courts for both criminal and civil matters yet were to retain the distinction between levels of judges, with both levels operating within the newly-merged court, it is our opinion that this would be judicially construed as tantamount to appointing the County Court judges as Supreme Court judges and thus an interference with the federal appointing function set out in section 96. While this result might seem to be stretching the words of section 96 taken literally, it would be consistent with the constitutional jurisprudence emerging from the case law discussed earlier. In short, without complementary federal action, Ontario could not merge the High Court and the County Courts in the same fashion as the two levels of courts in England have been merged on the criminal side.

3. *Summary*

The following propositions summarize the constitutional implications of merger or jurisdictional reorganization of the High Court and the County Courts in Ontario:

(a) If the County Courts were to be completely merged with the High Court of Justice, and if the present judges of the County Courts were to be given the status, salary and tenure equal to that of the judges of the High Court, then the Ontario Legislature would require the co-operation of the Parliament of Canada in the form of an amendment to the *Judges Act*, and of the Governor General in Council in making the necessary appointments.

(b) The Ontario Legislature can unilaterally extend the civil jurisdiction of the County Courts to the point where it is concurrent with that of the High Court or *vice versa*, except that its legislation cannot interfere with the federal appointing function under

section 96 of the *British North America Act* or conflict with or derogate from an Act of Parliament in relation to a head of exclusive federal jurisdiction in section 91 (e.g., divorce) designating the court or officer who is to have jurisdiction in relation to that matter.

(c) The Ontario Legislature can unilaterally extend the jurisdiction of local judges of the High Court to include any matter within the jurisdiction of the High Court, in the absence of any federal enactment to the contrary.

(d) Judicial authority has construed the federal appointing function under section 96 of the *British North America Act* as giving rise to a substantial limitation on provincial legislative power to reorganize the jurisdiction of the Supreme Court and County Courts, particularly where it is sought to reorganize or create new divisions of a court other than those to which the judges were appointed by their federal patents. This limitation can, however, be overcome by the issuance of new federal patents by the Governor General.

(e) Judicial authority has also construed the federal appointing function under section 96 as providing the basis of ancillary federal legislative powers such as the controlling provisions in the federal *Judges Act*.

(f) The Ontario Legislature cannot unilaterally extend the criminal jurisdiction of the judges of the County Courts to the point where it is concurrent with that of the judges of the High Court, except to the extent that it would be permitted by the Parliament of Canada under its exclusive jurisdiction over criminal law and procedure. It can, however, be argued on the authority of the recent Ontario divorce jurisdiction *Reference* that the Ontario Legislature can unilaterally extend the criminal jurisdiction of the local judges of the High Court to include the indictable offences listed in section 427(a) of the *Criminal Code*.

(g) The Ontario Legislature can unilaterally give the High Court judges exclusive jurisdiction over the trial of all indictable offences with a jury. There is considerable doubt whether the Ontario Legislature can unilaterally give the High Court judges exclusive jurisdiction over all indictable offences both with *or without* a jury since this might be considered to conflict with the federal power over criminal procedures respecting "speedy trials".

(h) It has never been determined if a provincial legislature can unilaterally merge the County Courts and the High Court as institutions but maintain the distinction between the two levels of judges within the merged court (as in England on the criminal side). This type of institutional merger may be more difficult in respect of criminal rather than civil matters because of the

limitations of the federal power over criminal law and procedure. In any event, such a merger by the Province without complementary federal action would probably be construed as tantamount to the appointment of County Court judges as High Court judges, and hence *ultra vires*.

F. Assessment and Recommendation

We have given careful consideration to the arguments put forward by the County and District Court Judges Association in support of their merger proposal. There is something to be said for the fact that County Court judges are exercising a civil and criminal jurisdiction which is close to being concurrent with that of High Court judges except for the prerogative writs and serious offences under section 427(a) of the *Criminal Code*. If jurisdiction alone were the determining factor and caseloads were the same (which they are not),[114] then one could make the case for equal status and salary for equal work.

Similarly, we concede that there are certain administrative benefits to the merger proposal. Calendaring conflicts between the High Court and the County Courts would be eliminated and more flexibility might result in the scheduling of cases and the assignment of judges within a district. In addition the court system generally would be simplified and thus more readily understood by the lay public, which is desirable.

But there is a price to be paid for merger which cannot be measured in terms of efficiency, flexibility and simplicity. This goes to the question of the quality of justice to be dispensed in our higher courts. We consider it essential to the court system in Ontario that there be a relatively small, highly competent group of trial judges to administer uniform and high quality justice over the most important criminal and civil cases in the province. In our view this is best done through a single court consisting of judges working in close association and consultation and operating on a province-wide circuit system. Such a court must exhibit the highest standards of intellectual leadership, hard work and judicial integrity of the sort that will radiate throughout every level of the court system if the people of this province are to have the calibre of justice to which they are entitled.

The role of High Court judges in Ontario is and should be different from County Court judges. This fact has been recognized since Confederation by the federal government, which appoints and pays them. The distinction is reflected in our written constitution. The High Court judges with a jury have the sole right to decide the question of life or death in capital murder cases. They are required by federal law to reside in the provincial capital and can be called on to sit in the Court of Appeal on a temporary basis. They can be assigned to try cases in every one of the county and district towns in the province, and gain wide experience in so doing. They

[114] In 1971, the 32 judges of the High Court (27 up to September) spent a total of 8,172 half days in court. During the same period the 99 county court judges (94 up to September) spent a total of 11,241 half days in court.

must remain detached from local conditions and personalities and maintain a high consistency of judicial standards and impartiality. They are closely associated with their fellow judges at Osgoode Hall and must stay abreast of developments in the law so as to be in a position to adjudicate fairly and wisely on the most important cases in the jurisdiction.

The County Court judges have a different but equally important role. They are the symbolic embodiment of "resident justice" in each county of the Province. While their jurisdiction today is not dissimilar to that of High Court judges, they perform their judicial duties locally and their case load is usually not as great. In many respects their judicial duties are more varied. Each acts as a judge of the County Court to which he is appointed, as chairman of the General Sessions of the Peace, as judge of the County Court Judges' Criminal Court, as judge of the Surrogate Court, as judge of the Small Claims Court, as appellate judge on summary conviction appeals, and as *persona designata* under a myriad of federal and provincial statutes. They also perform with impartiality many ceremonial or administrative functions in the community, thus engendering local respect for the administration of justice. They will probably work closely with members of the legal profession in their counties and will be more familiar with local conditions as they affect the cases coming before them. They fulfil a valuable and necessary function as the only federally-appointed judges accessible to the legal profession and the public on a regular basis for the many functions requiring a member of the judiciary with integrity, prestige and ability.

The proposal of the County and District Court Judges Association would merge the two levels of court thus providing for a blend of the roles outlined above. The province-wide circuit system of the High Court would be replaced by eight regionalized circuits and the County and District Court judges would become, in effect, High Court judges.

How would this affect the quality of justice in Ontario? Most important, it is our view that it would dilute the quality of the High Court. The federal executive appointed the judges referred to as judges of the County Court to perform the varied local functions described above. It can be assumed that they were thought to possess qualifications suitable for the County Court, not the High Court. The federal executive appointed the present 32 High Court judges to the Supreme Court and it can likewise be assumed that they were thought to possess qualifications suitable for that Court.

It cannot be assumed that the County and District Court judges all possess qualifications suitable for the High Court. The federal Parliament continues to recognize the differences in High Court and County Court judges through the titles, salaries and pensions which each group receives. Indeed, when the Province of British Columbia enacted legislation providing for merger of the very sort proposed for Ontario, the federal government failed to provide the necessary complementary action to complete the scheme notwithstanding the specific request of the Attorney General of that Province. There is no reason to believe that a similar request by Ontario would not receive identical treatment.

The matter goes deeper than this. A combined bench of 131 judges is more unwieldy than a bench of 32. Granted, the present proposal for merger envisages increased administrative efficiencies through the appointment of a presiding judge in each district circuit and a district administrator, responsible to the Chief Justice and the Senior Court Administrator respectively. But these are reforms which are not dependent on merging the two levels of Courts. Indeed, we make recommendations concerning regional administrators and increased administrative powers for the senior judge in each County Court circuit. It is our view that the quality of judicial standards is likely to remain higher in a smaller, closely disciplined bench of the size of the present High Court than if it were extended as proposed.

We also attach high priority to the retention of a province-wide circuit system in our higher courts as we explain in chapter 4. The merger proposal would seem to be inconsistent with this in that it would create eight regionalized circuits, each operating relatively independently of the others. Under the present circuit system in the High Court, the judges are kept in constant rotation and preside over sittings in virtually every county or judicial district during the course of their career on the bench. Thus, a more uniform jurisprudence is permitted to develop and the judges gain a great deal more experience than if they were located regionally. In addition it is easier for these judges to remain detached from local conditions. The collegiality which develops at Osgoode Hall where the judges have their offices and permanent headquarters we regard as beneficial to the administration of justice, permitting a free exchange of views and expertise among the judges on the difficult and complex cases coming before them from all parts of Ontario.

There is another important consideration: the possible diminution in the quality of justice if the present role of County Court judge were to be radically changed. The merger proposal envisages that each of the 131 judges on the combined court would be assigned to one of the eight judicial districts, but it is by no means clear that he would be a resident judge in the sense that each County Court judge is today. There may well be a sacrificing of quality in the sense of loss of a permanently resident judge who is an integral part of the local community in all of its aspects, and readily accessible to the bar and the public on short notice. The County Court judges perform many functions other than merely hearing criminal and civil cases, and many of the county towns might feel a significant loss of local identity should the County Court judge's role be changed as contemplated in the merger proposal. Many of these concerns were expressed in the brief of the Jurisdiction of Courts Committee of the Canadian Bar Association (Ontario Branch), as follows:

> A Judge's work centres on a County Town and his residence in the district or county stems from the recognition of the same principle — a Judge's services are needed (more often than for actual trials) for the multitude of duties and functions that require expeditious attention . . .
>
> The presence of a Judge in a community provides a County with the presence of a representative of the judicial system. It usually ensures that justice will be available not only to litigants but to many groups or classes to whom the present system provides easy and expeditious service.

Similarly, the Advocates' Society, in their brief, did not favour merger because "there is a decided advantage in having many local matters dealt with by a county court judge who is resident in the county and knowledgeable as to local conditions". Indeed, we think it fair to say that there is little support among members of the bar in Ontario for the proposal that the High Court and the County Courts should merge.

Finally, we come to the delicate question of judicial competence. We believe that no useful purpose is served by attempting to determine whether present County Court judges are less competent than present High Court judges. The most precise conclusion one could expect to draw from such an inquiry would be that there are some County Court judges who are equally competent as some High Court judges, and there are some who are not. Greater precision would be impossible.

It was suggested to us that one measure of relative competence might be the success rate of appeals from both levels of courts in the Court of Appeal. While we had reservations as to whether or not this was a legitimate measure of judicial competence, our research revealed that in the period January, 1970 to May, 1971, there was virtually no difference in the success rate on appeals from either level of court in both criminal and civil cases.

But surely the competence of present office-holders is not directly relevant to our inquiry. One should be able to assume that the Government of Canada will appoint only the most competent persons to whatever type of higher courts that are constituted by the Province, including appointment through promotion from one level of court to the next as judicial competence is clearly demonstrated. The important question is the type of institutional arrangement which is best suited to deliver justice of high quality. In our view, the traditional two-tiered system based on County and District Courts remaining separate and distinct from the High Court is the system best suited for Ontario. To merge the two levels would be to sacrifice many of the distinct and desirable features of each level for the sake of increased efficiency. Like the "tail wagging the dog" metaphor, it would be to place considerations of judicial quality in a position secondary to that of administrative convenience and efficiency. This we would oppose.

There are, of course, many jurisdictional and administrative reforms needed in both the High Court and the County and District Courts. But we firmly believe that each tier has a separate role to play and that with the implementation of proper administrative reforms each can provide institutional structures responsive to modern needs. Accordingly, we recommend that the proposal for merger not be adopted at this time.

G. Summary of Recommendations

We do not recommend that there be a merger between the High Court of Justice of the Supreme Court of Ontario and the County and District Courts.

H. Memorandum of Dissent and Explanation by the Honourable Richard A. Bell, P.C., Q.C.

To my sincere regret, I find myself in basic disagreement with my colleagues in their rejection of the proposal to merge the present High Court of Justice and the County and District Courts into one Superior Court. I believe that the consolidation of these Courts and the institution of a new regional circuit system are pre-requisites to effective, efficient and speedy administration of justice and as well, essential foundations of any genuine reform.

The subjects and problems which have been studied in this reference are so fundamental and extensive that inevitably differences of opinion have arisen among members of the Commission. The remarkable fact is not the existence of such differences, but that they have been so few. Generally, it has been possible to reconcile differences where we have not been originally in complete agreement or to set out in the Report itself the alternatives which commend themselves to the several members of the Commission. This issue is too grave to be so treated. Consequently, with deep respect for the experience, learning and wisdom of my colleagues, I am presenting this minority Report and outlining my own recommendations.

The case for consolidation has been stated with clarity and precision in the submission of The County and District Court Judges Association of Ontario to the Ontario Law Reform Commission dated March 25, 1971, which submission was given wide publicity. In general, I adopt their submissions and argument, and therefore do not intend to argue the case exhaustively or certainly not repetitiously. In my respectful opinion, their arguments were not answered effectively by the submissions of the Justices of the Supreme Court of Ontario, nor by the lengthy arguments which subsequently took place at Commission meetings, nor by the text of chapter 3 of this Report.

I adopt the outline of the requirements of the judicial system set out at page 6 of The County and District Court Judges Association submission as follows:

> Modern society requires a judicial system which, without being exhaustive, possesses the following characteristics: (1) Reasonable expedition in the determination of litigants' disputes, (2) Economy for both the litigants and society, (3) Accessibility to all members of society irrespective of their means or station in life, (4) Volume-handling ability to accommodate the litigation explosion corresponding, not only with increased population, but also with increased accessibility and justiciability of new grievances, (5) Comprehensibility of the system to the public for whose needs it exists and (6) "Justice" of the decisions in the sense of confidence among all members and sectors of society in the competence of the decision-makers and quality of their decisions.
>
> It is our view that it is only by consolidation that all of these requirements can be achieved.

In my opinion, the basic problem of judicial administration in Ontario today is the uneven utilization of judicial manpower. Many judges of both the High Court and the County and District Courts are seriously overworked. On the other hand, the talents of many more judges are being seriously under-utilized. Statistical analysis of the caseload borne by judges reveals a shocking disparity. The fault lies not with the judges but with the traditional establishment of our judicial units laid out in conformity with municipal administration units, and designed to cope with a rural society in Ontario of a pre-combustion engine era and having now little, if any, relevance to the industrial, rapid transit and urban-oriented society of Ontario in the 1970's.

Ontario does not lack in the number of judges needed to dispose of all legal proceedings within the periods of time suggested in chapter 1 of this Report, without backlogs or arrears of cases. It does lack seriously in the organization and the utilization of the talents of the existing number of judges. Good judges are going to seed for lack of work or challenge. This is not of their own choice, and indeed, most in that category are crying out for work and intellectual challenge; many are in high demand for non-judicial work.

An analysis of the caseload of County and District Court judges during the 14-month period from January 1971 through February 1972 reveals disparities which are a shocking commentary upon an out-moded system. The average number of court days per judge, *within his own county*, for certain counties is shown as follows:*

Lanark	8
Prescott and Russell	12
Rainy River	13
Bruce	13
Renfrew	17
Cochrane	18
Haldimand	20
Prince Edward	20
Kenora	22
Huron	25
Lennox and Addington	25
Muskoka	25
Wellington	27
Parry Sound	28
Perth	28
Thunder Bay	29
Temiskaming	30

*Statistics were not available for Manitoulin and Oxford, both of which are believed to be in the low category. These statistics do not reflect sittings in Small Claims Court, Surrogate Court or the exercise of *persona designata* jurisdiction, chambers jurisdiction or jurisdiction exercised as local judges of the Supreme Court. Since this Memorandum was prepared, I have had discussions with certain County Court judges, which indicate that the validity of certain of these statistics may be questionable. However, at this point of time, they are the most relevant statistics available.

The highest average numbers of court days per judge were:

Victoria	99
Ottawa-Carleton	96
Waterloo	95
Wentworth	93

It must be recognized, of course, that the average number of court days per judge does not reflect fully a judge's workload. But generally, a judge's chambers work reflects a ratio little different from his court work. Many of the judges with a light caseload are the most co-operative in seeking to fulfil judicial responsibilities outside their own counties.

My comments on the system are not intended to reflect upon any judges. Indeed, many of them are the reluctant prisoners of what they know to be an out-moded system. A system under which, in over 17 counties in Ontario, the County judge spends no more than two and one half days per month in court and, even in the busiest counties, only eight days per month, cannot continue to be tolerated merely because of its antiquity.

Equally, in my submission, the existing circuit system in the High Court is simply not working. This is not merely due to bad administration, although the existing quality of administration in the High Court is undoubtedly a factor. The system lends itself to inflexibility, with results that were admirably described in the brief to the Commission by The Ontario Sheriffs' and Court Registrars' Association under four headings as follows:

(a) The present system is wasteful of the time of Supreme Court judges.

(b) Accused persons may often be in custody or on bail for many months awaiting trial.

(c) Substantial civil cases often remain untried.

(d) Counsel are precluded from arranging for the trial of cases in a manner that will utilize their time to the best advantage of themselves or their clients.

The brief (incidentally, in my opinion, the most constructive brief received by the Commission) went on to say that,

> The abuses mentioned in the preceding paragraph apply equally to the County and District Courts. All are most unfair and costly to litigants and they happen with monotonous regularity.

The remedy, in my respectful opinion, lies in consolidation of the existing High Court of Justice with the County and District Courts into one Court to be known as "The Superior Court of Ontario" and the inclusion in its membership of all present members of the High Court and all present

members of the County and District Courts. Judges of the Superior Court would be appointed Surrogate Court judges, each of them having province-wide jurisdiction.

The present Divisional Court would become "the Divisional Court of the Superior Court" and every judge of the Superior Court would be *ex officio* a member of the Divisional Court, and the judges who would sit in the Divisional Court would be such as might be designated, from time to time, by the Chief Justice of the Superior Court.

Under my proposal, the province would be divided into judicial circuits and the Superior Court judges would be required to reside within the judicial circuit area to which they were assigned.

The submission of the County and District Court Judges Association proposed eight judicial districts as follows:

> The province would be divided into eight (8) judicial districts along the following lines: —
>
> District #1 Headquarters — Windsor, but would also include the Counties of Essex, Kent and Lambton.
>
> District #2 Headquarters — London, but would also include the Counties of Middlesex, Oxford, Perth, Huron, Bruce and Elgin.
>
> District #3 Headquarters — Hamilton, but would also include the Counties of Wentworth, Brant, Norfolk, Haldimand, Lincoln, Welland, Wellington and Waterloo.
>
> District #4 Headquarters — Toronto, but would also include the Counties of York, Peel, Simcoe, Halton, Grey, Dufferin and Ontario.
>
> District #5 Headquarters — Kingston, but would also include the Counties of Northumberland and Durham, Victoria, Hastings, Prince Edward, Lennox and Addington, Peterborough and Frontenac.
> Belleville, which is the geographic centre of this district, might be chosen as district headquarters.
>
> District #6 Headquarters — Ottawa, but would also include the Counties of Lanark, Carleton, Prescott and Russell, Stormont, Dundas and Glengarry, Renfrew and Leeds and Grenville.
>
> District #7 Headquarters — Thunder Bay, but would also include the Districts of Thunder Bay, Kenora and Rainy River.
>
> District #8 Headquarters — Sudbury, but would also include the Districts of Nipissing, Algoma, Cochrane, Manitoulin, Sudbury, Temiskaming, Parry Sound and Muskoka.

These proposals appear to me to be, in principle, sensible and workable. However, it is my understanding that the Government of Ontario proposes to divide the Province into five regions for purposes of departmental administration generally.

I believe there is merit in having the judicial circuits coincide generally with the regional units proposed for other aspects of public administration and consequently, my recommendation would be to adopt the territorial division and jurisdiction proposed to the government in preference to that proposed by the County and District Court Judges Association. This would mean judicial circuit headquarters in Toronto, Ottawa, London, Sudbury and Thunder Bay.

(Since this memorandum was first prepared, an alternative proposal for administrative regionalization has been advanced in a draft Report made to The Management Board by the Task Force on Decentralization of Administration. This alternative proposal would divide Ontario into six Regions instead of five. In effect, the change would be to divide the Central Region into two — Central and West Central, the headquarters respectively being in Toronto and in Hamilton (or in Kitchener). If the decision were mine, on balance, I would favour the six, as opposed to the five, administrative regions; and if the six administrative regions were adopted for general governmental purposes, I would favour the six regions being the judicial circuits of the Superior Court.)

The Chief Justice of the Superior Court should be empowered to name one of the judges to act as President of each judicial circuit for a two-year renewable term. The President of each judicial circuit, in co-operation with the Regional Court Administrator, would have the responsibility of arranging for the rotation of work and for the deployment of judges within the circuit.

For each judicial circuit, a court administrator of highest calibre should be appointed. He would be responsible, under the Provincial Director of Court Administration, for operating the machinery of the courts in each circuit.

One or more masters, on a full-time basis, would be appointed to be resident in each judicial circuit, and would have powers in each judicial circuit similar to those of the Senior Master at Toronto. They would hold sittings on a rotation basis in the various court centres within the judicial circuit.

I believe it continues to be desirable to have a judge locally resident in each of the court centres as well as judges resident at the headquarters of the judicial circuit. Over a period of time, clearly, the number of county towns with a resident judge must be reduced. In the initial stages and during the "phasing-in" process, I would propose that the present County and District Court judges, in their capacity as Superior Court judges, would continue to reside in their present county towns; that the members of the High Court could elect voluntarily to reside at a headquarters of a judicial circuit

other than Toronto; that if the numbers of present High Court judges electing to reside in any judicial circuit proved to be fewer than proportionate to the workload involved, the Chief Justice of the Superior Court might assign judges of the Toronto or other circuit from time to time, for sittings in another circuit.

It may well be that a number of High Court judges will take the attitude that they were appointed in accordance with the present system and should not be required to change. If so, I see no objection to a "grandfather" clause in the legislation which would protect fully the status and prestige of present High Court judges, provided it were clear also that, although operating out of Toronto as at present, they would sit in circuit in the Superior Court as they might be assigned by the Chief Justice of the Superior Court.

In future appointments to the Superior Court bench, some regard must be had to local residence. A reduced number of court centres will still require the resident presence of a judge. I foresee no problem, in these days of rapid transit, in working out an appropriate system of local residence at court centres coupled with circuit trial responsibilities.

The true objective of any system of court administration is to get cases tried and disposed of justly and as expeditiously as possible. Any new system will fail, as the present one so obviously has done, unless judges are available to try cases when cases are ready for trial and I add the converse, cases are ready for trial when judges are available to try them. I foresee the system I propose as giving a much higher degree of flexibility in the use of judicial manpower, providing for the full utilization of judge time for *all* judges, and the conclusion of all cases ready to be heard at any locale before a judge leaves. The present system of a High Court judge trying a small proportion of the ready cases, traversing the remainder for a period of months and moving on, leaving an accumulation progressively increasing from sitting to sitting, simply cannot be continued. Equally, the accumulation of arrears in one busy county or district, while a neighbouring County or District Court judge relaxes in comparative ease is an affront to Ontario citizens, each one of whom has equal right to access to justice. The system in effect in our Province today gives access to justice, which is much more expeditious for some than for others, based principally on geography. In my respectful submission, that is indefensible.

What are the objections to the merger of the two courts? I seek not to answer my colleagues nor to engage in public debate with them but some observations in chapter 3 cannot pass unnoticed. My colleagues have asserted:

> More important, it is our view that it would dilute the quality of the High Court.

The assumption that necessarily appointments to the High Court have been of persons of higher calibre than appointments to the County and District bench is one that I reject completely. To my personal knowledge, as one

formerly involved in government, not a few appointees to the County and District bench chose such appointment because they did not wish to undertake in middle-life the arduous duties of extended circuit travel across the whole province or for reasons of their own, chose not to be compelled to live in Toronto.

It is a sensitive and delicate matter to attempt to compare the judicial and intellectual qualities of members of any two courts. My personal experience indicates that there are members of the County Court bench who are the equal of the best of the High Court bench and few, if any, of the County Court bench who are less distinguished than the least of the High Court. Judges, like other humans, vary in capacity but most rise to the challenge. In my opinion, a unified Superior Court bench would not downgrade in any way the quality of justice administered, but would likely have the reverse effect, due first to judges responding to the additional challenge and secondly, to probable additional precaution on the part of the Governor General in Council in the making of appointments.

Actually, at the present time, a great many of the most difficult cases are tried by County and District Court judges and not by High Court justices. On the criminal side, the High Court generally tries the simplistic crimes and the County Court judge (either in General Sessions or in County Court Judges' Criminal Court) tries the complex crimes. On the civil side, the limitation of the County and District Courts to cases under $7,500 is illusory. As *persona designata*, County and District Court judges regularly decide cases and appeals of much more far-reaching consequence than is usual for a High Court judge. These facts are mentioned merely to place in perspective the actual relationship of the two Courts. Not always in fact is one "superior" and the other "inferior", whatever the legal theory may be.

I endeavoured to test in two ways, neither conclusive, my belief that judicial competence was not a basic obstacle to merger. First, I tried to assess the judicial competence of the Superior Court of Quebec, a unified and regionalized court, as compared with the High Court of Justice of Ontario. On all objective standards, I reached the conclusion that the Quebec Court was not in any way inferior to the Ontario Court. Secondly, at my request, our research advisors undertook to examine the statistics of the success rate on appeals to the Court of Appeal from the two levels of Ontario Courts. The result is indicated on page 91 of chapter 3 of this Report. Actually, the Court of Appeal from January, 1970 to May, 1971 allowed more appeals proportionately from High Court judges than from County Court judges. Marginally, therefore, the proportion of error was greater with High Court judges.

I repeat that such tests are neither fully satisfactory nor conclusive, but as well, I assert that the traditional aura which surrounds "a red judge" lends a degree of respect and awe, which makes High Court judges less susceptible to criticism than a County Court judge. I accept fully the statement in the Submission of the County and District Court Judges Association at page 44 as follows:

> . . . let it be clearly understood that we do not, in this submission, intend any denigration of the quality and performance of judges of the High Court of Justice. On the contrary, it is our firm conviction that the public of this province have every reason to be grateful for the dedication and quality of service of these judges. But the public can be equally proud of the contribution to society made by the judges of the County and District Courts. It is, however, beyond controversy that habits of respect among the legal profession are such that all too often judges of the High Court of Justice are thought of as superior in quality to County and District Court judges *for no other reason* than the plain fact that they *are* judges of the High Court of Justice. Surely lawyers, above all, should be prepared to base judgments on evidence, and it is submitted that no empirical evidence has ever been assembled or presented that on a *per capita*, or other basis, the quality of County and District Court judges is inferior to that of judges of the High Court of Justice. Indeed, we challenge anyone to demonstrate the contrary...

There is another and significant reason for anticipating an over-all improvement in the quality of judicial appointments under a unified Superior Court circuit system.

First, it is undeniable that a significant number of highly qualified barristers now refuse to consider appointment to the High Court because of the requirement of moving their residence to Toronto. This was mentioned by representatives of the local bar interviewed by the Commission in a number of areas. Equally and regrettably they do not consider appointment to the County Court bench a sufficient recognition of their talents.

Secondly, barristers in middle-age (the normal age of judicial appointment) have declined appointment to the High Court because of the upset to their established way of life and because of the "travelling salesman" aspect of the province-wide circuit system. It is asking a substantial sacrifice of a successful man or woman after age 40 to undertake constant travel, hotel room living and separation from family life as a condition of judicial preferment. Having spent a number of years in government, during which I discussed with many leading barristers their possible appointment to the bench, I assert unequivocally that this factor, in this vast province, is a real discouragement to many qualified persons who otherwise would seek and merit preferment.

The unification of the two courts would greatly lessen the need for change of residence and would provide reduced modified circuit systems which would least upset established patterns of social and family life. Thereby, there would be available for future appointment to the bench a substantial number of leading barristers who at this time would not consider accepting judicial appointment to either existing court.

Emphasis has been given to the alleged "collegiality" of Osgoode Hall and its suggested benefit to uniform administration of justice in the province. On the opposite side, one might speak of the "isolation" and the "insulation" of Osgoode Hall, with judges associating only with judges in the manner of the Cabots and Lodges of earlier days. I have grave doubts whether judges should be a group set apart from the community, associating

only with themselves in "collegiality". But even if one assumes its benefit, not all judges conform to it. It is notorious within the legal profession that a growing number of judges of the Supreme Court of Ontario are in active breach of the statutory requirement in the *Judges Act* that they reside at the City of Toronto or within five miles thereof, unless approval of another residence has been given by the Governor General in Council. An answer to a question by Mr. McCutcheon, M.P., in the House of Commons, appearing at pages 7500-1 of Hansard of the Third Session of the Twenty-Eighth Parliament 1970-72, shows that none of the justices of the Supreme Court now actually residing out of Toronto (and five miles thereof) are doing so with permission and demonstrates that these judges are in breach of the law. Whatever might be said about those sworn to enforce the law being the first to obey it, at least these non-resident judges are less than enthusiastic about the alleged "collegiality" of Osgoode Hall.

The existing province-wide circuit system of the High Court is alleged to promote "a more uniform jurisprudence". I challenge that thesis. I have observed no greater uniformity in Ontario than in Quebec or in other jurisdictions which have more localized court administrations. In any event, in my respectful submission, "uniformity of jurisprudence" is a matter for the Court of Appeal and the Supreme Court of Canada — a matter of justice openly administered, and not a matter for private, off-the-bench chats among judges in their Chambers or over a luncheon table at Osgoode Hall.

In summary, my best judgment leads me to the belief that a merger of the two Courts would not result in any dilution of the quality of justice but, on the contrary, would provide greater challenges and incentives, open the door to many qualified persons who now decline judicial appointment and, generally, improve the whole Ontario bench.

The constitutional aspects of merger cause some concern. I accept the summary of the constitutional implications of merger or jurisdictional reorganization set forth at pages 86 to 88 of chapter 3 of this Report. Because the Parliament of Canada has not yet enacted complementary legislation to implement the British Columbia legislation merging the Courts in that Province, my colleagues have concluded in the double negative "there is no reason to believe that a similar request by Ontario would not receive identical treatment" (page 89).

On the contrary, I believe that the Parliament of Canada and whatever ministers may then be advising His Excellency the Governor General would not decline or avoid a request from the Legislature of Ontario. It is the Legislature of Ontario which has the responsibility for the "administration of justice" and if the Legislature of the largest province of Canada decides that the better administration of justice which is its responsibility requires a merged Court it would be difficult for the Parliament of Canada, for long, to substitute its judgment. If Ontario joined British Columbia and Alberta in proposals for merged Courts, it would be an act of utter irresponsibility for any federal ministry to stand in their way.

In chapter 3, beginning at page 59, the Commission has set forth the recent developments in other jurisdictions, namely, British Columbia,

Alberta, Quebec and England. As I have already implied, I believe the legislation in British Columbia is good and should and will be complemented in due course by the Parliament of Canada. The Province of Alberta adopted a different course by giving to the District Court concurrent jurisdiction with the Supreme Court in all matters except capital offences, prerogative writs and divorces (and made representations to the federal Minister of Justice to amend the *Divorce Act* to give jurisdiction in divorce to the District Court). For all practical purposes, the Courts in Alberta are now one and I am advised by authorities in that province that the new legislation just now coming "on stream" appears to be effective and acceptable to both bench and bar. The merger of the Courts in Alberta is substantially in effect now and its completion in legal theory will not be long delayed. Soon, effect will be given to the representations of such distinguished Members of Parliament as Gerald W. Baldwin, M.P., and Honourable Patrick M. Mahoney (now a former M.P.) referred to in footnote 52 of chapter 3.

I mention the position in Quebec as described in chapter 3 beginning at page 61 only to emphasize that the Parliament of Canada and Her Majesty's Ministers in Canada cannot long deny to other provinces a merged Court such as has existed in Quebec for many years.

The new legislation in England based upon the Beeching Commission Report is interesting for comparison, if not genuinely applicable to Ontario. On the criminal side, the courts have been merged into one Crown Court, with an allocation of offences between two tiers of judges. On the civil side, merger has not been concluded but circuit judges (second tier judges) may hear High Court cases, if so designated by the Lord Chancellor. With typical English caution, this appears to be a half-way house on the inevitable road to full merger.

This leads me to examine whether there is any half-way house for Ontario. Personally, I do not like half measures nor intermediate positions. But it is desirable to explore two alternatives to full merger of the courts.

First, I accept and emphasize the constitutional submissions on pages 86 and 87 of chapter 3 of this Report that:

> (b) The Ontario Legislature can unilaterally extend the civil jurisdiction of the County and District Courts to a point where it is concurrent with that of the High Court or *vice versa* . . .
>
> (c) The Ontario Legislature can unilaterally extend the jurisdiction of local judges of the High Court to include any matters within the jurisdiction of the High Court, in the absence of any federal enactment to the contrary.

Consequently, as a minimum, if my recommendations for full merger of the Courts were not accepted, I would recommend:

(1) extension of the civil jurisdiction of the County and District Courts to complete concurrency with the High Court

(2) extension of the jurisdiction of the local judges of the High Court to the full plenitude of High Court jurisdiction.

The result would be that any County or District Court judge could try any case which a High Court judge might try. The available judicial manpower would be greatly increased — or rather re-allocated — and in the circumstances now so common in many urban counties, where the High Court judge fails to complete the assize or the non-jury sittings, a local judge of the High Court might be moved in at once to complete available court business. To make this effective, all local judges of the High Court would have to be subject to the direction of the Chief Justice of the High Court, who presumably would not direct any such judge without prior consultation with the Chief Judge of the County and District Courts and the Provincial Director of Court Administration.

A second alternative to full merger would be for the Legislature of Ontario to enact legislation providing for one court, staffed by two tiers of judges maintaining the present judges at each tier. In effect, this would resemble the English solution. I have already implied that this seems an unsatisfactory solution, and all I wish to add is that it would be preferable to the *status quo*.

My opinions and recommendations may now be presented in summary:

(1) A drastic revision of the court structure is indicated, and in my view, inevitable.

(2) The malaise in judicial administration which prompted this reference by the Attorney General cannot be cured by palliatives or providing crutches to maintain the *status quo*.

(3) Merger of the High Court and the County and District Courts into one Superior Court offers the best solution to effective use of judicial manpower.

(4) Alternatively, County and District Court judges in such capacity and as local judges of the High Court might be given fully concurrent jurisdiction and enabled thereby to do anything a High Court judge might do.

It will be obvious that my opinions expressed in this dissent limit considerably an unqualified acceptance of many of the other recommendations in this Report. I have tried to contribute objectively to those other recommendations which are necessarily predicated upon a rejection of my submission. Except where I have so indicated, I accept most such recommendations as an improvement upon the present situation.

I am grateful to all my colleagues for their indulgence and tolerance in the extended arguments related to this basic issue. Their opinions I respect, as I believe they do mine. I conclude with the confidence that my opinions are not as anathematic to all my colleagues as they are to some.

CHAPTER 4

THE HIGH COURT OF JUSTICE FOR ONTARIO

SUMMARY

The High Court of Justice for Ontario, which we shall hereafter refer to as the "High Court", is one of the two branches of the Supreme Court of Ontario. It consists of a Chief Justice of the High Court, who is president of the Court, and 31 other judges.[1] As a superior court of record it has both civil and criminal jurisdiction. It has virtually unlimited jurisdiction in civil matters except to the extent that it is taken away in unequivocal terms by statutory enactment.[2] In criminal matters it has jurisdiction to try all indictable offences.[3] In addition, the Court has some appellate jurisdiction. Certain statutes provide for appeals by way of stated cases, some of which may

[1] *The Judicature Act*, R.S.O. 1970, c. 228, s. 5.
[2] See *Re Michie Estate and City of Toronto* (1968), 66 D.L.R. (2d) 213. Section 2 of *The Judicature Act*, R.S.O. 1970, c. 228 states that the Supreme Court "has all the jurisdiction, power and authority that on the 31st day of December, 1912, was vested in or might be exercised by the Court of Appeal or by the High Court of Justice or by a divisional court of that court".
[3] *Criminal Code*, R.S.C. 1970, c. C-34, ss. 2, 426.

be heard by a single judge and others of which are required to be heard by the Divisional Court as a division of the High Court. The jurisdiction and functions of the Divisional Court are discussed in chapter 8. The primary function of the High Court is to try the more important civil and criminal matters in the Province.

The Court had its origin in the Court of King's Bench established in 1794 in Upper Canada with unlimited civil and criminal jurisdiction,[4] but it was not until 1881 that the institutional framework for the present High Court was created by the uniting of the Courts of Queen's Bench, Common Pleas and Chancery into one High Court with original trial jurisdiction.[5]

As the highest and therefore most visible trial court in the Province, the High Court of Justice has often been the subject of public comment and proposals for administrative reform. Delays, overloaded case lists, high costs and inflexibility in scheduling cases[6] have all prompted suggestions for reform from the High Court judges, members of the bar and the public. These proposals for administrative reform may conveniently be placed in four categories:

(1) Changes in jurisdiction;

(2) Abolishing or altering the circuit system;

(3) Improved procedures in the assignment of judges;

(4) Increasing the number of judges.

We shall deal with all these proposals in this chapter but at the outset we wish to make it clear that we do not recommend the adoption of any of them to the exclusion of all others. We do not believe that there is any simple solution to the present or future problems.

A. Jurisdiction

The High Court derives its general jurisdiction from *The Judicature Act*[7] and the *Criminal Code* together with other federal statutes, or by pre-

[4] *An act to establish a superior court of civil and criminal jurisdiction, and to regulate the court of appeal*, 34 Geo. 3, c. 2. (U.C.).

[5] *The Judicature Act*, 44 Vict., c. 5.

[6] See chapter 10.

[7] R.S.O. 1970, c. 228.

2. The Supreme Court shall be continued as a superior court of record, having civil and criminal jurisdiction, and it has all the jurisdiction, power and authority that on the 31st day of December, 1912, was vested in or might be exercised by the Court of Appeal or by the High Court of Justice or by a divisional court of that court, and such jurisdiction, power and authority shall be exercised in the name of the Supreme Court.

The jurisdiction of the Court as at December 31, 1912 can be found in *The Judicature Act*, R.S.O. 1897, c. 51, the relevant sections of which are as follows:

25. The High Court shall be a Superior Court of Record of original jurisdiction, and shall, subject as in this Act mentioned, possess all such powers and authorities, as by the law of England, are incident to a Superior Court of civil and criminal jurisdiction; and shall have, use and exercise all the rights, incidents and privileges of a Court of Record, and all other rights, incidents and privileges as fully to all intents and purposes as the same were on the

confederation criminal statutes and the common law. Section 2 of *The Judicature Act*, being a provincial enactment, merely enables the High Court to accept its criminal jurisdiction.

5th day of December, 1859, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law at Westminster in England, and may and shall hold plea in all and all manner of actions and causes as well criminal as civil, and may and shall proceed in such actions and causes by such process and course as are provided by law, and as shall tend with justice and despatch to determine the same; and may and shall hear and determine all issues of law and may and shall also hear and (with or without a jury as provided by law) determine all issues of fact that may be joined in any such action or cause, and judgment thereon give, and execution thereof award in as full and ample a manner as might, at the said date, be done in Her Majesty's Courts of Queen's Bench, Common Bench, or, in matters which regard the Queen's revenue (including the condemnation of contraband or smuggled goods), by the Court of Exchequer in England.

26. The High Court shall also, subject as in this Act mentioned, have the like jurisdiction and powers as by the laws of England were on the 4th day of March, 1837, possessed by the Court of Chancery in England, in respect of the matters hereinafter enumerated, that is to say:

1. In all cases of fraud and accident;
2. In all matters relating to trusts, executors and administrators, co-partnership and account, mortgages, awards, dower, infants, idiots, lunatics and their estates;
3. To stay waste;
4. To compel the specific performance of agreements;
5. To compel the discovery of concealed papers or evidence, or such as may be wrongfully withheld from the party claiming the benefit of the same;
6. To prevent multiplicity of suits;
7. To stay proceedings in a Court of Law prosecuted against equity and good conscience;
8. To decree the issue of Letters Patent from the Crown to rightful claimants;
9. To repeal and avoid Letters Patent issued erroneously or by mistake, or improvidently, or through fraud.

28. The High Court shall have the like jurisdiction and power as the Court of Chancery in England possessed on the 10th day of June, 1857, as a Court of Equity to administer justice in all cases in which there existed no adequate remedy at law.

29. The High Court shall have the like equitable jurisdiction in matters of revenue as the Court of Exchequer in England possessed on the 18th day of March, 1865.

41. The High Court shall have, generally, all the jurisdiction which, prior to the 22nd day of August, 1881, was vested in, or capable of being exercised by, the Court of Queen's Bench, Court of Chancery, Court of Common Pleas, and Courts of Assize, Oyer and Terminer, and Gaol Delivery (whether created by Commission or otherwise) and the High Court shall be deemed to be and shall be a continuation of the said Courts respectively (subject to the provisions of this Act) under the said name of "The High Court of Justice for Ontario."

42. The jurisdiction of the High Court shall include (subject to the exceptions hereinafter contained) the jurisdiction which at the commencement of this Act, was vested in or capable of being exercised by the Judges of the said Courts respectively, sitting in Court or Chambers, or elsewhere, when acting as Judges in pursuance of any statute or law; and all powers given to any such Court, or to any such Judges, by any statute; and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdiction.

Apart from the jurisdiction conferred by provincial or federal statutes, the High Court exercises, by virtue of section 129 of the *British North America Act, 1867*, all jurisdiction possessed by the superior courts prior to

43. Every Judge of the High Court shall have, use and exercise all the rights, incidents and privileges of a Judge of a Court of Record and all other rights, incidents and privileges as fully to all intents and purposes as the same were, prior to the fifth day of December, 1859, used, exercised or enjoyed by any of the Judges of any of Her Majesty's Superior Courts of Common Law at Westminster.

In order to ascertain the significance of s. 41 above quoted, it is necessary to look to *The Superior Courts of Law Act*, R.S.O. 1877, c. 39, the relevant provisions of which are as follows:

2. Her Majesty's Court of Queen's Bench for Ontario, and the Court of Common Pleas for Ontario, shall continue under the names aforesaid, and all commissions, rules, orders and regulations granted or made, in, by or respecting the said Courts, or the Judges or officers thereof, existing and in force when this Act takes effect, shall remain in force until altered or rescinded or otherwise determined.

4. The said Courts shall be Courts of Record of original and co-ordinate jurisdiction, and shall respectively possess all such powers and authorities as by the law of England are incident to a Superior Court of civil and criminal jurisdiction; and shall have, use and exercise all the rights, incidents and privileges of a Court of Record, and all other rights, incidents and privileges as fully to all intents and purposes as the same were on the fifth day of December, 1859, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law at Westminster in England, and may and shall hold plea in all and all manner of actions, causes and suits as well criminal as civil, real, personal and mixed, and may and shall proceed in such actions, causes and suits by such process and course as are provided by law, and as shall tend with justice and despatch to determine the same; and may and shall hear and determine all issues of law; and may and shall also hear and (with or without a jury, as provided by law) determine all issues of fact that may be joined in any such action, cause or suit, and judgment thereon give, and execution thereof award in as full and ample a manner as might, at the said date, be done in Her Majesty's Courts of Queen's Bench, Common Bench, or in matters which regard the Queen's revenue (including the condemnation of contraband or smuggled goods), by the Court of Exchequer in England.

It is also necessary to look to *The Chancery Act*, R.S.O. 1877, c. 40, s. 34 which provides that:

The Court shall have the like jurisdiction and powers as by the laws of England were on the fourth day of March, 1837 possessed by the Court of Chancery in England in respect of the matters hereinafter enumerated, that is to say:

1. In all cases of fraud and accident;
2. In all matters relating to trusts, executors and administrators, copartnership and account, mortgages, awards, dower, infants, idiots, lunatics and their estates;
3. To stay waste;
4. To compel the specific performance of agreements;
5. To compel the discovery of concealed papers or evidence or such as may be wrongfully withheld from the party claiming the benefit of the same;
6. To prevent multiplicity of suits;
7. To stay proceedings in a Court of Law prosecuted against equity and good conscience;
8. To decree the issue of letters patent from the Crown to rightful claimants;
9. To repeal and avoid letters patent issued erroneously or by mistake or improvidently or through fraud.

confederation. This provides the link between the present High Court and the ancient powers of the superior courts of civil and criminal jurisdiction in England. These powers are continued except to the extent that they are specifically taken away by valid federal or provincial legislation.[8]

The High Court is not subject to supervisory control by any other Court except by due process of appeal, and it exercises plenary judicial power in all matters concerning the general administration of justice within its area.[9]

1. *Inherent Jurisdiction*

The High Court possesses an inherent jurisdiction which is derived not from statute or common law but from the very nature of the Court itself as a superior court of law. This inherent jurisdiction includes the power to punish for contempt, to prevent abuse of process by summary proceedings, to control its own orders or judgments, and to supervise and review proceedings of inferior courts and the exercise of many but not all statutory powers of decision.

The inherent jurisdiction of the High Court involves residual powers on which the court may draw to protect the rights of the individual, and to give a remedy where the individual has been deprived of certain rights to which he is entitled.

In our view, the inherent jurisdiction of the High Court is one of its most important functions, essential to the maintenance of the rule of law in our court system. Any attempt to interfere with or limit this jurisdiction should be avoided.

2. *Civil Jurisdiction*

The general jurisdiction of the High Court to try civil causes is limited by statute only in respect of certain actions coming within the jurisdiction of the Surrogate Court.[10] The County Courts now exercise a concurrent juris-

[8]The restriction against altering or repealing laws enacted by or existing under statutes of the United Kingdom was removed by the *Statute of Westminster*.

[9]See *Bursey* v. *Bursey* (1966), 58 D.L.R. (2d) 451.

[10]Section 21 of *The Surrogate Courts Act*, R.S.O. 1970, c. 451 provides that:

Subject to *The Judicature Act*, all jurisdiction and authority in relation to matters and causes testamentary, and in relation to the granting or revoking of probate of wills and letters of administration of the property of deceased persons, and all matters arising out of or connected with the grant or revocation of grant of probate or administration, are vested in the several surrogate courts.

The Judicature Act, R.S.O. 1970, c. 228 contains no reference to these matters, but s. 38 of *The Judicature Act*, R.S.O. 1897, c. 51 does not appear to have been repealed. It provides that:

The High Court shall have jurisdiction to try the validity of last wills and testaments . . . and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments.

diction in most cases where the amount involved does not exceed $7,500.[11] Actions involving amounts in excess of $7,500 may be entered and tried in the County Courts unless a defendant disputes the jurisdiction of the Court.[12] In such cases, if tried in the County Court, the judge has the power to award costs on the Supreme Court scale.[13]

The increase in the civil jurisdiction of the County Courts, effective from July 1, 1971[14] has substantially reduced the caseload in the High Court for the time being.

A comparison between statistics for the last six months of 1971 and those for the last six months of 1970, shows that the number of civil actions set down for trial in the High Court, exclusive of divorce, decreased by about 25% from 2,455 to 1,835. This comparison has limited value, however, because in many of the actions set down for trial during the last six months of 1971 the writs would have been issued before July 1, 1971. It would be more useful to compare the last six months of 1972 with the last six months of 1970, but the figures for 1972 are not yet available. Another comparison may be made. The actions commenced in the Supreme Court, exclusive of divorce, during the last six months of 1970 were 9,279 as compared with 6,988 actions commenced in the last six months of 1971. During the relevant periods the number of actions set down in the

[11]*The County Courts Act*, R.S.O. 1970, c. 94, s. 14(1) provides that:

(1) The county and district courts have jurisdiction in,

(a) actions arising out of contract, expressed or implied, where the sum claimed does not exceed $7,500;

(b) personal actions, except actions for criminal conversation and actions for libel, where the sum claimed does not exceed $7,500;

(c) actions for trespass or injury to land where the sum claimed does not exceed $7,500, unless the title to the land is in question, and in that case also where the value of the land does not exceed $7,500 and the sum claimed does not exceed that amount;

(d) actions for the obstruction of or interference with a right-of-way or other easement where the sum claimed does not exceed $7,500, unless the title to the right or easement is in question, and in that case also where the value of the land over which the right or easement is claimed does not exceed that amount;

(e) actions for the recovery of property, real or personal, including actions of replevin and actions of detinue where the value of the property does not exceed $7,500;

(f) actions for the enforcement by foreclosure or sale or for the redemption of mortgages, charges or liens, with or without a claim for delivery of possession or payment or both, where the sum claimed to be due does not exceed $7,500;

(g) partnership actions where the joint stock or capital of the partnership does not exceed in amount or value $50,000;

(h) actions by legatees under a will for the recovery or delivery of money or property bequeathed to them where the legacy does not exceed in value or amount $7,500, and the estate of the testator does not exceed in value $50,000;

(i) in all other actions for equitable relief where the subject-matter involved does not exceed in value or amount $7,500; and

(j) actions and contestations for the determination of the right of creditors to rank upon insolvent estates where the claim of the creditor does not exceed $7,500.

[12]*Ibid.* s. 14(2).

[13]*Ibid.*

[14]S.O. 1970, c. 98, s. 3(1-11).

County Courts for trial increased from 3,342 to 3,630 (+8.6%) and the writs issued increased from 23,615 to 26,227 (+11%).

We are satisfied that this increase in civil jurisdiction in the County Courts has achieved, at least in part, the reduction in the civil workload of the High Court contemplated by the McRuer Commission Report in 1968.[15]

We are now of the view that there should be no changes in the $7,500 maximum civil jurisdiction of the County Courts until there has been sufficient opportunity to assess fully the impact of the most recent change on the distribution of civil workload. It may be that further increases in County Court jurisdiction will be required but it would be premature for us to make such a recommendation under present conditions.[16]

3. *Divorce Jurisdiction*

The recent amendments[17] to *The Judicature Act* permitting County Court judges as local judges of the High Court to exercise divorce jurisdiction came into effect on July 1, 1971. This has also brought about a substantial reduction in the workload of the High Court judges who previously had exclusive jurisdiction over divorce and related matters.

For the last six months of 1971 (immediately following the change), the number of divorce petitions set down in the High Court decreased by 36% (6,546 to 4,168) from the number set down in the same six month period in 1970. During the same period there were 2,055 divorce petitions set down in the Matrimonial Causes Court presided over by County Court judges as local judges of the High Court. This again does not give a sound basis for judgment as in many of the cases where petitions were set down for trial during the last six months of 1971 the petitions had been filed in the Supreme Court prior to July 1, 1971.

Sounder comparisons may be made. During the first six months of 1971 there were 6,388 divorce cases added to the list for hearing by the High Court. Since the amendment to *The Judicature Act* conferring jurisdiction on the County Court judges as local judges of the Supreme Court did not come into effect until July 1 of that year, no divorce cases could be commenced for hearing before them in that period. During the last six months of 1971, 4,321 divorce cases were added to the list for hearing before the High Court and during the same period 1,504 divorce cases were added to the list for trial before the Matrimonial Causes Court.

A change in the Rules concerning the adding of cases to the lists makes a further comparison on this basis unsound. Nevertheless, the trend

[15]Mr. McRuer recommended that the involuntary jurisdiction of the County Courts in personal injury cases should be raised to $10,000 with the right to apply to a Supreme Court judge for an order transferring an action from the County Court to the Supreme Court where it is made to appear that by reason of the complexities of the law or facts, the action is one that should be tried in the Supreme Court. Report No. 1, Vol. 2, pp. 611-620 (1968).

[16]See chapter 5.

[17]S.O. 1970, c. 97, s. 11(2).

toward having divorce cases tried before the County Court judges as local judges of the Supreme Court is shown by a consideration of the number of divorce petitions issued. During the first six months of 1972, 2,606 petitions were issued for trial in the High Court and 5,526 for trial in the Matrimonial Causes Court. Of the petitions issued for trial in the County of York, 1,970 were in the High Court and 1,177 were in the Matrimonial Causes Court. During the same period 4,283 divorce petitions were disposed of in the High Court and 4,264 in the Matrimonial Causes Court. Of the petitions disposed of in the Judicial District of York, 2,296 were disposed of in the High Court and 811 in the Matrimonial Causes Court.

It therefore appears that outside the County of York the caseload in the High Court for the trial of divorce petitions has very substantially diminished while in the Judicial District of York it has been reduced by approximately 25%. It is to be further observed that if our recommendations concerning the constitution of a Family Court are implemented[18] the workload of the High Court will be further reduced.

4. *Criminal Jurisdiction*

It is in the exercise of its criminal jurisdiction that we think that the resources of the High Court are not utilized fully. The *Criminal Code*[19] prevents the High Court from trying criminal cases without a jury except for offences under the *Combines Investigation Act*.[20] With the exception of the offences listed in section 427(a) of the *Criminal Code* which are within the exclusive jurisdiction of the High Court, the bulk of indictable offences are tried either by a County Court judge sitting with or without a jury or a Provincial judge, depending on the election of the accused. In 1970 there were only 243 criminal trials of indictable offences presided over by a High Court judge in Ontario, while from April to December in 1971, excluding the Judicial District of York, there were 1,027 trials presided over by a County Court judge sitting with or without a jury. The great majority of indictable offences were tried by Provincial judges.

It is significant that the statistics available showing the Court time devoted to criminal trials in the year 1971 indicate that a total of 651 days were spent before High Court judges while 1,308 days were spent before County Court judges. These statistics were prepared on the basis that if the Court sat for any period of time in the forenoon or the afternoon it was taken to be one-half day.

Bill C-2 to amend the *Criminal Code*, passed by the House of Commons on May 17, 1972, reduced materially the list of offences within the exclusive jurisdiction of the High Court under section 427(a) of the *Criminal Code*.

It is evident that there is a trend towards trying fewer criminal cases in the High Court. As critically noted by the McRuer Commission Report,[21]

[18]See chapter 13.
[19]R.S.C. 1970, c. C-34, s. 429.
[20]R.S.C. 1970, c. C-23, s. 44.
[21]*Op. cit.* n. 15 *supra*.

the distribution of workload in the High Court reflects an outdated view that property values far outweigh human values.

We recommend that this trend be reversed. Cases involving the liberty of the subject should take precedence in the work of the highest trial court in the Province. At present the bulk of the important criminal cases are tried by County Court judges or Provincial judges, while the High Court judges are required to spend most of their time on civil cases. This is patently wrong. The court system should be responsive to modern social needs. Criminal offences against society merit priority over private property disputes.

We recommend that when an indictment is preferred in the High Court the judges in Ontario be empowered to hear the case without a jury, upon the election of the accused. A provision to this effect, applicable to the Province of Alberta, is contained in the *Criminal Code*.[22] This recommendation should apply to offences within both the exclusive and the concurrent criminal jurisdiction of the Court.

We think that the general jurisdiction of the High Court to try all indictable offences should be invoked more frequently. This jurisdictional reform can be achieved without amendments to the *Criminal Code*. Under section 508 the Attorney General, or anyone by his direction, may prefer a bill of indictment before the grand jury of any Court constituted with a grand jury. The Attorney General should exercise his powers under this section to bring the most serious criminal cases of whatever nature before the High Court.

The Beeching Commission Report recommended the following considerations which might be expected to influence a decision towards a trial in the High Court:

(i) the offence involves death or serious risk to life (other than a case of dangerous driving having no aggravating features), such as setting fire to a house;

(ii) the offence is one of killing by dangerous driving where there are aggravating features;

(iii) widespread public concern is involved;

(iv) the case involves violence, or a threat of violence, of a serious nature;

(v) the offence involves dishonesty in respect of a substantial sum of money;

(vi) the accused holds a public position or is a professional or other person owing a duty to the public;

[22]R.S.C. 1970, c. C-34, s. 430.

(vii) the circumstances are of unusual gravity in some respect other than those indicated above;

(viii) a novel or difficult issue of law is likely to be involved.[23]

In our view these criteria may be useful as guidelines to the Attorney General in exercising his discretion, but they should not constitute strict rules. While it is important that serious criminal cases be tried in the High Court, accused persons should not be prejudiced by delays occasioned by circuit scheduling arrangements in the High Court, particularly if the cases can be dealt with more expeditiously in the General Sessions of the Peace.

5. *Jurisdiction Under Other Provincial and Federal Statutes*

Apart from *The Judicature Act*, the *Divorce Act* and the *Criminal Code*, there are at least 54 provincial statutes and 18 federal statutes conferring specific jurisdiction on the High Court or on the judges of the High Court in Ontario (see Appendices I and II to this chapter). While there are no statistics available to indicate the number of cases or the proportion of time spent by High Court judges in performing these duties, a brief perusal of the lists of statutes indicates a variety of judicial proceedings, involving important and complex matters. Some of the statutes also confer certain administrative duties.

A review of these statutes for the purpose of determining the most suitable jurisdictional arrangements for the High Court reveals two areas for reform.

First, there appears to be no obvious rationale or consistency of approach in the statutes as to whether a particular duty is conferred on the High Court or on a judge of the High Court as *persona designata*. In some cases, moreover, the language used makes it difficult to determine whether the duty is conferred on one or the other.

The main significance of the distinction between jurisdiction exercised as a "court" and jurisdiction exercised as "*persona designata*" is in the right of appeal. Section 29(1) of *The Judicature Act* as amended in 1971[24] reads:

> Except where it is otherwise provided by statute and subject to the rules regulating the terms and conditions on which appeals may be brought, an appeal lies to the Court of Appeal from,
>
> (a) any final judgment or order of a judge of the High Court in court or in chambers, whether at trial or otherwise; or
>
> (b) any judgment or order of the Divisional Court, with leave as provided by the rules, on any question that is not a question of fact alone.

[23]Cmnd. 4153, para. 197.
[24]*The Judicature Amendment Act, 1971*, S.O. 1971, c. 57, s. 3.

Section 3 of *The Judges' Orders Enforcement Act*,[25] as revised reads:

> An appeal lies from an order made by a judge as *persona designata* to the Divisional Court,
>
> (a) if the right of appeal is given by the statute under which the judge acted; or
>
> (b) if no such right of appeal is given, then by leave of the judge who made the order or by leave of the Divisional Court.[26]

Therefore where a provincial statute confers on a judge a *persona designata* jurisdiction and no specific right of appeal is given, the appeal lies to the Divisional Court with leave. On the other hand, if the jurisdiction is conferred on the Court of which the judge is a member, the right of appeal is not dependent on leave unless there is a specific provision in the Act concerning an appeal.

Under the federal statutes there is no encompassing appellate right with leave equivalent to that provided by *The Judges' Orders Enforcement Act* from decisions made by a judge acting as *persona designata*. The only appeal rights which exist are found in the federal statute conferring the jurisdiction. A judge acting as *persona designata* under a federal statute, however, is now subject to the supervisory power of the Federal Court of Canada as a "federal board, commission or other tribunal".[27]

Apart from the differences in the rights of appeal, other differences between proceedings *persona designata* and proceedings in Court have given rise to judicial discussion in other jurisdictions. For example, where a duty is conferred on a High Court judge as *persona designata* it may be open to question whether proceedings commenced before one judge may be continued before another judge, or whether a judge could subsequently reopen an order made in his jurisdiction as *persona designata* or whether during such proceedings he could commit for contempt or award costs or relieve against forfeiture.[28]

In the light of the fact that none of these problems have been discussed in any of the reported cases in Ontario, we have come to the conclusion that we should confine our recommendations to the subject of resolving the difficulties that arise out of the uncertainties experienced in determining when an appeal lies and to what Court.

[25]R.S.O. 1970, c. 227.
[26]*The Judges' Orders Enforcement Amendment Act, 1970*, S.O. 1970, c. 101, s. 1.
[27]See ss. 18 and 28 of the *Federal Court Act*, S.C. 1970-71, c. 1; also *Re Milbury and the Queen* (1972), 25 D.L.R. (3d) 499, and *Re Lavell and Attorney-General of Canada* (1971), 22 D.L.R. (3d) 188.
[28]These problems are discussed at length in Gordon, "*Persona Designata*" (1927), 5 Can. Bar Rev. 174, at p. 181. See also Kinnear, "The Doctrine of *Persona Designata* as Applied to the Ontario Dependents' Relief Act" (1942), 20 Can. Bar Rev. 324. Some of the problems of *persona designata* jurisdiction at the County Court level are illustrated most graphically in *Regina ex rel. Kamstra* v. *Caldarelli* (1970), 15 D.L.R. (3d) 669.

The *persona designata* jurisdiction has caused much confusion respecting appeal rights and has given rise to a long line of cases in which the courts have been required to go to great pains to determine whether a judge was acting as *persona designata* or whether he was exercising a jurisdiction of the Court.[29] Many of these decisions are difficult to reconcile.

In Appendices I and II to this chapter we have attempted to determine whether each statutory duty referred to was conferred on the judge as *persona designata* or on the Court. In the absence of judicial authority in each case we cannot say with certainty that our determination is right.

We are concerned here only with *persona designata* jurisdiction where a judge is given power to make an "order" affecting rights. We are not concerned with *persona designata* jurisdiction conferred on judges that does not involve making "orders", e.g., conducting an investigation under *The Municipal Act*[30] or a recount under *The Liquor Control Act*.[30a]

We have come to the conclusion that an amendment to *The Judges' Orders Enforcement Act*, to give a right of appeal without leave where power is conferred under a statute of Ontario on a judge of the High Court or judge of the Supreme Court as *persona designata*, and an amendment to *The Judicature Act*, to provide that where a jurisdiction is conferred on a judge of the High Court or judge of the Supreme Court under any statute of the Legislature other than *The Judicature Act* the appeal shall lie, unless otherwise specifically provided, to the Divisional Court, will resolve most of the real problems in this area. If such amendments are made there will be no need to debate whether the judge acts as judge of the Court or as *persona designata*. The right of appeal will be the same and to the same Court, the Divisional Court.

The second area of reform relates to those duties conferred on High Court judges which might be performed by other judges or public functionaries, thus freeing the High Court judges for more important work. A reform of this type is needed primarily at the County Court level.[31] There are a number of possible reforms here as well. Before dealing with specific duties, it is necessary to develop and articulate rational guidelines for determining which statutory duties are rightly conferred on judges and which should be transferred elsewhere.

The first step in setting such guidelines is to make an attempt to distinguish between the adjudicative and administrative duties of judges. In many respects the attempt to articulate such a distinction is reminiscent of the circular debate involved in determining whether a decision of an administrative tribunal is judicial, quasi-judicial or administrative.

[29] See *Re Guardian Realty Co. of Canada Ltd. and the City of Toronto*, [1934] O.R. 266; *Hynes* v. *Swartz*, [1937] O.R. 924; *Canadian Northern Ontario Railway Co.* v. *Smith* (1914), 50 S.C.R. 476; *C.P.R.* v. *The Little Seminary of Ste. Therese* (1889), 16 S.C.R. 606; *Re Town of Niagara and Kirby*, [1933] O.R. 174; *Re Election for St. Patrick's Riding*, [1934] O.W.N. 492; *Re Toronto Beaches Election*, [1944] 1 D.L.R. 204; *Re Courneys and the Village of Tweed*, [1949] O.R. 270; *Godson* v. *Toronto* (1890), 18 S.C.R. 36; and *Re Edwards and Stouffville*, [1960] O.W.N. 152.

[30] R.S.O. 1970, c. 284, s. 240(1).

[30a] See *Re Courneys and the Village of Tweed*, [1949] O.R. 270 (C.A.).

[31] See chapter 5.

Broadly speaking, adjudication is perceived as a process of decision-making or dispute resolution whereby claims of right are made by the parties involved in the dispute on the basis of preexisting rules, policies or principles existing either within a legislative framework or at common law. The judge is required to apply these rules, principles or policies to the particular dispute in a rational way in order to resolve those questions which are submitted to him. His function is perceived as one of "discovering" the implication of the standards.

A simple but negative definition of administrative duties is "those duties which are non-adjudicative". Included among administrative duties are those which are ceremonial, investigative, ministerial or operational in nature. A person exercising an administrative function often need not go beyond merely declaratory action.

The purpose of drawing the above distinction is to lay the groundwork for the basic proposition that the primary if not the exclusive role of judges in our constitutional system is to adjudicate. By their training, professional background, salaries, levels of competence and independence, judges are best equipped for adjudication. They are not administrators. Too often the legislatures have been prone to assign non-adjudicative duties to judges merely for convenience without considering the impact on the judicial work of the Court.

Accordingly, we would recommend that there be a presumption against the assignment of administrative or non-adjudicative duties to judges in the absence of strong countervailing considerations. In chapter 5 we make the same recommendation in respect of County Court judges. Concerning the High Court, the duties under the following existing statutes are examples of the duties that might be transferred to other public functionaries:

Provincial Statutes	Section Description	Other public functionary to whom the duty might be transferred
The Arbitrations Act, R.S.O. 1970, c. 25	s. 8: a judge of the Supreme Court may appoint an arbitrator	to the Provincial Secretary for Justice or his designee
The Public Officers Act, R.S.O. 1970, c. 382	s. 16: summary motion to a judge of the Supreme Court to appoint some disinterested person when a public officer is an interested party in any act, matter or thing to be undertaken or performed	to the Chairman of the Civil Service Commission or, if he is disqualified for reason of interest, then to the senior ranking Deputy Minister

Under *The Provincial Courts Act*[32] one or more judges of the Supreme Court may be appointed to conduct an inquiry into the removal for cause of a Provincial judge. The same Act stipulates that the Chief Justice of the High Court is to serve as a member of the Judicial Council for Provincial judges. In our view these non-adjudicative functions are sufficiently important in the sense of requiring demonstrated impartiality that such duties should be performed by judges.

It is to be noted also that Appendices I and II reveal a number of non-adjudicative duties which appear to be integrated with adjudicative duties under a specific section of a statute. Examples at the provincial level can be found in the investigative duties required of a judge under sections 144 and 188 of *The Insurance Act*.[33]

At the federal level numerous examples can be found under the *Bankruptcy Act*,[34] the *Companies' Creditors Arrangements Act*,[35] the *Canada Corporations Act*,[36] the *Trust Companies' Act*[37] and the *Winding-Up Act*.[38] Under these federal statutes the non-adjudicative duties are integrated with important adjudicative functions and therefore for purposes of convenience and consistency the presumption discussed earlier can be rebutted.

Apart from non-adjudicative duties, there may well be certain adjudicative duties in Appendices I and II which might be better transferred to other public functionaries. While the major problems concern the County Courts, to be later discussed, we would propose the following guidelines as applicable to duties of a *persona designata* nature conferred on judges in both the High Court and the County and District Courts. However these are guidelines only. It is not suggested that they be regarded as rules. There must be exceptions:

1. All adjudicative duties conferred by statute on judges requiring the simple and routine application of clearly defined standards in a consistent and uniform manner should be transferred to other public functionaries.

2. A presumption should arise to the effect that an adjudicative duty conferred on a judge should be transferred when there is in existence another qualified and competent public functionary or tribunal which is equipped to perform these adjudicative duties.

3. Adjudicative duties not falling within #1 and #2 above should remain with the judges unless with respect to specific duties there are compelling reasons relating to the inability of the judges to handle their normal workload of trial cases, which situation would

[32]R.S.O. 1970, c. 369, s. 4(1).
[33]R.S.O. 1970, c. 224.
[34]R.S.C. 1970, c. B-3, ss. 15, 20, 22, 23, 26, 28, 29, 41, 43, 48, 54, 63, 121, 133, 142, 150, 151, 157.
[35]R.S.C. 1970, c. C-25, ss. 4-5.
[36]R.S.C. 1970, c. C-32, ss. 4(5), 102(2), 134(1).
[37]R.S.C. 1970, c. T-16, s. 36(6).
[38]R.S.C. 1970, c. W-10, ss. 16-18, 71, 74, 75, 87-92, 153-159, 160-172.

suggest the transference of a specific duty to a new or existing public functionary or tribunal possessing the requisite specialization or expertise on such adjudicative matters.

None of the adjudicative duties listed in Appendices I and II appears to come within the first guideline. The second guideline will become most relevant if an integrated Family Court should be established in this Province, in which case the duties of High Court judges under *The Child Welfare Act*,[39] the *Divorce Act*,[40] *The Infants Act*,[41] *The Married Women's Property Act*[42] and *The Matrimonial Causes Act*[43] would probably be transferred to the new Family Court. Also under this guideline we would propose that duties of High Court judges under *The Constitutional Questions Act*,[44] which permits the Lieutenant Governor in Council to refer to a judge of the Supreme Court any matter he thinks fit "for a hearing and consideration" and an opinion with reasons, might be abandoned since the same duties may be conferred on the Court of Appeal which is better equipped institutionally to perform duties of this nature. Indeed, on every occasion since the turn of the century when this Act has been invoked by the Lieutenant Governor in Council, the reference has been to the Court of Appeal rather than to a single judge of the Supreme Court. In our view this advisory jurisdiction should be invoked only in exceptional circumstances and then only in the highest court best equipped to deal with complex jurisprudential questions. We would therefore recommend that *The Constitutional Questions Act* be amended accordingly.

B. The Circuit System

1. *History*

The principle of the circuit system in the Ontario High Court of Justice has been little changed since the beginning of the nineteenth century. Following the enactment in Upper Canada of the first *Judicature Act*[45] in 1794 establishing the Court of King's Bench with unlimited civil and criminal jurisdiction, the Governor followed the English practice of issuing Commissions of Assize and *Nisi Prius* from time to time between terms to the judges of that Court and other persons named, empowering them to try civil causes at the district towns. In practice, the Commissions of Assize and *Nisi Prius* (civil cases) were combined with Commissions of *Oyer* and *Terminer* and General Gaol Delivery (criminal cases) so that both civil and criminal cases were tried at the Assizes.[46]

Prior to 1794 civil cases were tried in the Courts of Common Pleas, one of which was located in each district. These courts were absorbed by

[39]R.S.O. 1970, c. 64.
[40]R.S.C. 1970, c. D-8.
[41]R.S.O. 1970, c. 222.
[42]R.S.O. 1970, c. 262.
[43]R.S.O. 1970, c. 265.
[44]R.S.O. 1970, c. 79, s. 1.
[45]n. 4 *supra*.
[46]See Riddell, *The Bar and The Courts of the Province of Upper Canada, or Ontario* 92 (1928).

the new Court of King's Bench. Criminal cases not tried at the General Sessions of the Peace — usually all capital felonies — were sent to the courts of *Oyer* and *Terminer* and General Gaol Delivery appointed by Commissions issued from time to time, but since the pre-1794 districts in Upper Canada had no safe gaols, those charged with capital felonies had to be sent to Montreal or occasionally to Quebec.[47]

There were four districts in Upper Canada at that time. The first was the District of Luneburg which ran from the eastern limit of what is now Ontario to a line drawn longitudinally through the mouth of the Gananoque River. The second was the District of Mecklenburg which ran west to a longitudinal line drawn through the mouth of the Trent River. The district of Nassau covered the area west to a longitudinal line through the extreme projection of Long Point on Lake Erie. The fourth was the District of Hesse which included all the residue of the Province in the western or inland parts thereof.[48]

The *Judicature Act* of 1794 required the Court of King's Bench to be "holden in a place certain",[49] which was to be the place where the Governor or Lieutenant Governor usually resided, and until such place was fixed it was to be the last place of meeting of the Legislative Council and Assembly. A specific place was not designated in the Act because, while Newark (Niagara) was the actual capital, Governor Simcoe had selected York (Toronto) as the temporary capital until the place, now London, which he had selected for the permanent capital, would be available.[50] When the Assizes in the various districts had tried the case with a jury, it was the practice to bring the Record back to the location of Court of King's Bench where judgment was then entered and process awarded.[51]

There were no statutory provisions enacted with respect to the circuit system until 1822[52] when the Governor or Lieutenant Governor was authorized to issue yearly in the vacation between the Michaelmas and Trinity terms (running from mid-July to mid-October), such Commissions of Assize and *Nisi Prius* into the several districts as were necessary for the purpose of trying all civil issues joined in the Court of King's Bench. The same statute provided that, when a suitable communication by land should be opened up with the capital into the respective districts and the circumstances of the Province required it, the Governor or Lieutenant Governor could issue a second such Commission into each district in the vacation between Hilary and Easter terms (covering roughly the period between the first of February and the end of April). Special Commissions for the trial of offenders upon extraordinary occasions could be issued at any time.

In 1837, because of the great increase in population in Upper Canada with the resulting formation of new districts and the necessity of providing

[47] *Ibid.* at 59, 62-63.
[48] *Ibid.* at 49.
[49] 34 Geo. 3, c. 2, s. 1 (U.C.).
[50] Riddell, *op. cit.* n. 46 *supra*, at p. 90.
[51] *Ibid.* at 92.
[52] *An act to repeal part of and amend the laws now in force respecting the practice of his Majesty's court of king's bench in this province*, 2 Geo. 4, c. 1, s. 27 (U.C.).

for more frequent delivery of the gaols, the number of judges of the Court of King's Bench was increased from three to five and the terms were rearranged so that Commissions of *Oyer* and *Terminer* and General Gaol Delivery and also of Assize and *Nisi Prius* were to be issued twice a year in each district for the trying of both criminal and civil cases.[53] This meant that sittings were to be held in each district in the period running from mid-February to mid-June and also in the period beginning in mid-August and terminating at the end of November. In addition to this, Special Commissions could still be issued for the trial of one or more offenders upon extraordinary occasions, when deemed expedient.

In 1849, what had become 20 districts in the Province were abolished and designated as counties for judicial as well as all other purposes,[54] with provision being made for the temporary union of counties and the future dissolution of such unions as the increase of wealth and population from time to time might require.[55] In that same year the legislation with respect to the circuit system was amended to provide for Commissions of Assize, *Nisi Prius*, *Oyer* and *Terminer* and General Gaol Delivery to be held twice a year in each county or union of counties, excepting the County of York for which special provisions were made.[56] In the County of York, the Courts of Assize and *Nisi Prius*, *Oyer* and *Terminer* and General Gaol Delivery were to be held three times a year, starting on the first Monday in January, the first Monday in May and the first Monday in November.[57]

Further changes were made in the circuit system in 1856 by *The Common Law Procedure Act of Upper Canada*[58] wherein Courts of Assize and *Nisi Prius*, *Oyer* and *Terminer*, and General Gaol Delivery could be

[53] *An act to increase the present number of judges of his Majesty's court of king's bench in this province; to alter the terms for the sittings of the said court; and for other purposes therein mentioned*, 7 Will. 4, c. 1, s. 7 (U.C.).
[54] 12 Vict., c. 78.
[55] The following were the counties or union of counties for judicial purposes:
Essex, Kent and Lambton
Frontenac, Lennox and Addington
Lanark and Renfrew
Leeds and Grenville
Lincoln, Haldimand and Welland
Northumberland and Durham
Prescott and Russell
Stormont, Dundas and Glengarry
Wentworth and Halton
Carleton
Hastings
Huron
Middlesex
Norfolk
Oxford
Peterborough
Prince Edward
Simcoe
Waterloo
York.
[56] *An act to make further provision for the Administration of Justice, by the establishment of an additional Superior Court of Common Law and also a Court of Error and Appeal in Upper-Canada, and for other purposes*, 12 Vict., c. 63, s. 20.
[57] *Ibid.* s. 21.
[58] 19 Vict., c. 43, ss. 152-153.

held with or without Commissions as the Governor thought best, and on such days as the chief justices and judges of the Superior Court of Common Law respectively named. If Commissions were issued, then the persons named therein (one of whom always had to be the Chief Justice or a judge of the Superior Court) presided. If no Commissions were issued, then the Courts of Assize and *Nisi Prius* could be presided over by one of the chief justices or the judges of the Superior Court, or in their absence by a County Court judge or a Queen's Counsel who could be requested by the chief justices or judges to attend for that purpose. Courts of *Oyer* and *Terminer* and General Gaol Delivery could be presided over by either the chief justices or judges, or by any Queen's Counsel or County Court judge (each and all of whom were deemed to be of the *quorum*), together with any one or more persons who were named by the Governor of the Province as associate justices[59] of said Courts. There was a maximum of five associate justices for each Court with the clerk of Assize being *ex officio* one of the associate justices. In the following year, however, the provision relating to associate justices was removed.[60]

In 1873 there was added to the County of York a fourth Court of Assize and *Nisi Prius* and of *Oyer* and *Terminer* and General Gaol Delivery which sat in each year on such days following Easter Term as the Superior Court judges named.[61] In addition the sittings of the Court of Assize and *Nisi Prius* in the County of York were, for the first time, permitted to be held separately and apart from the Courts of *Oyer* and *Terminer* and General Gaol Delivery, at the discretion of the chief justices and judges.[62] A third sitting was authorized for the County of Wentworth. In the following year the Courts of Assize and *Nisi Prius* and of *Oyer* and *Terminer* and General Gaol Delivery were permitted for the first time to be scheduled during term, with the Superior Court judges given the power to appoint the days and to appoint such Courts without Commission. Authority was also provided that in any county or union of counties the sittings of the Courts of Assize and *Nisi Prius* could be held separately and apart from the Courts of *Oyer* and *Terminer* and General Gaol Delivery.[63]

The Judicature Act of 1881[64] created the High Court of Justice which was to embody all the jurisdiction theretofore exercised by the Court of Queen's Bench, the Court of Chancery, the Court of Common Pleas and the Courts of Assize, *Oyer* and *Terminer* and General Gaol Delivery. The authority of the Lieutenant Governor to issue Commissions of Assize for criminal or civil cases in the High Court was continued, and the Commissioners named therein were deemed to constitute a Court of the said High Court of Justice.[65] Provision was also made for at least one sitting each year for the trial of non-jury cases in each county town.[66] These non-jury sittings were to be held "as often in every year as the due despatch of

[59]Lay justices could be appointed; *ibid.*
[60]*An Act to amend the Common Law Procedure Act 1856*, 20 Vict., c. 57, s. 30.
[61]36 Vict., c. 8, s. 52.
[62]*Ibid.* s. 53.
[63]37 Vict., c. 7, s. 26.
[64]44 Vict., c. 5, s. 9.
[65]*Ibid.* s. 22.
[66]*Ibid.* s. 46.

business and the public convenience may require".[67] In the 1887 Revised Statutes of Ontario[68] this requirement was changed so that both a non-jury sittings for civil causes and a jury sittings for both criminal and civil causes were required to be held annually in every county town. Where the non-jury sittings were scheduled for the same time as the jury sittings, separate lists were to be made and the jury cases disposed of first. Legislation about this time provided for additional sittings in the counties of York, Wentworth and Middlesex, and for sittings in Sault Ste. Marie and Port Arthur.[69]

Meanwhile the requirement (first enacted in 1837) that there be Courts of Assize and *Nisi Prius* and of *Oyer* and *Terminer* and General Gaol Delivery twice each year in every county and union of counties[70] had been continued in 1877 in the first Ontario statute revision following Confederation by *An Act respecting Courts of Assize and Nisi Prius and of Oyer and Terminer and of General Gaol Delivery.*[71] The relevant section was eventually brought into *The Judicature Act* by the statute revision of 1887.[72] In 1895 the requirement of not less than two sittings in each county town for each year was freed of any reference to terms or time of year (except for holidays and long vacation), and further provisions were made for mandatory additional annual sittings in Sault Ste. Marie, Port Arthur and Rat Portage (Kenora) as well as in the Counties of York, Carleton, Wentworth and Middlesex.[73]

In 1913 *The Judicature Act* was further amended. The judges were empowered to schedule as many sittings of the High Court in each county as were required for both civil and criminal matters, with the minimum requirement that there be at least two sittings in each year for every county and at least one additional sittings for the Counties of York, Carleton, Wentworth, Middlesex and the united Counties of Dundas, Stormont and Glengarry. Sittings for jury and non-jury matters were permitted to be held separately, as were criminal sittings.[74]

The present basis for the organization of the circuit system is governed by section 47(3) of *The Judicature Act*[75] which reads as follows:

> All such arrangements as may be necessary or proper for the holding of any of the courts, or the transaction of business in the High Court, or the arrangement from time to time of judges to hold such courts, or to transact such business, shall be made by the judges of that branch, with power in the Chief Justice of the High Court to make such readjustment or reassignment as is necessary from time to time.

[67]*Ibid.*
[68]R.S.O. 1887, c. 44, s. 90(1).
[69]47 Vict., c. 14, s. 13; 48 Vict., c. 13, s. 14.
[70]N. 53 *supra.*
[71]R.S.O. 1877, c. 41, s. 1.
[72]R.S.O. 1887, c. 44, s. 90(1).
[73]58 Vict., c. 12, s. 1.
[74]3-4 Geo. 5, c. 19, s. 44.
[75]R.S.O. 1970, c. 228.

The result is that the primary duty of determining when the courts will sit and what judges will preside rests with the judges of the High Court with power in the Chief Justice to make the necessary readjustments and reassignments.

2. *Present Organization*

The provisions of the present *Judicature Act*[76] respecting the organization of the circuit system are very little different from those existing at the turn of the century. Courts must sit in each of the 48 county or district towns twice a year and such sittings are in practice presided over by a judge of the Supreme Court.

Provision is made that at the request of a Supreme Court judge, a retired judge of that Court or a judge of a County Court or a Queen's Counsel may preside. The constitutional validity of this provision is highly questionable. There are functions performed by Supreme Court judges which cannot be performed by County Court judges. It is difficult, moreover, to see how the Province can authorize a judge to confer on a Queen's Counsel or a retired judge the powers of a Supreme Court judge.

No Commissions of Assize have been issued in recent years, nor have any Queen's Counsel or retired judges been requested by a Supreme Court judge to preside over a sittings of the High Court. On rare occasions County Court judges have been called on to preside at High Court sittings and in such cases they have been restricted to the trial of civil cases excluding divorce cases.

Sittings of the High Court in all county and district towns are fixed twice a year by the judges of the High Court. The lists are drawn according to the number of circuits and the number of weeks assigned to each sitting of the Court. A judge is assigned to each sittings. Where possible an attempt is made to follow the practice of allowing each judge taking a circuit one week free in every five during which time the judge can research and write his reserved judgments and generally attempt to stay abreast of developments in the law.[77] Open assignments are usually included in each circuit, with the knowledge that judges who are free may be used to fill emergency situations where another judge, previously assigned, has become ill or where an extra judge is required in a particular county or district to help clear up untried cases there.

A circuit guide is printed and distributed to all local registrars, sheriffs, gaolers and members of the legal profession in advance of the commencement of the first sittings included in the circuit guide.

A difficulty arises under the present system of constituting the sittings of the Court. If circumstances arise that require extended sittings of a Court

[76]*Ibid.* ss. 50-55.

[77]The judges of the Supreme Court of Ontario in their brief to the Commission suggested that one free week in five was an ideal and desirable ratio for assignments which it has not always been possible to maintain of late, thus resulting in a higher percentage of oral judgments.

in a particular judicial district, there is no power in the Chief Justice of the Court to constitute a new sittings. He may direct a sittings to be extended and assign a judge to preside at the extended sittings, but he does not have the power to constitute new sittings. This must be done by the judges of the Court.

Another feature of the present circuit system is the requirement in the *Judges' Act*[78] that the judges of the Supreme Court of Ontario reside at the City of Toronto or within five miles thereof, except where leave to reside elsewhere in the Province for any specified time is granted by the Governor in Council.

3. *Recent Problems and the Need to Reorganize*

From time to time criticisms have been made of the circuit system, bringing into question whether it should be abolished or at least altered. We first concern ourselves with some of the criticisms that have been raised.

It has been suggested that the system leads to an unavoidable waste of the time of the Court and that of the litigant. The distances and time involved in travelling by the Toronto-based judges sometimes result in an Assizes or a non-jury sittings not commencing until Monday afternoon and terminating on Thursday evening or Friday morning so that the judges can return to Toronto for the weekend. In terms of time made available by judges this may mean a three and a half or four-day week.[79]

Because the Assizes in Ontario combine both criminal and civil work, with priority given to criminal cases, there is often no certainty as to how many civil cases will be reached, if any, at a particular sittings. This causes great inconvenience to civil litigants, their counsel and witnesses who must be prepared to go on if near the top of the list, yet who may not be reached and have to come back for the next sittings.[80] If civil cases are not ready to go on when the criminal list is finished, High Court judges may have to return to Toronto without using the remainder of the week. Conversely, it is not uncommon for an Assize to be taken up wholly with criminal work, thus resulting in all civil cases being deferred to the next sittings, to the inconvenience of those involved in cases on the civil list.[81]

The circuit system is criticized on the ground that the High Court judge is required to move on in accordance with a circuit guide prepared some months in advance. This criticism is not necessarily justified as the Chief Justice has power to make reassignments or readjustments to meet the necessities of unforeseen circumstances. Such a system may prejudice litigants who happen to have cases in a county or district at a time when

[78]R.S.C. 1970, c. J-1, s. 8.

[79]Evidence of occurrences such as this was received from virtually all lawyers' groups with whom the Commission met in May, June and July, 1971.

[80]In the Commission's meetings with lawyers throughout the province this seemed to be the most important problem raised in considering the organization of the trial work of the High Court of Justice.

[81]In Sudbury the lawyers advised the Commission that no civil cases had been tried at the fall Assizes for over three years.

the number of cases to be tried is far greater than the allotted time permits and may militate against those litigants with long, complex cases because of the natural reluctance of the High Court judge to start a case that he may not be able to finish before moving to his next assigned sittings. As a result, the more difficult cases which most require adjudication by our best judges may be put over from one sittings to another. This difficulty can be overcome, of course, by fixing trial dates for long and difficult cases.

A final criticism that has been made of the circuit system is that it often leads to conflicts between the sittings of the High Court and the sittings of the County and District Courts particularly where the High Court sittings have had to be rescheduled[82] or High Court judges reassigned. In many counties and districts there are not enough courtrooms to conduct more than one or two trials at a time. Another complicating factor is that counsel who appear regularly in the courts usually have a number of cases on both the Supreme Court and County Court lists, often making the holding of concurrent sittings difficult. Since the High Court judges' schedules are less flexible, it is customary to reschedule cases in the County Court to accommodate the scheduling of cases in the High Court.

Most of the criticisms of the circuit system have some foundation — some more than others. We are, however, prepared to state that they do not constitute sufficient cause to change from the principle of a province-wide circuit system in the High Court which has existed in this jurisdiction since 1791. To move to a system of resident High Court judges or a system of small circuits operating concurrently in various regions of the Province would be to overreact to problems which can be overcome by less drastic changes. Nor would such a change be consistent with the representations made to us by members of the bar. Other solutions must be found.

The province-wide circuit system is one of the most important and valuable features of the High Court. Since the judges are kept in constant rotation it is a guarantee of impartiality and uniformity of judicial standards throughout the Province.[83] A judge who hears cases in all parts of the Province gains much more experience than one who is located only in one area or region. This experience may well increase the quality of justice that is dispensed.

In addition, the circuit system serves as a protection for accused persons and civil litigants who might otherwise have certain fears that a resident judge would not be sufficiently detached from the local conditions giving rise to the matters in issue.[84]

The tradition of the High Court judge on Assize taking justice to the

[82]This point was raised in the brief of the County and District Court Judges Association of Ontario.

[83]This argument was strongly advanced by the Beeching Commission at paras. 69 and 152. It was also suggested by several Thunder Bay lawyers at the Commission's meeting in that city on June 2, 1971.

[84]This argument was suggested to us by a criminal lawyer, Mr. R. J. Montello, at the Commission's meeting in Windsor on May 18, 1971. It was also advanced by the Beeching Commission at para. 69.

people runs deep in English legal history. The Beeching Commission Report in England recommended the preservation of the circuit system, albeit with revised circuit centres, and commented as follows:

> We were convinced that the argument in favour of a circulation of High Court Judges throughout the county to insure a uniform application of the law by judges whose impartiality and freedom from local associations is unquestioned, is of such weight that any solution we might propose should provide for it. We were aware, too, that difficulties and dangers might arise if individual High Court Judges were required to remain for long periods in isolated positions.[85]

The new English *Courts Act*, 1971 has carried out this recommendation.

Another major advantage of the province-wide circuit system is the collegiality which is permitted to develop at Osgoode Hall where all the High Court judges have their offices and permanent headquarters. The Beeching Commission Report made reference to this feature as follows:

> . . . movement of High Court Judges between London and the provinces, for the purpose of hearing the more serious civil and criminal cases, has a very great merit and has led to a consistency of judicial standards. During their time in London the judges join in the communal life of their Inns and have the opportunity of exchanging views with their fellow judges and with members of the Bar. While on circuit they are able to dispense justice which is seen to be wholly above local prejudices and problems and, at the same time they gain knowledge of life in different parts of the country which enables them to bring a wider perspective to bear on their work.[86]

Mr. McRuer, in the Report of The Royal Commission Inquiry into Civil Rights, spoke favourably of this feature in recommending the retention of the circuit system:

> Judges, as any other body of men in any walk of life, have to be subject to wise discipline, and discipline is much easier to maintain with the intimate and helpful relationship that now exists in the court. Daily association with one another inevitably improves the quality of the judges.[87]

A final advantage leading us to urge that the circuit system be preserved is that it permits greater specialization among the judges. If a particular type of case arises requiring a certain judicial expertise, then a judge having that expertise may be assigned to hear the case no matter where in the Province it is to be tried. This advantage will depend of course on the extent to which the exigencies of a predetermined circuit guide will permit the assignment of specialists. But a scheme calling for resident or regionally-based judges would be even less flexible in facilitating assign-

[85]Cmnd. 4153, para. 152.

[86]*Ibid.* para. 69.

[87]*Op. cit.* n. 15 *supra*, at p. 653.

ments to specialized and complex cases which arise from time to time around the Province.

In summary, the advantages of a province-wide circuit system far outweigh the disadvantages if an attempt is to be made to strike a balance favouring the quality of justice dispensed by the High Court rather than administrative convenience and efficiency.

We do not suggest, however, that the present circuit system is not in need of reform. We think it is. In view of the changing population and provincial development patterns leading to greater urbanization in Ontario we have concluded that it is not necessary to continue to hold sittings of the High Court in all of the 48 judicial districts of the Province.

Ontario, along with the rest of Canada, has become much more urbanized than when the original county and district boundaries were laid out under the *Baldwin Act* in 1849. Today over 40% of Ontario residents live in cities having a population in excess of 200,000 (Toronto, Hamilton, Ottawa, London and Windsor). The Court machinery required to deliver judicial services to the people in these urban centres is necessarily large and complex. Yet much the same type of machinery is required by present law and practice for at least two High Court sittings annually in 14 counties or districts with populations of less than 50,000.

Cost considerations in the holding of High Court sittings twice a year in each of the 48 county and district towns must not be forgotten. It is a laudable objective to take justice to the people through the trial of cases in the community closest to where the alleged crime was committed or the dispute arose. But we think this objective is now overemphasized. The development of improved means of transportation and hard surfaced roads has greatly changed the facilities for administering justice throughout Ontario since the judicial districts were first laid out. The original circuit system of 48 judicial districts was laid out in what can be truly regarded as the "horse and buggy age". But under the present circumstances of good private and public transportation facilities in most parts of the Province (at least in Southern Ontario), obstacles to attendance at or participation in a High Court trial from a distance have been greatly overcome.

From a consideration of 1971 caseloads of High Court sittings throughout the Province, excluding sittings at Toronto from the analysis, it appears that the High Court sat approximately 0.5 court days per thousand population annually. On this basis, to justify two sittings of a minimum of five days each per year, a circuit centre should serve a county or district population of a minimum of 20,000. Significantly, there are already three counties or districts which are at or below this minimum, and this of course is assuming merely an *average* number of High Court days (0.5) per thousand population. There will be many occasions when the average is departed from and the High Court will be in a centre for considerably less than the full ten days in a given year. This is borne out by the statistics for the calendar year 1971. Four counties or districts had High Court sittings of less than 10 days (Muskoka — 8, Lennox and Addington — 7½, Rainy

River — 6, and Manitoulin — 3). Nine more counties or districts had sittings of less than 15 days during the year (Dufferin — 14½, Bruce — 14, Grey — 14, Lanark — 12, Leeds and Grenville — 12, Huron — 11, Prince Edward — 11, Perth — 10½, Prescott and Russell — 10). It can be expected of course that the statistics will vary up or down from year to year but the significant point is that there are a substantial number of circuit centres where it is becoming increasingly difficult to justify separate High Court sittings on a continuing basis. In addition, since jurisdiction in divorce matters has been conferred on County Court judges as local judges of the High Court the need for High Court sittings in these centres will continue to diminish. If our recommendations concerning the organization of a Family Court are adopted, this need will further diminish.[88]

We recommend that there be a substantial reduction of the number of circuit centres for trials in the High Court. The present 48 circuit centres are based mainly on county or district units. While these may have been appropriate for the High Court at the time they were drawn, we do not think that they can continue to provide the proper basis of organization for the High Court circuits for the future. Many of the judicial districts have been and will continue to be proper geographic divisions for the distribution of governmental services of all types but we do not think this fact should retard the development we recommend.

The elimination of some of the circuit centres for purposes of trials in the High Court through amalgamation with adjacent circuit centres is recommended. Specifically, we recommend for immediate implementation the amalgamation of the following 16 trial centres:

Woodstock (with London)

St. Thomas (with London)

L'Orignal (with Ottawa-Carleton)

Gore Bay (with Sudbury)

Parry Sound — west half of the district (with Sudbury)

Parry Sound — east half of the district (with North Bay)

Welland (with St. Catharines)

Bracebridge (with Barrie)

Simcoe (with Brantford)

Cayuga (with Brantford)

Orangeville (with Brampton)

Lindsay (with Peterborough)

Napanee (with Kingston)

Perth (with Brockville)

Walkerton (with Owen Sound)

[88]See chapter 13.

Goderich (with Stratford)

Picton (with Belleville).

These 16 trial centres were chosen with the assistance of the Management Services Division of Treasury Board which by virtue of its broad responsibilities to the government has an overview of provincial development plans on all fronts. The following factors and guidelines were taken into account in selecting the 16 centres amalgamated:

1. The size of population;

2. The size of previous caseloads;

3. The geographic dispersal of the population and whether or not the adjacent circuit centre is within 60 road miles and convenient to the public;

4. The number of practising lawyers who will be inconvenienced by having to have their clients' High Court cases tried in an adjacent circuit centre;

5. The overall government direction concerning provincial development including population projections to the year 2001, projected public and private transportation facilities, and present and projected facilities for courthouses, detention centres, land registration offices, probation offices and other correctional facilities;

6. The policy that northern Ontario is to be treated differently from southern Ontario with existing circuit centres to be maintained until such time as sufficient air, rail and road facilities are available and accessible to the public to overcome the problems of distance and sparse population.

The following tables were prepared as a basis for our conclusions. Table I is a capsule view for 1971 of the present 48 High Court circuit centres, showing the population of both the city or town and the county in which the centre is located, the number of half-days spent on High Court sittings, the number of civil trials (the figures showing the number of criminal trials are not available) and the number of lawyers. Table II provides the same capsule information designed to show what the effect of the amalgamation of the 16 circuit centres with the most convenient adjacent centre would have been in 1971.

TABLE I

HIGH COURT OF JUSTICE
PRESENT SITUATION (1971)

	Location	Population	County	Population	Half Court Days (1971) Criminal	Civil	Total	Civil Trials (1971) Divorce	M.V.	Other	Total	Lawyers
		(000)		(000)								
1	Toronto	1981	York	2138	484	3946	4430	4332	112	241	4685	3295
2	Ottawa	292	Ottawa-Carleton	448	50	267	317	461	19	50	530	408
3	Hamilton	279	Wentworth	388	43	244	287	737	36	72	845	309
4	London	213	Middlesex	269	20	227	247	218	21	6	209	215
5	Kitchener	107	Waterloo	254	78	137	215	369	37	25	431	168
6	Windsor	196	Essex	293	72	128	200	528	24	54	606	162
7	Sudbury	91	Sudbury	169	33	121	154	207	34	30	271	75
8	Welland	45	Niagara (South)		30	115	145	187	3	3	193	184
9	St. Catharines	105	Niagara (North)	338	2	121	123	171	12	8	191	9
10	Barrie	27	Simcoe	153	29	105	134	351	10	41	402	91
11	Brampton	38	Peel	233	10	109	119	364	7	18	389	106
12	Sarnia	57	Lambton	110	12	100	112	160	12	17	189	49
13	Kingston	57	Frontenac	91	49	62	111	247	10	14	271	62
14	Whitby	24	Ontario	186	3	104	107	233	11	6	250	67
15	Sault Ste. Marie	75	Algoma	105	37	59	96	205	14	11	230	44
16	Thunder Bay	107	Thunder Bay	134	60	36	96	142	—	7	149	53
17	Peterborough	56	Peterborough	84	—	87	87	143	15	6	164	47
18	Milton	6	Halton	179	5	78	83	259	14	25	298	70
19	Brantford	60	Brant	87	15	69	74	156	5	4	98	49
20	Chatham	33	Kent	97	23	48	71	145	2	7	154	45
21	St. Thomas	24	Elgin	63	16	46	62	135	4	2	141	33
22	Belleville	34	Hastings	92	—	58	58	121	9	1	131	43
23	Lindsay	12	Victoria, Haliburton	43	32	23	55	37	1	2	40	25
24	Kenora	11	Kenora	33	41	12	53	30	1	2	33	11
25	Cobourg	11	Northumberland, Durham	92	—	53	53	109	2	6	117	33
26	Cochrane	5	Cochrane	79	8	41	49	77	5	2	84	20
27	Cayuga	1	Haldimand	31	14	25	49	20*	—*	1*	21*	11
28	Guelph	57	Wellington	104	10	38	48	141	5	3	149	52
29	Woodstock	25	Oxford	77	25	20	45	75	6	8	89	36
30	Simcoe	10	Norfolk	53	4	40	44	77	4	3	84	21
31	Parry Sound	6	Parry Sound	24	11	31	42	24	4	3	31	7
32	North Bay	45	Nipissing	68	4	37	41	81	10	5	96	28
33	Haileybury	5	Temiskaming	42	17	19	36	44	3	2	49	11
34	Cornwall	45	Stormont, Dundas, Glengarry	94	2	30	32	123	2	—	125	27
35	Pembroke	15	Renfrew	79	17	13	30	59	3	5	67	26
36	Orangeville	8	Dufferin	20	—	29	29	29	2	6	37	15
37	Walkerton	4	Bruce	43	15	13	28	43	3	1	47	13
38	Owen Sound	18	Grey	65	—	28	28	64	3	—	67	28
39	Perth	6	Lanark	39	4	20	24	33	—	—	33	16
40	Brockville	19	Leeds, Grenville	72	—	24	24	85	1	1	87	26
41	Goderich	7	Huron	50	8	14	22	30	2	—	32	14
42	Picton	5	Prince Edward	20	5	17	22	22	1	1	24	6
43	Stratford	23	Perth	61	—	21	21	108	6	5	119	32
44	L'Orignal	1	Prescott, Russell	42	12	8	20	4	—	1	5	8
45	Bracebridge	6	Muskoka	28	—	16	16	39	—	2	41	18
46	Napanee	5	Lennox and Addington	27	—	15	15	13	1	—	14	5
47	Fort Frances	9	Rainy River	22	—	12	12	36	—	—	36	6
48	Gore Bay	1	Manitoulin	7	3	3	6	6	—	1	7	1

* Incomplete records submitted by Haldimand County. Information not submitted for the period July 1, 1971 to October 1, 1971.

TABLE II

HIGH COURT OF JUSTICE
PROPOSED 32 CIRCUIT CENTRES

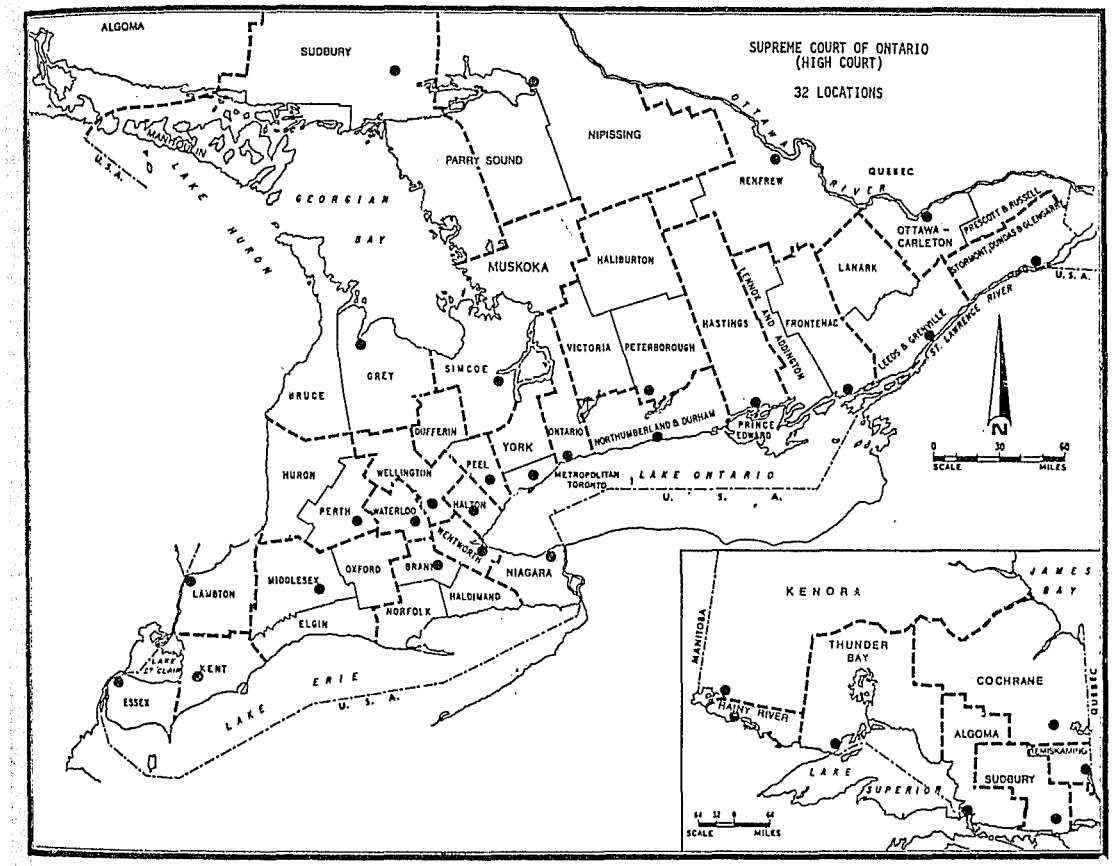
	Location	Counties	Population (000)	Half Court Days (1971) Criminal	Civil	Total	Civil Trials (1971) Divorce	M.V.	Other	Total	Lawyers	Locations Eliminated
1	Toronto	York	2138	484	3946	4430	4332	112	241	4685	3295	
2	London	Middlesex Oxford Elgin	409	61	293	354	428	31	16	439	284	Woodstock St. Thomas
3	Ottawa	Ottawa-Carleton Prescott, Russell	490	62	275	337	465	19	51	535	416	L'Orignal
4	Hamilton	Wentworth	388	43	244	287	737	36	72	845	309	
5	St. Catharines	Niagara (North) Niagara (South)	338	32	236	268	358	15	11	384	193	Welland
6	Kitchener	Waterloo	254	78	137	215	369	37	25	431	168	
7	Windsor	Essex	294	72	128	200	528	24	54	606	162	
8	Sudbury	Sudbury Manitoulin Parry Sound (West)	188	42	139	181	225	36	32	294	78	Gore Bay Parry Sound (West)
9	Brantford	Brant Norfolk Haldimand*	171	33	134	167	253*	9*	8*	203*	81	Simcoe Cayuga
10	Barrie	Simcoe Muskoka	181	29	121	150	390	10	43	443	109	Bracebridge
11	Brampton	Peel Dufferin	253	10	138	148	393	9	24	426	121	Orangeville
12	Peterborough	Peterborough Victoria, Haliburton	126	32	110	142	180	16	8	204	72	Lindsay
13	Kingston	Frontenac Lennox and Addington	118	49	77	126	260	11	14	285	67	Napanee
14	Sarnia	Lambton	110	12	100	112	160	12	17	189	49	
15	Whitby	Ontario	186	3	104	107	233	11	6	250	67	
16	Sault Ste. Marie	Algoma	105	37	59	96	205	14	11	230	44	
17	Thunder Bay	Thunder Bay	134	60	36	96	142	—	7	149	53	
18	Milton	Halton	179	5	78	83	259	14	25	298	70	
19	Belleville	Hastings Prince Edward	112+	5	75	80	143	10	2	155	49	Picton
20	Chatham	Kent	97	23	48	71	145	2	7	154	45	
21	North Bay	Nipissing Parry Sound (East)	80	9	53	62	93	12	7	111	32	Parry Sound (East)
22	Owen Sound	Grey Bruce	108	15	41	56	107	6	1	114	41	Walkerton
23	Kenora	Kenora	33	41	12	53	30	1	2	33	11	
24	Cobourg	Northumberland Durham	92	—	53	53	109	2	6	117	33	
25	Timmins	Cochrane	79	8	41	49	77	5	2	84	20	
26	Brockville	Leeds, Grenville Lanark	111	4	44	48	118	1	1	120	42	Perth
27	Guelph	Wellington	104	10	38	48	141	5	3	149	52	
28	Stratford	Perth Huron	111	8	35	43	138	8	5	151	46	Goderich
29	Haileybury	Temiskaming	42	17	19	36	44	3	2	49	11	
30	Cornwall	Stormont, Dundas, Glengarry	94	2	30	32	123	2	—	125	27	
31	Pembroke	Renfrew**	79	7	13	30	59	3	5	67	26	
32	Fort Frances	Rainy River	22	—	12	12	36	—	—	36	6	

* Incomplete records submitted by Haldimand County. Information not submitted for the period July 1, 1971 to October 1, 1971.
** (Five eastern townships of Nipissing)

In addition to the amalgamation of trial centres, we recommend that the easterly five townships of the district of Nipissing (just below Algonquin Park) be amalgamated with Renfrew County with the circuit centre at Pembroke for High Court purposes. We also recommend that the circuit centre for the District of Cochrane be the town of Timmins rather than the town of Cochrane for obvious demographic reasons.

Table III is a map of the Province showing the remaining 32 circuit centres following the proposed amalgamation.

TABLE III



We considered alternative models based on the same criteria as above showing proposed amalgamations resulting in 39, 20, 8 and 5 circuit centres. (See Appendices III, IV, V and VI to this chapter.) We believe, however, that the model for 32 circuit centres represents the best compromise between convenience of the public and the efficient and economic administration of the Court.

While urging the adoption of the above 16 amalgamations for purposes of High Court trials, we do not recommend such amalgamations in respect of the office of the local registrar in each of the 48 county and district towns. These offices are the first place of business for the litigants and their lawyers in each of these communities. In our view it would impose too sudden and unnecessary a hardship to close these offices. Court papers can be transferred to the appropriate trial centre immediately prior to the commencement of a scheduled sittings with little administrative difficulty. In most cases the office of the local registrar of the Supreme Court in the county and district towns is integrated for practical purposes with the office

of the clerk of the County or District Court. Indeed, in every circuit centre outside of Toronto, except in Ottawa, the local registrar of the Supreme Court and the clerk of the County or District Court are one and the same person and they utilize the same staff members for their various functions. It would serve no practical purpose nor save any substantial cost to amalgamate the office of the local registrar with the neighbouring county or district town's office unless there were to be a move towards regionalization in the County and District Court system. For reasons which we explain in some detail in chapter 5 we favour the retention of County and District Courts in each of the present 48 county and district towns. If the recommendations we make as to the future of the Family Courts are adopted, the retention of these judicial centres will be desirable.[89] If the administrative machinery of the County and District Courts is to be retained, there is no practical reason why the local registrar's offices cannot be maintained in their present integrated fashion.

Finally, we would recommend that for purposes of administrative flexibility the Chief Justice of the High Court should have the power to assign a particular trial or a sittings to any of the 16 judicial centres amalgamated with other circuit centres of the High Court where an unexpected overload occurs at any of the 32 regular trial centres. The exercise of such power would normally be made at the request, or with the concurrence of counsel and their clients involved in the cases to be reassigned, and would depend on whether the court facilities were available in one of the 16 centres. Under no circumstances should such a reassignment displace previously scheduled County Court sittings.

C. Assignment of Judges

We have examined the present law and practice in respect of the assignment of the High Court judges to the various sittings in each trial centre.

As we have stated it has been the collective responsibility of all of the judges of the High Court, and not the Chief Justice of the High Court, to fix the days for sittings in each trial centre and to determine which of the judges will preside. The tradition is preserved in section 47(3) of *The Judicature Act*:[90]

> All such arrangements as may be necessary or proper for the holding of any of the courts, or the transaction of business in the High Court, or the arrangement from time to time of judges to hold such courts, or to transact such business, shall be made by the judges of that branch, with power in the Chief Justice of the High Court to make such readjustment or reassignment as is necessary from time to time.

As we have already pointed out, a draft circuit list is drawn up twice a year, covering sittings in each of the 48 county and district towns. A typical circuit list will be made up of blocks of weekly assignments. There is

[89] *Ibid.*
[90] R.S.O. 1970, c. 228.

a fairly consistent pattern of keeping one week in five free for each judge so that the judge can prepare reserved judgments and generally read law reports and do research work. Outside Toronto, most assignments to a circuit centre will be for periods of one to three weeks, depending on the projected caseloads in the various trial centres. The sittings will usually be characterized as Assizes (criminal and civil jury cases), Non-Jury (civil only) or Weekly Court (in Toronto, London and Ottawa only). Occasionally open assignments are included in a circuit (noted as "to be assigned") to ensure some flexibility in emergency situations because of accumulations of untried cases or illness. Once the draft circuit list is drawn up it is circulated among all the judges of the High Court who may indicate their preferences for particular circuits in order of judicial seniority. Once all the circuits have been selected, a final meeting of the judges is held to ratify the selections or make suggested changes. When the circuits are fixed by the judges they are published in the circuit guide which is printed and distributed to all local registrars, sheriffs, gaolers and members of the legal profession in advance of the commencement of the sittings to which the guide refers.

It is the responsibility of the Chief Justice of the High Court to keep the system functioning smoothly from day to day and week to week, as can be implied from the words "with power in the Chief Justice of the High Court to make such readjustment or reassignment as is necessary from time to time," contained in section 47(3) of *The Judicature Act*. The nature and extent of this power have never been judicially tested. While it would appear broad enough to permit the Chief Justice of the High Court to direct any reasonable departures from the original circuit guide, it may not give him as much power with respect to the length of sittings and the assignment of judges as may be necessary.

It is our view that there should be a new approach to the preparation of the circuit lists consistent with our recommendations concerning the appointment of court administrators. The task should be divided into two parts. First, the drawing of the circuit list fixing the time and length of sittings should be done by the Provincial Director of Court Administration in consultation with the Chief Justice of the High Court or a judge appointed by him. This is discussed further in chapter 2. With a reduced number of trial centres, it should be possible to schedule longer sittings, particularly in the larger urban centres with the largest caseloads. An intimate and specialized knowledge of existing caseloads and accumulations, physical facilities and the habits of the members of the bar in each of the trial centres is required by the person drawing the circuits. The Provincial Director of Court Administration with a competent staff and adequate statistical data should be able to furnish this information.

The responsibility for the second task involving the circuit list should fall exclusively on the judges. We make a clear distinction between the scheduling of sittings and the assignment of judges to the various sittings scheduled. It is our view that it is important that the judges collectively should be responsible in the first instance for the assignment of judges to sit at scheduled sittings with the power in the Chief Justice to make

reassignments. Apart from the psychological advantages of allowing all the judges to participate in the decisions respecting the workload, there is an important additional factor — the public interest in the independence of the judges. There should be no room for any allegation or suspicion that in any case a particular judge has been assigned to a particular sittings because there is a case on the list in which there may be potential political interest. As we noted in chapter 1, we regard the assignment of judges as the exclusive preserve of the judiciary and not the government. It is a most important facet of the independence of the judges. The scheduling of the time and length of a sittings, on the other hand, is not the exclusive preserve of the judiciary and may quite properly involve professional court administrators employed by the government and working in close consultation with the Chief Justice.

We support the continuation of the present practice of scheduling the circuits in such a way as to permit each judge to have one week in five for the writing of reserved judgments and staying abreast of developments in the law. Indeed, if the workload of the High Court permits we favour one week in four. It must be remembered that the High Court is constituted as the most important trial court for both criminal and civil cases. The quality of the justice dispensed depends not only on the actual court decisions but on the carefully articulated reasons of the judges. The research and writing involved in a written decision on a difficult and complex case takes much time. It is not the sort of thing that can be done in the evenings, or on weekends or even in a single day in between court sittings.

We recommend that in the drawing of the circuit lists more use be made of "open assignments" so that there are judges available to be assigned on short notice to substitute for another judge who has become ill or has been held over at a previous sittings, or to take a second list at a sittings where an overflow of cases has unexpectedly developed.

The scheduling of courts and the fixing of lists of cases to be tried will be greatly facilitated if our recommendations concerning the abolition of civil juries are adopted.

In view of the fact that we have recommended in chapter 9 that the Christmas and long vacations be abolished, it will be necessary to recognize formally as part of the circuit scheduling arrangements the right of each judge to a proper vacation each year. This should be in the summer months in the majority of cases.

Section 8 of the federal *Judges Act*[91] requiring the judges of the Supreme Court to reside in Toronto or within five miles thereof is an important aspect of the circuit system. It should be preserved. The collegiality of the Court is best maintained if all the judges live in Toronto. This makes for sounder administrative practice in the event that readjustments or reassignments have to be made on short notice. An exception from the requirement of living in Toronto may be granted only by the Governor in Council, and for a specified time. Except where such an exception is made,

[91]R.S.C. 1970, c. J-1.

this requirement should be strictly enforced as an essential part of the administration of the circuit system.

An important aspect of administration is the time when Court opens and closes at a particular sittings. Wherever possible a sittings should commence not later than 11 a.m. on the first day of the sittings. Only in situations of great distance and where there is a lack of proper transportation facilities from Toronto should the starting time be 2 p.m. The circuit guide for the winter and spring sittings of 1972 specifies a 2 p.m. starting time for such centres as Belleville, Bracebridge, Cobourg, Lindsay, Peterborough, Picton, and Simcoe, even though these centres are accessible by motor vehicle in less than a half day's drive from Toronto. A 2 p.m. starting time is also authorized for London, Sault Ste. Marie, Thunder Bay and Windsor, notwithstanding that direct early morning air service may be available to each of these places.

Similarly, any practice that may have developed with some judges of closing a Court before 4 p.m. on Friday if there are cases still to be heard, should be discontinued.

Section 46 of *The Judicature Act* allows for considerable flexibility in the determination of the number of sittings of the High Court to be held in each circuit centre. It specifies that there shall be as many sittings as are required for the disposal of both civil and criminal matters subject only to the minimum in subsection 6 of at least two sittings in each year in and for every judicial district. We recommend that this minimum requirement be continued with more flexibility above the minimum.

One of the greatest complaints of the members of the bar with whom we met was that the scheduled High Court sittings outside Toronto would end before many of the cases ready to go on could be heard. This is not the fault of the judge but is a result of the rigid prescheduling of the sittings as part of the circuit guide prepared months in advance and it may be due to vacancies on the Court or illness of judges. The number of criminal cases on the list, which by law must be tried first, is often so great that many civil cases are not reached. This no doubt creates hardship for litigants and ways and means of relieving this hardship must be found.

Problems such as these will be alleviated somewhat by the reduction in the number of trial centres and further administrative reforms. We recommend the adoption of the principle that a judge will not leave a particular sittings until the list of cases ready to go on is completed or alternatively another judge is available to complete the list. This recommendation emphasizes the need for retaining a substantial number of open assignments in the circuits as originally drawn.

The proposal we recommend has been adopted in the High Court in England following the recommendations of the Beeching Commission Report:

> . . . we must emphasize that we regard it as essential that at those centres where there are not courts in continuous session to deal with

any given kind of work, the judges should not normally leave until the lists relating to that class of work have been disposed of. To make this possible, we intend that there shall be a small surplus of judge capacity at the disposal of the Circuit administration.[92]

In proper cases where it is apparent that the criminal and civil work of the court cannot be concluded in the allotted time concurrent courts should be set up if the necessary judges and courtroom accommodation are available.

Another alternative to overcome the rigidities in the circuit system discussed earlier would be to permit cases ready to proceed but not disposed of at a scheduled sittings to be placed on the list for the sittings in a neighbouring trial centre provided that the caseload there permitted. This would be a "safety valve" arrangement which would be used only where there were a few cases not disposed of for some reason and where it is convenient for counsel, their clients and witnesses to attend at another centre.

Many of the suggested changes could be brought about within the existing framework, provided that a competent professional court administrator is appointed pursuant to our recommendations in chapter 2. Some amendments to section 50 of *The Judicature Act* will have to be made if there is to be an elimination of any sittings in any county as we have recommended. We have not considered what other legislative changes may be necessary. This will include a detailed study of all the legislation bearing on the sittings of the High Court. Some changes in the Rules of Practice may be required in respect of the proposals for the setting up of concurrent civil lists on short notice or the transference of civil cases not reached to the trial lists in neighbouring centres.

If criminal cases are to be transferred from the judicial district in which the venue is laid in the indictment, it may be that an amendment to section 527 of the *Criminal Code*[93] is required.

We deal more fully with case scheduling and trial lists in chapter 10.

D. Number of Judges

In determining the number of judges required for the High Court consideration must be given to the recent amendments to the *Judges Act*,[94] where provision was made to enable the Legislature of each province to establish the additional office of supernumerary judge of the superior courts of the province, the number of such judges not to exceed the number of regular superior court judges in the province. A supernumerary judge is to "hold himself available to perform such special judicial duties as may be assigned him from time to time by the Chief Justice".[95] Existing Supreme

[92]Cmnd. 4153, para 185. Communications from Mr. A. D. M. Oulton of the Lord Chancellor's Office and Master I. H. Jacob of the Court of Queen's Bench indicate that the proposal has been successfully implemented.
[93]*Rex* v. *Adams*, [1946] O.R. 506.
[94]S.C. 1971, c. 55, s. 6.
[95]*Ibid.*

Court judges who have reached the age of 70 and who have been in office for at least ten years may elect to hold office as supernumerary judges by notifying the federal Minister of Justice and the provincial Attorney General of his desire to do so. The judge's salary of $35,000 continues until the judge reaches the normal retirement age of 75 or resigns or otherwise ceases to hold office.

Before these provisions for supernumerary judges become effective in a province, the provincial Legislature must provide enabling legislation to establish the office of supernumerary judge. The enabling legislation for Ontario is contained in Bill 242, *An Act to amend The Judicature Act*, which received Royal Assent on December 15, 1972.

It is probable that in the future, supernumerary judges will be available for duty in the Court of Appeal and the High Court of Justice from time to time. If supernumerary judges were available, the Chief Justice of Ontario or the Chief Justice of the High Court respectively could presumably assign a supernumerary judge where necessary to alleviate overloaded trial lists or to clear up accumulations in certain trial centres. This would give greater flexibility in the administration and management of the High Court circuit system.

We have had some reservations as to the present provisions for supernumerary judges in the recent amendments to the *Judges Act*. First, the Act does not indicate the extent to which a supernumerary judge is to "hold himself available". Does this mean that he is to be available for assignment by the Chief Justice at all reasonable times (i.e., five days a week, 11 months of the year excluding statutory holidays), in the same way as if he were a regular judge of the Supreme Court? Or does it mean that a supernumerary judge is to be available for a reduced number of weeks or months per year? If so, who is to determine which weeks or months? The Act also speaks of a supernumerary judge performing "such special duties as may be assigned to him from time to time". Under these provisions would it be open to the Chief Justice to assign a supernumerary judge to sittings in any one of the 32 trial centres of the High Court, or would such special judicial duties be restricted to Toronto?

If the purpose of these provisions is to allow a Supreme Court judge at age seventy to take advantage of a form of semi-retirement during which he can participate as a judge on a part-time basis in situations of his own choosing, their adoption may not make much contribution to the improvement of the administration of justice in the Supreme Court.

There are other considerations. Assuming that in Ontario as of July 1, 1972 the enabling legislation had been provided to take advantage of the amendments to the *Judges Act*, five judges of the Court of Appeal and seven judges of the High Court would have automatically qualified to elect to become supernumerary judges. If all these judges were to so elect and were assigned judicial duties on a regular basis, the change would be tantamount, at least for a time, to increasing the High Court by seven. Such a development is not, however, likely to occur. It is not probable that all who

qualify to elect to become supernumerary judges will so elect. Nor can it be assumed that it is the intention of the Act that they should continue to give full-time service as judges.

We think the legislation should have specified the extent to which supernumerary judges are to be required to be available to perform judicial duties. They should be available to be called on, on reasonable notice, to perform the duties assigned to them and they should remain within the jurisdiction except for personal vacation periods, the times for which should be arranged in advance with the Chief Justice. A supernumerary judge should not be assigned a regular circuit as part of the predetermined circuit guide, but he should be available on reasonable notice to relieve at any of the trial centres where this may be necessary or to sit to hear motions or in the Divisional Court.

Notwithstanding the provision for supernumerary judges, the complement of active judges must always be adequate to meet the requirements of the Court. At present the authorized complement for the High Court is 32. Whether this complement of judges is adequate depends on how the matter is viewed. If all the judges were regularly available to sit, then under the prevailing system the number may be adequate. However, this is rarely the case, since at any given time judges are unavailable because of illness or through assignment to other duties. Serious difficulties have been encountered as a result of shortages of judicial resources through such causes. Recently, up to seven judges have been unavailable to sit in the High Court: four by reason of illness; one permanently engaged on a Federal Commission; one engaged part-time on a Federal Commission and one vacancy has existed for six months. The result has been a diminution in the number of judges available to try civil non-jury cases in Toronto. Sometimes, often only one or two judges have been available, whereas normally four to six judges are assigned to sit each week to try such cases. In the Toronto non-jury Court there has been a serious accumulation of cases. This has been aggravated by the unavailability of judges. It is clear that in determining judicial resource needs at any time, allowance must be made for illness. This is a predictable factor which can be calculated as an average figure in projecting and measuring judicial requirements. It is not helpful to speak of a 32 judge Court if, on an average, three or four members of the Court are unavailable to sit from time to time.

In considering future judicial requirements of the High Court we must first consider a proposal that regular increases in the number of judges is the solution to the problems that arise in Court administration.

This may appear to be the easy solution but we caution against too readily resorting to it as the only solution of the difficulties that may confront the Court. Too often the complex problems of delay, overloaded case lists, expense and inflexibility are blamed solely on a shortage of judges. This is a short-sighted and sometimes dangerous approach. It tends to shield courts temporarily from any real institutional reforms and may inhibit a consideration of other means of solving these problems, e.g., administrative and jurisdictional reforms. In the case of a court such as the High Court, a further factor should be kept in mind: increasing the size of the court may ultimately detract from the collegiality of the courts' processes and dilute the quality of the judges and the justice dispensed.

While advising caution in resorting to increasing the size of the High Court, we wish to make it clear that we believe that additional appointments must be made and made promptly when really needed. It is equally true that vacancies should be filled promptly. Where a vacancy is obviously going to occur through retirement, an appointment should be made to fill the vacancy to take effect immediately upon the retirement of the judge. This is the practice in England and should be followed here. When a court is faced with a shortage of judges, serious consequences flow if this need goes unmet.

Any official request for increasing the number of judges should be preceded by a careful analysis of the total situation, and after careful consideration of possible alternative changes to meet the situation. We recommend that such matters as these be part of the responsibility of the long-term planning of the Provincial Director of Court Administration working in conjunction with the Chief Justice of the High Court.

This brings us to consider the present need for an increase in the number of judges in the High Court. The conclusion we have come to is that there is no clear answer at the present time. The answer will depend on the implementation of many of the recommendations in this Report. We have recommended a multiple approach involving jurisdictional changes and many administrative reforms. If all recommendations made in this Report were to be implemented forthwith, it would be difficult for us to say now whether or not the number of High Court judges should or should not be increased. We recommend that while our Report is being implemented the judicial resource needs of the High Court be carefully monitored. Ideally this monitoring should be carried out by the Provincial Director of Court Administration in consultation with the Chief Justice of the High Court.

E. Summary of Recommendations

1. There should be no changes in the $7,500 maximum civil jurisdiction of the County Courts until there has been sufficient opportunity to assess fully the impact of the most recent changes on the distribution of civil workload between the High Court and the County and District Courts.

2. When an indictment is preferred in the High Court, High Court judges in Ontario should be empowered under the *Criminal Code* to hear the case without a jury, upon the election of the accused.

3. The Attorney General for Ontario and his agents should invoke the procedure to prefer indictments in the High Court to a much greater extent than in the past. His decision to prefer the indictment in the High Court might be influenced by the following considerations:
   (a) the offence involves death or serious risk to life (other than a case of dangerous driving having no aggravating features), such as setting fire to a house;
   (b) the offence is one of killing by dangerous driving where there are aggravating features;

(c) widespread public concern is involved;

(d) the case involves violence, or a threat of violence, of a serious nature;

(e) the offence involves dishonesty in respect of a substantial sum of money;

(f) the accused holds a public position or is a professional or other person owing a duty to the public;

(g) the circumstances are of unusual gravity in some respect other than those indicated above;

(h) a novel or difficult issue of law is likely to be involved.

4. *The Judges' Orders Enforcement Act* should be amended to give a right of appeal without leave where power is conferred under a statute of Ontario on a judge of the High Court or a judge of the Supreme Court as *persona designata* and *The Judicature Act* should be amended to provide that where a jurisdiction is conferred on a judge of the High Court or judge of the Supreme Court under any statute of the Legislature other than *The Judicature Act* the appeal shall lie to the Divisional Court unless otherwise provided.

5. There should be a presumption against the assignment of administrative or non-adjudicative duties to judges in the absence of strong countervailing considerations. The provincial and federal statutes conferring such duties should be reviewed with the object of transferring such duties to other judges or public functionaries.

6. Certain adjudicative duties conferred on the High Court or High Court judges should be transferred to other judges or public functionaries, according to the following guidelines:

   (a) All adjudicative duties conferred by statute on judges requiring the simple and routine application of clearly defined standards in a consistent and uniform manner should be transferred to other public functionaries;

   (b) A presumption should arise to the effect that an adjudicative duty conferred on a judge should be transferred when there is in existence another qualified and competent public functionary or tribunal which is equipped to perform these adjudicative duties;

   (c) Adjudicative duties not falling within (a) and (b) above should remain with the judges unless with respect to specific duties there are compelling reasons relating to the inability of the judges to handle their normal workload of trial cases, which situation would suggest the transference of a specific duty to a new or existing public functionary or tribunal possessing the requisite specialization or expertise on such adjudicative matters.

7. *The Constitutional Questions Act* should be amended to permit references to the Court of Appeal only and to delete the provision permitting such references to a single judge of the Supreme Court.

8. The province-wide circuit system should be retained but there should

be a move towards regionalization through the gradual reduction of the number of circuit centres which now exist. The present 48 circuit centres should be reduced to 32 for purposes of holding trials through amalgamation of some of the less-busy centres with adjacent centres. However the office of the local registrar should be retained in each of the 48 county and district towns. For purposes of administrative flexibility, the Chief Justice of the High Court should have the power to assign a particular trial or sittings to any of the 16 circuit centres otherwise eliminated in situations of unexpected overload in any of the 32 trial centres.

9. The assignment of judges to the various circuits and sittings should remain the collective responsibility of all the High Court judges.

10. The High Court circuits and sittings should be scheduled in such a way as to permit each judge to have one week in five for the writing of reserved judgments and staying abreast of developments in the law.

11. In the drawing of circuits and sittings, more use should be made of "open assignments" so that there are judges available to be assigned on short notice to substitute for judges who have become ill or have been held over at sittings, or to take a second list at a sittings where an overflow of cases has unexpectedly developed.

12. The requirement in the federal *Judges Act* that Supreme Court judges should reside in Toronto or within five miles thereof should be strictly enforced as an essential part of the administration of the circuit system.

13. Wherever possible a High Court sittings should commence at 11 a.m. on the first day of the sittings, and should continue until 4 p.m. on the last day of the sittings assuming there are still cases to be heard.

14. There should continue to be a minimum requirement of two sittings annually in each of the 32 remaining circuit centres, and a flexible approach in respect of further sittings above the minimum.

15. There should be a principle that a High Court judge will not leave a particular sittings until the list of cases ready to go on is completed or alternatively a new judge is available to come in and complete the list.

16. In proper cases where it is apparent that the criminal and civil work of the Court cannot be concluded in the allotted time, concurrent courts should be set up if the necessary judges and courtroom accommodations are available.

17. It should be possible for cases ready to go on but not disposed of at a scheduled sittings to be placed on the list for the sittings in a neighbouring trial centre provided that the caseload there permits.

18. The Provincial Director of Court Administration in consultation with the Chief Justice of the High Court should be responsible for reviewing the caseload of the Court during the implementation of our recommendations with a view to determining whether the number of judges should be increased.

APPENDIX I

ONTARIO STATUTES CONFERRING POWERS AND DUTIES ON SUPREME COURT JUDGES IN ONTARIO

(This Table is to be considered in the light of what we said at p. 114)

Act	Section Description	Adjudicative	As a Court	*Persona Designata*	Non Adjudicative
The Absentees Act, R.S.O. 1970, c. 3	s. 2 The Supreme Court may by order declare a person to be an absentee.	x	x		
	s. 3 The Supreme Court may by order declare a person no longer an absentee.	x	x		
	s. 4 The Supreme Court may make an order as to the administration of the estate.	x	x		
The Arbitrations Act, R.S.O. 1970, c. 25	s. 8 A judge of the Supreme Court may appoint an arbitrator.				x
	s. 11 The court may remit the matters for reconsideration to the arbitrator or umpire.	x	x		
	s. 12 The court may remove an arbitrator where he has misconducted himself.	x	x		
The Business Corporations Act, R.S.O. 1970, c. 53	s. 99 Jurisdiction of court to try actions brought by shareholder in his representative capacity.	x	x		
	s. 109 The court may requisition a shareholders' meeting by court order.	x	x		
	s. 217 A corporation may be wound up by court order.	x	x		
The Charities Accounting Act, R.S.O. 1970, c. 63	s. 4 Application to a judge of the Supreme Court where executor or trustees in default.	x	x		
The Child Welfare Act, R.S.O. 1970, c. 64	s. 70 The Supreme Court may make an order for adoption.	x	x		
The Collection Agencies Act, R.S.O. 1970, c. 71	s. 36 A judge of the High Court may issue a restraining order as to violations under this Act.	x		x	
The Condominium Act, R.S.O. 1970, c. 77	s. 21 The Supreme Court may order that the government of the property be terminated under certain circumstances.	x	x		
	s. 23 The Supreme Court may order performance of any duties under this Act.	x	x		
The Constitutional Questions Act, R.S.O. 1970, c. 79	s. 1 The Lieutenant Governor in Council may refer to a judge of the Supreme Court any matters he thinks fit for a hearing, consideration and an opinion with reasons.	x		x	
The Construction Safety Act, R.S.O. 1970, c. 8	s. 17 A judge of the Supreme Court may upon application grant a restraining order.	x		x	
The Controverted Elections Act, R.S.O. 1970, c. 84	s. 33 Every petition shall be tried by two judges of the Supreme Court without a jury.	x		x	
	s. 39 The judges constituting an election court have the same powers, jurisdiction and authority as judges of the Supreme Court.	x		x	

APPENDIX I (continued)

Act	Section Description	Adjudicative	As a Court	*Persona Designata*	Non Adjudicative
The Conveyancing and Law of Property Act, R.S.O. 1970, c. 85	s. 27 The Supreme Court may declare the validity of sale under power although mistaken payment to tenant for life.	x	x		
	s. 38 Lien on lands for improvement under mistake of title to be determined by Supreme Court.	x	x		
	s. 49 The Supreme Court may make an order for instance of reversioner.	x	x		
The Corporation Securities Registration Act, R.S.O. 1970, c. 88	s. 7 Rectification by a judge of the Supreme Court of omissions and misstatements in documents filed.	x		x	
The Corporations Act, R.S.O. 1970, c. 89	s. 78 Supreme Court order to commence action to determine liability of insiders.	x	x		
	s. 113(4) Sanction by the Court of a rearrangement of authorized capital.	x	x		
	s. 244 An insurer incorporated in Ontario may be wound up by order of the Supreme Court.	x	x		
	s. 273 A corporation may be wound up by order of the court.	x	x		
	s. 327 The court may direct method of holding meetings.	x	x		
	s. 339 Power of court to correct affidavit.	x	x		
The Crown Administration of Estates Act, R.S.O. 1970, c. 99	s. 12 The Supreme Court is to decide rights upon application of persons having claims upon the estate.	x	x		
The Devolution of Estates Act, R.S.O. 1970, c. 129	Numerous duties involved with the devolution of estate (see sections 16(1)(d), 20(1), 20(2), 22(7)) are conferred on a judge of the Supreme Court.	x		x	
The Dower Act, R.S.O. 1970, c. 135	s. 13 Application may be made by a judge of the Supreme Court to dispense with consent.	x		x	
	s. 15 Application where wife is mentally ill but not confined to a hospital may be made to a judge of the Supreme Court.	x		x	
	s. 16 Bar of dower on sale in bankruptcy may be made by a judge of the Supreme Court.	x		x	
The Evidence Act, R.S.O. 1970, c. 151	s. 151 Instruments offered in evidence may be impounded by a judge of the Supreme Court.	x		x	
The Election Act, R.S.O. 1970, c. 142	s. 130 Inspection of ballots in the custody of the Chief Election Officer to be made only under an order of a judge of the Supreme Court and under certain conditions.	x		x	
The Fraudulent Debtors Arrest Act, R.S.O. 1970, c. 183	s. 2(1) A judge of the Supreme Court may make an order for the arrest of debtor.	x		x	

APPENDIX I (continued)

Act	Section Description	Adjudicative	As a Court	*Persona Designata*	Non Adjudicative
The Habeas Corpus Act, R.S.O. 1970, c. 197	s. 1 A judge of the Supreme Court may under certain circumstances award a writ of *habeas corpus*.	x		x	
The Industrial Safety Act, R.S.O. 1970, c. 220	s. 27 The chief inspector may apply to a judge of the Supreme Court for an injunction.	x		x	
The Infants Act, R.S.O. 1970, c. 222	s. 1(1) Orders as to the custody of and right of access to infant at the instance of father or mother.	x	x		
	s. 1(4) Orders as to maintenance by father.	x	x		
	s. 4 The Supreme Court may authorize the sale or lease of infant's estate.	x	x		
	s. 6 The Supreme Court may sanction the execution of a new lease.	x	x		
	s. 11 The Supreme Court may make an order for maintenance where there is a power of appointment in favour of children.	x	x		
	s. 12 The Supreme Court may make an order for application of dividends of stocks for maintenance of infants.	x	x		
	s. 18 Removal of guardians.	x	x		
The Insurance Act, R.S.O. 1970, c 224	s. 144 A judge of the Supreme Court may inquire into the facts and an order for execution may be made for issue against an insurer forthwith under certain circumstances.	x		x	x
	ss. 183-185 The court may make declarations as to sufficiency of proof or presumption of death and make an order respecting the payment of the insurance money.	x	x		
	s. 188 The power of the court includes the jurisdiction to order that an action be brought, and request further evidence and inquiry.	x	x		x
	s. 191(2) A court may upon application of a beneficiary in special circumstances declare commutation of instalments of insurance money.	x	x		
	s. 224 The insured or insurer may apply to the Supreme Court where a defence of more than one contract is involved.	x	x		
	s. 235 The Supreme Court may order the insurer to pay monies into court.	x	x		
	s. 240 On application the Supreme Court shall make such orders as it deems necessary.	x	x		
The Judicature Act, R.S.O. 1970, c. 228	s. 2 General jurisdiction	x	x		
	s. 19 The Supreme Court may grant a mandamus or injunction restraining obscene publications or restrain publication of articles or pictures insulting the Queen.	x	x		
	s. 42 A judge of the High Court may make an order vacating a caution or certificate.	x			

APPENDIX I (continued)

Act	Section Description	Adjudicative	As a Court	*Persona Designata*	Non Adjudicative
The Landlord and Tenant Act, R.S.O. 1970, c. 236	s. 21 Judge of the Supreme Court may make an order as to protection of under-lessees on forfeiture of superior lease.	x		x	
	s. 39 In the event of a dispute involving a lien of the landlord in bankruptcy or the rights of the assignee, the dispute shall be disposed of by a judge of the Supreme Court.	x		x	
The Married Women's Property Act, R.S.O. 1970, c. 262	s. 12 Empowers a judge of the Supreme Court to hear and dispose of questions between husband and wife as to real property.	x		x	
The Matrimonial Causes Act, R.S.O. 1970, c. 265	Hearing actions for divorce or nullity and related matters of maintenance, alimony, settlement of property, custody of children, etc.	x	x		
The Mining Act, R.S.O. 1970, c. 274	s. 138 Except where permitted by this Act every proceeding to void, cancel or annul a Crown patent may be brought or taken in the Supreme Court.	x	x		
	s. 139 Transfer of proceeding from Mining Commissioner to Supreme Court.	x	x		
The Mortmain and Charitable Uses Act, R.S.O. 1970, c. 280	s. 7 Necessity for sale of land for a charitable purpose otherwise by will is to be determined by a judge of the Supreme Court.	x		x	
	s. 12 A judge of the Supreme Court has power to sanction the retention or acquisition of land from any charitable use.	x		x	
	s. 14(1) Procedure in cases of breach of a charitable trust, etc., or where order necessary for administration — to be determined by the Court.	x	x		
The Motor Vehicle Accident Claims Act, R.S.O. 1970, c. 281	s. 19(1) Order from a judge of Supreme Court as to owner or driver of motor vehicle in cases where judgment has been obtained against the Registrar.	x		x	
The Municipal Act, R.S.O. 1970, c. 284	s. 152 A judge of the Supreme Court may try the validity of election of a member of a municipal council in the right to hold his seat.	x		x	
	s. 283 The Supreme Court may quash a by-law in whole or in part for illegality.		x		x
The Ontario Human Rights Code, R.S.O. 1970, c. 318	s. 18 A judge of the Supreme Court may enjoin an individual from contravening this Act.	x		x	
The Ontario Water Resources Act, R.S.O. 1970, c. 332	s. 31(3) On application a judge of the Supreme Court may grant an injunction to prevent pollution of water.	x	x		
The Partition Act, R.S.O. 1970, c. 338	Various sections of the act confer jurisdiction on the Court as to partition and compensation.	x	x		
The Perpetuities Act, R.S.O. 1970, c. 343	s. 5 The Supreme Court may on application determine validity of interest in property.	x	x		

APPENDIX I (continued)

Act	Section Description	Adjudicative	As a Court	*Persona Designata*	Non Adjudicative
The Pregnant Mare Urine Farms Act, R.S.O. 1970, c. 359	s. 18 The Supreme Court or a judge thereof may issue an injunction for an offence against the Act or the regulations.	x	x		
The Provincial Courts Act, R.S.O. 1970, c. 369	s. 4(2) The Lieutenant Governor in Council may appoint one or more judges of the Supreme Court to conduct an inquiry into removal for cause of a Provincial judge				x
	s. 7(b) The Judicial Council for Provincial judges is to be composed *inter alia* of the Chief Justice of the High Court.				x
The Public Health Act, R.S.O. 1970, c. 377	s. 94(2) Application to judge of Supreme Court for the removal or abatement of the nuisance.	x	x		
	s. 96 Where the removal or abatement of the nuisance involves a value of $2,000 or more, the removal or abatement must be by order of a judge of the Supreme Court.	x	x		
The Public Officers Act, R.S.O. 1970, c. 382	s. 16 Summary motion to a judge of the Supreme Court to appoint some disinterested person when public officer is an interested party for any act, matter on things to be undertaken or performed.				x
The Quieting Titles Act, R.S.O. 1970, c. 396	s. 4 Every application to quiet title to Crown lands shall be made to the Supreme Court or judge thereof.	x	x		
The Registry Act, R.S.O. 1970, c. 409	s. 30 A judge of the Supreme Court may order witnesses to make affidavit or proof of the execution of any instrument for the purpose of registration.	x		x	
The Schools Administration Act, R.S.O. 1970, c. 424	s. 65(2) The Supreme Court may appoint some person to convey land to a school board on behalf of an owner otherwise disqualified.				x
The Securities Act, R.S.O. 1970, c. 426	s. 27(1) The Commission may apply to a judge of the Supreme Court for the appointment of a receiver or a receiver and manager or a trustee of the property a person or company under certain circumstances.	x		x	
	s. 90 Application to a judge of the High Court designated by the Chief Justice of the High Court for an order declaring a take-over bid to be an exempt offer.	x		x	
	s. 143 Order for compliance or restraint by a judge of the High Court designated by the Chief Justice of the High Court, in cases of non-compliance with or violation of Act or regulations.	x		x	
The Settled Estates Act, R.S.O. 1970, c. 431	s. 2 The Court may authorize leases of settled estates under certain conditions.	x	x		
The Solicitors Act, R.S.O. 1970, c. 441	s. 7 A judge of the Supreme Court may allow actions for costs by a solicitor without waiting for expiry of one month after delivery on probable cause that the party involved is about to depart from Ontario.	x	x		

APPENDIX I (continued)

Act	Section Description	Adjudicative	As a Court	*Persona Designata*	Non Adjudicative
The Succession Duty Act, R.S.O. 1970, c. 449	s. 28(4) A judge of the Supreme Court may on application of the commissioner make an order for the evidence of any person to be taken *de bene esse*.	x	x		
The Surrogate Courts Act, R.S.O. 1970, c. 451	s. 73(6) A judge of the Supreme Court may make an order for removal of the proceedings respecting the passing of accounts to the Supreme Court where an important claim is involved.	x	x		
The Trustee Act, R.S.O. 1970, c. 470	s. 5 The Supreme Court may make an order for the appointment of a new trustee or new trustees.	x	x		
	s. 10 The Supreme Court under certain circumstances may make an order vesting the land in any such person or manner as the court sees fit.	x	x		
	s. 13 The Supreme Court under certain circumstances may make vesting orders as to stock and choses in action.	x	x		
	s. 37 Removal of personal representatives and appointment of other proper persons.	x	x		
The Used Car Dealers Act, R.S.O. 1970, c. 475	s. 32 A judge of the Supreme Court upon application may issue a restraining order.	x		x	
The Variation of Trusts Act, R.S.O. 1970, c. 477	s. 1 Any settlement or other disposition of a trust is to be approved by the Supreme Court.	x	x		
The Vendors and Purchasers Act, R.S.O. 1970, c. 478	s. 3 The Supreme Court may make orders as to requisitions, objections, compensation, etc.	x	x		
The Vexatious Proceedings Act, R.S.O. 1970, c. 481	s. 1 Order requiring leave of Supreme Court or judge thereof before a person may bring legal proceedings.	x		x	
The Warehouse Receipts Act, R.S.O. 1970, c. 489	s. 9 Where a negotiable receipt has been lost or destroyed, a judge of the Supreme Court may order delivery of the goods provided certain conditions are met.	x	x		
The Women's Equal Employment Opportunity Act, R.S.O. 1970, c. 501	s. 31 A judge of the Supreme Court may grant a restraining order on application by the Minister, following a conviction for an offence under the Act.	x		x	

APPENDIX II

FEDERAL STATUTES CONFERRING POWERS AND DUTIES ON HIGH COURT JUDGES IN ONTARIO

Act	Section Description	Adjudicative	As a Court	*Persona Designata*	Non Adjudicative
Admiralty Act, R.S.C. 1970, c. A-1	s. 4(1) Governor in Council may appoint any judge of superior or county court to be a district judge in Admiralty.	x	x		
	s. 7(1) A district judge in Admiralty may appoint a superior or county judge to be a deputy judge for Admiralty with the approval of the Governor in Council.	x	x		
	s. 8(2) The Governor in Council may appoint a superior court judge to be a surrogate judge.	x	x		
Bankruptcy Act, R.S.C. 1970, c. B-3	s. 15(1)(6)(7) Court must give permission before the trustee exercises any borrowing powers and may make orders providing for trustee's advances and vesting certain property on trustee as reimbursement.				x
	s. 16(1) Court may give directions in relation to any matter affecting the administration of the estate of a bankrupt, on application of the trustee.				x
	s. 16(2) Court may make any order to expedite where an estate has not been fully administered.				x
	s. 17 Court may order redirection of bankrupt's mail to trustee.				x
	s. 18 Court must pass accounts of former trustee on substitution and approve disbursements.				x
	s. 19 Appeal to court against trustee.	x	x		
	s. 20 Proceeding by creditor when trustee refuses to act must be authorized by an order of the court.	x	x		x
	s. 21(5) Court may increase or reduce trustee's remuneration, on application.				x
	s. 22(2) Court may make an order providing for final disposition of property.	x	x		x
	s. 23 Court to make the order discharging the trustee, subject to certain conditions.	x	x		x
	s. 26 Court may make a receiving order upon a petition and then appoint a trustee.	x	x		x
	ss. 28 and 29 Court may appoint an interim receiver under certain conditions.	x	x		x
	s. 41 Court may approve or refuse to approve proposal accepted by creditors, subject to certain conditions.	x	x		x
	s. 43 Annulment of proposal by court on default.	x	x		x
	s. 45 Valuation by court of claim of any creditor who elects not to participate in a proposal involving purchase of new securities.				x

APPENDIX II (continued)

Act	Section Description	Adjudicative	As a Court	*Persona Designata*	Non Adjudicative
	s. 48 Court may make order respecting salary, wages, etc., of bankrupt.	x	x		x
	s. 54 Order of court respecting removal of property from the province.	x	x		x
	s. 63 Court may authorize trustee to commence any action in names of trustee and the bankrupt's partner.	x	x		x
	s. 78 Court examination of adequacy of consideration in a reviewable transaction.				x
	s. 79 Court inquiry into dividends and redemptions of shares.				x
	s. 121 Right of creditor who has not proved claim before declaration of dividend to disturb that dividend to be determined only on terms and conditions ordered by the court.	x	x		x
	s. 133(2) Court may order examination of bankrupt, trustees and other on application of creditor.	x	x		x
	s. 136 Court may issue warrant to cause a non-attending bankrupt or other person to be apprehended and brought up for examination.	x	x		
	s. 138 Court may authorize arrest of bankrupt under certain circumstances.	x	x		
	s. 142 Court may grant or refuse discharge, depending on certain conditions.	x	x		x
	s. 150 Court may annul and discharge under certain circumstances.	x	x		x
	s. 151 Court may annul a bankruptcy under certain circumstances.	x	x		x
	s. 157(8) Court may direct any issue to be tried by any judge or officer of any of the courts of the province, subject to an appeal to a judge.	x	x		x
	s. 159 Powers of court respecting search warrants and committal orders.	x	x		
	s. 169 Bankruptcy offences — may be an optional prosecution on indictment in the High Court.	x	x		
	s. 176(3) Court may authorize the trustee to initiate criminal proceedings in certain situations.				x
Canada Elections Act, R.S.C. 1970, 1st supp., c. 14	s. 57 On failure of County Court judge to order a recount, any aggrieved party may make an application to a judge of the Supreme Court.	x		x	
	s. 60(2) Order of Supreme Court judge required for inspection and production of election documents in custody of Chief Electional Offices.	x		x	
Canada Pension Plan, R.S.C. 1970, c. C-5	s. 81(3) Judge of a superior court may, under certain circumstances, appoint the chairman of the Review Committee.				x
	s. 85(2) The Chairman of the Pension Appeals Board may be a judge of a superior court of a province. Other members of the Appeals Board may be judges of a superior court of the province.	x		x	
	s. 18 Each commission to report to the Chief Electoral Officer.				x

APPENDIX II (continued)

Act	Section Description	Adjudicative	As a Court	*Persona Designata*	Non Adjudicative
Extradition Act, R.S.C. 1970, c. E-21	s. 9 All judges of the superior courts and of the county courts are authorized to act judicially in extradition matters.	x		x	
Fugitive Offenders Act, R.S.C. 1970, c. F-32	s. 8 Proceedings in Canada on warrant issued elsewhere — judge of Court may endorse warrant to authorize apprehension of fugitive under certain conditions.	x		x	
	s. 17 Court may discharge fugitive in trivial cases.	x	x		
Income Tax Act, S.C. 1970-71, c. 63	s. 232(1)(a) Judge means a judge of a superior court having jurisdiction in the province.				
	s. 231(4) Approval required by a judge of the superior or county court regarding searches.	x		x	
	s. 232(2)(3)(4) Solicitor-client privilege is to be determined by the court.	x	x		
Inquiries Act, R.S.C. 1970, c. 1-13	s. 10 Witnesses failing to attend are subject to a penalty imposed by a judge of the superior court.	x		x	
Canadian Citizenship Act, R.S.C. 1970, c. C-19	s. 2 "Court" includes a superior court.				
	s. 10 The Minister may grant a certificate of Citizenship to any person who makes application for that purpose and satisfies the Court of certain conditions.	x	x		x
Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25	s. 11 The court may restrain proceedings under Bankruptcy Act or Winding-Up Act.	x	x		x
	ss. 4 and 5 The Court may order meetings respecting compromises with secured and unsecured creditors.	x	x		
Canada Corporations Act, R.S.C. 1970, c. C-32	Supreme Court motions are authorized in relation to winding up; s. 102(2) meeting of shareholders; s. 134(1) meeting of shareholders to consider compromise.	x	x		x
Divorce Act, R.S.C. 1970, c. D-8	s. 5(1) Jurisdiction of Court to entertain petition for divorce and to grant relief in respect thereof.	x	x		
	s. 8(1) Duty of Court respecting possibility of reconciliation.	x	x		
Electoral Boundaries Readjustment Act, R.S.C. 1970, c. E-2	s. 6 The appointment of the commission chairman for each province is by the chief justice from the judges of the court over which he presides.				x
Loan Companies Act, R.S.C. 1970, c. L-12	s. 43(4) Court may order that any entry in the books for registration and transfer of shares of the capital stock of a company be struck out or rectified under certain conditions.	x	x		
National Defence, R.S.C. 1970, c. N-4	s. 201 Court Martial Appeal Court may include judges of a Superior Court, in addition to four Federal Court Judges.	x	x		
Railway Act, R.S.C. 1970, c. R-2	s. 147 Orders of a judge are to be had where tenants in tail or for life own the said property in order to have the right to sell the property.	x		x	

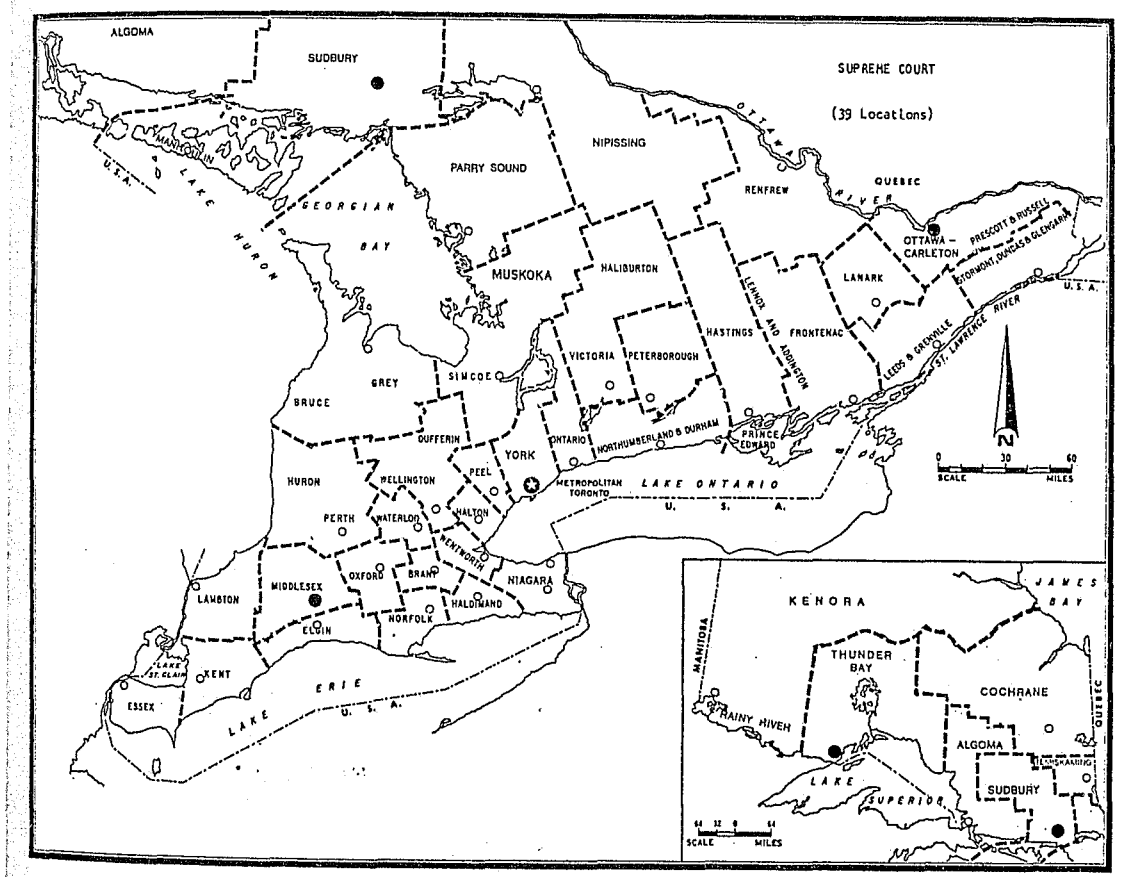
APPENDIX II (continued)

Act	Section Description	Adjudicative	As a Court	*Persona Designata*	Non Adjudicative
	s. 158 Service of an expropriation notice by advertisement may be permitted by judge of a superior court for the province or district, on application.	x		x	
	s. 161 The judge shall, upon application being made to him, become the arbitrator for determining compensation and where the judge is personally interested in the outcome on application a judge of a superior court may appoint a county or superior court judge to be arbitrator.	x			x
	s. 170 Where the arbitrator dies or is incapacitated a judge of the superior court on application shall appoint any county or superior court judge to be an arbitrator.				x
	s. 173 Appeal to a superior court or court of last result from the award of the arbitrator.	x	x		
	s. 400 A superior court judge may on the application of the company or any clerk or agent of the company appoint any persons who are British subjects to act as constables.				x
	s. 403 A superior court judge may dismiss any constable who is acting within his jurisdiction.				x
Trust Companies Act, R.S.C. 1970, c. T-16	s. 36(4) The court on application may order that any entry in the books for the registration and transfer of shares of the capital stock of a trust company be struck out or otherwise rectified on the ground that the entry does not accurately express or define the existing rights of the person appearing to be the registered owner of any shares of the capital stock of the company.		x		
Unemployment Insurance Act, R.S.C. 1970, c. U-2	s. 18(1) The Governor in Council may appoint an umpire and deputy umpires from *inter alia*, the superior courts of the provinces.				
	ss. 31 and 34(1) A decision of the Commission may be appealed to the umpire who may direct the Commission to reconsider and rehear.	x		x	
	s. 33 The Commission may refer certain questions to the umpire for decision.	x		x	
	s. 72 Appeal lies to the umpire from any decision of the board of referees under certain conditions.	x		x	
Winding-Up Act, R.S.C. 1970, c. W-10	ss. 10-16 Court on application may make winding-up orders on certain situations and in the process may order an inquiry into the affairs of the company.	x	x		x
	ss. 17 and 18 Court may stay proceedings either before or after winding-up order made, under certain conditions.	x	x		x
	ss. 23-32 Court may appoint liquidator in certain situations.				x

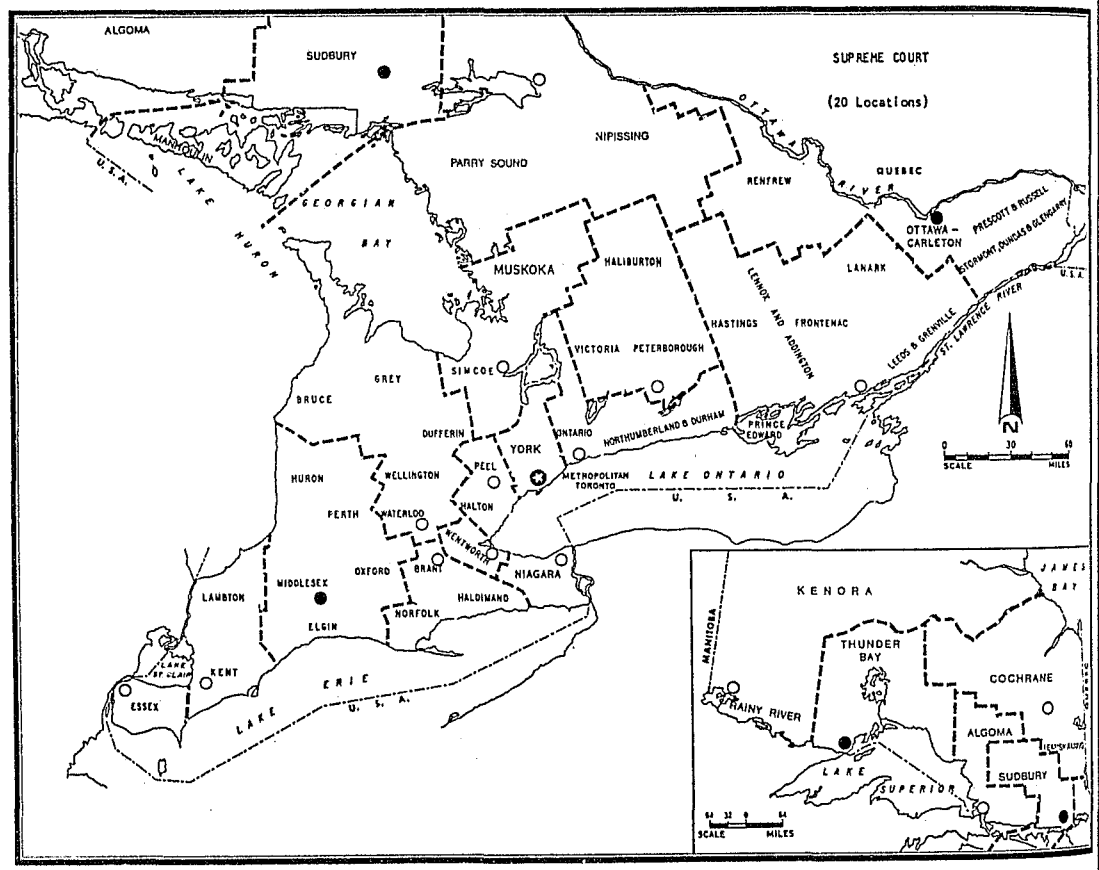
APPENDIX II (continued)

Act	Section Description	Adjudicative	As a Court	*Persona Designata*	Non Adjudicative
	ss. 33-39 Court must approve the exercise of certain powers by liquidators.				x
	ss. 41-43 Court may appoint inspectors and determine their remuneration.				x
	s. 49 Court may discharge the liquidator under certain circumstances.				x
	ss. 57-62 Court may require handing over money and books by contributories, order payments by or make calls on them, and adjust the rights of contributories among themselves.				x
	ss. 63-68 Court may make certain orders respecting meetings of creditors.				x
	ss. 71(2), 74, 75(3) Court may allow or disallow creditors' claims under earlier circumstances.	x	x		x
	ss. 87-92 Powers of court on contestation of claims.	x	x		x
	s. 92 Orders respecting distribution of assets.	x	x		x
	s. 112 Court may refer or delegate to any officer of the court any powers conferred in the court by this Act after a winding-up order is made.				x
	s. 141 Court may direct criminal proceedings against any director, manager, officer or member.				x
	ss. 153-159 Powers of Court in winding up applications for banks.	x	x		x
	ss. 160-172 Miscellaneous powers of Court on winding up applications for insurance companies.	x	x		x

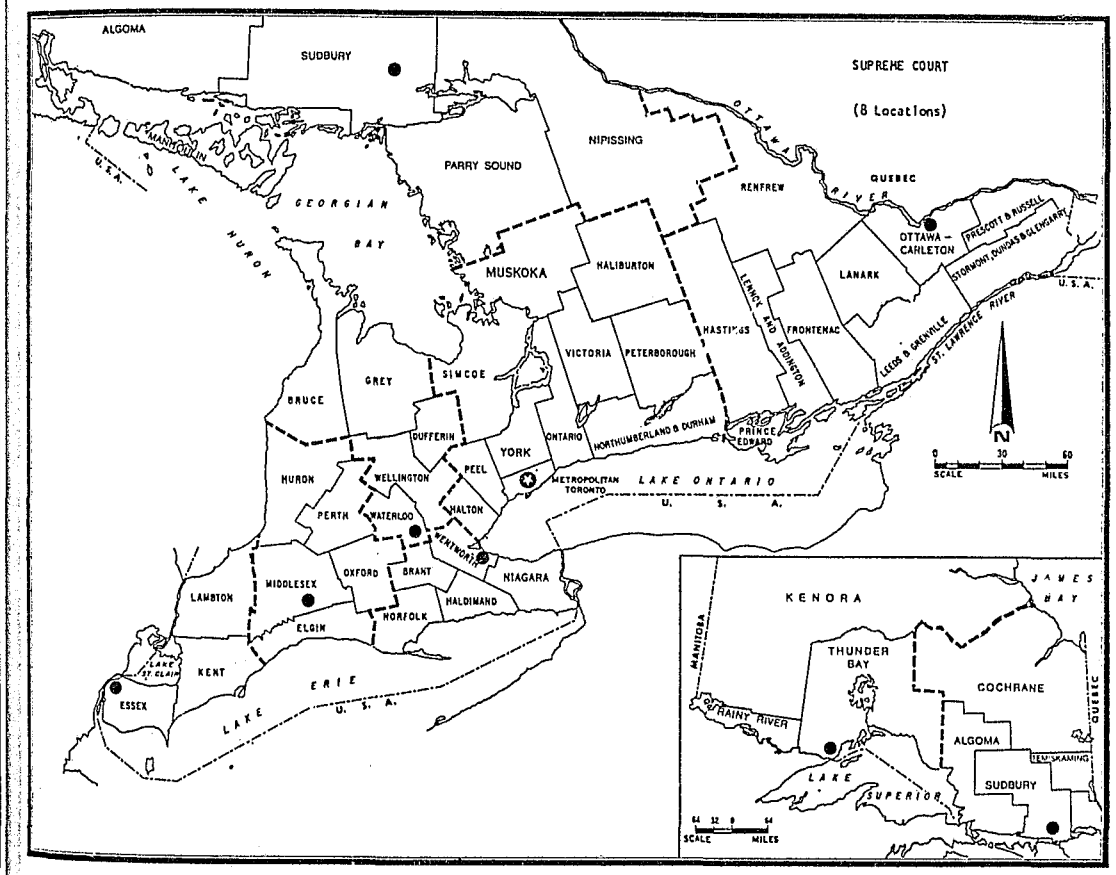
APPENDIX III



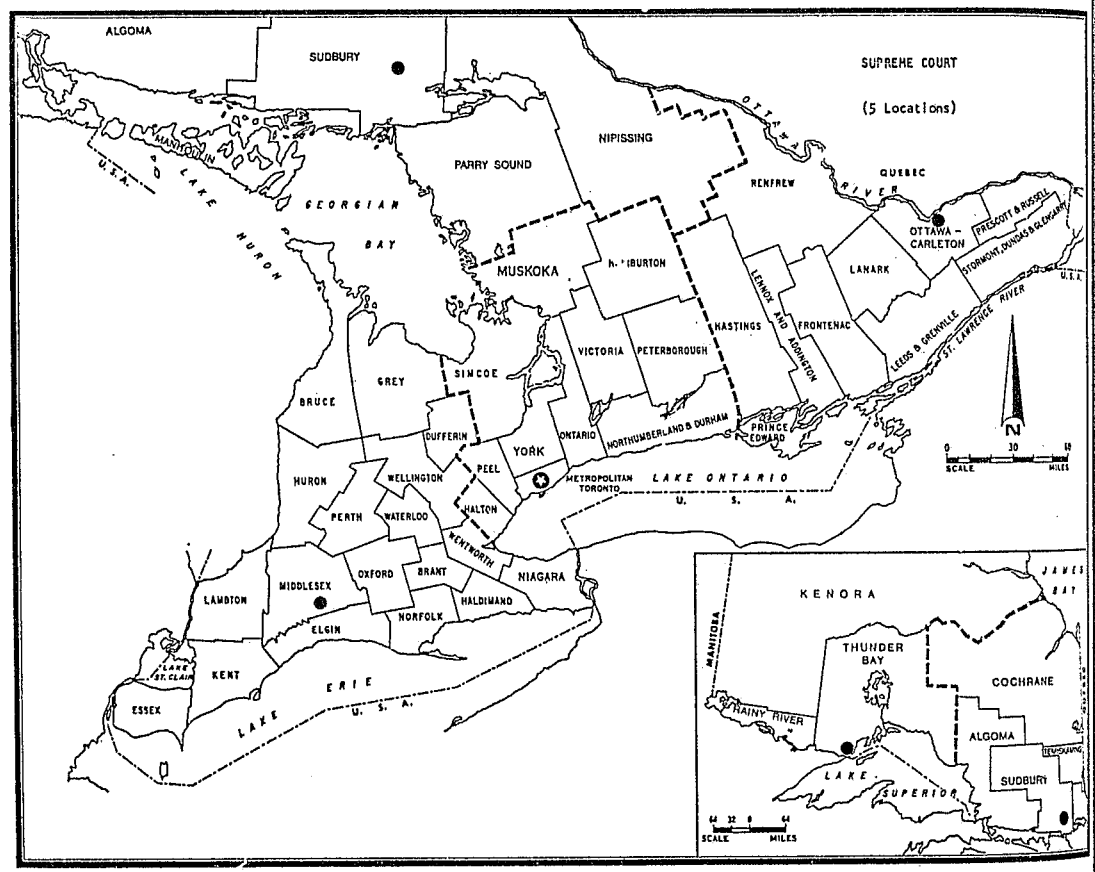
APPENDIX IV



APPENDIX V



APPENDIX VI



CHAPTER 5

THE COUNTY AND DISTRICT COURTS

SUMMARY

The County Courts are courts of record created by an Ontario statute[1] under the power conferred on the Province for the "Constitution, Maintenance, and Organization of Provincial Courts" contained in section 92(14) of *The British North America Act*. In those northern areas of the Province that are organized into districts rather than counties, these courts are called "the District Courts".[2] They are classified according to ancient usage as "inferior courts". This denomination signifies that they are subject

[1] *The County Courts Act*, R.S.O. 1970, c. 94.

[2] For brevity, the term "County Court" will be used in this chapter to mean both the County and the District Courts, except where otherwise specified in the text, or where the context indicates that the District Court is excluded.

to certain forms of review and correction[3] by the superior court of original jurisdiction in the Province — the Supreme Court of Ontario.

Every county or district has a County Court judge, and many also have one or more "junior judges". A junior judge possesses the same power and authority as the judge of his county, but must exercise it subject to "the general regulation and supervision of the judge".[4] There are at present 99 judges and junior judges on the County Court bench. One of these is the "Chief Judge of the County and District Courts", who is president of the County and District Courts,[5] with general supervisory powers over arranging the sittings of the courts, including chambers.[6]

The Province is divided into eight court districts for the administrative purposes of the County Courts.[7] The judges for each of the counties or districts comprising a court district are required to reside within that district.[8] A judge may exercise and perform in any part of his court district any power or duty that he can exercise in the county to which he was appointed, and may perform any judicial or other functions in the County Court of any county in Ontario, in the same manner and to the same effect as a judge of that Court.[9]

County Court judges are appointed by the Governor General.[10] They hold office during good behaviour[11] until the compulsory retirement age of 75 years.[12]

A. Civil Jurisdiction

The County Courts as courts of civil jurisdiction can be traced back to the District Courts which were established in 1794 to deal with actions involving not more than £15.[13] The District Courts became courts of record in 1822,[14] and were re-named "County Courts" in 1849.[15]

The general limits of the civil jurisdiction of the County Courts have always been established by reference in their constituent statute to a specified sum of money. This amount has been increased many times since the establishment of these Courts. At present, a County Court has civil jurisdiction where the amount claimed does not exceed $7,500.[16] However, an action claiming a sum greater than $7,500 may be commenced in a County Court, and unless the jurisdiction is disputed, it will proceed to trial in that court.

The County Courts' civil jurisdiction under *The County Courts Act* is not unrestricted where sums under $7,500 are involved. Rather, the Act sets out 10 categories such as contract, tort, easements, recovery of property, legacies, and so on, that are within their jurisdiction.[17] Although these categories are specific, they are also quite broad, with the result being that most civil cases within the specified monetary limit that fall within the unlimited original jurisdiction of the Supreme Court also fall within the statutory jurisdiction of the County Courts.[18]

As regards causes of action within their jurisdiction, the County Courts have, with one exception, the power to grant any remedy or relief, whether legal or equitable, that can be granted by the Supreme Court in a similar case.[19]

In addition to the categories of matters in which jurisdiction is conferred by *The County Courts Act*, these Courts are granted additional jurisdiction, or their judges are required to perform additional duties under some 101 provincial statutes and 119 federal statutes.[20]

In 1841, the Division Courts were established to deal with small claims. These were courts of record, presided over by the District Court judges,[21] and after 1849, the County Court judges. The Division Courts were renamed as the Small Claims Courts in 1970.[22] In southern Ontario, these Courts have jurisdiction where the amount claimed in an action does not exceed $400.[23] In northern Ontario, this amount is set at $800.[24] At present, there are 168 Small Claims Courts in Ontario. *The Small Claims Courts Act* specifies that the judge of a Small Claims Court is to be either the judge of the County Court or a judge specially appointed to the Small Claims bench under the Act.[25] At present only eight judges serve exclusively as Small Claims Court judges, with the result being that in most places the County Court judge presides over the Small Claims Court as an additional duty.

[3] For example, to judicial review (formerly the prerogative writ jurisdiction) exercised by the Supreme Court of Ontario under *The Judicial Review Procedure Act, 1971*, S.O. 1971, c. 48.
[4] *The County Judges Act*, R.S.O. 1970, c. 95, s. 6. Except where otherwise required by the context or specified in the text, "judge" as used in this chapter will also refer to "junior judge".
[5] R.S.O. 1970, c. 95, s. 15(1).
[6] *Ibid.* s. 16(4).
[7] A map of the County Court Districts and District Court Districts accompanies this chapter as Appendix I.
[8] The *Judges Act*, R.S.C. 1970, c. J-1, s. 34.
[9] *The County Judges Act*, R.S.O. 1970, c. 95, ss. 5(1) and 16.
[10] *The British North America Act*, s. 96.
[11] The *Judges Act*, R.S.C. 1970, c. J-1, s. 34.
[12] *Ibid.* s. 24.
[13] 34 Geo. 3, c. 3 (U.C.).
[14] 2 Geo. 4, c. 2 (U.C.).
[15] S.C. 1849, c. 78.
[16] *The County Courts Act*, R.S.O. 1970, c. 94, s. 14.
[17] *Ibid.* The other categories are injury to land, mortgages, partnerships, equitable relief and insolvency. Jurisdiction with respect to partnerships is measured by the value of the partnership capital which the Act sets at $50,000 rather than $7,500.
[18] Libel is an example of a subject matter with respect to which the County Court has no jurisdiction: R.S.O. 1970, c. 94, s. 14(1)(b).
[19] R.S.O. 1970, c. 94, s. 20. The exception is that the County Courts do not have power to appoint or remove a trustee under *The Trustee Act*, R.S.O. 1970, c. 470.
[20] Lists of the relevant provincial and federal statutes are appended to this chapter as Appendix II.
[21] S.C. 1841, c. 8.
[22] *The Division Courts Amendment Act*, S.O. 1970, c. 120.
[23] *The Small Claims Courts Act*, R.S.O. 1970, c. 439, s. 54.
[24] *Ibid.* s. 196.
[25] *Ibid.* s. 1(h).

Courts of Probate were established in Upper Canada in 1793.[26] In 1858, these became the Surrogate Courts, which were courts of record. County Court judges were made *ex officio* judges of those Courts.[27] Since 1867, power to appoint judges to the Surrogate Courts has been in the Lieutenant Governor in Council. County Court judges are no longer *ex officio* judges of the Surrogate Courts, but the practice has been to appoint them to preside over these Courts for all parts of the Province. The Surrogate Courts deal with matters involving wills, intestacies, the administration of estates, and guardianship and custody of infants. They are constituted by a provincial statute, *The Surrogate Courts Act*.[28]

There are several additional important functions carried out by County Court judges with respect to civil matters. Every County Court judge is appointed local judge of the Supreme Court, with "power and authority to do and perform all such acts and transact all such business in respect of matters and causes in or before the High Court as he is by statute or the rules empowered to do and perform."[29] As local judges of the Supreme Court, the County Court judges have recently assumed significant new duties. On July 1, 1971, legislation came into effect extending the jurisdiction of the local judge to "the exercising of all such powers and authorities and the performing of such acts and the transacting of all such business as may be exercised, performed or transacted by the Supreme Court or a judge thereof under the *Divorce Act* (Canada)."[30] Although it is too early for settled patterns to have been established under this new legislation, the available statistics show that a significant proportion of the matrimonial causes formerly dealt with by Supreme Court judges are now being heard and determined by County Court judges sitting as local judges of the Supreme Court.[31]

The Judicature Act also specifies that the County Court judge is *ex officio*, an official referee of the Supreme Court,[32] and is local master of the Supreme Court, *pro tempore*, where that office is vacant or where the local master is absent or ill.[33] There is no office of local master in the Judicial District of York and local masters have been appointed only in Middlesex County, Essex County and the Judicial District of Ottawa-Carleton. In all other counties and districts, the office is filled by the County Court judge.

B. Criminal Jurisdiction

Prior to Confederation, judges of the County Courts were also justices of the peace. As such, they would, together with a second justice, preside

[26] 33 Geo. 3, c. 8 (U.C.).
[27] S.C. 1858, c. 93.
[28] R.S.O. 1970, c. 451.
[29] *The Judicature Act*, R.S.O. 1970, c. 228, s. 118(1). See also *Rules of Practice*, Rules 211-214, R.R.O. 1970, Reg. 545, as amended.
[30] *The Judicature Amendment Act, 1970* (No. 4), S.O. 1970, c. 97, s. 11(2).
[31] See heading A. 3, "Divorce Jurisdiction" in chapter 4 "The High Court of Justice for Ontario".
[32] *The Judicature Act*, R.S.O. 1970, c. 228, s. 97(1).
[33] *Ibid.* s. 99.

over the General Sessions of the Peace. In 1873, the County Court judge was authorized to sit without a justice of the peace to conduct criminal trials at the General Sessions.[34] In the same year, the County Court judge was authorized to try persons in the County Court Judges' Criminal Court if they consented to be tried out of Sessions and without a jury.[35]

Subject to some modifications, these arrangements have been carried forward to the present day in the *Criminal Code*[36] and the provincial statutes. *The General Sessions Act* makes the judges of the County Court the chairmen of the Courts of General Sessions of the Peace.[37] These Courts, in turn, are designated in the *Criminal Code* as "the court of criminal jurisdiction" for the Province of Ontario.[38] In the Court of General Sessions, a County Court judge, sitting with a jury, may try all indictable offences except those that are within the exclusive jurisdiction[39] of the Supreme Court in its capacity as the "superior court of criminal jurisdiction" for the Province.[40] Although the Supreme Court has concurrent jurisdiction with the Courts of General Sessions in all indictable offences to be tried with a jury, the only cases that it usually hears during the Assizes, apart from those that are within its exclusive jurisdiction, are trials of persons who are in custody when the Assizes begin.[41]

The *Criminal Code* also names the "judge or junior judge of a County or District Court" as the judge before whom indictable offence cases will be heard when the accused is to be tried by a judge sitting without a jury.[42] When sitting alone, the County Court judge is constituted a court of record for the trial of indictable offences by *The County Court Judges' Criminal Courts Act*.[43]

Part XXIV of the *Criminal Code*, which deals with summary convictions, provides an appeal from the summary conviction court to the "County Court of the district or county or group of counties where the adjudication was made."[44] This appeal is determined by the holding of a trial *de novo* — in effect, a retrial of the case before the County Court judge.[45]

[34] 36 Vict., c. 8, s. 56. County Court judges are still justices of the peace, and have "power to do alone whatever is authorized to be done by two or more justices of the peace": *The Justices of the Peace Act*, R.S.O. 1970, c. 231, s. 1.
[35] 36 Vict., c. 8. s. 57.
[36] R.S.C. 1970, c. C-34.
[37] R.S.O. 1970, c. 191, s. 7.
[38] R.S.C. 1970, c. C-34, s. 2.
[39] *Ibid.* s. 427.
[40] *Ibid.* s. 2, designates the Supreme Court of Ontario as "the superior court of criminal jurisdiction" in this Province.
[41] Trials of persons in custody may be done pursuant to the Supreme Court's commission of "general gaol delivery".
[42] R.S.C. 1970, c. C-34, s. 482(a).
[43] R.S.O. 1970, c. 93. In the provisional judicial districts of northern Ontario, this court is called the District Court Judges' Criminal Court. In southern Ontario, it is called the County Court Judges' Criminal Court.
[44] R.S.C. 1970, c. C-34, s. 747(e). The *Criminal Code* also provides for an appeal by way of stated case, which is heard by the Supreme Court of Ontario. See ss. 761-770.
[45] The procedure prescribed for a trial *de novo* is, subject to a few modifications, the same procedure as is employed by the summary conviction court.

The Summary Convictions Act says that Part XXIV of the *Criminal Code* applies to every case to which that Act applies.[46] This means that the above-described trial *de novo* procedure in a County Court is a method of appeal in provincial offence cases as well as in criminal matters.

C. Proposals for Reform

1. *Simplification of the Court Structures and Terminology*

As is apparent from what has been set out above, the subject of "County Courts" embraces several different courts, with names and jurisdictional designations that often convey little meaning to persons outside the legal profession and which are not accurate indications of function. Thus, a judge of a County Court may perform judicial duties throughout a group of counties which is called a "district". A judge from the same bench is called a "District Court judge" in northern Ontario, and performs judicial duties in a "district" which is not a group of counties.

The County Court Judges' Criminal Court is known as the District Court Judges' Criminal Court in northern Ontario. The County and District Court judges also preside over criminal courts when they sit at the General Sessions of the Peace.

As we pointed out in chapter 1, the distinctions implied by these matters of structure and terminology are confusing to the lay public and are of little relevance either to the efficient management of these courts or the proper administration of justice in the Province.

We therefore recommend that the County Courts, the District Courts, the County Court Judges' Criminal Courts, the District Court Judges' Criminal Courts and the Courts of General Sessions of the Peace be reconstituted as a single court of record with only one name. Although "County Court" is a title of some historical significance, given the fact that the judges of these Courts now regularly serve groups of counties, and the fact that the Magistrates' Courts have been designated as Provincial Courts, it may be concluded that a new name should be conferred in lieu of "County Court". After giving this matter some thought we have decided that the question of whether there should be a new name, and if so, what it should be, is something that should be pursued with the judges themselves in the course of implementation of the recommendations made in this Report.

2. *Civil Jurisdiction*

The civil jurisdiction of the County Courts was raised in 1971 from $3,000 to $7,500. As we pointed out in the chapter dealing with the High Court, it is too early at this time to assess the effect of this change on the

[46] R.S.O. 1970, c. 450, s. 3. *The Summary Convictions Act* does not, however, prescribe the procedure for all provincial offences. See *e.g.*, *The Liquor Control Act*, R.S.O. 1970, c. 249, s. 114, which provides for an appeal on the record to a judge of the County Court sitting in chambers.

workload and efficiency of either the High Court or the County Courts. Implementation of the proposals made in this Report will add further variables which will affect the distribution of cases between these courts. For these reasons a reliable statistical base through which the effects of the increase in County Court jurisdiction can be predicted with reasonable accuracy does not now exist and will probably not be able to be developed for the next several years. We therefore recommend that County Court civil jurisdiction not be changed at the present time, but that it be re-examined after an appropriate time has elapsed following legislative implementation of our recommendations.

3. *The Trial De Novo*

The trial *de novo* is an anachronistic "relic of frontier days in Canada".[47] It was an important feature of our law at the time when the only record of evidence in a summary conviction case was that which was written down on the information by the magistrate, who often may have had no legal training. An appeal involving either a question of fact or of law would have been, at best, extremely difficult under such circumstances, and the right to a second trial before a County Court judge was therefore a justifiable and essential way in which to overcome the deficiencies in the old system of Magistrates' Courts.

The trial *de novo* has not been particularly necessary to safeguard against any general lack of legal expertise in the Magistrates' Courts of more recent years. The major reorganization under *The Provincial Courts Act, 1968*[48] has further strengthened these courts and their bench. The Provincial Courts are now courts of record, presided over by judges whose qualifications are reviewed before appointment by the Judicial Council. We therefore conclude that the retention of the trial *de novo* on the ground that it protects against some fundamental institutional inadequacies in the Provincial Courts is unjustified.

Many trials *de novo* are appeals from decisions of justices of the peace. We have no doubt that there are substantial inadequacies in many of these courts. Equally, however, we are convinced that the solution to these problems does not lie in providing a second trial before a more highly qualified judicial officer to those who can spare the time and expense that this involves, but rather in ensuring that the trial is conducted as it should be in the court of first instance, including keeping a proper record of the proceedings. We will be making appropriate recommendations to this end when we deal with the justices of the peace in a subsequent Part of our *Report on Administration of Ontario Courts*. In addition, we are of the opinion that the recommendation made in this section of this chapter concerning the abolition of the trial *de novo* contains adequate safeguards for those cases wherein the record of the proceedings before a justice of the peace is faulty or incomplete.

The following views of the Provincial Judges' Association (Criminal Division) were considered by the Commission when dealing with the ques-

[47] McRuer Commission Report, 788 (Report No. 1, Vol. 2, 1968).
[48] S.O. 1968, c. 103. Now R.S.O. 1970, c. 369.

tion of whether the trial *de novo* now serves some useful purpose or important function, even though the original rationale behind this form of appeal no longer exists:

> The trial *de novo* would seem to be open to two criticisms. In so far as it is taken merely as an opportunity to reargue the law with no evidence in addition to the transcript at trial, it usurps the function of the stated case and offers none of its advantages. The resulting judgment is not a binding authority. The procedure is also more costly and time consuming, since it requires the complete transcript of evidence and cannot be heard until its place on the lists of the county court judges criminal court or general sessions is reached. As it is technically a county court trial, the solicitor or counsel fees incurred are considerably greater than the stated case brought by way of originating motion.
>
> The second criticism levelled at the trial *de novo* is that when used as the statute intended it to be used, both Crown and defence counsel too often treat the original trial itself as a preliminary hearing. This inevitably leads to the frustration of witnesses since they must be recalled months later when their memories are dimmer and consequently more malleable than at the original trial.

There can be no doubt that a great deal of valuable court time is unnecessarily taken up by the re-hearing in a County Court of a case that has been, or could have been properly presented to a summary conviction court in the first place. During a recent two-year period in the Judicial District of York, of all the cases heard by County Court judges sitting as appellate courts hearing trials *de novo* and in the Courts of General Sessions of the Peace and the County Court Judges' Criminal Court, more than one-third of the docket was made up of trials *de novo*. On September 30, 1972, 54.5% of the trials *de novo* awaiting hearing in the Judicial District of York had been on the lists for 6 to 12 months, 34.1% had been pending for 13 to 18 months, and 9.8% had not been reached after 18 months or more. During the first half of 1972, available statistics indicate that approximately 13% of the total court time of the County Court judges in the Province was taken up by trials *de novo*. The burden that this imposes upon the time and facilities of the courts, upon the witnesses, and upon the system for the administration of justice in the Province cannot be said today to be balanced by any particular advantages that are gained from this mode of appellate proceeding.

We conclude that the retention of the trial *de novo* is no longer justified, either as a matter of utility or principle, and recommend that this form of appeal in summary conviction matters be replaced by an appeal on the record. Since there is a possibility in some cases that no proper record will have been kept, we recommend that there be power in the appeal court to consider not only the record but also to hear further and other evidence where it considers it to be in the interest of justice in the case.

These recommendations should apply to all summary conviction appeals, whether the offence arose under a provincial statute or under the *Criminal Code*. With respect to provincial offences, these recommendations can be implemented by amendments to *The Summary Convictions Act*,[49] *The Liquor Control Act*,[50] and *The Liquor Licence Act*.[51] For criminal offences, representations would have to be made to the Federal Government for appropriate amendments to Part XXIV of the *Criminal Code* that would be applicable to Ontario. We invite attention to the fact that these recommendations emphasize the need for adequate court reporting in summary conviction matters. We will return to the topic of court reporting, and make appropriate recommendations in connection therewith, in a subsequent Part of our *Report on Administration of Ontario Courts*

4. *Organizational Aspects of the County Courts*

The necessity for some fundamental restructuring of the County Courts was made clear to us by the County and District Court Judges Association of Ontario. The following views were expressed:

> The County Courts of this province are presided over by a Chief Judge who has the administrative responsibility in connection with 94 members of his bench,[52] and yet his only administrative assistance comes from one secretary.
>
> When originally constituted . . . County Courts were individual Courts in every county, and the judge was his own administrative head of his Court. Now, with county court judges having jurisdiction throughout the province and the movement of county court judges from one Court to another being quite common, the County Court bench is in effect one cohesive bench, with the Chief Judge attempting to be the administrative head of this large bench, without adequate administrative machinery.
>
> The workload of the county court judges is not equally distributed across the province. This then is again not the fault of the judges, but that the linking of the administration of justice to the county administrative unit, even at the very time when the county municipal unit is being displaced by the regional municipal unit, makes it difficult for the Chief Judge to equalize the workload among all county court judges.

One of the very serious problems adverted to in the passage set out above will be measurably decreased by implementation of the measures recommended in the chapter of this Report dealing with a new structure for court administration.[53] It cannot be doubted that the full-time services of highly skilled professional court administrators are essential in the County Courts, as in the other courts in the Province.

[49]R.S.O. 1970, c. 450.
[50]R.S.O. 1970, c. 249.
[51]R.S.O. 1970, c. 250. Neither this Act, nor *The Liquor Control Act*, *supra* note 50, provides for the introduction of new evidence before the appeal court.
[52]This number has now risen to 99.
[53]Chapter 2, *supra*.

The unequal distribution of the workload in the County Courts can be illustrated by the following table, showing the experience in Court District Number 1 in southwestern Ontario during a three month period.[54]

County	Number of Writs Issued April-June 1971 in the County Court	Number of Judges	Ratio of Writs to Judges
Huron	33	1	33:1
Bruce	38	1	38:1
Elgin	50	1	50:1
Perth	81	1	81:1
Oxford	86	1	86:1
Kent	108	1	108:1
Lambton	138	1	138:1
Middlesex	467	4	117:1
Essex	564	4	141:1

The system that is designed to equalize the distribution of workload among the counties in a court district is set out in *The County Judges Act*:[55]

> 15. (4) To ensure the dispatch of business of the various courts including chambers, that are presided over by the judges of the county and district courts, including the surrogate and small claims courts where it is customary for the county or district court judge to act as judge of the surrogate court and the small claims court, the chief judge shall have general supervisory powers over arranging the sittings of such courts, including chambers.
>
> (5) For the purpose of arranging the sittings of the various courts and considering matters relating to the courts and the judges, the chief judge shall convene a meeting of the judges and junior judges of each county and district court district at least once in each year and shall preside thereat.
>
> (6) The chief judge and the judges and junior judges of the county and district court district shall discuss and consider the time and other requirements of the various courts in the county or district court district, having regard to the efficient administration of justice in Ontario, and shall make such arrangements as may be necessary or proper for the holding of such courts, including chambers, and the transaction of such business as are customarily held and transacted by the judges and junior judges of the county or district court district with power in the chief judge to make such readjustment or reassignment as he considers necessary or proper from time to time.
>
> (7) In the arrangement of the courts and the assignment of judges thereto, regard shall be had to,

[54] The number of writs issued is not, of course, the same thing as the number of cases tried, nor does it encompass the spectrum of duties that a County Court judge is called upon to perform. It is, however, a reasonably accurate indicator of the relative frequency with which all court functions are invoked in one county, as compared to another.

[55] R.S.O. 1970, c. 95, s. 15.

> (a) the desirability of rotating the judges within each county and district court district; and
>
> (b) the greater volume of judicial work in certain of the counties and districts,
>
> but no judge or junior judge shall be required to sit outside his county or district court district, as the case may be, without his consent.

(a) *Regionalization of the County Courts*

The procedures set out above, coupled with the division of the Province into eight county and district court districts, are indicative of the shift mentioned by the County and District Court Judges Association away from "individual courts in every county" towards a "cohesive bench". Given the variation in workloads among individual counties, and the fact that there is now a great deal of rotation by judges within each court district, it follows that certain organizational changes should be made so as to enable these courts to deal better not only with the judicial business within a single county, but also with matters that affect two or more counties within a court district, or two or more court districts within the Province.

We therefore recommend that the county and district court districts be renamed "circuits", and function as such. Although judges should continue to be appointed to a particular county or district, the basic unit for these courts should be the circuit and not the county or district.

We note that the September 30, 1972 draft of *Interim Report Number 1* of the Task Force on Decentralization of Government Administration contains alternatives employing five and six planning and administrative regions. Whether the circuit boundaries can or should be adjusted in order to coincide with the planning regions is a question that can only be answered after the policy decision is taken to establish such regions and their number and boundaries are settled.

(b) *Powers of the Chief Judge*

It will be noted that "general supervisory powers over arranging the sittings of such courts, including chambers" is conferred upon the Chief Judge, as well as the specific power to "make such readjustment or reassignment as he considers necessary or proper from time to time" over the sittings of the courts and the rotation of the judges within a particular court district. The Chief Judge does not, however, have power to require a judge "to sit outside his county or district court district . . . without his consent." We are of the view that the Chief Judge should have overall authority and responsibility to assign judges to sit outside their circuit (or, employing present terminology, their court district) if the volume of judicial work in other circuits warrants this, and so recommend. In addition, with respect to the responsibilities to be exercised in the counties and the circuits by certain judges, as specified below, we recommend that all such duties be conferred subject to the supervision and direction of the Chief Judge.

(c) *Judges and Junior Judges*

The County Judges Act provides that:[56]

> A judge may be appointed for the county court of each of the counties and for the district court of each of the provisional judicial districts.

In those counties and judicial districts where the workload is such that more than one judge is required, additional appointments are made. These additional appointees are called "junior judges". We are of the opinion that this is an unfortunate denomination, both with respect to what it might imply to the public and with respect to the facts of the experience and abilities of the judges to whom it is applied. We recommend the term "junior judge" be abolished, and that all members of the bench in a county or district where two or more judges are appointed be known as "judges".

The Surrogate Courts Act also creates the judge — junior judge distinction.[57] The same objections apply to this terminology in the Surrogate Courts as in the County Courts, and it is therefore recommended that the title of "junior judge" be done away with in these courts as well.

In counties and districts where there is a multiple-judge court there will be a necessity to supervise the day-to-day operations of the courts in the county, to deal with court problems that affect the county as a whole, and to coordinate the efforts of all the judges in the county to these ends. There will also be a need to ensure that the operations of the County Court in a county (and the Surrogate and Small Claims Courts in counties where they are presided over by County Court judges) are coordinated with the arrangements made under *The County Judges Act* for the functioning of the courts throughout the circuit. This should be done by one judge who would have responsibility for each individual county. The Commission therefore recommends that in counties where there are two or more judges, one judge be designated by the appointing authority as "senior judge" with the responsibilities as set out above. It is further recommended that appointments of senior judges be made on the basis of administrative ability rather than length of service on the bench.

(d) *Senior Judge of a Circuit*

Each of the eight circuits of the County and District Courts will present a unique set of operational problems, based upon such phenomena as litigational patterns, distances between trial centres, transportation and court facilities, the urban-rural characteristics of the circuit, availability of judges, and many more. The task of coordinating all the factors in a given circuit will be a large one and one which will require effective supervision and control on the judicial side from within the circuit in addition to the contribution that can be expected from the efforts of a professional court administrator working with the Chief Judge. We therefore recommend that the Province should create the office of "senior circuit judge", and one

[56] *Ibid.* s. 2.
[57] R.S.O. 1970, c. 451, s. 8.

judge should be so designated by the appointing authority for each circuit. Under the direction of the Chief Judge, the senior circuit judge should be responsible, in consultation with the judges of his circuit, to plan and carry into effect the assignment of judges to the courts in the circuit, having regard to the desirability of rotating the judges within the circuit, and the need to equalize the burdens of the judicial duties of each judge. In addition, the senior circuit judge should have the power to make such readjustment or reassignment as he considers necessary from time to time. The senior circuit judges should, after the Chief Judge, take rank and precedence among themselves according to seniority of appointment, and should be appointed on the basis of administrative ability rather than length of service on the bench.

(e) *Judges for the County and District Courts of the Counties and Districts of Ontario*

Under *The County Judges Act*, it is possible for some judges to be appointed "at large" rather than to the County Court of a particular county. The Act specifies:[58]

> 4. (1) In addition to the judges mentioned in section 2 and the junior judges mentioned in section 3, one or more judges or junior judges, not exceeding seventeen in number, may be appointed,
>
> (a) for the county or district court of any county or district that the Lieutenant Governor in Council designates; or
>
> (b) for the county and district courts of the counties and districts of Ontario.
>
> (2) A judge or junior judge appointed for the county and district courts of the counties and districts of Ontario shall reside in the county court district or district court district that is designated by the Lieutenant Governor in Council.

At present there are nine judges appointed under subsection (1)(b) of section 4, above. Most of these judges have become more or less permanently associated with a particular county, although they do provide the Chief Judge, in certain instances, with some capability to send a judge to a place where, for example, a serious backlog has occurred or a judge has fallen ill.

We are of the view that a properly functioning circuit system with judges who rotate among trial centres and senior circuit judges exercising on-the-spot supervisory powers will provide the necessary degree of flexibility to overcome problems caused by the illness of a judge, an unusual increase in the number of cases on the trial lists or other delay-producing situations.

It is important to recognize that the operation of the restructured County Courts, as described above in this chapter, will depend in no small

[58] R.S.O. 1970, c. 95.

part upon the ability of the senior judges in the counties and the senior circuit judges to assist the Chief Judge in supervising the execution of effective programmes involving the efforts of all the judges in any given locality. This process would, in our opinion, be hindered if there were some judges who were outside the regular judicial hierarchy. We therefore recommend that the appointment of judges at large be terminated and that those judges who are now appointed for the County and District Courts of the counties and districts of Ontario be reappointed to particular counties and districts.

5. *Adjudicative and Administrative Functions Performed by County and District Court Judges*

In the chapter of this Report dealing with the High Court, we have pointed out that for many years the Provincial Legislature and the Parliament of Canada have been designating judges as the persons who shall perform a wide range of particular duties created by statute. Some of these are, or are closely related to, the traditional adjudicative functions that judges should perform. Others have devolved upon the judges merely because they must be done by someone, and a judge has apparently appeared to be a convenient official to the legislators who created the duty.

The undesirable effects of this process are cumulative. While the judges of all courts are affected by it to some degree, it is the judges of the County and District Courts who now bear the greatest portion of these duties.[59] We therefore restate here our recommendation that there be a presumption against the assignment of administrative or non-adjudicative duties to judges in the absence of strong countervailing considerations. In addition, we recommend that, with respect to adjudicative duties imposed upon the judges of the County and District Courts, either when sitting as a court or as *persona designata*,[60] the following guidelines should be applied:[61]

1. All adjudicative duties conferred by statute on judges requiring the simple and routine application of clearly defined standards in a consistent and uniform manner should be transferred to other public functionaries.

2. A presumption should arise to the effect that an adjudicative duty conferred on a judge should be transferred when there is in existence another qualified and competent public functionary or tribunal which is equipped to perform these adjudicative duties.

3. Adjudicative duties not falling within #1 and #2 above should remain with the judges unless with respect to specific duties there are compelling reasons relating to the inability of the judges to handle their normal workload of trial cases, which situation would suggest the transference of a specific duty to a new or existing public functionary or tribunal possessing the requisite specialization or expertise on such adjudicative matters.

[59]See Appendix II to this chapter for the lists of the relevant provincial and federal statutes.

[60]Another aspect of the *persona designata* jurisdiction of the judges of the County Courts is dealt with in section C. 5(c) of this chapter, below.

[61]We again note that these are put forward as guidelines to which there must be exceptions rather than as rules applicable to all cases.

The implications of these recommendations are discussed in turn below.

(a) *Administrative or Non-Adjudicative Duties*

It is possible to divide administrative or non-adjudicative duties conferred on judges into four general categories:

1. Ceremonial
2. Investigative
3. Ministerial
4. Operational

Ceremonial duties are usually conferred on judges where a public official of some considerable prestige is required to perform the particular duty in question. Examples of such duties would include the performance of marriages by a County Court judge under the provisions of *The Marriage Act*,[62] the granting of a certificate of citizenship by a County Court judge under the *Canadian Citizenship Act*,[63] or the role of judges as "school visitors" in the public schools in the municipalities where they reside, under *The Public Schools Act*.[64]

Investigative duties are occasionally conferred from time to time on judges either as individuals or as chairmen of commissions or committees. One of the classic examples here is section 240 of *The Municipal Act*[65] under which investigatory or fact-finding duties are conferred on County Court judges who, at the request of the municipal council, are required to investigate any matter relating to a supposed malfeasance, breach of trust or other misconduct on the part of a member of council.

Ministerial duties are conferred on judges when they are required to exercise powers of appointment. For example, *The Bailiffs Act*[66] requires that a bailiff who wishes to act as a bailiff in a county other than that for which he is appointed by the Lieutenant Governor must first obtain the consent of the judge of the County Court of the county in which he proposes to act. Another example is section 102 of *The Insurance Act*[67] in which the County Court judge has the duty to appoint an appraiser or umpire if certain conditions listed therein prevail as a result of a disagreement between the insured and the insurer.

[62]R.S.O. 1970, c. 261, s. 26(1). In connection with this duty, attention is invited to this Commission's *Report on Family Law, Part II: Marriage* (1970) at p. 57: "[T]here appears to be no good reason for including the solemnization of marriage in the duties of judges."

[63]R.S.C. 1970, c. C-19, s. 10.

[64]R.S.O. 1970, c. 385, s. 8.

[65]R.S.O. 1970, c. 284.

[66]R.S.O. 1970, c. 38, s. 4.

[67]R.S.O. 1970, c. 224.

Operational duties are conferred in such situations as under *The Justices of the Peace Act*[68] where a prospective justice of the peace is to be examined in regard to his qualifications for office by the judge of the County Court of the county in which he resides. A similar provision exists in *The Notaries Act*[69] with respect to any person other than a barrister or solicitor who is desirous of being appointed a notary public.

These are not all of the administrative or non-adjudicative duties performed by County Court judges, nor are they all duties that should necessarily be performed by other public officials. Rather, they are examples of the kinds of duties that should be tested against the presumption which would have them carried out by non-judicial officers "in the absence of strong countervailing considerations".

We are of the view that there is no body or group of persons that would be better qualified to determine whether a non-adjudicative or administrative duty is a proper or appropriate function for a County Court judge, than the judges themselves. We therefore recommend that, employing the presumption set out above as part of the terms of reference, a committee of County Court judges be established for these purposes:

1. to give detailed consideration to the matter of non-adjudicative and administrative duties imposed upon County Court judges by statute; and

2. where it is concluded that certain of these duties are not properly within the functions of a judge, to consider the matter as to how the duties might otherwise be performed; and

to make appropriate proposals to those charged with the responsibility for drawing up the legislation implementing the recommendations of this Report.

There is one particular duty, difficult to classify under any of the heads employed in the foregoing analysis, with respect to which it is necessary to make a specific recommendation. Under section 8 of *The Police Act*,[70] one of the members of every board of commissioners of police must be a "judge of any county or district court designated by the Lieutenant Governor in Council". Members of these boards are paid by the municipality for the duties they perform in connection therewith.[71] The boards have broad hiring, maintenance and disciplinary powers with respect to municipal police forces. In addition they have powers to pass by-laws dealing with a wide range of matters that have very little to do with the police function. Under *The Municipal Act*, boards of commissioners of police may, for example, pass by-laws regulating and licensing the carriage of goods and the taxi business,[72] the sale of magazines and newspapers on the streets and in

[68]R.S.O. 1970, c. 231, s. 2(2).
[69]R.S.O. 1970, c. 300, s. 2(1).
[70]R.S.O. 1970, c. 351.
[71]The Council of the municipality is required to provide for the payment to the board members of "a reasonable remuneration": *Ibid.* s. 8(4). Minimum payments are prescribed in R.R.O. 1970, Reg. 680.
[72]R.S.O. 1970, c. 284, s. 377(1).

public places,[73] second-hand shops,[74] certain public fairs,[75] salesmen,[76] food shops and restaurants,[77] auctioneers,[78] billiard parlours,[79] barber shops,[80] and so on.

We are of the view that none of these functions, or any others within the jurisdiction of boards of commissioners of police, requires the presence of a County Court judge on such boards. We concur with those passages in the McRuer Commission Report that point out that in some cases, such as where the adjudicative duties of a judge who is in receipt of remuneration from a municipality involve a contest between a citizen and that municipality, the essential elements of impartiality and independence of the judiciary may be, or may appear to be, interfered with.[81] Further, the scheduling and operation of a circuit system for the County Courts cannot work efficiently if some judges are tied down in various municipalities on an *ad hoc* basis performing extra-judicial duties as police commissioners. We therefore recommend that those provisions of *The Police Act* that make a County Court judge a statutory member of a board of commissioners of police be repealed, and that County Court judges not be assigned to perform these duties in the future.

(b) *Adjudicative Duties*

With respect to adjudicative duties assigned to County Court judges, either when sitting as a court or as *persona designata*, the Commission's proposals are contained in the three guidelines set out above.

The first guideline is that adjudicative duties which require the simple and routine application of clearly defined standards should be transferred away from judges and given to other public functionaries. These duties most frequently involve extending time for filing or registration, routine clerical decisions and the assessment of ability to pay in judgment summons or other like proceedings. Examples of the duty to extend time are found in *The Conditional Sales Act*, under which a County Court judge can grant an extension of time for filing a renewal statement,[82] and in *The Bills of Sale and Chattel Mortgages Act* where the late registration of a mortgage or conveyance can be permitted by a judge of the County Court.[83] Clerical duties might include the sanctioning of an arrangement between shareholders under *The Corporations Act*,[84] the exemption by a County Court judge of any sale from the provisions of *The Bulk Sales Act*,[85] and the power of the County Court judge to order a person refusing or neglecting to register a mortgage discharge in a period of time after the money has been paid him to do so under *The Registry Act*.[86] Other examples of clerical

[73]*Ibid.* s. 377(5)
[74]*Ibid.* s. 378.
[75]*Ibid.* s. 379.
[76]*Ibid.* s. 381(1).
[77]*Ibid.* s. 381(5) and (6).
[78]*Ibid.* s. 381(7).
[79]*Ibid.* s. 383(1).
[80]*Ibid.* s. 383(2).
[81]McRuer Commission Report, 717-719 (Report No. 1, Vol. 2, 1968).
[82]R.S.O. 1970, c. 76, s. 5(5).
[83]R.S.O. 1970, c. 45, s. 11.
[84]R.S.O. 1970, c. 89, s. 113(4).
[85]R.S.O. 1970, c. 52, s. 3.
[86]R.S.O. 1970, c. 409, s. 59(5).

duties are the power of a County Court judge to sanction certain sales and conveyances under *The Religious Institutions Act*,[87] and the power of a Surrogate Court judge to direct the passing of accounts of perpetual care funds under *The Cemeteries Act*.[88]

The most common example of assessing ability to pay is in the judgment summons proceedings conducted by a Small Claims Court judge under *The Small Claims Courts Act*.[89]

The second guideline — the transference away from the judges of adjudicative duties which are better performed by other existing tribunals — may well involve qualitative value judgments as to the competence of other officials or tribunals to decide certain types of questions. However, an obvious case for transference can be made with respect to the duty of a County Court judge under *The Employment Agencies Act*[90] to review an order of the supervisor of employment agencies on a licensing application, with power to reverse the decision of such supervisor. This duty might be better performed by the Commercial Registration Appeal Tribunal established under *The Department of Financial and Commercial Affairs Act*.[91] Another example is the duty of the County Court judge to settle the amount of a bond under *The Execution Act*[92] in situations where the sheriff is not satisfied with the bond offered by a person claiming goods in possession of a third party and not the initial debtor. There would seem to be no reason why the sheriff could not himself make the determination as to whether the bond offered was satisfactory, with a right in the creditor required to give the bond as part of the execution arrangement to appeal to the County Court judge if he thought the amount specified by the sheriff was unreasonable.

The third and final guideline — the transference of adjudicative duties to new tribunals in order to assist the judges in handling their normal workload by relieving them of a substantial burden — is most applicable to assessment appeals under *The Assessment Act*.[93] It appears to the Commission that a strong case could be made for transferring these duties to a province-wide Assessment Appeal Board, at least to decide questions of fact and valuation. Indeed, it may be that such a tribunal might be a better vehicle for bringing commercial expertise to bear on the question of valuation. However, it may be necessary to leave questions of law to be decided by the courts because of possible constitutional limitations.[94]

[87] R.S.O. 1970, c. 411, s. 12(3).
[88] R.S.O. 1970, c. 57, s. 31.
[89] R.S.O. 1970, c. 439, s. 131.
[90] R.S.O. 1970, c. 146, s. 6(3).
[91] R.S.O. 1970, c. 113, s. [illegible].
[92] R.S.O. 1970, c. 152, s. 20(5).
[93] R.S.O. 1970, c. 32, ss. 55, 64, 65, 66.
[94] *Toronto* v. *York*, [1938] A.C. 415. See also Laskin, *Canadian Constitutional Law* (3d ed. 1966) at pp. 809-813. Attention is invited to the recent *Report of the Select Committee on the Ontario Municipal Board*, November 21, 1972, at p. 16, where the recommendation is made that the Ontario Municipal Board be the "centralized administrative body to deal with assessment appeals" directly from the Assessment Review Court, thereby eliminating appeals to the County Court judge, but with power in the Board to state cases of law to the County Court or the Supreme Court where questions of law arise. If the anticipated volume of appeals appears to be too great for the Board, the *Report* recommends the establishment of a separate assessment appeal board, with the same appellate jurisdiction as recommended for the Ontario Municipal Board.

Three other matters that represent a substantial drain on the time of County Court judges are the trial of mechanics' lien actions, the hearing of Small Claims Court cases and the making of adoption orders. Mechanics' lien actions are tried by County Court judges when sitting as local judges of the Supreme Court, except in the Judicial District of York, where they are tried either by a Supreme Court judge or the Supreme Court Master. These actions are often difficult, involving a number of parties and substantial accounting problems. The problem of the incursion on the time of County Court judges caused by small claims matters will be dealt with in a subsequent Part of the Commission's *Report on Administration of Ontario Courts*, where we will be examining the Small Claims Courts in some detail. Without trying to anticipate the recommendations we will be making in that Part, it appears at present as if one solution to this problem will lie in the appointment by the provincial authorities of more full-time judges to the small claims bench in those larger municipal centres where provincial judges who would do small claims work exclusively are required. Similarly, as described in chapter 13 of this Report, we are now engaged in a comprehensive study of the Family Courts in Ontario, and as part of that Report, will be giving full consideration to jurisdictional matters in family law, including the making of adoption orders.

The several duties imposed on County Court judges in the area of election law (controverted elections, determination of the right of a person to vote, etc.) are related to matters that fall within the third guideline, not in the sense that these duties represent a substantial drain on the time of the County Court judges, but because they may tend to put a judge in an undesirable and controversial position. The inevitable partisan nature of the issues may lead to aspersions upon the judges, either expressed or implied, which would not occur in any other context and which would tend to weaken the respect in which these courts and this bench are held by the public. However, in the absence of any concrete proposal from any quarter for a full-time election tribunal with adjudicative powers at either the federal or provincial level, it may be that these duties would best be left with the County Court judges.

For the same reasons as set out above in dealing with non-adjudicative and administrative duties of judges, we recommend that the matter of transferring certain adjudicative duties to other public officials or tribunals be referred to a committee of County Court judges for detailed analysis, in accordance with the three guidelines set out above, for the purpose of formulating specific legislative proposals. In addition, we recommend that these three guidelines be employed in the future whenever legislation is drafted under which adjudicative duties are created which might be assigned to the County Court judges.

(c) *Duties Conferred on the Court and Duties Conferred on the Judge as Persona Designata*

The statutes assigning particular administrative, adjudicative or non-adjudicative duties to be performed by County Court judges will in some cases vest the jurisdiction in the court and in other cases, in the judge as *persona designata*.[95] In many cases, there is no obvious reason for the

[95] A useful review of the history of *persona designata* jurisdiction is contained in the judgment of Middleton, J. A., in *Re Hynes and Swartz*, [1937] O.R. 924 (C.A.).

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choice of one rather than the other, and quite often, very little apparent difference between the words used in the statute to create court jurisdiction and the words that create *persona designata* jurisdiction.

The analysis that we have made of court and *persona designata* jurisdiction in the High Court chapter of this Report applies equally to the County Courts. An appeal from a judge sitting *persona designata* may go to a different court than an appeal from the same judge in the same matter exercising a jurisdiction conferred on the court. This is nothing more than a trap for the unwary, and can lead to confusion, to unnecessary litigation, and to added expense for the litigants and for the public purse. In addition, the fact that a matter begun before one judge sitting *persona designata* may not be able to be completed before another judge from the same bench creates problems that will be exacerbated by the movement of individual judges within the circuits for the County Courts that we have proposed earlier in this chapter. It must also be recognized that these problems are particularly acute within the County Courts because of the fact that the County Court judges perform a much greater variety of *persona designata* and court functions than do the judges of any other bench.

Turning first to the matter of appeals from the County Court, or from a judge thereof as *persona designata*, the present situation is as follows.

When a County Court hears cases under the general provisions of *The County Courts Act*[96] where the sum claimed does not exceed $7,500, the judge is exercising court jurisdiction. An appeal lies from his decision or order, except where the decision or order is interlocutory, to the Court of Appeal. This is provided by section 33 of *The County Courts Act*:

> 33. (1) An appeal lies to the Court of Appeal at the instance of any party to a cause or matter from,
>
> (a) every decision or order of a judge in court or chambers under any of the powers conferred upon him by the rules of court or by a statute, unless provision is made therein to the contrary;
>
> (b) every decision or order in a cause or matter disposing of any right or claim;
>
> (c) any decision or order of a judge, whether pronounced or made at the trial, or on appeal from taxation or otherwise, that has the effect of depriving the plaintiff of county court costs on the ground that his action is of the proper competence of the small claims court, or of entitling him to county court costs on the ground that the action is not of the proper competence of the small claims court.
>
> (2) This section does not apply to an order or decision that is not final in its nature but is merely interlocutory or where jurisdiction is given to the judge as *persona designata.*

[96]R.S.O. 1970, c. 94, s. 14.

With respect to the substantial number of statutes apart from *The County Courts Act* conferring powers on the County Court judges, a judge will exercise court jurisdiction under some, and under others, a *persona designata* jurisdiction. Such statutes may provide for an appeal, may be silent as to appeals, or may state that the order of the court or judge is final and there can be no appeal.

The following provisions of *The Conveyancing and Law of Property Act*[97] are illustrative of a statute other than *The County Courts Act* conferring a power to make an order on the County Court, and prescribing an appeal. The power is contained in section 38(1):

> 38. (1) Where a person makes lasting improvements on land under the belief that it is his own, he or his assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the court is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.

The appeal is provided for in section 38(6):

> (6) An appeal lies to the Court of Appeal from any order made under this section.

Notwithstanding section 38(6), an appeal from a County Court from an order made under section 38(1) will go to the Divisional Court, not the Court of Appeal. On April 17, 1972, section 17 of *The Judicature Act*[98] came into force. This section, among other things, says with reference to the County Courts that where an appeal to the Court of Appeal is provided in a statute other than *The County Courts Act* — as is the case in *The Conveyancing and Law of Property Act*, above — that such provision shall be deemed to provide that the appeal is to the Supreme Court. Another function of section 17 is to give to the Divisional Court jurisdiction to hear all appeals to the Supreme Court that come from County Courts, except appeals under *The County Courts Act*.[99] The section reads as follows:

> 17. (1) The Divisional Court has jurisdiction to hear, determine and dispose of,
>
> (a) all appeals to the Supreme Court under any Act other than this Act and *The County Courts Act*;
>
> (b) applications for judicial review under *The Judicial Review Procedure Act, 1971*;
>
> (c) all appeals from judgments or orders of judges of the High Court on applications for judicial review under *The Judicial Review Procedure Act, 1971*;

[97]R.S.O. 1970, c. 85. The Supreme Court has concurrent jurisdiction with the County Courts under the section set out in the text.
[98]R.S.O. 1970, c. 228.
[99]*I.e.*, appeals in interlocutory matters, which, by virtue of section 39 of *The County Courts Act*, go to a judge of the Supreme Court.

(d) all appeals from interlocutory judgments or orders of a judge of the High Court, in court or in chambers, with leave as provided in the rules;

(e) all applications by way of stated case, whether as an appeal or otherwise, to the Supreme Court under any Act other than *The Summary Convictions Act*;

(f) all appeals from final judgments or orders of the Master of the Supreme Court.

(2) Where, by or under any Act, other than this Act and *The County Courts Act*, provision is made for an appeal to the High Court or the Court of Appeal, or to a judge thereof, or to a judge of the Supreme Court, or for an application thereto by way of stated case under any Act other than *The Summary Convictions Act*, whether as an appeal or otherwise, such provision shall be deemed for the purposes of subsection 1 to provide that the appeal or application shall be to the Supreme Court.

A considerable number of statutes apart from *The County Courts Act* that confer a power to order or decide upon the County Courts follow the pattern described above — *i.e.*, they prescribe that an appeal lies to the Court of Appeal, and, by virtue of section 17 of *The Judicature Act*, the appeal is rerouted into the Divisional Court. *The Woodmen's Lien for Wages Act*[100] is an example of an exception to this rule. Under this Act, an unpaid woodman may enforce a lien for wages by an action brought in a District Court.[101] The Act does not advert to appeals, but rather specifies that "the practice and procedure in actions brought in the district courts . . . shall, so far as they are not inconsistent with this Act, apply to proceedings taken under this Act.[102]

Since there is no provision in the Act for an appeal, section 17(2) of *The Judicature Act* does not apply, and the Divisional Court has no jurisdiction to hear an appeal thereunder. Rather, an appeal would be governed by section 33 of *The County Courts Act* and would go to the Court of Appeal.

Where a statute confers jurisdiction on a County Court judge as *persona designata* rather than on the County Courts, then appeals go to the Divisional Court. The governing statutory provision is section 3 of *The Judges' Orders Enforcement Act*:[103]

3. (1) An appeal lies from an order made by a judge as *persona designata* to the Court of Appeal,

(a) if the right of appeal is given by the statute under which the judge acted; or

[100]R.S.O. 1970, c. 504.
[101]*Ibid.* s. 10. The Act is in force only in the judicial districts in northern Ontario. Hence the reference to "the District Court" rather than "the County or District Court".
[102]*Ibid.* s. 35.
[103]R.S.O. 1970, c. 227.

(b) if no such right of appeal is given, then by leave of the judge who made the order or by leave of the Court of Appeal.

(2) On the day on which section 17 of *The Judicature Act* is proclaimed in force, subsection 1 is amended by striking out "Court of Appeal" in the second line and in the second and third lines of clause *b* thereof and by inserting in lieu thereof in each instance "Divisional Court".

The Married Women's Property Act[104] is an example of a statute under which a judge acts as *persona designata* and in which a right of appeal is given. Section 12 of this Act provides that a County Court judge may make an order with respect to title to or possession of property in questions between husband and wife. This section creates a right of appeal to the Court of Appeal from the judge's order where the value of the property in dispute exceeds $200. Since the coming into force, however, of section 17(2) of *The Judicature Act*, an appeal from an order made under section 12 of *The Married Women's Property Act* goes to the Divisional Court.

An example of a statute under which a County Court judge exercises *persona designata* jurisdiction and in which no right of appeal is given is found in *The Private Sanitaria Act*.[105] Under section 56 of this Act, a judge may, under specified conditions, commit an habitue of alcohol or drugs to a private sanitarium for up to two years. An appeal from such an order would lie to the Divisional Court by virtue of section 3(1)(b) of *The Judges' Orders Enforcement Act* but only, as specified in subsection (1)(b), with leave of the County Court judge who made the order for committal, or with leave of the Divisional Court.

Putting aside interlocutory matters, and at the risk of over-simplification, the following table is a general picture of the basic elements of appeals from the County Courts, or from a County Court judge acting *persona designata*:

	Statute Governing Proceedings	Jurisdiction Exercised	Provision in the Statute for Appeal	Leave to Appeal Required	Appellate Court Named in Statute	Court that Hears Appeal
1.	*County Courts Act*	Court	Yes	No	Court of Appeal	Court of Appeal
2.	Other than *County Courts Act*	Court	Yes	No	Court of Appeal	Divisional Court
3.	Other than *County Courts Act*	Court	No	No	None	Court of Appeal
4.	Other than *County Courts Act*	*Persona Designata*	Yes	No	Court of Appeal	Divisional Court
5.	Other than *County Courts Act*	*Persona Designata*	No	Yes	None	Divisional Court

[104]R.S.O. 1970, c. 262.
[105]R.S.O. 1970, c. 363.

We are of the view that the situation respecting appeals described in this table is unnecessarily complex, and that the whole procedure respecting appeals from the County Courts, or from County Court judges exercising *persona designata* jurisdiction, needs to be rationalized. Further, we think that the law of Ontario should embody the principle that in every case there should be at least one review of an order or decision of a court, or an order of a judge sitting *persona designata*, as of right.

As shown in line 3 of the above table, in proceedings under those statutes that create additional court jurisdiction apart from *The County Courts Act*, and in which no appeal is provided, appeals now go to the Court of Appeal. We are of the view that this is attributable to the particular wording of section 17 of *The Judicature Act* rather than to the fact that the matters at issue under these statutes might be of particular public importance or special jurisprudential significance. There is no compelling reason for continuing to send appeals under these statutes to the Court of Appeal as a class, and at least one good reason not to — *i.e.*, the need to eliminate the potential for error that arises when appeals in matters that are often quite similar are directed to different courts. Removing these appeals from the Court of Appeal and directing them to the Divisional Court would not only eliminate what appears to be an anomaly arising under section 17 of *The Judicature Act*, but it would also have the virtue of greatly simplifying the whole appellate procedure. Simplicity does not, of course, guarantee justice, but needless complexities can and do lead to injustice.

The Commission therefore recommends that *The County Courts Act* be amended to provide that all appeals arising out of the exercise of County Court jurisdiction created under any Act other than *The County Courts Act*, except for matters that are interlocutory in nature, should lie to the Divisional Court. The effect of this amendment would be that all appeals resulting from the exercise of statutory powers that are conferred under these other Acts by a County Court judge, whether sitting as a court or sitting *persona designata*, would lie to the Divisional Court. An appeal from an order or decision that is not final in its nature but is merely interlocutory should continue to lie as at present, as prescribed by section 39 of *The County Courts Act*. The matter of appeals from a judgment, order or decision made under *The County Courts Act* is discussed in chapters 7 and 8 of this Report where we deal with and make recommendations with respect to the jurisdiction of the Court of Appeal and the Divisional Court.

In accordance with the principle that in every case there should be at least one opportunity for a review of an order or decision, we recommend that the leave provisions be dropped from section 3 of *The Judges' Orders Enforcement Act*. This would mean that all appeals going to the Divisional Court from County Court judges, regardless of the type of jurisdiction exercised, would be as of right. Further appeals from the Divisional Court to the Court of Appeal would continue to be with leave as prescribed in section 29(2) of *The Judicature Act*.

Before leaving this subject, we feel obliged to comment upon the complexity of and lack of clarity in the way in which the Statutes of Ontario

deal with these appeals. It is probable that few if any citizens of this Province would be able to ascertain their rights of appeal in County Court matters unless they had been trained in law. Lawyers have also been known to have been misled by the device whereby many statutes say one thing, while one or two general statutes deem them to say something else. Our terms of reference in this project do not extend to suggesting ways in which the general body of the law can be made more intelligible to the persons governed thereby. At the very least, however, those statutes affected by the recent amendment of section 17 of *The Judicature Act* should be changed at the next revision so as to give an accurate indication of the existing state of the law.

When a judge of a County Court acting *persona designata* exercises his statutory jurisdiction, it is possible that the matter, for reasons of convenience or necessity, should be continued or concluded by another judge in another county. There is no procedure for accomplishing this, and it is not clear whether it can be done. This jurisdictional problem has arisen in the past and should be corrected. We are of the view that *persona designata* matters should be able to be dealt with by any County Court judge, rather than being tied to the particular judge before whom the matter originally came, or a judge in a particular county. This is essentially a problem of control and the considerations that apply to its solution do not differ markedly from those that relate to the extended jurisdiction conferred on judges in court matters under sections 5(1) and 16 of *The County Judges Act*.[106]

The Commission therefore recommends that extended jurisdiction to hear and deal with *persona designata* matters should be conferred on County Court judges under *The County Judges Act* in the same way in which that Act now confers extended jurisdiction on the judges to hear and deal with court matters.

6. *The Clerk of the Court*

One solution to many of the difficulties that arise with respect to the routine non-adjudicative and minor adjudicative duties now done by judges would be to allow some of these functions to be assumed by the County Court clerks.[107] These officers could serve, with respect to the County Courts, a function that is essentially similar to that of the Master of the Supreme Court. In general, this would involve the elevation in status of the County Court clerk. In particular, it would require, as a long term goal, the adoption of the policy that County Court clerks be legally trained. Some of the functions that we consider to be suitable for transfer to the County Court clerks at the present time are:

1. Solemnization of marriage under *The Marriage Act*;[108]

[106] R.S.O. 1970, c. 95.

[107] Section 106(5) of *The Landlord and Tenant Amendment Act, 1972*, S.O. 1972, c. 123, is illustrative of the policy described in the text. Under this subsection, if a landlord has applied for a writ of possession or for an order for payment of arrears of rent, and the tenant does not dispute the application, "the clerk of the court may sign an order directing that a writ of possession issue or may give judgment for the amount claimed, or both. . . ."

[108] R.S.O. 1970, c. 261.

2. Permitting late filing of a renewal statement under *The Conditional Sales Act*;[109]

3. Permitting late registration of a mortgage or conveyance under *The Bills of Sale and Chattel Mortgages Act*;[110]

4. Revision of voters' lists under *The Municipal Franchise Extension Act*;[111]

5. Revision of voters' lists under *The Voters' Lists Act*;[112]

6. Revision of voters' lists under *The Municipal Act*.[113]

We therefore recommend that County Court clerks be assigned responsibility for dealing with the routine duties set out above, and such other matters as may appear to fall within the same general terms of reference. In certain cases, it will be appropriate for an appeal to be provided from the decision of a County Court clerk in these matters. We recommend that such appeals go to the County Court We further recommend that a policy be adopted under which County Court clerks would be legally trained. Where persons with legal qualifications are appointed as County Court clerks, we recommend that they be given extended responsibilities with jurisdiction to deal with minor adjudicative matters arising in the County Court in a way that is similar to the functions of the Master of the Supreme Court of Ontario.

There is a particular problem in connection with the trials of criminal cases at the General Sessions of the Peace or the County Court Judges' Criminal Courts that should be mentioned when dealing with the clerk of the court. At present, there appears to be a hiatus in control between the time when a person accused of a crime elects for trial before a judge or a court composed of a judge and jury, and the time of the trial itself. A similar problem exists with respect to summary conviction matters between the time of filing of the notice of appeal and the time when the appeal is heard. Information about the status of cases during these periods is not readily accessible and it is difficult for supervisory powers to be exercised over the criminal lists.

We recommend that the clerk of the County Court maintain a register of all committals for trial showing the date of committal, indicating whether the accused person elected to be tried by a judge or by a court composed of a judge and a jury, and the date upon which the trial was held. This register should also show, for summary conviction appeals, the date upon which a notice of appeal was filed and the date upon which the appeal was heard.

[109]R.S.O. 1970, c. 76. It will be noted that this function, and the late registration functions under *The Bills of Sale and Chattel Mortgages Act, infra* note 110, will be governed by the provisions of *The Personal Property Security Act*, R.S.O. 1970, c. 344, upon its coming into force.
[110]R.S.O. 1970, c. 45.
[111]R.S.O. 1970, c. 288.
[112]R.S.O. 1970, c. 485.
[113]R.S.O. 1970, c. 284.

The register would allow a senior judge of a circuit to maintain control over and assess the state of the lists in criminal matters in his circuit and would enable the Chief Judge to keep under review the progress and disposition of all criminal cases throughout the Province. It would also be a document of primary importance to the court administrative officers who have responsibility for the County Courts.

The register described above should be open to public inspection in the same manner and on the same terms as are the books of the County Courts under the provisions of *The Judicature Act*.[114]

7. *The County Court Judge as Local Judge of the Supreme Court*

Section 118 of *The Judicature Act*[115] provides as follows:

> 118. (1) Every judge of a county court is a local judge of the High Court for the purposes of his jurisdiction in actions in the Supreme Court, and may be styled a local judge of the Supreme Court, and has, in all causes and actions in the Supreme Court, subject to the rules, power and authority to do and perform all such acts and transact all such business in respect of matters and causes in or before the High Court as he is by statute or the rules empowered to do and perform.
>
> (2) Where a county court judge is authorized to exercise jurisdiction in a county other than the county for which he is appointed, he has, while exercising jurisdiction in such county, the like power as a local judge of the High Court as though he were a judge of the county court of such county.
>
> (3) Without limiting the generality of subsections 1 and 2, the jurisdiction of the local judges of the High Court extends to the exercising of all such powers and authorities and the performing of such acts and the transacting of all such business as may be exercised, performed or transacted by the Supreme Court or a judge thereof under the *Divorce Act* (Canada).

The *Rules of Practice*[116] set out in some detail the jurisdiction of a local judge of the Supreme Court.

In summary form, the local judge has, in all causes and matters in his county, the same power and authority as does the Supreme Court Master at Toronto.[117] Under the Rules, the Supreme Court Master is empowered and required to dispose of all applications made in chambers with the exception of an enumerated list of matters that are reserved to High Court judges.[118] This list comprises such things as "matters relating to criminal proceedings or the liberty of the subject"; "appeals and applications in the

[114]R.S.O. 1970, c. 228, s. 126.
[115]*Ibid.* s. 118.
[116]R.R.O. 1970, Reg. 545, as amended.
[117]*Ibid.* Rule 211. The same jurisdiction is also conferred on the local master by this Rule.
[118]*Ibid.* Rule 210.

nature of appeals"; "proceedings as to mentally incompetent persons", and so on. There are altogether some 16 such categories that are excepted from the jurisdiction of the Master, and which are therefore also excepted from the jurisdiction of the local judge of the Supreme Court.

The Rules also give the local judge jurisdiction in some particular matters to exercise the powers of a High Court judge sitting in court or chambers,[119] and, where the solicitors for all parties reside in his county or agree that the matter shall be heard before him, jurisdiction to hear any matter, subject to a few enumerated exceptions.[120]

When we visited centres outside Toronto, representations were made to us in some places by solicitors and local bar associations to the effect that the jurisdiction of the local judge should be expanded. Because this jurisdiction is less than the jurisdiction that can be exercised by a High Court judge, the nature of an action or proceeding commenced in the High Court outside Toronto will sometimes require a solicitor to travel to Toronto for a hearing before a High Court judge, or will require him to employ a Toronto counsel as agent to have the matter heard expeditiously. There is now a Weekly Court held in London and in Ottawa,[121] to which a High Court judge travels in order to conduct High Court business, including matters that cannot be dealt with by the local judge. There are not, however, enough judges available on that bench to extend this service to all High Court trial centres, and in a good many locations, the paucity of High Court matters would not justify the establishment of additional Weekly Courts in any event.

Quite early in the course of our research for this project it became apparent that, as well as the revision of certain statutes and administrative procedures, appropriate changes to the Rules of Practice would be required. It was also apparent that the task of revising the Rules was of such magnitude and complexity that it should be consigned to a special body established for that purpose alone. As a matter of policy, we therefore took the decision not to undertake the devising and recommending of major changes to the Rules of the sort that would be required in order to effect a substantial alteration of the functions of the local judge. The matter of the necessity for and techniques of the revision of the Rules will be taken up specifically in a subsequent Part of the Commission's *Report on Administration of Ontario Courts*. For present purposes, we are of the view that the jurisdiction of the local judges should be expanded through changes to the Rules so as to

[119]Rule 212 gives jurisdiction with regard to (a) motions for judgment in undefended actions other than matrimonial causes; (b) motions to appoint receivers after judgment by way of equitable execution; and (c) applications for leave to serve short notice of a motion to be made before a judge sitting in court or chambers.

[120]The exceptions under Rule 212 are (a) applications for taxed or increased costs under Rule 660; (b) motions for injunction, except as provided in Rule 213; and motions to strike out a jury notice except for irregularity. Rule 213 gives the local judge jurisdiction to grant an *ex parte* injunction in certain limited circumstances and on consent, to hear motions to continue, vary or dissolve the injunction. Rule 214 gives the local judge jurisdiction in certain circumstances to hear motions for partition or administration.

[121]Established under Rule 239.

relieve, if not eliminate, the difficulties and expense encountered by litigants and their solicitors in those trial centres outside Toronto where there is not now a Weekly Court. The precise nature of the changes to the Rules that should be made in order to bring this about, however, should be left to a body established to undertake a general revision thereof.

D. Summary of Recommendations

1. The County Courts, the District Courts, the County Court Judges' Criminal Courts, the District Court Judges' Criminal Courts and the Courts of General Sessions of the Peace should be reconstituted as a single court of record with only one name.

2. County Court civil monetary jurisdiction should not be changed at the present time, but should be reexamined after an appropriate time has elapsed following legislative implementation of our recommendations.

3. The trial *de novo* in summary conviction offences should be replaced by an appeal on the record with power in the appeal court to consider not only the record but also to hear further and other evidence where it considers it to be in the interest of justice in the case.

4. The County and District Court districts should be renamed "circuits", and function as such.

5. The Chief Judge of the County and District Courts should have authority and responsibility to assign judges to sit outside their circuit if the volume of judicial work in other circuits warrants this.

6. The term "junior judge" should be abolished.

7. In counties where there are two or more judges, one judge should be designated by the appointing authority as "senior judge" with responsibility, subject to the supervision and direction of the Chief Judge, to supervise the day-to-day operations of the courts in the county, to deal with court problems that affect the county as a whole, to coordinate the efforts of all the judges in the county, and to ensure that the operations of the County Court in a county (and the Surrogate and Small Claims Courts in counties where they are presided over by County Court judges) are coordinated with the arrangements made under *The County Judges Act* for the functioning of the courts throughout the circuit.

8. Appointments of senior judges should be made on the basis of administrative ability rather than length of service on the bench.

9. The Province should create the office of "senior circuit judge" and one judge should be so designated by the appointing authority for each circuit, with responsibility, subject to the supervision and direction of the Chief Judge, in consultation with the judges of his circuit, to plan and carry into effect the assignment of judges to the courts in the

circuit, having regard to the desirability of rotating the judges within the circuit, and the need to equalize the burdens of the judicial duties of each judge, and having power to make such readjustment or reassignment as he considers necessary from time to time.

10. The senior circuit judges should, after the Chief Judge, take rank and precedence among themselves according to seniority of appointment, and should be appointed on the basis of administrative ability rather than length of service on the bench.

11. The appointment of judges at large should be terminated and those judges who are now appointed for the County and District Courts of the counties and districts of Ontario should be reappointed to particular counties and districts.

12. Employing the presumption against the assignment of administrative or non-adjudicative duties to judges in the absence of strong countervailing considerations as part of the terms of reference, a committee of County Court judges should be established:

    (a) to give detailed consideration to the matter of non-adjudicative and administrative duties imposed upon County Court judges by statute; and

    (b) where it is concluded that certain of these duties are not properly within the functions of a judge, to consider the matter as to how the duties might otherwise be performed; and

    to make appropriate proposals to those charged with the responsibility for drawing up the legislation implementing the recommendations of this Report.

13. Those provisions of *The Police Act* that make a County Court judge a statutory member of a board of commissioners of police should be repealed, and County Court judges should not be assigned to perform these duties in the future.

14. The matter of transferring certain adjudicative duties to other public officials or tribunals should be referred to a committee of County Court judges for detailed analysis and the formulation of specific legislative proposals in accordance with the following guidelines:

    (a) All adjudicative duties conferred by statute on judges requiring the simple and routine application of clearly defined standards in a consistent and uniform manner should be transferred to other public functionaries.

    (b) A presumption should arise to the effect that an adjudicative duty conferred on a judge should be transferred when there is in existence another qualified and competent public functionary or tribunal which is equipped to perform these adjudicative duties.

    (c) Adjudicative duties not falling within (a) and (b) above should remain with the judges unless with respect to specific duties there are compelling reasons relating to the inability of the judges to handle their normal workload of trial cases, which situation would suggest the transference of a specific duty to a new or existing public functionary or tribunal possessing the requisite specialization or expertise on such adjudicative matters.

15. The three guidelines set out in the previous recommendation should be employed in the future whenever legislation is drafted under which adjudicative duties are created which might be assigned to the County Court judges.

16. *The County Courts Act* should be amended to provide that all appeals arising out of the exercise of County Court jurisdiction created under any Act other than *The County Courts Act*, except from interlocutory orders and decisions should lie to the Divisional Court.

17. The leave provisions should be removed from section 3 of *The Judges' Orders Enforcement Act*.

18. Extended jurisdiction to hear and deal with *persona designata* matters should be conferred on County Court judges under *The County Judges Act* in the same way in which that Act now confers extended jurisdiction on the judges to hear and deal with court matters.

19. County Court clerks should be assigned responsibility for dealing with the routine duties that are now performed by judges including:

    (a) Solemnization of marriage under *The Marriage Act*;

    (b) Permitting late filing of a renewal statement under *The Conditional Sales Act*;

    (c) Permitting late registration of a mortgage or conveyance under *The Bills of Sale and Chattel Mortgages Act*;

    (d) Revision of voters' lists under *The Municipal Franchise Extension Act*;

    (e) Revision of voters' lists under *The Voters' Lists Act*;

    (f) Revision of voters' lists under *The Municipal Act*;

    and such other matters as may appear to fall within the same general terms of reference.

20. Where it is appropriate for an appeal to be provided from the decision of a County Court clerk, such appeal should go to the County Court.

21. A policy should be adopted under which County Court clerks would be legally trained.

22. Where persons with legal qualifications are appointed as County Court clerks, they should be given extended responsibilities with jurisdiction to deal with minor adjudicative matters arising in the County Court in a way that is similar to the functions of the Master of the Supreme Court of Ontario.

23. The clerk of the County Court should maintain a register of all committals for trial showing the date of committal, indicating whether the accused person elected to be tried by a judge or by a court composed of a judge and a jury, the date upon which the trial was held, and for summary conviction appeals, the date upon which the notice of appeal was filed and the date upon which the appeal was heard.

24. The register described in the preceding recommendation should be open to public inspection in the same manner and on the same terms as are the books of the County Courts under the provisions of *The Judicature Act*.

25. The jurisdiction of the local judges of the Supreme Court should be expanded through changes to the Rules so as to relieve, if not eliminate, the difficulties and expense encountered by litigants and their solicitors in those trial centres outside Toronto where there is not now a Weekly Court, subject to the proviso that the precise nature of the changes to the Rules that should be made in order to bring this about should be left to a body established to undertake a general revision thereof.

APPENDIX I

COUNTY AND DISTRICT COURTS
Judicial Districts

APPENDIX II

Provincial and federal statutes conferring jurisdiction on the County and District Courts and the Surrogate Courts, or the judges thereof (or on County Court judges in some other capacity) in addition to the jurisdiction conferred under *The County Courts Act*, R.S.O. 1970, c. 94, and *The Surrogate Courts Act*, R.S.O. 1970, c. 451.

A. Provincial Statutes

Chapter in R.S.O. 1970	*Name of Act*
2.	*The Absconding Debtors Act*
15.	*The Agricultural Societies Act*
16.	*The Air Pollution Control Act*
32.	*The Assessment Act*
33.	*The Assignment of Book Debts Act*
34.	*The Assignments and Preferences Act*
38.	*The Bailiffs Act*
45.	*The Bills of Sale and Chattel Mortgages Act*
52.	*The Bulk Sales Act*
54.	*The Business Records Protection Act*
57.	*The Cemeteries Act*
60.	*The Change of Name Act*
63.	*The Charities Accounting Act*
64.	*The Child Welfare Act*
76.	*The Conditional Sales Act*
84.	*The Controverted Elections Act*
85.	*The Conveyancing and Law of Property Act*
89.	*The Corporations Act*
92.	*The Costs of Distress Act*
95.	*The County Judges Act*
97.	*The Creditors Relief Act*
102.	*The Crown Timber Act*
118.	*The Department of Municipal Affairs Act*
126.	*The Dependants' Relief Act*
128.	*The Deserted Wives' and Children's Maintenance Act*
129.	*The Devolution of Estates Act*
130.	*The Disorderly Houses Act*
135.	*The Dower Act*
136.	*The Drainage Act*
142.	*The Election Act*
146.	*The Employment Agencies Act*
150.	*The Estreats Act*
151.	*The Evidence Act*
152.	*The Execution Act*
154.	*The Expropriations Act*
155.	*The Extra-Judicial Services Act*
158.	*The Farm Loans Act*
159.	*The Farm Loans Adjustment Act*
164.	*The Fatal Accidents Act*

Chapter in R.S.O. 1970	*Name of Act*
167.	*The Fines and Forfeitures Act*
172.	*The Fire Marshals Act*
183.	*The Fraudulent Debtors Arrest Act*
188.	*The Gas and Oil Leases Act*
201.	*The Highway Improvement Act*
202.	*The Highway Traffic Act*
211.	*The Hotel Fire Safety Act*
224.	*The Insurance Act*
228.	*The Judicature Act*
230.	*The Jurors Act*
231.	*The Justices of the Peace Act*
234.	*The Land Titles Act*
236.	*The Landlord and Tenant Act*
245.	*The Lightning Rods Act*
248.	*The Line Fences Act*
249.	*The Liquor Control Act*
255.	*The Local Improvement Act*
261.	*The Marriage Act*
262.	*The Married Women's Property Act*
263.	*The Master and Servant Act*
267.	*The Mechanics' Lien Act*
271.	*The Mental Incompetency Act*
274.	*The Mining Act*
279.	*The Mortgages Act*
284.	*The Municipal Act*
286.	*The Municipal Arbitrations Act*
288.	*The Municipal Franchise Extension Act*
295.	*The Municipality of Metropolitan Toronto Act*
300.	*The Notaries Act*
334.	*The Ophthalmic Dispensers Act*
338.	*The Partition Act*
340.	*The Partnerships Registration Act*
351.	*The Police Act*
354.	*The Power Commission Act*
363.	*The Private Sanitaria Act*
370.	*The Provincial Land Tax Act*
377.	*The Public Health Act*
384.	*The Public Parks Act*
385.	*The Public Schools Act*
390.	*The Public Utilities Act*
393.	*The Public Works Act*
399.	*The Radiological Technicians Act*
409.	*The Registry Act*
411.	*The Religious Institutions Act*
422.	*The Sanatoria for Consumptives Act*
424.	*The Schools Administration Act*
430.	*The Separate Schools Act*
439.	*The Small Claims Courts Act*
441.	*The Solicitors Act*

Chapter in R.S.O. 1970	*Name of Act*
445.	*The Statute Labour Act*
450.	*The Summary Convictions Act*
470.	*The Trustee Act*
471.	*The Unclaimed Articles Act*
472.	*The Unconscionable Transactions Relief Act*
478.	*The Vendors and Purchasers Act*
485.	*The Voters' Lists Act*
486.	*The Wages Act*
488.	*The Warehousemen's Lien Act*
489.	*The Warehouse Receipts Act*
492.	*The Water Powers Regulation Act*
504.	*The Woodmen's Lien for Wages Act*
505.	*The Workmen's Compensation Act*

B. Federal Statutes

Chapter in R.S.C. 1970	*Name of Act*
A-1	The *Admiralty Act*
A-3	The *Aeronautics Act*
A-5	The *Agricultural Products Board Act*
A-7	The *Agricultural Products Marketing Act*
A-8	The *Canada Agricultural Products Standards Act*
A-12	The *Alien Labour Act*
A-13	The *Animal Contagious Diseases Act*
A-19	The *Atomic Energy Control Act*
B-1	The *Bank Act*
B-3	The *Bankruptcy Act*
B-5	The *Bills of Exchange Act*
C-3	The *Canada Deposit Insurance Corporation Act*
C-5	The *Canada Pension Plan Act*
C-7	The *Canadian Dairy Commission Act*
C-16	The *Central Mortgage And Housing Corporation Act*
C-19	The *Canadian Citizenship Act*
C-21	The *Coastal Fisheries Protection Act*
C-23	The *Combines Investigation Act*
C-28	The *Dominion Controverted Elections Act*
C-29	The *Cooperative Credit Associations Act*
C-30	The *Copyright Act*
C-31	The *Corporations and Labour Unions Returns Act*
C-32	The *Canada Corporations Act*
C-34	The *Criminal Code*
C-38	The *Crown Liability Act*
C-39	The *Currency and Exchange Act*
C-40	The *Customs Act*
C-41	The *Customs Tariff Act*
D-1	The *Canada Dairy Products Act*
D-2	The *Defence Production Act*

Chapter in R.S.C. 1970	*Name of Act*
D-3	The *Defence Services Pension Continuation Act*
D-8	The *Divorce Act*
E-4	The *Electricity Inspection Act*
E-5	The *Emergency Gold Mining Assistance Act*
E-9	The *Estate Tax Act*
E-12	The *Excise Act*
E-15	The *Explosives Act*
E-17	The *Export And Import Permits Act*
E-21	The *Extradition Act*
F-7	The *Feeds Act*
F-10	The *Financial Administration Act*
F-12	The *Fish Inspection Act*
F-14	The *Fisheries Act*
F-27	The *Food and Drugs Act*
F-29	The *Foreign Enlistment Act*
G-16	The *Canada Grain Act*
G-17	The *Grain Futures Act*
H-3	The *Hazardous Products Act*
H-10	The *Humane Slaughter of Food Animals Act*
I-2	The *Immigration Act*
I-5	The *Income Tax Act*
I-6	The *Indian Act*
I-9	The *Industrial Development Bank Act*
I-10	The *Industrial Research And Development Incentives Act*
I-12	The *Inland Water Freight Rates Act*
I-13	The *Inquiries Act*
I-14	The *Inspection and Sale Act*
I-15	The *Canadian And British Insurance Companies Act*
I-16	The *Foreign Insurance Companies Act*
I-22	The *International River Improvements Act*
J-1	The *Judges Act*
L-1	The *Canada Labour Code Act*
L-5	The *Canada Lands Surveys Act*
L-8	The *Livestock and Livestock Products Act*
L-9	The *Livestock Feed Assistance Act*
L-11	The *Livestock Shipping Act*
L-12	The *Loan Companies Act*
L-13	The *Lord's Day Act*
M-7	The *Meat Inspection Act*
N-1	The *Narcotic Control Act*
N-8	The *National Harbours Board Act*
N-16	The *National Trade Mark And True Labelling Act*
N-22	The *Northwest Territories Act*
O-3	The *Official Secrets Act*
P-4	The *Patent Act*
P-5	The *Pawnbrokers Act*
P-10	The *Pest Control Products Act*
P-13	The *Plant Quarantine Act*
P-14	The *Post Office Act*

Chapter in R.S.C. 1970	*Name of Act*
P-19	The *Precious Metals Marking Act*
P-21	The *Prisons And Reformatories Act*
P-25	The *Proprietary Or Patent Medicine Act*
P-38	The *Public Works Act*
R-1	The *Radio Act*
R-2	The *Railway Act*
R-9	The *Royal Canadian Mounted Police Act*
S-7	The *Seeds Act*
S-8	The *Senate And House Of Commons Act*
S-9	The *Canada Shipping Act*
S-10	The *Small Businesses Loans Act*
S-11	The *Small Loans Act*
S-16	The *Statistics Act*
S-17	The *Canada Student Loans Act*
T-3	The *Telegraphs Act*
T-4	The *Telesat Canada Act*
T-5	The *Canada Temperance Act*
T-11	The *Trade Unions Act*
T-14	The *Transport Act*
T-15	The *Department of Transport Act*
T-16	The *Trust Companies Act*
V-4	The *Veterans' Land Act*
V-6	The *Visiting Forces Act*
W-1	The *Wages Liability Act*
W-2	The *War Measures Act*
W-4	The *War Service Grants Act*
W-5	The *War Veterans Allowance Act*
W-7	The *Weights And Measures Act*
W-8	The *Whaling Convention Act*
Y-1	The *Youth Allowances Act*

Chapter in R.S.C. 1970 1st Supplement	*Name of Act*
2	The *Arctic Waters Pollution Prevention Act*
5	The *Canada Water Act*
12	The *Criminal Records Act*
14	The *Canada Elections Act*
26	The *Motor Vehicle Safety Act*
29	The *Nuclear Liability Act*
33	The *Quarantine Act*
34	The *Radiation Emitting Devices Act*
37	The *Saltfish Act*
46	The *Textile Labelling Act*

These lists were compiled from data furnished to the Commission by the County and District Court Judges Association of Ontario.

CHAPTER 6

MOTIONS IN COURT AND CHAMBERS

SUMMARY

A. Introduction

This chapter is concerned with the jurisdiction or forum in which a particular type of court proceeding, namely a motion, or application, is heard. Unlike the practice followed in the case of trials, where oral testimony is given before a judge, and sometimes also a jury, in open court, motions are usually heard by a judge or the Master on written materials furnished by counsel on behalf of the parties. These materials generally consist of a notice of motion served and filed on behalf of the applicant, affidavits served and filed on behalf of one or all of the parties and, sometimes, typewritten transcripts of cross-examinations of witnesses on their affidavits, these cross-examinations having taken place previously in the office of a special examiner and not in court. Oral evidence may only be given by leave of the court.[1]

There are two forums in which motions are heard at present: court and chambers. The central issue to be examined in this chapter is whether

[1] *The Rules of Practice*, Rule 231.

these two separate jurisdictions should be maintained in Ontario or whether the distinction between them should be abolished or modified. Fundamental to this enquiry is an assessment of the degree of fairness and efficiency inherent in the present system under which motions are brought, heard and disposed of, and, to the extent that the present system fails to meet these criteria, an examination of what changes may be thereby warranted. Criticism of the present system appears to focus primarily on the elements of inflexibility and delay introduced into the procedure for the hearing of motions as a result of the distinction between court and chambers (for example, arising out of the necessity, at least in Weekly Court in Toronto, that a court motion be brought on a different day than a chambers motion), on procedural differences arising out of the distinction (such as the different phraseology required for court notices of motion and orders than for chambers notices of motion and orders), and on the injustice which may arise where a motion is heard in the wrong forum. As will be seen, the subject is somewhat broader than might appear at first glance, as it involves a consideration of some fundamental aspects of the administration of justice in general.

It should perhaps be pointed out at the outset that while the chapter to a large extent focuses on practice and procedure in the Supreme Court of Ontario, the general recommendations contained herein as to the court-chambers distinction and as to the practice and procedure relating to the hearing of motions are intended to apply both to the Supreme Court and to the County and District Courts. Under *The County Courts Act*[2] and the Rules of Practice of the Supreme Court of Ontario,[3] the practice and procedure in the Supreme Court is made generally applicable to the County and District Courts, so that changes effected in the practice and procedure in the Supreme Court pursuant to our recommendations would, where applicable, apply also to the County and District Courts. We see no reason why this should not be the case with respect to the subject matter under consideration.

B. Present Law and Practice in Ontario

1. *Allocation of Motions Between Court and Chambers*

The Rules of Practice and Procedure of the Supreme Court of Ontario specify which motions shall be heard in court and which ones in chambers. Rule 207 reads:

> Any power conferred upon the court by a statute or by law may be exercised by a judge sitting in court, and, when so provided by the rules, by a judge in chambers, or the Master, or a local judge or a local master in chambers, or any master or referee to whom a cause or matter is referred.

The basic principle would appear to be, therefore, that motions shall be heard in court unless it is provided by the Rules that they may be heard in chambers. Rule 209 sets forth in 18 separate paragraphs "applications

[2]R.S.O. 1970, c. 94, s. 24.
[3]*Rules of Practice*, Rule 770.

which shall be disposed of in chambers". In this category are included such matters as applications concerning infants, mental incompetents, the liberty of the subject, certain trusts and estates matters and the conduct of actions or matters.[4] In addition to the foregoing matters, which are only a partial list of the contents of Rule 209, certain other matters, such as applications for judicial review in those circumstances where they may be made to the High Court, are also required to be heard in chambers, as provided in Rule 629.[5]

In addition to distinguishing between matters which are to be heard in court and those which are to be heard in chambers, the Rules also provide for the hearing of certain matters by the Master. Under Rule 210, the Master is "empowered and required" to dispose of all applications properly made in chambers except with respect to certain matters listed under that Rule. Rules 211 to 214 govern the hearing of motions by local judges and local masters.[6]

While Rule 207 indicates that the Rules shall provide which matters shall be heard in chambers, Rule 209 itself recognizes that a statute may determine the proper forum for a motion made under it, since one of the matters required by Rule 209 to be heard in chambers is a motion under any statute that authorizes an application to a judge. Thus where the Legislature provides in a statute for an application to a judge, it may be taken as having intended that the jurisdiction conferred is to be exercised by a judge in chambers.[7] There is also at least one instance where the Legislature has expressly stated that a matter is to be heard in chambers.[8] These

[4]Rule 209 provides:
The following applications shall be disposed of in chambers:
1. For the sale, lease or mortgaging of the estates of infants.
2. As to the custody, guardianship, maintenance, and advancement of infants.
3. For administration or partition without action.
4. Relating to the conduct of actions or matters.
5. For the payment into court of moneys under *The Trustee Act*.
6. Applications for leave to issue and to vacate certificates of *lis pendens*.
7. Appeals from an interlocutory judgment or order of the Master in chambers or a local judge in chambers.
8. Motions for judgment under rules 57 to 62.
9. An order upon consent dismissing an action either with or without costs.
10. Applications under *The Mental Incompetency Act*.
11. Applications for and on the return of a writ of *habeas corpus*.
12. Motions for interpleader.
13. Motions to wind up companies under the Federal or Ontario Acts.
14. Motions for payment of money out of court.
15. Motions under rules 546 and 567.
16. Applications for interim corollary relief under section 10 of the *Divorce Act* (Canada).
17. Originating motions under paragraphs 3, 4, 6 and 10 of rule 607.
18. Motions under any statute that authorizes an application to a judge.

[5]See also *The Judicial Review Procedure Act*, S.O. 1971, c. 48.
[6]Our recommendations in respect of the powers of local judges are contained in chapter 5.
[7]At least one statute authorizes an application to "the Supreme Court or a judge thereof" (*The Insurance Act*, R.S.O. 1970, c. 224, ss. 145(d) and 183), so that the applicant has a choice as to whether to proceed in court or in chambers.
[8]See s. 5 of *The Summary Convictions Act*, R.S.O. 1970, c. 450 (a case stated under Part XXIV of the *Criminal Code*).

factors have an important bearing on the question whether, should it be decided to abolish the chambers jurisdiction, this could be done simply by a change in the Rules of Practice. In our view it could not. Even if it is accepted that the question of the forum in which a motion is heard is a matter of "practice and procedure" and not substantive law, and thus falls within the jurisdiction of the Rules Committee to make rules relating to the "practice and procedure of the courts", the Rules of Practice by themselves probably cannot finally determine the question of forum. Thus if it were decided to abolish the distinction between court and chambers an amendment to *The Judicature Act*[9] would be required.

2. *Differences Between Court and Chambers*

There are several differences between proceedings held in court and those held in chambers. These differences may be outlined as follows:

(a) A judge in court sits in open court. The public may not be excluded except in certain instances, such as, for example, where the judge deems it to be in the interest of public decency and morals that the public be excluded. (This exception, contained in section 84 of *The Judicature Act*, is applicable to motions in court.) "A judge sitting in chambers does not mean he is sitting in any particular room, but that he is not sitting in open court."[10] In chambers, members of the public theoretically do not have the right to attend, but in practice it is rare in the Supreme Court of Ontario for those chambers motions which are heard on a regular chambers day or at a regular sittings not to be heard in open court, and no effort is generally made to exclude the public, whether the matter is heard by a judge or whether it is heard by the Master in a hearing room. It is true, however, that judges do hear chambers motions (usually consent or *ex parte* matters) in their own chambers, that is, their private offices, where notice is not necessary or the delay in giving notice and setting the matter down for a regular chambers day might defeat the purpose of the motion.

(b) In Toronto, where at least 90% of the Supreme Court motions are heard, gowns are worn in court during the regular court term, but not in chambers. Gowns are not worn at the hearing of court or chambers motions in Ottawa and London (the other centres where regular sittings of the Supreme Court are held for the hearing of motions).

(c) Students may appear on behalf of parties on certain types of motions in chambers but on none at all in court.[11]

(d) In Toronto, the judge sits in court on Mondays and Wednesdays and in chambers on Tuesdays, Thursdays and Fridays to hear

[9] R.S.O. 1970, c. 228.

[10] *Hartmont* v. *Foster* (1881), 8 Q.B.D. 82, at p. 84.

[11] See amendments to the Rules of the Law Society of Upper Canada made under s. 54(1) para. 19 of *The Law Society Act*, R.S.O. 1970, c. 238, dated June 22, 1971.

motions during the regular court term; elsewhere, however, court and chambers motions in the Supreme Court are heard together.[12]

(e) No motion may be proceeded with in the absence of the other party in chambers until one-half hour after the return thereof,[13] but there is no such restriction on the hearing of a court motion.

(f) Court notices of motion and orders are phrased in a slightly different form than chambers notices and orders.[13a]

(g) A list of the cases set down for argument in court is required to be posted the day before the day for which they are set down,[14] but there is no such requirement for cases set down for argument in chambers. In practice, in Toronto, identical types of lists are posted for hearings by a judge in both court and chambers.

(h) Unless otherwise directed by the judge, *ex parte* and unopposed motions in chambers are required to be heard before contested motions and appeals.[15] There is no such provision for court motions.

In order that the foregoing enumeration of differences between proceedings held in court and those held in chambers may appear in its proper perspective, the observation may be made that apart from such formal differences as the day of the week on which the motion is returnable, the requirement as to the wearing of a gown (both of these differences applying only in the case of motions heard in Toronto) and the form of the notice of motion and the order, there is usually no practical difference in the way in which contested court and chambers matters are brought and heard in the Supreme Court. Lists of cases to be heard by a judge are posted for both court and chambers matters, chambers motions heard on a regular chambers day are heard in open court in the same manner as are court motions, without any effort being made to exclude the public, and, as shall be seen shortly, court and chambers motions are accorded the same degree of publicity. Furthermore, there is no difference in the appealability of court and chambers decisions; the appeal procedure is governed according to whether the judgment or order appealed from is interlocutory or final and not whether it was made in court or in chambers.[16]

Turning briefly to the procedure in the County Courts, it may be observed that the practice followed with respect to the hearing of motions

[12] *Rules of Practice*, Rules 237(1) and 239. See also Rule 182.

[13] *Ibid.* Rule 227(1).

[13a] See Forms 39, 40, 68 and 69 to the *Rules of Practice.*

[14] *Rules of Practice*, Rule 237(3).

[15] *Ibid.* Rule 237(6).

[16] With respect to final judgments or orders of a judge of the High Court in court or chambers, see *The Judicature Act*, s. 29(1) as amended by S.O. 1971, c. 57, s. 3, and with respect to appeals from interlocutory judgments or orders of a judge of the High Court, in court or in chambers, see *The Judicature Act*, s. 17(1)(d) as amended by S.O. 1971, c. 57, s. 1. Appeals from final judgments or orders of the Master are also governed under the latter statutory reference; appeals from interlocutory judgments or orders of the Master are dealt with in Rule 514.

varies greatly throughout the Province. In Toronto and certain other centres, County Court motions are generally heard in open court, lists are posted, and proceedings are relatively formal; in many small centres, however, lesser degrees of formality are observed and chambers (and sometimes even court) motions are not necessarily heard in open court. No distinction is drawn anywhere, however, between court and chambers motions insofar as the day on which a motion may be brought is concerned; in the County Court of the Judicial District of York, for example, court and chambers motions are heard interchangeably from Monday to Friday inclusive throughout the year and gowns are not worn.

3. *Effect of Bringing a Motion in the Wrong Forum*

It is important to recognize that a Supreme Court judge in chambers exercises the jurisdiction of the Supreme Court of Ontario. Chambers is not some special forum connected with the court in only a tenuous manner; rather it is a way in which a judge of the Supreme Court exercises the jurisdiction of the court.[17] We now consider the power of a judge to hear a court matter in chambers and, conversely, a chambers matter in court.

If a motion is made in the "wrong" forum, and this is noticed by the court or counsel before it is heard, resort may be made to Rule 225(1) which provides:

> The court may adjourn for consideration in chambers any motion or matter brought before it that should have been brought on in chambers or that, though properly brought on in court, may, in the opinion of the court, be disposed of more conveniently in chambers; and any motion or matter brought on in chambers that should have been brought on in court may be adjourned into court.

Certain aspects of this Rule deserve comment. First, even though a motion is brought in the wrong forum, the judge in that forum is given sufficient jurisdiction at least to channel the motion to its proper destination, so that the initial steps that have been taken, such as the preparation and service of the documents, will not prove abortive. Secondly, it may be noted that the court may "legislate", to some extent contrary to the basic Rules, by directing that some motions, even though properly brought in court, shall be disposed of in chambers. Implicit in this is a recognition that the respective jurisdictions of court and chambers are not so fundamentally disparate that a court matter could never be properly disposed of in chambers where it is more convenient that it be so heard. However, the chambers judge, unlike his English counterpart,[18] does not have a similar power to adjourn motions properly brought on in chambers to a judge sitting in court.[19] Finally, it would appear that a matter brought on in chambers that should have been brought on in court has to be adjourned to

[17]See s. 125 of *The Judicature Act*, which provides: "Any judge presiding at any sittings of the court or in chambers shall be deemed to constitute the court."

[18]See R.S.C. 1965, Order 32, Rules 13 and 18.

[19]But see Rule 629(2) of the *Rules of Practice* as amended by O. Reg. 115/72, enabling a judge in chambers to "adjourn for consideration by the Divisional Court any application for judicial review under *The Judicial Review Procedure Act, 1971*".

court, or, presumably, dismissed, even though the chambers judge, had he been sitting in court, might have decided that the motion might more conveniently have been disposed of in chambers.

The second aspect of the present inquiry is to consider the result where a motion is actually heard and decided in the "wrong" jurisdiction. The law is clear that a judge in chambers does not have jurisdiction to make an order with respect to a motion which should have been brought in court, and any order so made cannot be rectified on appeal by being regarded as having been made in court.[20] This is so even though the order in question may in fact have been made in open court. Presumably the applicant would have to start all over again and proceed in the proper forum. The drastic difference resulting from observing that a motion was brought in the "wrong" forum after the order is made, on the one hand, and noting it at the outset, where an adjournment under Rule 225 would repair the error, needs no further elaboration.

In contrast to the situation where a judge in chambers makes an order with respect to a motion which should have been brought in court, it is reasonably clear that a judge sitting in court has the power effectively to dispose of a motion which the Rules provide should have been brought in chambers.[21] This is so despite the wording of Rule 209 (which states that certain applications "shall be" disposed of in chambers), since, as was seen earlier, chambers is merely a way of exercising what is essentially a court jurisdiction. Reference is made once again to Rule 207, where, in a sense, the chambers jurisdiction appears to be included within the court's jurisdiction.

4. *Reporting of Proceedings Held in Court and Chambers*

There is a body of English jurisprudence setting out the circumstances in which the reporting of matters which have taken place in chambers will amount to a contempt of court. It should be noted, however, that the case law was developed in the context of English practice, where chambers applications are heard in private, so that it possibly has no application in Ontario or at best has an application somewhat different from that which it had in England prior to the enactment of statutory changes in that jurisdiction.

In *Alliance Perpetual Building Society* v. *Belrum Investments Limited and Others*[22] a newspaper editor was fined for having published a report of a matter which had taken place in chambers, on the grounds that since chambers matters are heard in private (in England), there was no right to give any account of them while the proceeding was pending and had not been adjourned into court. The law was less strictly construed and applied

[20]*Perini Limited* v. *Consolidated Denison Mines Limited*, [1959] O.W.N. 119; *Ex parte Louie*, [1960] O.W.N. 273; *Sovereign Securities and Holdings Company Limited* v. *Hunter*, [1964] 1 O.R. 7; *Airst* v. *Glover*, [1968] 2 O.R. 863; *Procopio* v. *D'Abbondanza et al*, [1970] 1 O.R. 127.

[21]See *The Sarnia Agricultural Implement Manufacturing Company* v. *Perdue* (1886), 11 P.R. 224.

[22][1957] 1 All E.R. 635.

in *Re De Beaujeu*,[23] where a distinction was drawn between the publication of an account of proceedings taking place in chambers and the mere publication of the result of the proceedings. Wynn-Parry, J. stated as follows:

> In my judgment, in proceedings involving wards of court the judge has a complete discretion to allow or forbid publication of the proceedings or any order made therein. In the absence of any special direction, I am of opinion that *prima facie* it would be a contempt of court to publish an account of proceedings relating to an infant conducted in chambers without the express permission of the judge who heard the case. I use the words '*prima facie*' because I do not intend to attempt to state any exhaustive rule. There may well be cases in which the permission of the judge is not required, because, for example, of the lapse of time between the hearing and the date of the publication. Such cases must be dealt with as and when they arise and, as I see it, cannot conveniently be made the subject of any hard and fast or exhaustive rule. On the other hand, I am of opinion that it would not be a contempt of court to publish the order, or an accurate summary of the order, made on such proceedings unless the judge directed that neither the order nor such summary should be published. No such direction was made by me in this case, and, in my judgment, the act complained of did not constitute a contempt of court.[24]

The English statutory sequel to these decisions, section 12 of the *Administration of Justice Act 1960*,[25] provides as follows:

> (1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say —
>
> (a) where the proceedings relate to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant;
>
> (b) where the proceedings are brought under Part VIII of the Mental Health Act, 1959, or under any provision of that Act authorising an application or reference to be made to a Mental Health Review Tribunal or to a county court;
>
> (c) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published;
>
> (d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings;

[23] [1949] 1 All E.R. 439.
[24] *Ibid.* at pp. 441-42.
[25] 8 and 9 Eliz. 2, c. 65.

> (e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.
>
> (2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.
>
> (3) In this section references to a court include references to a judge and to a tribunal and to any person exercising the functions of a court, a judge or a tribunal; and references to a court sitting in private include references to a court sitting in camera or in chambers.
>
> (4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section.

These provisions, apart from clauses (a) to (d) inclusive in subsection (1), appear to reverse the general position reflected in the case law, so that everything is now publishable except what is expressly prohibited.

There is virtually no indigenous case law respecting the law of contempt of court in relation to chambers matters in Ontario. In view of the difference between the practice in England and that followed in general in Ontario with respect to the hearing of chambers motions, the English cases possibly have no application in this jurisdiction. Even if they were to apply, what actually happens in the Supreme Court of Ontario on a regular chambers day and in some of the County Courts (that is, chambers motions being heard in open court with no effort being made to exclude the public) is probably sufficient to constitute "permission" by the judge to report what has taken place. In fact, the decisions in all motions are reported on a daily basis in the press and it is clear that the fact that a matter is heard in chambers is not regarded as being any bar to the full reporting of the facts thereof and the submissions made therein. Furthermore, the reasons for judgment given in chambers matters are reported in the law reports to the same extent as those in court matters.

5. *Policy Considerations: The Open Court Principle*

Neither *The Judicature Act*, the Rules of Practice nor *The County Courts Act* define "court" or "chambers", and the Rules, particularly Rule 207 and those following, assume an existing institutional distinction between court and chambers. Attempts to assess the basis of the distinction are hampered somewhat by the lack of a comprehensive treatment in the jurisprudence of the origins, nature and development of the chambers jurisdiction.

While there is relatively little law relating to the chambers jurisdiction as such, a canvass of the leading authorities on the open court principle is

useful, inasmuch as chambers is regarded negatively as being the opposite to open court. The leading decision is that of the House of Lords in *Scott* v. *Scott*,[26] which involved the determination, *inter alia*, of the status of an order that a hearing concerning the validity of a marriage be heard *in camera*. The reasons for judgment of the law lords are instructive, and it may be noted that they are not entirely in accord. Viscount Haldane, L.C. said:

> . . . Whatever may have been the power of the Ecclesiastical Courts, the power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge.[27]

The "overriding principle" he referred to was that hearings can be held *in camera* if justice cannot otherwise be done. This he accepted "provided that the principle is applied with great care".[28] Finally, he referred to specific instances where it may be necessary to conduct a hearing in private, namely in cases involving wards of the court or lunatics, or litigation as to a secret process.

The Earl of Halsbury, in a much-quoted statement, said:

> I am of opinion that every Court of justice is open to every subject of the King.[29]

He expressed reservations as to any general principle that hearings may be held in secret where this is necessary so that justice may be done, as he felt such a principle was capable of too wide an application:

> My Lords, while I agree with the Lord Chancellor in the result which he has arrived at in this case, and generally in the principles he has laid down, I wish to guard myself against the proposition that a judge may bring a case within the category of enforced secrecy because he thinks that justice cannot be done unless it is heard in secret. I do not deny it, because it is impossible to prove what cases might or might not be brought within that category, but I should require to have brought before me the concrete case before I could express an opinion upon it.[30]

A passage from Earl Loreburn's decision indicates a frank appreciation of the lack of obvious principles respecting the chambers jurisdiction:

[26] [1913] A.C. 417.
[27] *Ibid.* at p. 435.
[28] *Ibid.* at p. 436.
[29] *Ibid.* at p. 440.
[30] *Ibid.* at p. 442.

> I cannot think that the High Court has an unqualified power in its discretion to hear civil proceedings with closed doors. The inveterate rule is that justice shall be administered in open Court. I do not speak of the parental jurisdiction regarding lunatics or wards of Court, or of what may be done in chambers, which is a distinct and by no means short subject, or of special statutory restrictions.[31]

In addition to referring to the exceptions to the open court principle (cases involving wards of the court, lunatics, trade secrets and "what may be done in chambers"), he referred to a fifth general category:

> Again, the Court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general.[32]

The strongest passage favouring the open court principle is probably that of Lord Shaw of Dunfermline:

> What has happened is a usurpation — a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.
>
> It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.' 'The security of securities is publicity.' But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: 'Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise.'[33]

The author of an article written shortly after the *Scott* decision expressed the hope that "the distinction between the court *in camera* and the judge in chambers may before long be judicially determined, for the

[31] *Ibid.* at p. 445.
[32] *Ibid.* at pp. 445-46.
[33] *Ibid.* at p. 477.

subject needs elucidation."[34] It may be observed that the nature of the chambers jurisdiction generally is still in need of elucidation. It is interesting to note, however, that in section 84 of *The Judicature Act*, which empowers the judge to exclude the public from the court when he "deems it to be in the interest of public decency and morals", Ontario has adopted a rule substantially at variance with the principles laid down in *Scott* v. *Scott*.

Another leading case is that decided by the Privy Council on appeal from the Appellate Division of the Supreme Court of Alberta in *McPherson* v. *McPherson*.[35] The question to be decided was the validity of a divorce decree w'ich had been obtained pursuant to a trial held in the judges' law library in the courthouse. The Privy Council held that the decree was voidable on the grounds that the trial had been held in a room marked "private", resulting in the effective, albeit not deliberate, exclusion of the public, contrary to the open court principle as laid down by the House of Lords in the *Scott* decision. Even though the actual presence of the public was not deemed necessary, the court must be open to the public.

6. *Assessment of the Present Position*

While there are no hard and fast criteria which appear to govern the legislative decision as to the allocation of motions between court and chambers, it is perhaps reasonable to say that one of the basic grounds for directing a motion to be heard in chambers is that it is less "important" than one which is to be heard in court. A feature of this distinction is probably the degree of legitimate public interest that certain matters be heard in open court rather than in the privacy of chambers; conversely, there may clearly be instances (for example, in the case of matters relating to the affairs of infants) where privacy is desirable because of the nature of the subject matter under consideration. Another, unrelated ground, is that it may well be more convenient for some matters to be disposed of without all of the formalities attendant on a motion being heard in open court, such as the posting of notices showing the cases to be heard. In some instances, for example in matters of urgency such as in the case of *habeas corpus* applications, it may be essential that the matter be heard without delay. Insofar as these criteria are concerned, while the pattern to be discerned in the present law allocating motions between the two forums is not in all respects perfectly coherent, the Rules would appear to strike a generally appropriate balance between the matters which are to be heard in court and those in chambers.

While the chambers jurisdiction may be justified in terms of the nature of the subject matter to be heard or on the grounds of convenience, such justification is tempered somewhat by the fact that apart from such matters as the day on which the motion is returnable (in the case of Supreme Court motions heard in Toronto) and the form of the notice of motion and the order, there is, as has been seen, often no practical difference in Ontario between the way many court and chambers motions are brought and heard. The advantages of the chambers jurisdiction are more apparent in the case of those chambers motions which are in fact heard in private, such as in the

[34]Fox, "Criminal Contempt" (1914), 30 L.Q. Rev. 56, at p. 57.
[35][1936] A.C. 177.

case of consent or *ex parte* matters, where notice of the application is not necessary or where the delay in giving notice and bringing the matter on a regular chambers day might defeat the purpose of the motion.

The fact that in Ontario most chambers motions in the Supreme Court and in some of the County Courts are heard in open court also negatives what could otherwise be taken to be the most important disadvantage of chambers, namely that chambers impinges on the open court principle. However, if the advantages of the chambers jurisdiction are tempered by the manner in which it is exercised in Ontario, there are also disadvantages which are thereby rendered more apparent. In the first place, the application of what in many cases is an artificial distinction may result in great injustice being done if a court matter is accidentally heard in chambers, even though the motion may be heard in the same manner as it would be heard in court; that is in open court. The case law is replete with examples of applications being brought in the wrong forum, either inexcusably or otherwise. The cost of litigation may be increased unnecessarily.

The present distinction between court and chambers also causes a certain amount of inflexibility and delay in the processing of motions in Toronto. For example, two clear days' notice is necessary for an interlocutory motion.[36] The motion may be one which is returnable in court, but if the first day after the expiry of the two days is a Thursday, then, in the normal course, the applicant would have to wait until the following Monday to get his matter on. Furthermore, in motions where several counsel are involved, it may be that they are all agreeable to proceed on a particular day in the near future but that this day is not the slated day for the type of motion in question. Unnecessary delay thereby ensues.

C. The Practice in Other Jurisdictions

The Commission has examined the practice in several other jurisdictions with respect to the allocation of motions between court and chambers, for purposes both of comparison with the present practice in Ontario and as a possible aid to the formulation of proposals for its reform. A brief summary of our examination follows.

1. *Canada*

Generally, the ten other common law jurisdictions in Canada (the other provinces, excluding Quebec, and the two territories) have preserved the distinction between the forums of court and chambers for the hearing of motions, but in many cases with less formality than that which characterizes the distinction in Ontario. As in Ontario, chambers matters are for the most part heard in open court, with no restrictions whatever on the publicity given to them. However, in some of the provinces inroads have been made on the distinction between court and chambers. In British Columbia for example, court and chambers applications are heard on the same list. In Alberta all motions, applications and hearings other than the trial of actions may be disposed of in chambers. Under the Rules of

[36]*Rules of Practice*, Rule 217.

Practice of Prince Edward Island, all applications may be made either in court or in chambers and invariably the lawyer making the application makes it in chambers.

The greatest inroads on the court-chambers distinction have been made in the Federal Court of Canada, where a formal chambers jurisdiction does not exist at all. Subject to certain exceptions, all applications are made in court, but may be heard in the absence of the public where it is decided that the particular motion relates to a class of matters that ought, for a special reason, to be dealt with *in camera*.[37] Rule 326 of the Federal Court Rules provides:

> (1) Subject to paragraph (2), every application shall be made in court; and the Court shall be open to the public when the motion is made unless the Court otherwise directs in the case of a particular motion after having heard argument as to whether the motion relates to a class of matter that ought, for special reason, to be dealt with *in camera*.
>
> (2) A judge not sitting in court may make any order that might be made in court,
>
> (a) if he is satisfied that all parties affected have consented thereto,
>
> (b) if the application was made in accordance with Rule 324 [which makes provision for motions which may be made in writing without the personal appearance of counsel], or
>
> (c) if he is satisfied that, in the interest of the administration of justice, the order should be made without giving the parties an opportunity to be heard (as, for example, when a hearing must be adjourned by reason of the illness of a judge or the unavailability of court room facilities);
>
> but any order so made under subparagraph (a) may be set aside on the application of any party on the ground that he did not in fact consent thereto and any order so made under subparagraph (b) or (c) may be set aside, or varied on such terms as may be just, on the application of any party who did not have an opportunity to be heard.

2. *England*

In England, unlike Ontario, there is a real practical distinction between court and chambers. Applications and proceedings in chambers are conducted in private, before a Master or a registrar, or occasionally before a judge. In proceedings before a judge, only the immediate parties and their

[37] In *The Federal Court of Canada—A Manual of Practice* (1971), at p. 33, W. R. Jackett, the present Chief Justice of the Federal Court, cites the decisions in *Scott* v. *Scott* and *McPherson* v. *McPherson*, discussed earlier, as being relevant to a consideration as to what constitutes "special reason" that a matter be heard *in camera*.

legal advisers are allowed to be present, a rule which is strictly enforced; but in proceedings before the Master, other solicitors than those concerned with the matter being heard are also allowed to be present. Whether the proceedings are held before a judge or the Master, the general public is not allowed to attend, in contrast to the practice in Ontario with respect to the hearing of chambers motions.[38] Proceedings held in court are held in public, unless the court is sitting *in camera*.

Applications brought in chambers may be adjourned to court.[39] Resort is generally made to this practice when the judge desires to give judgment in open court rather than to leave it unreported which would be the result if it were given in chambers. A judge in court may also direct certain matters to be disposed of in chambers.[40]

With respect to an order being made in the "wrong" forum, there would not appear to be any rule in England which has the effect of rendering a decision of a judge in chambers a nullity because the application should have been heard in court. On the contrary, the Supreme Court Rules are designed to prevent any irregularity in procedure from resulting in a nullity,[41] although it would appear to be rare in England for a judge in chambers to deal with a matter which should have been dealt with in court.

3. *New South Wales*

The newly-established practice in this jurisdiction is conveniently set forth in sections 11 and 80 of the *Supreme Court Act 1970*, which provide:

> 11. (1) The distinction between court and chambers is abolished.
>
> (2) The business of the Court, whether conducted in court or otherwise, shall be taken to be conducted in court. . . .
>
> 80. Subject to any Act, the business of the Court may be conducted in the absence of the public —
>
> (a) on the hearing of an interlocutory application, except while a witness is giving oral evidence;
>
> (b) where the presence of the public will defeat the ends of justice;
>
> (c) where the business concerns the guardianship, custody or maintenance of an infant;

[38] The Commission is indebted to Master I. H. Jacob of the Queen's Bench Division for his helpful memorandum outlining the practical aspects of the hearing of motions in England.

[39] R.S.C. 1965, Order 32, Rules 13 and 18.

[40] *Ibid.* Rule 19.

[41] R.S.C. 1965, Order 2, Rule 1. It is interesting to note that while there is a similar, more general Rule in Ontario (Rule 186), it was not even referred to in the judgment of the Court of Appeal in *Ex parte Louie* ([1960] O.W.N. 273) to relieve against a court matter being decided in chambers.

(d) where the proceedings are not before a jury and are formal or non-contentious;

(e) where the business does not involve the appearance before the Court of any person;

(f) in proceedings in the Equity, Probate or Protective Division, where the Court thinks fit; or

(g) where the rules so provide.

D. Proposals for Reform

1. *The Problem Defined*

In the view of the Commission, the present situation in Ontario with respect to the allocation of motions between court and chambers has little, if anything, to recommend it. The present system suffers from a needless formalism which, as we have seen, may result in injustice being done if a matter is heard in the wrong forum, an injustice rendered more apparent by the fact that there is very often little difference in practice between the way chambers motions and court motions are heard. The present system furthermore results in a certain amount of inflexibility and delay in the processing of motions and contributes nothing towards reducing the cost of litigation.

Stated simply, therefore, it appears to us that the problem presented by virtue of the deficiencies in the present system is to devise a system which is based not upon needless formalism but rather upon common sense and functional grounds.

2. *Solutions Considered and Rejected by the Commission*

The Commission has given consideration to several possible approaches to the reform of the present system whereby motions are heard. These approaches, which have been rejected for the reasons given, may be outlined as follows:

(a) To abolish the chambers jurisdiction and require all motions to be heard in open court. Since many chambers motions are in fact heard in the same manner as court motions, there is a temptation to recommend the abolition of the chambers jurisdiction and to recommend that all motions be heard in open court. The Commission rejected this approach because there are certain motions which, because of their nature (for example, concerning intimate family matters in which the public has no legitimate interest, or certain consent or *ex parte* matters, generally of an interlocutory nature), probably should be capable of being disposed of privately and without all of the paraphernalia associated with an open court hearing. To require such matters to be heard in open court would in our view be unduly formal and serve no useful purpose. In addition, it would increase the costs to the parties involved.

(b) To maintain the present allocation of motions between court and chambers but to require court and chambers motions to be heard together. This is the practice in the Supreme Court in London and Ottawa, and in Toronto in vacation, as well as in the County Courts, and while its adoption would probably be an improvement over the present practice, the present unnecessary formalism would still be preserved; notices of motion and orders would still have to be correctly drawn and some motions would still result in nullities.

(c) To abolish the chambers jurisdiction and specify that all matters are to be heard in open court except where the judge directs otherwise. This approach would enable certain matters to be brought before judges in the privacy of their own chambers and avoid the unnecessary inconvenience and expense of hearing everything in court, but in our view it gives far too much power to judges, or, stated differently, places far too heavy a burden upon them. The language of Viscount Haldane in *Scott* v. *Scott* will be recalled, as will Lord Halsbury's criticism of the broad standard laid down by Viscount Haldane. It is for this reason that we have reservations concerning some aspects of the approach adopted by the Rules of the Federal Court and by the New South Wales legislation, discussed earlier. Both contain rather vague directions as to what may be heard in private, thus opening up the possibility of an unwarranted extension of exceptions to the open court principle, a principle which in our view should be the cornerstone of any new system to be adopted. If there is to be a division between open court and private hearings, we are of the opinion that it should be settled, for the most part, legislatively rather than judicially.

(d) To preserve the present practice but to give the court power to "cure" by amendment any proceedings heard in chambers which should have been brought in court. In our view such a solution does no more than attack on a superficial basis the problems inherent in the present system. On the one hand it recognizes the existing distinction between court and chambers, and on the other hand indicates that the distinction need be of no account.

(e) To require that all matters be brought in court but to regard any matter heard by a judge under any circumstances as being properly heard in court. In our view, this would be a fundamentally wrong solution, as the application of the open court principle so eloquently expressed in *Scott* v. *Scott* would be thereby greatly thwarted.

3. *Approach Adopted by the Commission*

The deficiencies in the present system of allocating motions between court and chambers dictate the necessity of devising a system which will overcome the procedural difficulties encountered as a result of the court-chambers distinction. An acceptance of the open court principle should, in

our view, form the basis of any such system. It is not necessary to repeat here what was said in several of the judgments in *Scott* v. *Scott* in support of the open court principle. Those statements are not empty rhetoric but reflect the significance of what is probably the most important single element in the administration of justice. At a time when the principles of "open government" generally are being widely espoused,[42] there is in our view no warrant for any action to be taken relating to the judicial branch of government which would tend to facilitate the private or secret hearing of cases.[43]

We recommend therefore that, subject to the qualifications set out below, all motions should be required to be heard in open court (or, where a motion is not heard by a judge, at a hearing open to the public). Rule 207 should be amended so as to incorporate this principle. We also think it is time that the "chambers" description be dispensed with and the institutional concept of chambers abolished. By way of exception to the general recommendation, certain matters would be permitted to be heard in the absence of the public, in the sense that the public would either be deliberately excluded from the hearing or the hearing would be held in a place to which the public does not have access. This is the general approach adopted in the Federal Court of Canada and in New South Wales, although, as indicated earlier, we are not in agreement with the standards laid down in those jurisdictions as to what matters may be heard in the absence of the public.

In keeping with our view that the question as to what matters should be permitted to be heard in the absence of the public should, so far as is possible, be settled legislatively rather than judicially, we turn now to a consideration of this question. It is clear that from the point of view of expediency it should be possible for some matters to be disposed of without the need for a hearing in court at some pre-determined sitting time; to require all matters to be heard in open court would, in our view, detract from the speedy, inexpensive and convenient administration of justice. This is especially true where it is urgent that a matter be heard without delay. There are also certain matters, referred to earlier, which by their nature are more appropriately heard in private. The Commission is of the view that the matters listed in Rule 209 adequately reflect these considerations and we recommend that those matters be permitted to be heard in the absence of the public where the judge hearing the motion (or the Master where the motion is one that is required to be heard by the Master) gives his *fiat* in individual cases. It is anticipated from the present practice that the exclusion of the public would not occur frequently, at least on regular sittings days. It should be made clear, however, by amendment to *The Judicature Act*, that nothing in the Rules made thereunder should be construed to deprive the court of any power it may have apart from the Rules, either inherent (as discussed in *Scott* v. *Scott*, in relation, for example, to the hearing of a matter involving a trade secret), statutory (as laid down, for

[42]See, for example, the recent *Report of the Special Committee of the House of Commons on Statutory Instruments* (1968-69), particularly at p. viii.

[43]See Wright, "The Open Court: The Hallmark of Judicial Proceedings" (1947), 25 Can. Bar Rev. 721.

example, by section 84 of *The Judicature Act*) or otherwise, to hear matters in the absence of the public.

It follows from the foregoing recommendations that the Rules of Practice would have to be amended wherever they refer to the distinction between court and chambers. Thus, for example, it is suggested that Rule 209 be amended to provide that the applications listed therein may be disposed of in the absence of the public on the *fiat*, in individual cases, of the judge, or of the Master where the matter is one which is required to be disposed of by the Master. Rule 210, instead of referring to the chambers jurisdiction, would provide that the Master is empowered and required to dispose of those applications listed under Rule 209, with the exceptions listed. Appropriate changes would also have to be made in various other Rules which refer to the chambers jurisdiction, including the Rules which apply to local judges and local masters, as it is intended that motions heard by such persons also be governed by the principles discussed in this chapter.

Pursuant to our recommendation to abolish the institutional concept of chambers we recommend that appropriate amendments be made either to *The Interpretation Act*[44] or the relevant statutes to provide that where power is conferred on "a judge in chambers" it is to be exercised in accordance with these recommendations.

One important aspect of the proposals put forward would be the elimination of separate court and chambers days for the hearing of Supreme Court motions in Toronto. Weekly Court would be replaced by "Motion Court", which would be held five days a week in Toronto and less frequently in Ottawa and London. It is suggested that gowns not be worn in Motion Court. Students could continue to appear on certain types of motions as they do now. All motions required to be disposed of by a judge would be disposed of by a judge sitting in Motion Court. Notices of motion and orders would follow one basic form, except that an order made in the absence of the public should expressly so state under the judge's name at the beginning of the order. (The same should apply in the case of an order made by the Master.) Where the order relates to a matter falling within Rule 209 and the motion has been heard in the absence of the public, and the order fails to so state, this should be treated as an irregularity and such an order should be subject to amendment in a proper case.

If the distinction between court and chambers is abolished, one of the more undesirable features of the present system would be eliminated, namely the ease in which a motion may be brought in the wrong forum and thereby in certain cases result in a nullity. That a nullity should result where a court matter is heard in chambers, and heard there in virtually the same manner as it would have been heard in court, is clearly an injustice. If an order is to result in a nullity under the system as proposed, the rationale for this would not rest on a formalistic distinction between court and chambers but on the substantive ground that a matter not falling within Rule 209 was in fact not heard in open court.

[44]R.S.O. 1970, c. 225.

We recommend finally that a provision along the lines of section 12 of the *Administration of Justice Act 1960* in force in England respecting the publication of information relating to proceedings before any court sitting otherwise than in open court be incorporated into *The Judicature Act*, so that, with certain exceptions, everything is clearly stated to be publishable except what is expressly prohibited.

The distinction between court and chambers is well-enshrined but there is little to justify the present practice in Ontario. The proposals put forward in this chapter are intended to introduce a more functional, and hopefully more efficient, approach to the hearing of motions.

E. Summary of Recommendations

1. *The Judicature Act* should be amended to abolish the present distinction between court and chambers.

2. All motions or applications heard by a judge should be required to be heard in open court, except with respect to a matter referred to in Rule 209 of the Rules of Practice, which should be permitted to be heard in the absence of the public on the *fiat* of the judge or local judge in individual cases.

3. The hearing of motions or applications by the Master should be open to the public, except where the Master or local master hearing the motion gives his *fiat* in the individual case with respect to a matter referred to in Rule 209 of the Rules of Practice that it be heard in the absence of the public.

4. The Rules of Practice should be amended so that references to "chambers" be changed in accordance with the foregoing recommendations.

5. Appropriate amendments should be made either to *The Interpretation Act* or the relevant statutes to provide that where power is conferred on a "judge in chambers" it is to be exercised in accordance with these recommendations.

6. *The Judicature Act* should be amended to provide that nothing in the Rules made thereunder should be construed to deprive the court of any power it may have apart from the Rules, either inherent, statutory or otherwise, to hear matters in the absence of the public.

7. Separate court and chambers days in Toronto should be abolished and replaced by a daily "Motion Court". Weekly Court in Ottawa and London should also be replaced by "Motion Court".

8. It is suggested that gowns not be worn in Motion Court.

9. Notices of motion and orders for all motions should follow one basic form, except that an order made otherwise than in open court or at a hearing open to the public should expressly so state under the judge's

or Master's name at the beginning of the order. Where a matter falling within Rule 209 is heard in the absence of the public and the order fails to so state, this should be treated as an irregularity and such an order should be subject to amendment in a proper case.

10. A provision along the lines of section 12 of the *Administration of Justice Act 1960* in force in England respecting the publication of information relating to proceedings before any court sitting otherwise than in open court should be incorporated into *The Judicature Act*.

11. Where applicable, the foregoing recommendations should apply to the hearing of motions in the County and District Courts, as well as to the hearing of motions in the Supreme Court.

CHAPTER 7

THE COURT OF APPEAL FOR ONTARIO

SUMMARY

A. INTRODUCTION

The Court of Appeal for Ontario and the High Court of Justice for Ontario compose the two branches of the Supreme Court of Ontario.[1] Since 1949 the Court of Appeal has consisted of the Chief Justice of Ontario and

[1] *The Judicature Act*, R.S.O. 1970, c. 228, s. 3.

nine other judges designated as justices of appeal.[2] Although its jurisdiction is primarily of an appellate nature it exercises a limited original jurisdiction under certain provincial statutes.

This Court is a true court of appeal in that it is composed of an independent judiciary constituting a separate and distinctive court which is not limited merely to correcting errors of law. Unless there is an express provision of law to the contrary it has jurisdiction to give the judgment that ought to have been given in the lower courts. As the highest superior court of the province, the Court of Appeal has two important roles: to resolve differences between the parties having causes before it and to develop jurisprudence for the Province.

B. History

When the Province of Upper Canada was established in 1791 its highest appellate court was not an independent and distinctive body possessing wide powers.[3] Upper Canada was divided at first into four districts with a Court of Common Pleas of unlimited jurisdiction for each. Appeals lay to the Governor and Executive Council of Upper Canada.[4] Within a short time the English law in civil matters was introduced together with civil trial by jury. The resulting changes in practice were so great that in 1794 a Court of King's Bench was created to replace the Courts of Common Pleas and a Court of Appeal established to hear appeals therefrom.[5] The Court of Appeal consisted of the Governor of the Province or the Chief Justice (who was president of the Court of King's Bench) and any two or more members of the Executive Council. It had power to review both law and fact in civil appeals involving more than one hundred pounds. In criminal matters it was merely a court of error with no power to review facts.

In 1837 the Court of Chancery was established. Its decisions were subject to appeal to the Court of Appeal.[6]

In 1849 a new court was established, designated as the Court of Common Pleas and having the same powers and jurisdiction as the Court of King's Bench. At the same time the Court of Appeal was abolished and replaced by a Court of Error composed of all nine of the judges of the Courts of Common Pleas, King's Bench and Chancery.[7] Eight years later it was enacted that seven of the nine judges were sufficient for a quorum.[8]

The Court was reconstituted in 1874 as a distinctive Court of Error and Appeal consisting of four judges.[9] Legislation in 1878 permitted a quorum of three of the four judges to hear appeals from inferior courts.[10]

[2]In that year the number of justices of appeal was increased by two by *The Judicature Amendment Act, 1949*, S.O. 1949, c. 46, s. 1.
[3]See 31 Geo. 3, c. 31.
[4]*Ibid.* s. 34.
[5]*An Act to establish a Superior Court of Civil and Criminal Jurisdiction and to regulate the Court of Appeal*, 34 Geo. 3, c. 2 (U.C.).
[6]*An Act to establish a Court of Chancery in this Province*, 7 William 4, c. 2, s. 16.
[7]12 Vict., c. 64.
[8]20 Vict., c. 5, s. 4.
[9]*An Act to make further provision for the due Administration of Justice*, 37 Vict., c. 8, ss. 1, 4.
[10]41 Vict., c. 8, s. 2.

The Judicature Act of 1881[11] united the existing Court of Appeal,[12] Court of Queen's Bench, Court of Chancery, and Court of Common Pleas into the Supreme Court of Judicature for Ontario, to be composed of two permanent divisions, the High Court of Justice and the Court of Appeal. The latter was simply a continuation of the existing Court of Appeal.

The civil business of the High Court was conducted with one judge presiding, except where jurisdiction, both original and appellate, was conferred on three judges of the High Court sitting together as a Divisional Court of the High Court.[13]

In 1892 some appellate jurisdiction in criminal matters was conferred on the Divisional Courts by the original *Criminal Code*.[14] The Court of Appeal exercised jurisdiction of a criminal nature only in cases where appeals were provided under provincial statutes which prescribed penalties as a means of enforcement.[15] Not until 1900 was any appellate jurisdiction under the *Criminal Code* transferred to it.[16]

When the Court of Appeal was first instituted a full quorum of four judges was required to sit on appeals from the single judges of the High Court as well as from the Divisional Courts. In 1895 *The Judicature Act* was amended to permit three judges to sit on appeals from the single judges.[17] In 1897 the Court of Appeal was increased to five members and all five were required for a quorum on appeals from the Divisional Courts.[18] Appeals from judgments of single judges continued to be heard by three justices of appeal except where the Court directed that an appeal be heard before the full Court.[19] The Court was permitted to sit in two divisions when the dispatch of business required. The supplementary judges needed to form a quorum for a division were drawn from the High Court, but in all cases two members of the Court of Appeal were required to form a quorum in each division.[20]

Early during the period following 1881 the main appellate jurisdiction was vested in the Court of Appeal, with the jurisdiction of the Divisional Courts being limited to:

appeals from a judge in chambers;

proceedings where directed under statutes;

cases of *habeas corpus* in which a judge directed a writ be returnable before it;

cases where the parties agreed to its jurisdiction; and

[11]44 Vict., c. 5.
[12]In 1876 the Court of Error and Appeal had been renamed the Court of Appeal by 39 Vict., c. 7, s. 22.
[13]*The Judicature Act, 1881*, 44 Vict., c. 5, ss. 28, 29.
[14]*Criminal Code*, 1892, 55 and 56 Vict., c. 29, s. 3(e).
[15]Holmested and Langdon, *Rules of Practice* 45 (2d ed. 1898).
[16]*The Criminal Code Amendment Act*, 1900, 63-64 Vict., c. 46, s. 36.
[17]*The Judicature Act, 1895*, 58 Vict., c. 12, s. 11.
[18]*The Judicature Act, 1897*, 60 Vict., c. 13, ss. 1, 2.
[19]*Ibid.*
[20]*Ibid.* s. 4.

applications for new trials in the High Court where the action had been tried with a jury.[21]

Under the first *Criminal Code* limited criminal appellate jurisdiction was conferred on the Divisional Courts only.[22]

By 1912, through successive enactments, the jurisdiction of the Court of Appeal had been limited to:

appeals from decisions of the Divisional Courts given on appeal from decisions of High Court judges;

appeals from decisions of High Court judges in court with leave where an appeal would lie from that Court to the Supreme Court of Canada; and

appeals under certain statutes including the *Criminal Code*.[23]

There was no right of appeal from the Divisional Courts in respect of judgments on appeal from the County, District, Division or Surrogate Courts.[24] Likewise the decisions of the Divisional Courts were final in most other cases provided for by statute, with no further appeal to the Court of Appeal.[25] The Court of Appeal was thus reserved for only the most important cases.

On January 1, 1913 after a prolonged period of public debate, the Divisional Courts of the High Court were abolished by *The Law Reform Act*.[26] The purpose of the Act expressed in its full title was to eliminate

[21]Rule 471 made under *The Judicature Act, 1881*, 44 Vict., c. 5.
[22]N. 14 *supra*.
[23]*An Act to amend The Judicature Act*, 4 Edw. 7, c. 11, s. 2(2) provided that the Court of Appeal should have jurisdiction as provided by:
(a) *The Ontario Voters' Lists Act*;
(b) *The Ontario Election Act*;
(c) *The Ontario Controverted Elections Act*;
(d) *The Ontario Registry Act*;
(e) *The Joint Stock Companies Winding-up Act, (Ontario)*;
(f) *The Assessment Act*;
(g) *The Liquor License Act*;
(h) *An Act respecting appeals to the Court of Appeal on Prosecutions to enforce Penalties and punish Offences under Provincial Acts*;
(i) *An Act for more effectually securing the Liberty of the Subject*;
(j) *The Mechanics' and Wage Earners' Lien Act*;
(k) *The Criminal Code, 1892*, and amendments thereto;
(l) *The Winding-Up Act, (Canada)*;
(m) *The Municipal Drainage Act*; and
(n) *The Succession Duty Act*.
In addition, s. 77 of *The Judicature Act*, R.S.O. 1897, c. 51, provided for an appeal to the Court of Appeal from a decision of a Divisional Court on an appeal from the Surrogate Court involving matters of account or distribution in excess of $1,000 or of such importance that the case could have been removed by a party from the Surrogate Court into the High Court in the first instance.
[24]*The Judicature Act*, R.S.O. 1897, c. 51, s. 77, except for two specified rights of appeal in account or distribution matters as set out in the preceding footnote.
[25]Only four of the special statutes conferring jurisdiction on the Divisional Court provided for a further appeal to the Court of Appeal: *An Act to amend The Judicature Act*, 4 Edw. 7, c. 11, s. 2.
[26]*The Law Reform Act, 1909*, 9 Edw. 7, c. 28 proclaimed on January 1, 1913 by order dated July 4, 1912.

double appeals and reduce the cost of litigation. There is some doubt that the incidence of double appeals posed a problem. At any rate, the measures taken to eliminate them were much criticized at the time.[27]

The reforms of 1913 also brought significant changes in the constitution of the Court of Appeal. It was renamed the Appellate Division of the Supreme Court of Ontario and was divided into two permanent Divisional Courts. The first of these consisted of the five incumbent justices of appeal, and the second, five judges of the Supreme Court selected once a year by the judges of the Supreme Court to act for the period of one year. Provision was also made for temporary Divisional Courts of the Appellate Division to be composed of High Court judges selected in the same way and to sit when the pressure of business so required.[28]

The Divisional Courts of the Appellate Division exercised all of the jurisdiction formerly vested in the Divisional Courts of the High Court. A quorum of each Division consisted of four judges except for the consideration of appeals under the *Criminal Code* and *The Ontario Controverted Elections Act*.[29]

In 1923 the system of appointing High Court judges for yearly terms to the Second Divisional Court was discontinued and justices of appeal were appointed solely to that Division.[30] Finally, in 1931 the Divisional Courts of the Appellate Division were abolished and merged into one Court renamed the Court of Appeal for Ontario. At the same time, however, the Court was empowered to sit in two divisions of not fewer than three judges if necessary for the dispatch of business.[31] In 1936 the membership in the Court was reduced from 10 to eight.[32] In 1949 it was again increased to 10.[33] Despite the changes in membership, the quorum provisions remained unchanged. The structure and composition of the Court has not altered since 1949, although its jurisdiction has been changed by the establishment of the Divisional Court in 1972.[34]

C. Constitution

The Court of Appeal consists of the Chief Justice of Ontario, who is president of the Court,[35] and nine justices of appeal. All members of the Court of Appeal are *ex officio* judges of the High Court, and all the judges of the High Court are *ex officio* members of the Court of Appeal.[36] Except where otherwise provided, appeals are heard by not fewer than three justices, but always by an uneven number. (Prior to the establishment of the

[27]For example, see "Comment" (1909), 45 Can. L.J. 2.
[28]*The Law Reform Act, 1909*, 9 Edw. 7, c. 28, ss. 13, 14.
[29]*The Judicature Act, 1913*, S.O. 1913, c. 19, ss. 5, 41(1)(2).
[30]*The Judicature Amendment Act, 1923*, S.O. 1923, c. 21, ss. 2, 5, 6.
[31]*The Judicature Amendment Act, 1931*, S.O. 1931, c. 24, s. 6.
[32]*The Judicature Amendment Act, 1936*, S.O. 1936, c. 31, s. 2.
[33]*The Judicature Amendment Act, 1949*, S.O. 1949, c. 46, s. 1.
[34]*The Judicature Amendment Act, 1971*, S.O. 1971, c. 57, proclaimed in force April 17, 1972.
[35]*The Judicature Act*, R.S.O. 1970, c. 228, s. 4(1).
[36]*Ibid.* s. 9.

Divisional Court certain appeals were heard by a single justice of appeal under at least eight provincial statutes and the *Divorce Act*.) The Court is empowered to sit in one, two or more divisions as determined by the Chief Justice.[37] Matters incidental to the hearing of an appeal but not involving the ultimate decision may be decided by one justice of appeal.[38]

Provision is made by section 15 of *The Judicature Act* for any judge or retired judge to sit or act on request as a judge of either branch of the Court. We question the constitutionality of this provision as it applies to retired judges as distinct from supernumerary judges. The right to request a judge of the High Court to sit in the Court of Appeal has some value, but not much realistic value for the purpose of relieving the workload on the Court of Appeal. In chapter 4 we refer to the amendment to the *Judges Act*[39] giving a judge who has reached the age of 70 and who has been on the Supreme Court of Ontario for 10 years, a right to elect to become a supernumerary judge. It is unnecessary to repeat what we said there. While the enactment of the enabling legislation may give some temporary relief to the Court of Appeal we are not convinced that it will have any long term effect on the workload of that Court.

The Court of Appeal sits in Toronto to hear civil appeals[40] and most of the criminal appeals.[41] In recent years there have been occasional sittings in Kingston and Burwash for the hearing of appeals of prisoners in institutions there. We think that this is a proper matter for the discretion of the Court and that there should be no formal requirement that sittings be held outside Toronto.

D. Jurisdiction

The Court of Appeal exercises both civil and criminal appellate jurisdiction as well as a very limited original jurisdiction.[42] Until the legislation creating the Divisional Court was proclaimed in force in 1972 jurisdiction was conferred on the Court of Appeal by at least 74 Ontario statutes apart from *The Judicature Act* and other statutes establishing courts and by many federal statutes including the *Criminal Code*.[43] During the last 10 years the caseload of the Court has been steadily expanding both in volume and complexity. Appendix I to this chapter illustrates the increase from 1961 to 1971 in appeals set down and argued. This table, however, shows only the number of appeals, and this is only one of the factors deserving consideration when proposing reforms for the administration of business before the Court. With the industrial and commercial development of Ontario, the complexity of matters coming before the Court grows, and thus more time

[37] *Ibid.* s. 43.
[38] *Ibid.* s. 34.
[39] R.S.C. 1970, c. J-1, amended by the *Judges Amendment Act*, S.C. 1971, c. 55.
[40] *The Judicature Act*, R.S.O. 1970, c. 228, s. 16.
[41] Rule 21 of the Criminal Appeal Rules passed under s. 438 of the *Criminal Code* by the Judges of the Supreme Court of Ontario provides for two sittings a month in each month to hear criminal appeals, subject to the directions of the Chief Justice.
[42] For example, under *The Constitutional Questions Act*, R.S.O. 1970, c. 79, s. 1.
[43] See McRuer Commission Report, 659 (Report No. 1, Vol. 2, 1968). See also Appendix C at p. 674.

must be devoted to them. Appendix II shows the growing burden on the Court as reflected by the backlog of appeals at the end of each year from 1969 to December 31, 1972.

There can be no doubt that prior to the creation of the Divisional Court, the resources of the Court of Appeal were so extended that it could not discharge all its responsibilities to its satisfaction. This was the conclusion expressed in the McRuer Commission Report in 1968:

> Under present conditions it is quite impossible for the judges of the Court of Appeal in Ontario adequately to meet their responsibility as judges of the court of last resort in the Province. They are compelled, by force of circumstances, to dispose of cases on a sort of assembly-line basis. They are forced to choose between the prompt disposition of appeals by a court of three judges, and the painstaking deliberation by a court of five judges which the work of an ultimate court of appeal for the Province demands. Rather than have long delays and a large backlog of appeals the choice has wisely been made for the former. It is not right that such a choice should have to be made, nor is it right that litigants should have to be put to the great expense of appealing to the Supreme Court of Canada before they can get decisions by at least a five-judge court in matters justifying an appeal to the highest court of the Province.[44]

In recent years it has been exceptional for the Court to sit with five judges. Circumstances have permitted the Chief Justice to direct the hearing of appeals before five judges only on the request of counsel in the most important civil cases and in criminal matters mostly in capital and non capital murder appeals. The McRuer Commission Report recorded that in 1966 three criminal appeals only were heard by a Court of five judges. There were no civil cases heard by more than three judges in that year.[45] In 1971 the Court met with five judges only twice in civil cases and only on three occasions for criminal appeals.[46] It is revealing that during that same year 47 appeals comprising 11.5% of the total numerical civil caseload were brought before one justice of appeal sitting alone. One hundred and sixty, or 39%, of civil appeals were disposed of without the giving of reasons and 117, or 28%, were disposed of without calling on the respondent.[47] It would appear from these statistics that the court is required to devote much time to appeals that ought not to be before the highest Court of the Province.

It was to ease the burden of the Court of Appeal that an intermediate court of appeal was recommended by the McRuer Commission[48] and implementing legislation introduced into the Legislature on October 7, 1970, as Bill 183.[49] On the occasion of first reading, the then Minister of Justice and Attorney General for Ontario made the following statement:

[44] *Ibid.* p. 661.
[45] *Ibid.* p. 660.
[46] Court of Appeal Returns to the Ministry of the Attorney General.
[47] *Ibid.*
[48] McRuer Commission Report, 659 *ff.* (Report No. 1, Vol. 2, 1968).
[49] *The Judicature Amendment Act, 1971*, S.O. 1971, c. 57.

I might summarize by saying that the general effect of the Act is to reorganize certain court procedures. In particular, the Act sets up a divisional court as a branch of the High Court of Justice.

This will be an intermediate court of appeal, which will be designed to hear all appeals from administrative tribunals and will hear appeals in certain other matters which are presently heard by a single judge of the High Court of Justice. The court will be made up of three judges, not necessarily the same personnel each time, but it will be a three-man, three-judge court.

It will not entail the naming of additional judges but will be within the present structure of the court as a divisional court. It is designed to relieve the burden which presently falls on the court of appeal so that our highest court of appeal will then be able to devote itself to most fundamental and important matters which we think perhaps are not receiving as much attention presently as is desirable.

Another function which I might mention is that this new divisional court will enable the judges of the high court to obtain a wide and valuable experience as appellant [*sic*] judges, which will assist them in their functions as trial judges, to build a body of law and an appeal procedure which will be certainly relevant, I think, as they approach trial matters.

It is also provided that that court will sit outside of Toronto from time to time in the cities of Ottawa, London, Sault Ste. Marie, Thunder Bay and Sudbury. That, I might say, is perhaps a beginning but we think it is a good departure and we shall see how it works.[50]

No changes in principle were made when the Bill was reintroduced in revised form as Bill 83 on June 24, 1971.

In creating the Divisional Court as an appellate court, and conferring jurisdiction on it, the Legislature has given implicit recognition to certain basic principles. The Court of Appeal should be maintained with the existing complement of 10 members who should sit in panels of five where the circumstances warrant. The jurisdiction of the Court should be defined specifically in the enabling statute and should in no case be left to subordinate regulation, rule or administrative direction.

The effect of the legislation, proclaimed in force on April 17, 1972, was to place some limitations on appeals that might be taken to the Court of Appeal. It is apparent from our analysis in the following section that these limitations have done little to relieve the caseload of the Court and the pressures on it have become intolerable.

It is imperative that further measures be adopted at once. The remedies most frequently suggested are increases in the membership of the Court and the further transfer of jurisdiction to the Divisional Court.

[50]Legislature of Ontario Debates, October 7, 1970, at p. 4739.

We reject the proposal of enlargement of the Court. It is traditional in common law jurisdictions for the highest appellate courts to be composed of fewer than 10 members. In only one other Canadian province, the Province of Quebec, are there more than nine members in the highest appellate court. In that province the court holds sittings in Montreal and Quebec. In the great majority of states in the United States the highest court is composed of five or seven members. An enlargement of the court can achieve a reduction in the workload of its members only if it sits in divisions. The usual practice of the Court of Appeal in recent years has been to sit in two divisions. At the time of writing it has resorted to sitting in three divisions in an attempt to cope with its heaviest caseload on record. This detracts from the collegiality of the Court, which is one of its essential features. Uniformity of decisions and consistency of jurisprudence, so important to the quality of justice in Ontario, depend in large measure on the retention of the Court of Appeal at its present size.

We consider next, changes in the jurisdiction of the Court of Appeal.

E. Civil Caseload

In an attempt to assess the impact on the Court of Appeal of the changes in jurisdiction brought about with the creation of the Divisional Court we have analyzed all the civil cases in which judgment of the Court was rendered in 1971. Out of a total of 421 cases, 112 (or roughly 26%) would have devolved upon the Divisional Court had it then been in existence. There has been insufficient experience as yet on which to base an estimate of the corresponding increase in the caseload of the Court of Appeal by reason of its new jurisdiction in appeals from the Divisional Court.

It is to be emphasized that the reduction by 26% in the number of civil cases coming before the Court by no means reflects an equivalent reduction in the normal workload of the Court. First, the hearing time devoted to civil appeals accounts for only about 60% of Court time. Secondly, much more hearing time is required for some categories of appeals than others. Of the 112 appeals which would have been diverted from the Court of Appeal to the Divisional Court, had it been in existence in 1971, 31% were appeals from the Small Claims Courts.[51] These appeals were heard by one judge of the Court of Appeal. To treat them as equivalent in all respects to other appeals would be unrealistic.[51a]

On any analysis the impact of the legislation creating the Divisional Court on the workload of the Court of Appeal will fall far short of the expressed expectations of the former Minister of Justice and Attorney General for Ontario when it was first introduced.

Two alternative jurisdictional changes have been proposed which would best alleviate the burdens on the Court of Appeal. We consider them under the following two headings.

[51]*The Small Claims Courts Act*, R.S.O. 1970, c. 439, s. 112, as amended by S.O. 1970, c. 120, s. 10.

[51a]The value of weighted caseload studies to this type of analysis is discussed in chapter 2.

1. *Appeals on Questions of Law Alone*

It has been suggested that all civil appeals from the County Courts be to the Divisional Court and that *The Judicature Act* be amended to provide that (1) appeals from the High Court involving a question or questions of fact only be required to be heard by the Divisional Court and (2) appeals from the High Court involving a question or questions of law only be heard by the Court of Appeal. The relief to the Court of Appeal thus provided may be estimated roughly. A review of the records of the Court for 1971 reveals that approximately 51% of civil cases argued were appeals from the Supreme Court and approximately 36% appeals from the County and Surrogate Courts. (Very few appeals from the Surrogate Courts were argued.) The time required for the hearing of all appeals from the Supreme Court was approximately 2½ times that for hearing appeals from the County Courts. This is natural as Supreme Court appeals are likely to involve more difficult questions of law and fact.

We do not think the above suggested amendment to *The Judicature Act* would prove satisfactory. An appellant would always be confronted with jurisdictional problems such as — does the appeal in this case involve only a question of law; or does it involve a question of fact alone; or does it involve both questions of law or fact; or does it involve a question of mixed law and fact? In every appeal these questions would have to be answered in order to determine whether the appeal lies to the Court of Appeal or Divisional Court. In our view this would not be an acceptable solution to the problems that confront us. We, therefore, discuss the alternate proposal.

2. *Monetary and Divorce Jurisdiction*

We favour an extension of the jurisdiction of the Divisional Court in two areas:

(1) Appeals from judgments in uncontested divorce cases.[51b]

In making this first recommendation we realize that an amendment to the *Divorce Act* may be required and that it will be for the Province to make representations to the Federal Government.

(2) Appeals from all judgments, orders or decisions made in the exercise of jurisdiction specifically conferred by section 14(1) of *The County Courts Act*.

We think that the court to which an appeal lies in the first instance should in principle be determined by the importance of the matter but this principle is difficult to express in any simple legislative form. We must seek a practical formula. The simplest one would be to provide that all appeals from judgments given or orders made by County Court judges should lie to the Divisional Court and appeals from the judgments given or orders

[51b]This recommendation may be affected by the Commission's Report on Family Courts. See chapter 13.

made by High Court judges should lie to the Court of Appeal. This formula, however, is open to valid criticism. In the first place an action may be commenced in a County Court that would be within the jurisdiction of the Supreme Court and unless the jurisdiction of the County Court is disputed, it has jurisdiction to try the action. If, in such cases, judgment is given in a County Court for an amount in excess of $7,500, it seems illogical that an appeal should lie to the Divisional Court while an appeal from a judgment given in the High Court for an amount less than $7,500 would lie to the Court of Appeal.

To meet this illogical situation we considered a formula based on the "amount in controversy", fixed at $7,500. The words "in controversy" are taken from the *Supreme Court Act*.[52] However, the formula used in the *Supreme Court Act* presents difficulties in application to the problem we are considering. In the case of an appeal to the Supreme Court of Canada the question is not to which of two courts the appeal lies but whether or not a right of appeal exists at all. In any case if the appeal has any real merit leave to appeal may be given by the Supreme Court notwithstanding the amount in controversy. It is a very different matter when it comes to determining which of two courts has jurisdiction to hear an appeal. A formula must be found which will not put an appellant in an uncertain position as to which court the appeal should be taken.

The solution we recommend is as follows:

(a) Where a County Court judge exercises a jurisdiction under *The County Courts Act* that could not have been exercised by a judge of the County Court apart from the provisions of section 14(2) of that Act, the appeal shall lie to the Court of Appeal;

(b) Where a judge of the Supreme Court exercises a jurisdiction under *The Judicature Act* or the inherent jurisdiction of the Court the appeal shall lie to the Court of Appeal;

(c) Where a County Court judge exercises a jurisdiction specially conferred on the County Court under section 14(1) of *The County Courts Act* the appeal shall lie to the Divisional Court;

(d) Where a County Court judge exercises a jurisdiction conferred on the County Courts or on a judge of the County Court under any statute other than *The County Courts Act* the appeal shall lie to the Divisional Court. (See our discussion of *persona designata* jurisdiction in chapter 5.);

(e) Where a High Court judge gives a judgment, order or decision within the jurisdiction specially conferred on the County Court under section 14(1) of *The County Courts Act* the appeal shall lie to the Divisional Court;

(f) Where a High Court judge exercises a jurisdiction conferred on the High Court or a judge of the High Court under any statute

[52]S.C. 1970, c. S-19, s. 36. For a discussion of the problems of interpretation in questions of the monetary jurisdiction of the Supreme Court of Canada see Crane, "The Jurisdiction of the Supreme Court of Canada" (1968), 11 Can. Bar J. 377, at p. 380.

other than *The Judicature Act* the appeal shall lie to the Divisional Court. (See our discussion of *persona designata* jurisdiction in chapter 4.)

If this solution is adopted provision must be made for a simple determination of jurisdiction where it is disputed. For example, if a respondent wishes to dispute the jurisdiction of the court to which the appeal is taken, he should be required to move within 10 days to quash the appeal. If the jurisdiction is not disputed, the court to which the appeal is taken should be presumed to have jurisdiction. On motion to quash, if the court finds that it does not have jurisdiction, it should direct that the appeal be transferred to the court having jurisdiction. If there is any abuse of the procedure by taking appeals to the Court of Appeal through an agreement between the parties not to dispute the jurisdiction of the Court of Appeal, the court can exercise a regulating power through the order as to costs that may be made.

Our analysis of the 1971 experience reveals that the implementation of this recommendation would have resulted in an additional reduction of 24% in the numerical civil caseload of the Court of Appeal.

F. Criminal Caseload

The criminal caseload of the Court of Appeal has increased by 100% since 1963. There has been an increase of 46% since 1966, the source year for statistics analyzed in the first Report of the McRuer Commission released in 1968.[53] The criminal caseload, amounting to 40% of the total caseload of the Court, was unaffected by the creation of the Divisional Court. Before considering possible jurisdictional changes to alleviate that caseload we examine two statutory provisions affecting the caseload of the Court: the new bail legislation and the entitlement of prisoners in custody to attend before the Court.

1. *Bail Applications*

The Bail Reform Act[54] has among its objectives the extension of the grounds upon which interim release of convicted persons pending appeal will be granted. Although the onus is on the applicant to show that release should be granted, it is satisfied by meeting the prescribed statutory formula. The rule no longer prevails that bail is to be granted pending appeal only in exceptional circumstances.

A judge of the Court of Appeal has jurisdiction to release an appellant from custody pending appeal in:

[53]According to the Annual Reports of the Inspector of Legal Offices and to the monthly returns of the Court of Appeal to the Systems Development Branch of the Ministry of the Attorney General, criminal appeals argued in the Court of Appeal were as follows:

1963 — 295 appeals
1966 — 403 appeals
1968 — 466 appeals
1971 — 589 appeals

[54]S.C. 1971, c. 37, proclaimed on January 3, 1972.

(1) appeals to the Court of Appeal from conviction where notice of appeal has been filed and where leave is required, when he has given notice of application for leave;[55]

(2) appeals to the Court of Appeal from sentence only where leave has been granted;[56]

(3) appeals to the Supreme Court of Canada on applications for leave to appeal to the Supreme Court of Canada where the notice of appeal has been filed or the application for leave served;[57]

The Court of Appeal has jurisdiction to grant interim release:

(4) upon the direction of the Chief Justice or acting Chief Justice to review any decision of a judge of a superior court of criminal jurisdiction relating to interim release or detention of an accused;[58]

(5) upon the direction of the Chief Justice to review the decision of a judge of the Court of Appeal in relation to interim release pending appeal.[59]

It is expected that the new bail philosophy will result in an increased number of applications for release which will in turn place new burdens on the Court of Appeal. For example, from the period September 1, 1972 to December 31, 1972, 118 bail applications were entertained by a justice of appeal.[59a]

2. *Right of Appellant to Be Present*

Unrepresented appellants may present argument either orally or in writing.

The *Criminal Code* in section 615 provides that:

(1) Subject to subsection (2), an appellant who is in custody is entitled, if he desires, to be present at the hearing of the appeal.

(2) An appellant who is in custody and who is represented by counsel is not entitled to be present

(a) at the hearing of the appeal, where the appeal is on a ground involving a question of law alone,

(b) on an application for leave to appeal, or

(c) on any proceedings that are preliminary or incidental to an appeal,

[55]*Criminal Code*, R.S.C. 1970, c. C-34, s. 608(1)(a) as amended.
[56]*Ibid.* s. 608(1)(b).
[57]*Ibid.* s. 608(1)(c).
[58]*Ibid.* s. 608(1).
[59]*Ibid.*
[59a]Returns of the Court of Appeal to the Systems Development Branch of the Ministry of the Attorney General.

unless rules of court provide that he is entitled to be present or the court of appeal or a judge thereof gives him leave to be present.

(3) An appellant may present his case on appeal and his argument in writing instead of orally, and the court of appeal shall consider any case of argument so presented.

(4) The power of a court of appeal to impose sentence may be exercised notwithstanding that the appellant is not present.

These provisions were considered by the Supreme Court of Canada in *Smith* v. *The Queen*.[60] In that case the appellant had been convicted of the offence of having possession of instruments for house-breaking contrary to the *Criminal Code* and was sentenced to two years' imprisonment. In his notice of intention to appeal he indicated expressly his desire to present oral argument. When the matter came before the Ontario Court of Appeal, the appellant was in custody, he was not represented by counsel and he was not advised of the hearing date. In his absence the Court considered the notice of application for leave to appeal, the judge's report and the submissions of counsel for the Crown. It then dismissed the appeal against conviction as frivolous, granted leave to appeal against sentence and increased the sentence from two to five years.

On appeal to the Supreme Court of Canada, Cartwright, J. (as he then was), who delivered the judgment of the Court, held that pursuant to the section of the Code corresponding exactly to the present section 615(1) the appellant had a right to be present and that the Court should have adjourned the case to enable him to be there. It was held to be an error in law to proceed in his absence.

The rights conferred by section 615 require clarification. Are unrepresented appellants in custody entitled to be present on applications for leave or other preliminary or incidental proceedings such as bail applications? Are they entitled to be present if they signify that they intend to present written as opposed to oral argument? Is there such an entitlement where the appeal is on a question of law alone? In the light of the *Smith* decision it is possible that all of the foregoing questions may be answered in the affirmative. If so, the work of the Court would be affected in two ways.

The first concerns the flexibility of the Court to have certain leave applications decided by one justice of appeal rather than the full Court.[61] The effect of the enabling legislation is all but negated if appellants in custody have a right to be in attendance at the hearing. In those cases where leave is granted by one judge an adjournment will be necessary in order that a Court of three judges may convene and hear the appeal. A second attendance of the appellant will then be required. If this interpretation is correct this cumbersome procedure can be eliminated only by having all leave applications heard by a formally convened Court of three judges in the first instance. This would enable the Court when leave is granted to proceed immediately to hear the appeal as it is empowered to do under the Criminal Appeal Rules.[62]

[60][1965] S.C.R. 658.
[61]See the *Criminal Code*, R.S.C. 1970, c. C-34, ss. 603(1)(a)(ii) and 603(1)(b).

Secondly, the right to be present in itself almost certainly encourages the filing of appeals. In recent years the incidence of appeals by unrepresented appellants ("in person" prisoner appeals) has been increasing. Appendix III to this chapter illustrates the trends in appeals from 1966 to 1971. Statistics for the years prior to 1970 are not, unfortunately, available to show the breakdown of requests to present oral as opposed to written argument. It is our understanding, however, that within those applications shown as "in writing" prior to 1970 a small number (perhaps only 10%) specified oral argument.

It is highly probable that the increase in appeals where the accused makes a request to appear in person is a reflection of the growing awareness of prisoners that they may receive a trip to Toronto at public expense. This not only creates very real security risks but also a substantial expense. To meet this situation the Court of Appeal holds sittings from time to time in Kingston and Burwash.

Because of the nature and purpose of an appeal, the right of an appellant in custody to be present before the Court of Appeal should not be absolute but should be related to whether his presence will assist the Court in coming to a proper conclusion in the case.

G. Changes in Criminal and Quasi-Criminal Jurisdiction

1. *Summary Conviction Offences — Provincial*

There are no statistics available upon which to base an accurate estimate of the number of appeals involving provincial offences which reach the Court of Appeal. It is safe to say that there are very few. In 1971, for example, there was only one case argued in the Court of Appeal which originated under *The Highway Traffic Act*.[63]

Appeals lie under the provisions of the *Summary Convictions Act*,[64] incorporating Part XXIV of the *Criminal Code*, to the Court of Appeal in three ways:

(1) by leave on a question of law alone from the decision of a County Court on appeal via trial *de novo* from a Provincial Court.[65]

[62]Criminal Appeal Rule 22.
[63]1971 Returns of the Court of Appeal to the Systems Development Branch of the Ministry of the Attorney General.
[64]R.S.O. 1970, c. 450, s. 3.
[65]*Criminal Code*, R.S.C. 1970, c. C-34, s. 771(1)(a).

(2) by leave on a question of law alone from the decision of the Supreme Court on a case stated on law or jurisdiction from a Provincial Court.[66]

(3) on the certification of the Attorney General for Canada or Minister of Justice and Attorney General for Ontario that the appeal involves the construction of the *British North America Act* and is of sufficient importance to justify an appeal from a judgment or order of the Supreme Court or a judge thereof on a stated case or an application to quash a conviction or to discharge a prisoner.[67]

There is some doubt whether the provisions of *The Summary Convictions Act* are amended by *The Judicature Amendment Act, 1971*[68] to substitute the Divisional Court for the Court of Appeal in all of the three instances enumerated above.

We recommend that all appeals that now lie to the Court of Appeal under *The Summary Convictions Act* of Ontario, whether from a decision on a stated case or otherwise, should lie to the Divisional Court except those appeals under section 22 involving important constitutional questions.

2. *Summary Conviction Offences — Federal*

Reliable data is not available to show the number of appeals reaching the Court of Appeal under section 771 of the *Criminal Code*. It can be stated with confidence, however, that they are few in number.

Appeals lie to the Court of Appeal by the terms of the Code with leave of the Court on questions of law from the decisions of the County Court on appeal and from decisions of the Supreme Court on stated cases.[69] We recommend that the Province make representations to the Federal Government that amending legislation be enacted to substitute the Divisional Court for the Court of Appeal in all summary conviction appeals, whether by way of stated case or otherwise.

3. *Indictable Offences*

Even if our recommendations set out earlier in this chapter are adopted, the workload of the Court of Appeal will not be reduced sufficiently to accomplish the objectives which we believe to be desirable. The Court will not be given the flexibility to sit with five judges whenever it may be thought necessary and the judges of the Court will not be able to devote as much time to judgments as is compatible with the development of jurisprudence in the Province. It is imperative that further relief be provided.

We have concluded that the solution best suited to the maintenance of a high quality of justice in Ontario lies in the transferral of all appeals from

[66]*Ibid.* s. 771(b). For a history of the right of appeal by stated case see *Rex* v. *Red Line Ltd.* (1930), 65 O.L.R. 11, affirmed on another point, 65 O.L.R. 199.
[67]*The Summary Convictions Act*, R.S.O. 1970, c. 450, s. 22.
[68]*The Judicature Amendment Act, 1971*, S.O. 1971, c. 57, s. 1.
[69]*Criminal Code*, R.S.C. 1970, c. C-34, s. 771(1)(a)(b).

Provincial judges to the Divisional Court.[70] The numbers of these appeals are such that the transferral will afford the necessary relief to the Court of Appeal without making unreasonable demands on the Divisional Court as it is now constituted.

In 1971 the Court of Appeal rendered judgment in 521 criminal appeals.[71] Of these, 342 (or 66%) were appeals from Provincial judges.[72] The Court of Appeal devoted to them 46% of the court time allotted to criminal appeals. However, it cannot be assumed that 46% of court time for the hearing of criminal appeals will be saved by the Court of Appeal if our recommendations are adopted. There are various factors to be taken into consideration, some of which are unknown. In particular, changes in the incidence of "in person" appeals and changes in the manner in which accused persons exercise their right of election to be tried by a Provincial judge might produce marked variations in both the time required to dispose of appeals and the number of appeals from Provincial judges.

For the most part appeals which are argued by the appellant "in person" do not involve questions of law. Slightly over one third of the appeals from Provincial judges argued in the Court of Appeal in 1971 were argued by the appellant without the aid of counsel. The proportion of "in person" appeals from other Courts was much lower. Twenty-three percent of appeals from County Court judges were "in person" appeals. Only one appeal from a Supreme Court judge was argued in person.

It may be that the recommended changes will affect the exercise of the right of election by accused persons. The right to elect to be tried by a Provincial judge is not available in all indictable cases. These fall within three categories. First, by section 427 of the *Criminal Code* certain offences are within the exclusive jurisdiction of the Supreme Court.[73] The accused, therefore, has no right of election. Secondly, by section 483 of the Code certain offences are designated to be within the absolute jurisdiction of magistrates (Provincial judges). Here again, the accused has no right of election. All other indictable offences fall within a third category where the accused has a right to elect whether to be tried summarily by a Provincial judge.[74] If he fails to elect he is committed for trial before a judge and jury, subject to a right to re-elect to be tried by a judge alone in the County Court Judges' Criminal Court or, with the consent in writing of the Attorney General or counsel acting on his behalf, by a Provincial judge alone.[75]

[70]Reference should be made to the Commission's forthcoming Report on Family Courts for a discussion of appeal provisions in family law matters. See chapter 13.
[71]The figures set out in this analysis were derived from the minute books of the Court of Appeal and do not correspond exactly with other source data reported within the Ministry of the Attorney General and frequently referred to in this Report.
[72]The 342 appeals were composed as follows:
105 — against conviction;
143 — against sentence alone;
94 — of both sentence and conviction.
[73]Bill C-2 to amend the *Criminal Code*, enacted on May 17, 1972, decreases the number of offences within this category.
[74]*Criminal Code*, R.S.C. 1970, c. C-34, s. 484.
[75]*Ibid.* s. 492.

If our recommendations are implemented there would be no change in the rights of appeal from the Supreme Court in the first category. In the second, all appeals would be taken to the Divisional Court. In the third, the right of appeal would depend on the election of the accused. The exercise of the election of a trial court would operate as an automatic and conclusive designation of either the Divisional Court or the Court of Appeal as the court having jurisdiction on appeal.

Apart from alleviating the workload of the Court of Appeal, our recommendation, if implemented, would offer additional positive benefits. The Divisional Court is a Court composed of trial judges who are engaged regularly in the administration of the criminal law throughout the Province. The exercise of appellate jurisdiction in the Divisional Court will give the opportunity to draw on that experience. A further benefit, more discernible to the public, would be the accessibility of the Court. The Divisional Court, unlike the Court of Appeal, is required to hold sittings at locations outside of Toronto. If the recommendations we make are implemented, the number of those localities may be extended.

We recommend that appropriate representations be made to the Government of Canada to secure the necessary amendments to the *Criminal Code* to provide that all appeals from conviction, acquittal and sentence for indictable offences by Provincial judges lie to the Divisional Court.

H. Practices and Procedures

1. *Leave to Appeal*

Certain appeals reach the Court of Appeal as of right while others are permitted only (a) with leave of the Court of Appeal or the Court from which the appeal is taken or (b) on the certification of a designated Minister that the appeal is a proper one for consideration.[76] If all appeals were restricted by the requirement that leave be first obtained, the number of civil cases reaching the full Court would no doubt be reduced. It has been estimated that the civil caseload would have been reduced by as much as 16% over a given period if such a requirement had been in effect prior to the creation of the Divisional Court.[77] To impose a condition requiring leave to appeal to the Court of Appeal where leave was not previously required is to be avoided unless an appeal as of right to another court in the first instance is substituted. We make recommendations above for relieving the burden on the Court of Appeal by giving rights of appeal in certain civil and criminal matters to the Divisional Court. In the light of that, we recommend that the provisions of *The Judicature Act*[78] requiring leave to appeal to the Court of Appeal from judgments of the Divisional Court should remain unchanged. Leave to appeal to the Court of Appeal in all other cases should not be required.

Legislation implementing these recommendations should safeguard the rights that accused persons now have to appeal to the Supreme Court of

[76]For example, *The Summary Convictions Act*, R.S.O. 1970, c. 450, s. 22.
[77]Statistics supplied as a result of a survey conducted by the Court of Appeal in 1971.
[78]R.S.O. 1970, c. 228, s. 29, as re-enacted by S.O. 1970, c. 97, ss. 4, 13(2).

Canada. We do not favour rigid statutory provisions governing the composition of the Court of Appeal to hear applications for leave to appeal except that a quorum of three judges should be required to hear applications for leave to appeal from the Divisional Court.

2. *Transcripts on Appeal*

On the setting down of civil appeals for hearing, an appellant is required to order the evidence for use on the appeal.[79] Rule 498(d) provides that:

> where compliance with the rule as to appeal books would cause undue expense or delay, a judge of the Court of Appeal may give special directions.

This Rule is seldom invoked. The result is that appeals are commonly delayed pending receipt from the court reporter of copies of transcripts of the proceedings before the trial court when a full transcript is not required. Costs to the client are increased by the reproduction of certain unnecessary portions of the evidence, and the time of the Court is often wasted in examining evidence that is not relevant to the issues on appeal.

Attempts have been made to make the profession familiar with the provisions of the Rule and to encourage its more frequent employment. In May and June of 1965, the following notice was inserted in the Ontario Reports:

> Much expense to litigants can be avoided by applying for special directions under Rule 498(d) to dispense with the reproduction of part or all of the exhibits or part or all of the transcript of evidence which is not material to the issues raised in the appeal.
>
> The various matters referred to in this notice will be considered as a factor in the disposition of the costs of an appeal.[80]

Two years later the Rule was considered in *Canadian Memorial Chiropractic College* v. *Municipality of Metropolitan Toronto*.[81] The Court of Appeal in that case reduced the amount recoverable by the appellant for obtaining the necessary copies of the transcript and preparation of the appeal books to one-half of the costs taxable, on the basis that only a small portion of the material was referred to before the Court. In delivering the judgment of the Court, McLennan, J.A. said:

> It is the duty of solicitors for parties on appeal to this Court to be vigilant to see that only evidence and exhibits relevant to the determination of the issues in appeal are reproduced. The duty arises from a proper consideration of the interests of their clients and as officers of the Court in the interests of the administration of justice. To the extent that irrelevant material is reproduced the unsuccessful party is

[79]*Rules of Practice*, Rule 498.
[80]Notice to the Profession, Ontario Reports, Part 18, May 14, 1965.
[81][1967] 1 O.R. 244.

> unnecessarily penalized in costs and the preparation and presentation of appeals is delayed. The duty to apply for directions must rest primarily on the solicitors for an appellant but the solicitors for a respondent are not free from responsibility.[82]

The attention of the profession has again been drawn to this duty in a recently published decision of the Court of Appeal.[82a]

The opportunity to avoid unnecessary expense and delay is also recognized in criminal matters. The *Criminal Code* in section 609(2) makes provision for a judge of the Court of Appeal to dispense with the reproduction of evidence taken at the trial.

It has been submitted to us that despite the provisions of the Rules of Practice and all that has been said, the system is still being abused. Unnecessary portions of transcripts are being ordered and filed without regard to the Rule. We recommend that an application for directions be required in civil cases to determine what portion of the evidence and exhibits should be reproduced. The application should be heard in the first instance by the Registrar with the right to have his decision reviewed by a judge of the Court of Appeal.

3. *Oral Argument*

We have received submissions that the statement required to be filed by Rule 501 of the Rules of Practice should be more in the nature of a written argument and that oral argument should be circumscribed by specified time limits. The Rule as amended in 1972 provides that both appellant and respondent file with the Court a concise statement of law and fact intended to be argued. It has been made clear that the statement is not intended or desired to be a factum or a brief, but should be a concise statement of the points without argument.[83] In 1965 the following notice to the profession appeared in the Ontario Reports:

> At a recent meeting of the Judges of the Court of Appeal for Ontario it was directed that the following matters be drawn to the attention of the Members of the profession.
>
> Rule 501 provides that a Statement of Points of Law and Fact intended to be argued on an appeal shall be filed and the note to that rule states that the statement should not be a factum or a brief but a concise statement of the points without argument.
>
> A practice has grown up which does not comply with this rule. The memoranda being filed have become unduly expansive; e.g. the evidence is set out in great detail and is all too frequently restricted to the evidence upon which the particular party relies. This results in a one-sided statement of the evidence and too often without an accom-

[82] *Ibid.* 245.
[82a] *Menton* v. *Lamonday and Buttineau*, [1972] 3 O.R. 411, at 412 (blue pages).
[83] *Rules of Practice*, Note to former Rule 501 as amended by O. Reg. 115/72, s. 7.

> panying indication of the point or points to which it is pertinent. The rule requires a statement of points of fact intended to be argued — not a statement of evidence.
>
> The requirement of a statement of the points of law intended to be argued has often degenerated into a written argument which is repeated twice or thrice. This plainly defeats the object which the rule is designed to attain.
>
> . . . the various matters referred to in this notice will be considered as a factor in the disposition of the costs of an appeal.[84]

In *Crone* v. *Robert Crone Pictures Ltd. & Orion Insurance Co.*[85] the Court of Appeal made reference to the Rule and to the notice and admonished the appellant for filing a lengthy document going far beyond the requirements of the Rule.

Rule 20 of the Criminal Appeal Rules is to the same effect. It requires the appellant and respondent to file

> a concise statement of the points of law and fact to be argued, which shall include with respect to each point references to the transcript and the authorities relied on.[86]

The Rules are otherwise in the Supreme Court of Canada. By Rule 31(1), Part III, the factum on appeal is to contain a brief of the argument setting out the points of law or fact to be discussed. Our attention has been drawn to a practice of that Court to limit oral argument on applications for leave to fifteen minutes.

In the Supreme Court of the United States written arguments are filed on appeal and a time limit is imposed on oral argument. The major advantages claimed for this practice are that:

(1) it permits greater precision in framing the argument;

(2) it permits the Court to study the argument in greater detail;

(3) it permits the Court the opportunity to conduct research in advance of the hearing and to direct the emphasis in oral argument to the issues which require amplification;

(4) it deprives the articulate and experienced counsel of the advantages he may have over the counsel inexperienced in oral argument;

(5) it conserves Court time;

[84] Notice to the Profession, Ontario Reports, 1965.
[85] [1966] 1 O.R. 221.
[86] Section 615(3) of the *Criminal Code* permits an unrepresented appellant to present argument in writing. See also Criminal Appeal Rule 14.

(6) it provides a written record which can be referred to by the Court at the time of drafting its judgment.

We have carefully considered these submissions and have come to the conclusion that there should be no change in the Rules relating to argument. The time required by the Court to review extensive written argument prior to the oral hearing would more than offset any possible benefits in time saved at the actual hearing. It is preferable that there be continuing flexibility at the hearing for the Court to direct the issues to be emphasized and elaborated. There must be reasonable restrictions on the extent of argument. It is appropriate for the Court which must give judgment on the issues before it to provide guidance as to the importance of the matters upon which it will base its decision. This is best accomplished under the present Rules.

4. *Judicial Specialization*

We reject the suggestion that judges be confined to the hearing of certain classes of case only. The administration of justice is best served by judges with broad experience. In this regard it is to be hoped that consideration will be given by those responsible for judicial appointments to the appointment of lawyers with expertise in varied and diverse areas of law. This expertise may then be taken into account, as it has been in the past, by the Chief Justice in the assignment of members of the Court on an *ad hoc* basis to the hearing of cases.

5. *Law Clerks*

Administrative arrangements have been in existence for some time whereby a recent law graduate may be appointed to act as law clerk to the Court of Appeal. He performs functions, assigned to him by the Court under the direction of the Chief Justice, which in the past have included legal research, editing and proofreading judgments and acting as court clerk in sittings at Kingston and Sudbury. Recently he has been assigned to the preparation of summaries of all judgments of the Court of Appeal. These unedited versions of decisions are published in the Ontario Reports in advance of the fully edited copy and have been recognized by the Courts and the profession as an important improvement in law reporting.

The office of law clerk has proven of value. The administrative arrangements should be extended to encompass the immediate appointment of one additional law clerk for the Court of Appeal and as many more as the Court may request from time to time.

6. *Indemnity for Costs in Successful Appeals*

It has been submitted to us that it is unfair for the costs of a successful appeal to be borne by the parties to an action. The usual practice on civil appeals is for the appellate court to award court costs to be paid by the party unsuccessful on appeal. These include the costs of the successful party in both the reviewing court and at trial. The result is that the unsuccessful

litigant, not the Province, bears the expense of an error made by an institution of the government. Occasionally the court will give recognition to special cases where it is not appropriate to award costs to the successful party. In *William McLeod and George McPherson on their own behalf and on behalf of all other members of the United Steel Workers of America, Local 2894* v. *Rory F. Egan and Galt Metal Industries Ltd.*,[87] leave to appeal to the Supreme Court of Canada was granted on the ground that the appeal was one that ought to be submitted to the Court. The Court of Appeal, however, held that it was not a proper case for the respondent to pay any of the costs of the application for leave or of the appeal; accordingly leave was granted on the undertaking of the applicant that he would pay the respondents, the party and party costs on both applications in any event of the appeal.

On appeal in summary conviction matters, the Court of Appeal may make any order with respect to costs that it considers just and reasonable whether the appeal is heard and determined or is abandoned or is dismissed for want of prosecution.[88]

Justification for the proposal that the state take responsibility in proper cases for the costs of successful appeals can be based not only on the theory of error by the trial judge, but also, as has been pointed out by Professor L. C. B. Gower, simply on the uncertainties of law. There are cases where a trial judge has been bound to follow a decision of a higher Court, but has been reversed on appeal because the decision binding on him is overruled.[89] There are other cases where appeals arise out of the difficulty of construing statutes of the Legislature or Parliament.

The McRuer Commission Report recommended that the government safeguard litigants from costs incurred through manifest error on the part of judges giving rise to orders for a new trial. It was concluded that a discretionary power should be conferred on the Court of Appeal:

> upon the disposition of an appeal in a civil or criminal case, to direct that all costs incurred in the case should be paid in whole or in part by the government of the province where it finds that the judge has misconducted the trial or there has been obvious error. No such order should be made without due notice to the Attorney General.[90]

The recommendation has not been implemented.

A broader approach to the costs in successful appeals has been adopted in two Australian States. New South Wales and Victoria have both enacted legislation for the indemnification by the state of unsuccessful respondents in both civil and criminal cases. Both enactments extend also

[87][1972] 2 O.R. 256 (blue pages).
[88]*Criminal Code*, s. 758. See also McRuer Commission Report, 792 (Report No. 1, Vol. 2, 1968).
[89]Gower, "The Cost of Litigation" (1954), 17 M.L. Rev. 1. The author concluded the article with a recommendation that the costs of a successful appeal be borne by public funds in appeals from the County Court on a question of law.
[90]McRuer Commission Report 1405 (Report No. 2, Vol. 4, 1969).

to costs on abortive trials or trials where additional costs are incurred through the death or protracted illness of the judge or disagreement among the jury.

The New South Wales scheme came into existence under the *Suitor's Fund Act* of 1951. An indemnity fund was created from part of the general revenue collected from Court fees. Indemnity becomes available on appeals successful on a question of law or in some circumstances where a new trial is ordered. This extends to cases where an award of damages has been held excessive or inadequate. The Crown is excluded from the benefits under the Act and there is a limitation on the total amount to be indemnified in any case.

The Victorian *Appeal Costs Fund Act* of 1964 relies heavily on the experience of New South Wales. The Fund is financed through an extra fee assessed on all originating processes. Indemnification may be granted in the discretion of the Court according to a sophisticated formula. In part it is provided that the following parties qualify for indemnity:

(1) a party who is a respondent on an appeal which succeeds on a question of law. The amount indemnified is limited to the costs on appeal and does not extend to the Court of first instance;

(2) a defendant in a criminal case where a conviction is quashed and a new trial ordered on a question of law. The indemnification extends to the costs incurred in the proceedings prior to the quashing of the conviction where further costs are incurred by reason of the new trial;

(3) a respondent where a new trial is ordered on the ground that a verdict of a jury is against the evidence or the weight of evidence. In this case the indemnity is provided against the costs of the new trial and not the first proceedings.

To protect the Fund from paying twice in a sequence of appeals, the Act makes specific provision for the vacation of certificates of indemnity under certain conditions. As in New South Wales, the Crown is excluded from the benefits of the Act and there is a limitation on the total amount of indemnification in any one case.

We recommend the Court of Appeal and the Divisional Court be given power to order the indemnification as to costs in proper cases from a fund established for that purpose. The fund should not be established by any form of tax on litigants who resort to the courts.

I. Summary of Recommendations

1. There should be no formal requirement for the Court to hold sittings outside Toronto.

2. The civil caseload of the Court of Appeal should be reduced by empowering the Divisional Court to hear:

   (1) all appeals from judgments in uncontested divorce cases; and

   (2) appeals from all judgments, orders or decisions made in the exercise of jurisdiction specifically conferred by section 14(1) of *The County Courts Act*.

3. The right of an appellant in custody to be present before the Court of Appeal should not be absolute but should depend on whether his presence will assist the court in coming to a proper conclusion in the case.

4. All appeals, whether on a stated case or otherwise, which now lie to the Court of Appeal under *The Summary Convictions Act*, except for appeals on important constitutional questions, should lie instead to the Divisional Court.

5. All summary conviction appeals whether on a stated case or otherwise arising under the *Criminal Code* which at present lie to the Court of Appeal should lie instead to the Divisional Court.

6. All appeals from conviction, acquittal and sentence in indictable matters from Provincial judges should lie to the Divisional Court rather than the Court of Appeal.

7. If our recommendations are adopted, the provisions of *The Judicature Act* specifying that appeals to the Court of Appeal from the Divisional Court may be taken only with leave of the Court of Appeal on questions that are not questions of fact alone should remain unchanged. Legislation implementing these recommendations, however, should safeguard the rights that an accused person now has to appeal to the Supreme Court of Canada.

8. An application for directions should be required in civil cases to determine what portion of the evidence and exhibits should be reproduced for the purposes of appeal. The application should be heard in the first instance by the Registrar with the right to have the decision reviewed by the Court of Appeal.

9. No change should be made to Rule 501 or to Criminal Appeal Rule 20 either to permit written argument or to fix any specific length of time to present oral argument.

10. Judicial specialization is appropriate in the Court of Appeal only in the sense that the expertise of the various members of the Court is considered by the Chief Justice in assigning them to individual cases.

11. There should be immediate authorization for the appointment of one additional law clerk to the Court and for as many more as the Court may request from time to time.

12. The Court of Appeal and Divisional Court should have power to order the indemnification as to costs in proper cases, both civil and criminal from a fund established for that purpose. The fund should not be established by any form of tax on litigants who resort to the courts.

APPENDIX I

CASELOAD OF THE COURT OF APPEAL

CRIMINAL

	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971
Criminal Appeals set down by Solicitors	224	252	251	272	208	281	425	450	416	411	462
by Crown										62	81
In writing Criminal Appeals filed or in person	447	495	426	541	440	425	266	368	538	578	599
In writing or in person Criminal appeals refused	368	437	362	415	355	161	144	105	130	91	85
Criminal Appeals disposed of after argument	313	305	295	398	290	596	528*	528*	494*	493	590

CIVIL

Civil Appeals set down	548	562	795	704	671	621	653	628	675	664	779
Civil Appeals disposed of by the Court											
from Supreme Court	195	197	198	185	189	186	173	207	197	221	215
from County and Surrogate Courts	143	149	173	182	143	140	132	119	128	129	150
from Small Claims Courts (formerly Division Courts) and Tribunals	51	47	74	96	67	70	61	71	90	79	54
TOTAL	389	393	445	463	399	396	366	397	415	429	419
Motions heard by the Court	27	37	48	53	54	47	34	27	22	16	28
Motions heard in Chambers	134	143	146	157	183	179	257	265	310	308	388

Court of Appeal statistics derived from Reports of Inspector of Legal Offices and Systems Development Branch of the Ministry of the Attorney General.

*Due to the method of keeping statistics in these years, these figures may be subject to error particularly as to the disposition of "in writing" appeals.

APPENDIX II

COURT OF APPEAL
APPEALS PENDING

As at December 31, 1969	Civil Appeals		415
	Criminal:	Prisoner	224
		Solicitor	141
			780
As at December 31, 1970	Civil Appeals		464
	Criminal:	Prisoner	271
		Solicitor	111
			846
As at December 31, 1971	Civil Appeals		531
	Criminal:	Prisoner	258
		Solicitor	167
		Crown	34
			990
As at June 30, 1972	Civil Appeals		578
	Criminal:	Prisoner	238
		Solicitor	222
		Crown	17
			1055
As at August 31, 1972	Civil Appeals		605
	Criminal:	Prisoner	273
		Solicitor	284
		Crown	25
			1187
As at October 31, 1972	Civil Appeals		631
	Criminal:	Prisoner	252
		Solicitor	235
		Crown	23
			1141
As at December 31, 1972	Civil Appeals		641
	Criminal:	Prisoner	232
		Solicitor	281
		Crown	16
			1170

Derived from Annual Reports of Inspector of Legal Offices, and returns of the Court to the Systems Development Branch of the Ministry of the Attorney General.

APPENDIX III

COURT OF APPEAL — CRIMINAL APPEALS

Year	Set Down In Writing	Set Down In Person	Disposed of Without Hearing	Heard In Person	Heard Crown	Heard Solicitor	Total
1966	425		354	144	58	201	403
1967	266		211	50	52	373	475
1968	368		196	61	31	374	466
1969	538		252	48	49	340	437
1970	104	474	374	117	72	298	487
1971	96	503	397	152	62	375	589

The figures relating to appeals set down and appeals heard are not reconcilable prior to 1970 due to absence of any figures as to appeals pending at beginning or end of year.

CHAPTER 8

THE DIVISIONAL COURT

SUMMARY

A. JURISDICTION

The Divisional Court exercises both an original and appellate jurisdiction. Section 17 of *The Judicature Act*[1] provides:

(1) The Divisional Court has jurisdiction to hear, determine and dispose of,

(a) all appeals to the Supreme Court under any Act other than this Act and *The County Courts Act*;

(b) applications for judicial review under *The Judicial Review Procedure Act, 1971*;

(c) all appeals from judgments or orders of judges of the High Court on applications for judicial review under *The Judicial Review Procedure Act, 1971*;

(d) all appeals from interlocutory judgments or orders of a judge of the High Court, in court or in chambers, with leave as provided in the rules;

(e) all applications by way of stated case, whether as an appeal or otherwise, to the Supreme Court under any Act other than *The Summary Convictions Act*;

(f) all appeals from final judgments or orders of the Master of the Supreme Court.

(2) Where, by or under any Act, other than this Act and *The County Courts Act*, provision is made for an appeal to the High Court or the Court of Appeal, or to a judge thereof, or to a judge of the Supreme Court, for an application thereto by way of stated case under any Act other than *The Summary Convictions Act*, whether as an appeal or otherwise, such provision shall be

[1]R.S.O. 1970, c. 228 as re-enacted by S.O. 1971, Vol. 2, c. 57, s. 1.

deemed for the purposes of subsection 1 to provide that the appeal or application shall be to the Supreme Court.

(3) Where an appeal under any Act referred to in subsection 2 can only be brought with leave,

(a) obtained from the Court of Appeal, such leave shall be obtained from the Divisional Court; or

(b) obtained in any other manner, such leave shall be obtained from the Divisional Court or a judge thereof as provided in the rules.

In addition to the jurisdiction conferred on the court under *The Judicature Act*, it derives jurisdiction under several statutes.[2]

B. Constitution

The court is constituted as a division of the High Court of Justice. The Chief Justice of the High Court acts as president and designates judges of the High Court to sit as judges of the Divisional Court from time to time.[3] A complementary amendment to *The Judicature Act* was made at the time of creation of the Divisional Court increasing the number of High Court judges from 27 to 32.[4]

With experience, consideration may have to be given to setting up a permanent court, structured with judges especially appointed thereto or a court with some judges specially appointed thereto and some judges drawn on a rotation basis from the High Court so that two or more courts may sit at the same time. It is important that our recommendations summarized below for increased jurisdiction of the court be implemented without delay and that during the course of implementation there be a continuing review of its performance. This might be a task for the Attorney General's Advisory Committee on Court Administration recommended in chapter 2.

C. Sittings

Except where otherwise provided, the proceedings of the Court are to be conducted before three judges, one of whom is to be the Chief Justice of the High Court or his designee.[5] The court is empowered to sit in two or more sections as directed by the Chief Justice.[6]

Continuous sittings are to be held at Toronto except during vacation. Sittings at London, Ottawa, Sudbury, Sault Ste. Marie and Thunder Bay are to be held for matters set down for hearings at those places at such times as the Chief Justice may fix for their expeditious dispatch.[7] The

[2]For example see *The Judges' Orders Enforcement Act* R.S.O. 1970, c. 227, s. 3.
[3]*The Judicature Act*, R.S.O. 1970, c. 228, s. 6, proclaimed in force April 17, 1972.
[4]S.O. 1970, c. 92, s. 1.
[5]R.S.O. 1970, c. 228, s. 48(1), proclaimed in force April 17, 1972.
[6]*Ibid.* s. 48(2).
[7]*Ibid.* s. 48(3).

designated cities are to serve judicial areas composed of groups of counties as provided in the Rules.[8] The matters which may be heard outside Toronto have been specified in the Rules to include *ex parte* proceedings; proceedings where the parties consent to the place of hearing; proceedings where the respondents reside or solicitors have offices in the judicial area; appeals where the trial or hearing was held in the judicial area and proceedings in which the matter in controversy arose in the judicial area.[9]

The Rules designate certain times for the sittings of the Court outside Toronto and empower the Chief Justice to postpone or cancel sittings or to fix the place and time at which pending proceedings shall be heard.[10] It is our view that the Court should not be required to hold sittings at any other location but that it should be made clear that it has power to do so where the convenient, economic and efficient disposition of cases warrants it.

D. Leave to Appeal

An appeal may be taken from any judgment or order of the Divisional Court to the Court of Appeal only with leave of the Court of Appeal on questions that are not questions of fact alone.[11] No change in these provisions is recommended. They should be made to apply as well to appeals from decisions within the expanded areas of jurisdiction which we have recommended in this Report.[12] The result is that if leave is refused the decision of the Divisional Court is final. It would appear that the Supreme Court of Canada is without jurisdiction to entertain an appeal from an order refusing an application for leave.[13] In these cases where the appellant has obtained a review of his case by a bench of three judges and the Court

[8]Rule 497(3) as remade by O.Reg. 115/72, s. 7 provides:
(3) For the purpose of the Divisional Court the counties and districts set out below in the second column opposite the name of each of the foregoing cities in the first column shall be deemed to form a judicial area under the name of that city:

Column 1	*Column 2*
London	Middlesex, Lambton, Elgin, Oxford, Perth, Norfolk, Kent, Essex, Huron
Ottawa	Ottawa-Carleton, Lanark, Leeds, Grenville, Stormont, Dundas, Glengarry, Frontenac, Prescott, Russell, Renfrew
Sudbury	Sudbury, Nipissing, Parry Sound, Manitoulin, Temiskaming, Cochrane
Sault Ste. Marie	Algoma
Thunder Bay	Thunder Bay, Kenora, Rainy River

It should be observed that these judicial areas do not conform with the administrative and planning regions under consideration by the government. See chapter 2, n. 4.
[9]Rule 497(4) as remade by O.Reg. 115/72, s. 7.
[10]Rule 497(2)(7).
[11]R.S.O. 1970, c. 258, s. 29 as re-enacted by S.O. 1971, Vol. 2, c. 57, s. 3, proclaimed in force April 17, 1972.
[12]With respect to our recommendation for the taking of certain criminal appeals to the Divisional Court see chapter 7 where we specify that the rights of appeal that convicted persons now have to appeal to the Supreme Court of Canada should be safeguarded.
[13]*Canadian Utilities Ltd.* v. *D.M.N.R.*, (1964), 41 D.L.R. (2d) 429; *Paul* v. *The Queen* (1960), 127 C.C.C. 129.

of Appeal has considered that it is not an appropriate case for further review, it is proper that the matter should end there.

E. Additional Jurisdiction

In chapter 7 we discussed fully some of the problems confronting the Court of Appeal, and there it was recommended that a substantial part of the jurisdiction of the Court of Appeal to hear both civil and criminal appeals be transferred to the Divisional Court.

In addition to the jurisdiction that the Court now exercises it is recommended that it be given jurisdiction to hear:

(1) all appeals from judgments in uncontested divorce cases;

(2) all appeals from County Court judges exercising a jurisdiction specially conferred on the County Court under section 14(1) of *The County Courts Act*;

(3) all appeals from High Court judges where the judge gives a judgment order or decision within the jurisdiction specially conferred on the County Court under section 14(1) of *The County Courts Act*;

(4) all appeals whether by way of stated case or otherwise which now lie to the Court of Appeal under *The Summary Convictions Act* (except appeals on important constitutional questions);

(5) all summary conviction appeals whether on stated case or otherwise arising under the *Criminal Code* which now lie to the Court of Appeal; and

(6) all appeals from conviction, acquittal and sentence by Provincial judges for indictable offences whether tried in the exercise of the absolute jurisdiction of a Provincial judge or on the election of the accused.

It is to be observed that all these recommendations cannot be implemented by the Legislature but insofar as they can be implemented, prompt action should be taken, and insofar as it is necessary to have legislation by Parliament, representations should be made to the proper authorities to accomplish this end.

In chapters 4 and 5 we make recommendations with respect to appeals from judges of the High Court and County and District Courts exercising jurisdiction as *persona designata*. The effect of these recommendations will be to eliminate the requirement for leave to appeal to the Divisional Court under *The Judges' Orders Enforcement Act*[14] and to divert to the Divisional Court all appeals from judgments, orders or decisions of the High Court

[14]R.S.O. 1970, c. 227, s. 3.

and the County and District Courts where the jurisdiction exercised was conferred under statutes (other than *The Judicature Act* and *The County Courts Act*) which make no specific provision for an appeal.

In chapter 13 we summarize our alternative recommendations for the constitution of a new Family Court.[15] Under the first alternative the judges of that Court whose appointments were approved by the Province would be appointed by the Federal Government and appeals from their decisions would lie to the Divisional Court. Implementation of this recommendation would increase the jurisdiction of the Divisional Court beyond our recommendations outlined above to include,

(1) appeals in the first instance under *The Child Welfare Act*[16] in wardship and affiliation matters;

(2) possibly some appeals under *The Reciprocal Enforcement of Maintenance Orders Act*;[17]

(3) appeals from orders under section 8 of *The Training Schools Act*;[18]

(4) appeals from judgments in contested cases under the *Divorce Act*;[19]

(5) appeals from judgments in alimony actions under *The Judicature Act*;[20]

(6) appeals under the *Juvenile Delinquents Act*;[21]

(7) appeals in the first instance under *The Deserted Wives' and Children's Maintenance Act*;[22]

(8) appeals in the first instance under *The Children's Maintenance Act*;[23]

(9) appeals in the first instance under *The Minor's Protection Act*;[24]

(10) appeals in the first instance under *The Parents' Maintenance Act*;[25]

(11) appeals in any other family law matters within the jurisdiction of the Family Court that are now within the general jurisdiction

[15]The Commission's full Report on Family Courts is to be published as part of the Family Law Project.
[16]R.S.O. 1970, c. 64.
[17]R.S.O. 1970, c. 403.
[18]R.S.O. 1970, c. 467.
[19]R.S.C. 1970, c. D-8.
[20]R.S.O. 1970, c. 228.
[21]R.S.C. 1970, c. J-3.
[22]R.S.O. 1970, c. 228.
[23]R.S.O. 1970, c. 67.
[24]R.S.O. 1970, c. 276.
[25]R.S.O. 1970, c. 336.

of the High Court and County and District Courts where the judgment, order or decision would not be within the jurisdiction specifically conferred on the County Courts under section 14(1) of *The County Courts Act*.[26]

Mr. McRuer wishes to express his dissent concerning transferring appeals to the Divisional Court where the appeal now lies under *The Summary Convictions Act* to a County or District Court judge. He deals with this in his reservations to chapter 13.

Under the second alternative two classes of judges of the Family Court would be appointed, one by the Federal Government and the other by the Province. The federally appointed judges would have jurisdiction in all family law matters as defined and the provincially appointed members in those matters now within the jurisdiction of judges of the Provincial Courts (Family Division). Appeals from the provincially appointed members would be to the federally appointed members and appeals from the latter would be to the Divisional Court. If this structure were adopted, the jurisdiction of the Divisional Court would be extended beyond that outlined in chapters 4, 5 and 7 to include the following appeals:

(1) possibly some appeals under *The Reciprocal Enforcement of Maintenance Orders Act*;

(2) appeals from judgments in contested cases under the *Divorce Act*;

(3) appeals from judgments in alimony actions under *The Judicature Act*;

(4) appeals from the first judgment on appeal under the *Juvenile Delinquents Act*; and

(5) appeals in any other family law matters within the jurisdiction of the Family Court that are now within the general jurisdiction of the High Court or County and District Courts where the judgment order or decision would not be within the jurisdiction specifically conferred on the County Courts under section 14(1) of *The County Courts Act*.

In chapter 7, we made recommendations concerning practices and procedures in the Court of Appeal and more particularly as to the reproduction of transcripts for appeal and the indemnity for costs in successful appeals which are also applicable to the Divisional Court.

F. Summary of Recommendations

In addition to the specific recommendations made in chapters 5, 7 and 13 and discussed in this chapter we recommend:

[26]R.S.O. 1970, c. 94.

1. During the course of implementation of our recommendations for increased jurisdiction, the workload of the Divisional Court should be kept under continuous review by the Attorney General's Advisory Committee on Court Administration with a view to considering whether a permanent court structured with judges appointed thereto, or a court with some judges specially appointed thereto and some judges drawn on a rotational basis from the High Court, should be set up.

2. The Divisional Court should be specifically empowered but not required to hold sittings in locations other than those set out in section 48(3) of *The Judicature Act*.

3. No change should be made with respect to the provisions for leave to appeal to the Court of Appeal from the judgments and orders of the Divisional Court.

CHAPTER 9

COURT VACATIONS

SUMMARY

A. INTRODUCTION

In the letter containing the original terms of reference of the project concerning the Administration of Ontario Courts, the then Minister of Justice and Attorney General, the Honourable Arthur A. Wishart, Q.C., made specific reference to the difficulties arising in the administration of justice from vacation periods and the present procedures in providing sittings of the Courts. The Minister of Justice stated that

> . . . it remains a matter of increasing concern, to both myself and the public, that the facilities of the administration of justice, including our Judges, may not be available during the vacation period and during other times of the year outside the Metropolitan areas when the necessary requirements of the public may be adequately met. Many questions are involved in resolving this difficulty which will involve not only the public but also the legal profession and the Judges of the

various courts. Any effective solution will have to take into consideration the requirements of all aspects of our society and this will take some considerable time, if the study is to be complete.

The concept of court vacations was one of the most controversial subjects of our inquiry. We canvassed extensively the opinions of judges, members of the legal profession, court officials, litigants and members of the general public. It should not be surprising that we found many diverging views. We have come to the conclusion, as a result of what we have heard, read and experienced, that court vacations should be abolished in Ontario. Standing alone, however, that statement of the general principle for reform is superficial and unhelpful. What is required is a detailed analysis of the implications of the adoption of the general principle with particular emphasis on the trial of cases at the various levels of the courts. In particular we wish immediately to signify our belief, bearing in mind the traditions and realities of life in Ontario, that the abolition of court vacations ought not to force litigants into the judicial process during July, August or the period between Christmas and New Year — times which may be particularly inconvenient to them. Similarly, although we recommend the abolition of court vacations, we do not believe that it follows that all parts of the judicial machinery must be engaged at a consistent level throughout the year. What we seek is merely to change the inflexibility of the present system of court vacations to provide a flexible framework within which judicial processes become available in July, August and at Christmas, to those who, within reason, want them.

Due no doubt to climatic factors, the concept of summer vacation is deeply rooted in our society. Schools close, the regular classes at universities close and some industrial plants shut down completely for a vacation period since it is frequently more economical to do so than to attempt to maintain production with the work force engaging in staggered holidays. It is equally true and apparent, however, that the pattern of life is changing and increasing numbers of Canadians take winter holidays, either in or outside the country.

Whether in spite of or because of this change in the pattern of life, there has been an increasing demand in recent years for the services of the courts during the summer months, and it has been our task to examine the legitimacy of this demand.

We begin with a review of the present law and practice.

B. Present Law and Practice

The concept of "court vacation" in the Superior Courts has been a part of Ontario law since before Confederation.[1] Today this term refers to two periods of time, the months of July and August (a period known as the "long vacation") and the two weeks beginning on December 24 (a period known as the "Christmas Vacation").

[1] *An Act respecting the Superior Courts of Civil and Criminal jurisdiction*, C.S.U.C. 1859, c. 10, s. 18.

Many people confuse the concept of court vacation, and the rules and practices governing it, with the principle of judges' vacations. These are different matters. A court vacation is a period of time during which the Supreme Court of Ontario, the County and District Courts, the Surrogate Courts and the Small Claims Courts, as institutions, and many of their general procedural processes will not be available to the public. The court administrative offices will, however, usually be open and, apart from their personal vacations, many of the judges will be engaged in hearing motions, dealing with applications or writing judgments which have been reserved to permit written reasons to be given. As a rule the judges take their personal vacations during the months of July and August, but this is not always the case. So far as the federally appointed judges are concerned, the *Judges' Act*[2] is silent concerning the time and duration of the personal vacations of the Supreme Court judges and those of the County and District Courts. The judges of the Provincial Courts under regulations governing the civil service are entitled to three weeks' vacation each year during their first fifteen years of service and thereafter four weeks' personal vacation.

Tables I-III set out the statutory provisions authorizing court vacations and the rules prescribing what may not be done in these periods, the time limitations which are not to run and the court applications which are permitted to be heard.

TABLE I

THE SUPREME COURT OF ONTARIO

STATUTORY PROVISIONS *The Judicature Act*, R.S.O. 1970, c. 228	RULES Rules passed under s. 114 of *The Judicature Act*
s. 114(10) (e) Subject to the approval of the Lieutenant Governor in Council, the Rules Committee may at any time amend or repeal any of the rules and may make further or additional rules for carrying this Act into effect, and in particular for, (a) regulating the sittings of the courts; . . . (b) fixing the vacations:	Rule 179 The vacations are, (a) the long vacation, consisting of the months of July and August; and (b) the Christmas vacation, consisting of the period from the 24th day of December to the 6th day of the following January, both days inclusive.
s. 16(1) Subject to the rules, the courts and the judges thereof, or any commissioner appointed under section 55, may sit and act, at any time and at any place, for the transaction of any part of the business of the courts, or of the judges or for the discharge of any duty that by any statute, or otherwise, is required to be discharged.	Rule 180 An examination other than a cross-examination upon an affidavit of merits shall not be held in the long vacation except by consent or by direction of the court.

[2] R.S.C. 1970, c. J-1.

TABLE I (continued)

s. 34

In any cause or matter pending before the Court of Appeal, any direction incidental to it not involving the decision of the appeal may be given by a judge of that court, and a judge of that court may, during vacation, make any interim order that he thinks fit to prevent prejudice to the claim of any of the parties pending an appeal, but every such order is subject to appeal to the Court of Appeal.

s. 48(3)

In accordance with the rules, sittings of the Divisional Court shall be held in Toronto continuously, except during vacations and holidays, and shall be held in London, Ottawa, Sudbury, Sault Ste. Marie and Thunder Bay at such times as the Chief Justice of the High Court may fix for the expeditious dispatch of the matters set down for hearing at those places.

s. 49(1)

Sittings of the High Court shall be held in accordance with the rules of court at Ottawa and London on at least one day each alternate week, except during vacation.

s. 50(1)(6)

There shall be as many sittings of the High Court in and for every county as are required for the trial of civil causes, matters and issues and for the trial of criminal matters and proceedings.

...

(6)

Subject to the rules, at least two sittings shall be held in each year in and for every county, and additional sittings shall be provided when necessary for the due dispatch of business.

Rule 181

Unless otherwise directed by the court, the time of the long vacation, or of the Christmas vacation, shall not be reckoned in the computation of the times appointed or allowed by these rules for,

(a) delivering or amending a pleading, except the defence in matrimonial causes and in actions for alimony;
(b) appeals to a judge in chambers;
(c) reports becoming absolute, except in undefended mortgage actions;
(d) moving to discharge an order adding a party, except an order adding a subsequent encumbrancer in a mortgage action;
(e) moving to add to, vary or set aside a judgment by a party served therewith;
(f) setting an action down for trial pursuant to sub-rule 4 of rule 246;
(g) delivering a notice of appeal to an appellate court.

Rule 182

One or more of the judges shall be selected for the hearing in Toronto during long and Christmas vacations of all such applications as require to be heard promptly.

Rule 183

During long vacation all applications within the jurisdiction of the Master that require to be heard immediately or promptly shall be heard by one of the following officers, viz., the Master, the assistant masters, and the registrars, who shall arrange among themselves before the commencement of each long vacation on what days and for what period each shall act, and in the absence of such arrangement the duty devolves upon them in rotation, beginning with the junior officer in order of appointment, and they shall sit at least one day in each week.

TABLE I (continued)

Rule 497

(1) Sittings of the Divisional Court shall be held at Toronto continuously except during vacations and on holidays.

(2) Unless otherwise directed in writing by the Chief Justice of the High Court, sittings of the Divisional Court shall also be held:

in London commencing on the second Monday of January and October
in Ottawa commencing on the second Monday of February and November
in Sudbury commencing on the second Monday of March
in Sault Ste. Marie commencing on the second Monday of April
in Thunder Bay commencing on the second Monday of May

Rule 498(e)

(iii) subject to clause (iv), appeals to the Court of Appeal in respect of which proof service of notice of perfection has been filed on or before the 25th day of any month shall be placed upon the list of cases to be heard in the second month thereafter in which appeals are to be heard,

(iv) appeals to the Court of Appeal in respect of which proof of service of notice of perfection has been filed in the period from May 26 to July 25 inclusive shall be placed on the list of cases to be heard in September.

Rules passed under section 424 of the Criminal Code of Canada

s. 21(1)

Subject to the direction of the Chief Justice of Ontario or the senior justice of appeal, there shall be two sittings of the Court of Appeal in each month to hear criminal appeals.

TABLE II
COUNTY COURTS

STATUTORY PROVISIONS	RULES
The County Courts Act, R.S.O. 1970, c. 94: s. 11 In each year the sittings of each county or district court shall be held at such time or times as is ordered by the chief judge, and the order of the chief judge shall be deemed to be a regulation to which the Regulations Act applies. *The County Judges Act*, R.S.O. 1970, c. 95: s. 15(4) To ensure the dispatch of business of the various courts, including chambers, that are presided over by the judges of the county and district courts, including the surrogate and division courts where it is customary for the county or district court judge to act as judge of the surrogate court and the division court, the chief judge shall have supervisory powers over arranging the sittings of such courts, including chambers. *The General Sessions of the Peace Act*, R.S.O. 1970, c. 191: s. 3 In each year the sittings of each court of general sessions of the peace shall be held at such time or times as is ordered by the chief judge, and the order of the chief judge shall be deemed to be a regulation to which the Regulations Act applies. *The County Court Judges' Criminal Courts Act*, R.S.O. 1970, c. 93: s. 1 The judge of every county or district court or a junior judge thereof, authorized to preside at the sittings of the court of general sessions of the peace is constituted a court of record for the trial, out of sessions . . .	

TABLE III
PROVINCIAL COURTS

STATUTORY PROVISIONS	RULES
The Surrogate Courts Act, R.S.O. 1970, c. 451 s. 4 The sittings of the Surrogate Court shall be held in the county court house or such other place as the judge may direct . . . *The Small Claims Courts Act*, R.S.O. 1970, c. 439 s. 8 The sittings of a small claims court in a county town may be held in the court house. *The Provincial Courts Act*, R.S.O. 1970, c. 396 s. 10(3) (4) (3) Each chief judge shall have general supervision and direction over arranging the sittings of his courts and assigning judges for hearings in his courts, as circumstances require. (4) In the arrangement of the courts and the assignment of judges thereto, regard shall be had to, (a) the desirability of rotating the judges; and (b) the greater volume of judicial work in certain of the counties and districts.	

1. *Pre-trial Procedure*

It is an observed fact that professional patterns are changing and an increasing number of legal offices now experience very little seasonal change in the tempo of their activity. This is understandable with respect to non-court activity, particularly in the large urban centres, but in recent years, judging from the evidence submitted to us by the representatives of the local law associations, there is an increasing amount of pre-trial court oriented activity carried on throughout the summer months. Much of this must be done by consent of the solicitors for the parties because otherwise, under the rules, time does not run and the parties cannot be forced on. In our view this is a salutary development since it enables continuous, orderly preparation for trial and relieves the tendency of over-loading prior to the beginning and after the end of present vacation periods.

More specifically, the following details should be noted.

(a) *Court of Appeal*

We were advised that in 1971 some 44 motions respecting appeals were heard by a single judge sitting during the months of July and August.

In 1972, during the same period, 55 motions were heard, also by a single judge.

(b) *High Court*

One or more judges are required to be available in Toronto during the long and Christmas vacations to hear applications required "to be heard promptly".[3] We were advised by the judges of the High Court that in the summers of 1971 and 1972, two judges heard motions and applications concurrently in Weekly Court and chambers in Toronto during three days in each week. Some judges require counsel to establish urgency on the hearing of motions or applications, but others do not. From information available for the months of July and August in 1970, 1971 and 1972 it would appear that the number of motions and applications heard in Toronto came close to the normal monthly average for the rest of those years.

Rule 183 of the *Rules of Practice*[4] appears to confer the jurisdiction of the Master on the "registrars" of the Supreme Court during long vacation, but nowhere in the *Rules of Practice* is "registrar" defined. It is not clear whether the jurisdiction is conferred on the local registrars or on the Registrar of the Supreme Court only. We were advised by the Registrar that he has never known of an occasion when the jurisdiction has been exercised.

The Masters of the Supreme Court at Toronto now hear chambers motions on Tuesday, Wednesday and Thursday mornings of each week during long vacation.

(c) *County and District Courts*

Applications in chambers are heard during the summer months as required.

(d) *Surrogate Courts*

The present practice in most jurisdictions is to hold chambers and other proceedings during July and August.

(e) *Small Claims Courts*

Chambers applications and other proceedings are generally conducted during July and August.

2. *Trials and Appeals*

From what has gone before it will be apparent that the most contentious matter with which we were confronted was whether or not the present rules and practices with respect to trials and appeals should be retained. The present position is set out below.

[3] *Rules of Practice*, R. 182 (see Table I *supra*).
[4] See Table I *supra*.

(a) *Court of Appeal*

(i) *Civil Side*

The Court of Appeal does not normally sit to hear civil appeals during vacation periods. One civil appeal was heard in the month of July both in 1971 and 1972.

(ii) *Criminal Side*

Provision is usually made, however, for the hearing of certain criminal appeals.[5] For example, a special sitting of the Court was held on August 3, 1972 for the hearing of the following appeals:

(1) Appeals against sentence where the appellant was in custody and the sentence imposed was less than one year.

(2) Appeals against conviction where the appellant was in custody and either:

(a) wished to appear in person; or

(b) appealed by a solicitor to whom special leave was granted prior to July 26, 1972 to bring the appeal on for hearing during vacation.

We were advised that six criminal appeals were argued in the Court of Appeal in the summer of 1971. Four of these were "in writing" appeals by prisoners. In 1972, 16 criminal appeals were heard. Ten of these were "in writing" appeals by prisoners, and six were presented by counsel.

(b) *High Court*

By law the High Court of Justice for Ontario is not required to hold civil or criminal trials during vacation and it is not customary for it to do so.[6]

We think it worthwhile to point out again, in view of the proposals for reform which we make in this chapter, that the present practice relating to trials in the High Court is to conduct two Assizes and non-jury sittings a year at most trial centres, usually for a stipulated period. Criminal trials are scheduled first, followed by civil jury trials and civil non-jury trials in that order.

The above does not, obviously, apply in large centres such as Toronto, Ottawa-Carleton, Hamilton, London and Windsor. Outside these areas, however, it appears that the arrangements outlined above have, in the past, been adequate (with some minor exceptions where extra sittings have had to be scheduled to cope with backlog situations).

(c) *Divisional Court*

It is apparent from section 48(3) of *The Judicature Act* and Rule 497[7] that the Divisional Court is not required to sit during vacation. The

[5] See *Criminal Appeal Rules*, R. 21(1).
[6] See Table I *supra*. An exception to the general rule occurred in July, 1971 when, on the consent of counsel, 122 divorce actions were tried by a High Court judge in the Judicial District of York because an unusual backlog of cases had accumulated.
[7] See Table I *supra*.

Chief Justice of the High Court is not, however, precluded from scheduling sittings during vacation.

(d) *County and District Courts, General Sessions of the Peace, County Court Judges' Criminal Courts*

In the General Sessions of the Peace and the County Court Judges' Criminal Courts, there is no statutory rule providing for vacation periods. As is indicated by Table II, sittings in these courts are arranged by the Chief Judge of the County and District Courts by regulation. Until recently the dates of the beginning of sittings in the General Sessions of the Peace were specifically prescribed by statute. The dates fixed did not require sittings at periods during July and August or the two week period at Christmas. With the abolition of statutory sittings, however, and the vesting of the power to designate the dates for sittings in the Chief Judge of the County and District Courts[8] flexibility was introduced into the scheduling of trials and other proceedings during the summer and at Christmas.

The statutory sittings in the County Courts were also abolished.[9] The legislative provisions with respect to the sittings of those courts are not clear. Rule 770 provides that in the absence of any other provision the *Rules of Practice* apply to the County Courts with respect to civil procedure. This rule was passed under the authority of section 40 of *The County Courts Act*.[10] Section 11 of the Act empowers the Chief Judge of the County and District Courts to order sittings of the County Court, but makes no reference to vacation. It is an arguable question whether this provision overrides the *Rules of Practice* or is to be read with them.

In the summer of 1972 a significant number of cases in the County Courts, General Sessions of the Peace and County Court Judges' Criminal Court were disposed of both at Toronto and at other trial centres as may be seen from the following table:

TABLE IV

Cases Disposed of in July and August of 1972 in the County Courts, the General Sessions of the Peace and the County Court Judges' Criminal Courts

	Judicial District of York	Outside the Judicial District of York
County Court	data not reported	47 non-jury civil actions
		6 civil jury actions
		49 summary conviction appeals
		*14 mechanics lien actions
		*240 divorce actions
General Sessions of the Peace	2	22
County Court Judges' Criminal Court	50	47

* tried by County Court judges as local judges of the High Court.

[8] *The County Courts Amendment Act 1970*, S.O. 1970, c. 98, s. 2; *General Sessions Amendment Act 1970*, S.O. 1970, c. 99, s. 1.
[9] *The County Courts Amendment Act 1970, ibid.*
[10] R.S.O. 1970, c. 94.

A study done in 1971 shows that in the Judicial District of York, 63% of cases listed for trial in the County Court Judges' Criminal Court and General Sessions of the Peace, for July and August were disposed of. The following explanations were given for the failure of the remainder of the cases to proceed:

Witness not available	5 cases
Counsel requested adjournment	10 cases
Transcript not ready	1 case
Accused failed to appear or was unfit	6 cases
Judge not available	1 case
Crown not available	3 cases
Reasons not ascertainable	2 cases

We were advised by several County Court judges in the Judicial District of York that in the summer of 1971 there were no problems encountered in assembling jurors for trials in the General Sessions of the Peace. Any problems respecting conflicting commitments of counsel were obviated through the device of the Assignment Court at which the original summer date was set only with the approval of the counsel involved.

(e) *Surrogate Courts*

There is no legislative prescription concerning vacation for the Surrogate Courts, which are provincial courts presided over by County Court judges. The Chief Judge of the County and District Courts does, however, have general supervisory power over the Surrogate Court to arrange sittings including chambers.[11] In some, but not all, jurisdictions trials are held during the months of July and August.

(f) *Small Claims Courts*

In the Small Claims Courts, which are also provincial courts presided over by County Court judges (with three exceptions in the Judicial District of York, where three Small Claims Court judges have been appointed), or lawyers acting as part-time judges, it is not usual to schedule trials during vacation notwithstanding the absence of any legislative prescription prohibiting them. The Chief Judge of the County and District Courts has the same power to arrange sittings of Small Claims Courts as he has in the Surrogate Courts.[12]

(g) *Provincial Courts*

There are no prescribed rules concerning vacation which affect the Provincial Courts. They operate substantially on the same basis in July and August and in the Christmas vacation as at any other time of the year.

C. Proposals for Reform

As we have already noted, the concept of court vacation was one of the most controversial subjects of our inquiry, but after careful consideration we have come to the conclusion that the statutory provisions and

[11] *The Surrogate Courts Act*, R.S.O. 1970, c. 451, ss. 4, 11.
[12] *The Small Claims Courts Act*, R.S.O. 1970, c. 439, ss. 1(1)(h), 1(2), 12.

Rules of Practice concerning court vacation ought to be repealed and court vacation abolished to be replaced by a system which takes account of the fact that while many litigants and their counsel will not wish to go to trial during the present vacation periods, others may and do want the services of the courts at these times. It is a matter of particular urgency that the courts be available to conduct the criminal trials of accused persons in custody.

The calendar of prisoners in the Don Jail in Toronto as of August 2, 1971 showed 16 persons, all but one of whom had been committed for trial in June or July. One of the prisoners, who was charged with robbery, had been committed for trial in April. Eight were committed in June, one of whom was charged with murder, and the remaining seven, charged with miscellaneous indictable offences, were committed for trial in July.[13]

It is also notable that on June 30, 1972 there were 422 summary conviction appeals on hand in the County Court of the Judicial District of York.

Although we find it imperative that the strictures of the court vacation be removed in criminal matters, we also find that the complexity of our society in 1973 can no longer support a system whereby all trials of civil actions are precluded during a period which approaches one quarter of every year.[14]

Equally serious is the delay and postponement of trials due to "shut down" and "start up" phases. It is well known that the trial of certain cases on the list will not be commenced in the dying weeks of term for the reason that there can be no assurance that they will be concluded by the commencement of the vacation period on July 1. Even if other cases are available to be tried and the court resources thus used productively, this does not do justice in the cases that are required to be postponed. Similarly it takes the existing system some time at the close of court vacation to begin functioning normally again. This results in some loss of productivity. Perhaps these matters might be endured and were acceptable in other times when lists could be cleared up substantially at the end of the term and there was no appreciable accumulation of cases during the court vacation period. Such happy circumstances do not exist today.

On the civil side in the Judicial District of York, there were 1,794 actions on the Supreme Court trial lists as of June 30, 1972, and 3,296 as of September 1972, broken down as follows:

[13]An examination of the list of prisoners in the Toronto Jail as of September 2, 1972 shows (with one exception) that none of the prisoners had been committed for trial earlier than July 24, 1972. The exception was a prisoner charged with rape who had been committed for trial on January 26, 1972. The list of prisoners shows a notation that he had been undergoing observation or treatment at the Clarke Institute, but does not show when he had been returned to gaol.

[14]The High Court of Justice is closed for two weeks at Christmas, nine full weeks during July and August, and in recent years has not commenced a full week of sittings until the second week of September following the summer. This means that for 12 of the 52 weeks there are no High Court sittings, and this does not take into account those weeks when sittings are completed before the Friday of that week. The situation is not quite as severe in some of the County and District Courts — see Table IV *supra*.

	June 30, 1972	July 30	Aug. 30	Sept. 30
Motor vehicle jury	4	20	213	195
Motor vehicle non-jury	164	179	391	392
Other jury	6	8	17	15
Other non-jury	856	800	1116	1125
Divorce Supreme Court	572	713	1284	1190
Matrimonial Causes Court	192	309	598	379
TOTAL	1794	2029	3619	3296

In the County Court of the Judicial District of York, there were 281 cases on the trial lists as of June 30, 1972, broken down as follows:

	June 30, 1972
Motor vehicle jury	38
Motor vehicle non-jury	102
Other jury	0
Other non-jury	141
TOTAL	281

In the High Court in the counties and districts outside the Judicial District of York, there were 1,350 actions on the trial lists as of June 30, 1972, broken down as follows:

Motor vehicle jury	654
Motor vehicle non-jury	159
Other jury	208
Other non-jury	289
Divorce	40
TOTAL	1350

In the County Courts in the counties and districts outside the Judicial District of York, there were 1,009 cases on the trial lists as of June 30, 1972, broken down as follows:

Motor vehicle jury	69
Motor vehicle non-jury	506
Other jury	22
Other non-jury	412
TOTAL	1009

In seeking means of serving the public better by bringing cases to trial more expeditiously once they are ready for trial, we have discussed with the judges, members of the local law associations, court officials and others throughout the Province, the circumstances which might prove to be obstacles in the free scheduling of trials during the present period of court vacations. The difficulties envisaged were stated to us in the following terms:

1. I can't get my witnesses together in the summer.

2. It will be impossible for my clients to schedule their own personal vacations in advance.

3. Most people like to go away on vacation during the summer and at Christmas.

4. I run a small office and need a stretch of time each year during which I can clean up my files and get away for a personal vacation without threat of last minute court appearances or proceedings hanging over me.

5. It is impossible to empanel a jury during the summer months when people are away on vacation.

6. Most of the courtrooms don't have air-conditioning and a trial during the summer is intolerable.

7. We get along fine under the present rules so why change them.

8. The only demand for summer trials seems to come from Toronto so why inflict changes on the rest of the Province.

9. Most litigation lawyers exchange pleadings and conduct pre-trial court proceedings during the summer on a consent basis, so there is really no problem of delay in terms of moving the cases along.

10. The judges may be ill-disposed toward counsel who push a trial on during the summer months.

11. The practice of law in the Supreme and County Courts is exacting enough now, so why increase the burden and drive lawyers into other areas of practice.

Many of the above positions have validity, and it must be stressed that in recommending the abolition of court vacations we do not suggest for a moment that judges, lawyers, court officials, jurors and witnesses are not entitled to a regular vacation at a time reasonably convenient to themselves and their families. Nor do we suggest, and we emphasize this, that, if the circuit system in the High Court is serving the public adequately by a system of two sittings in each trial centre each year, it would be justifiable to recommend the adoption of a system which would provide each litigant with an absolute right to a trial at any trial centre at any time during the year. Such a system would be theoretically possible, but in terms of financial cost and realistic use of judicial resources it would be totally unacceptable. Nor do we suggest that the scheduling of trials should be as intensive during the summer months or at Christmas. We simply recommend that fixed court vacations should remain no longer as an inflexible rule entrenched in the law, preventing a substantial segment of our courts from serving the public during a quarter of the year.

If a person charged with a criminal offence has been accorded all the preliminary procedural and evidentiary protections, and the Crown has had sufficient time to prepare the case against the accused, it is important both in his interest and that of the public that the court should be available to conduct the trial.

Similarly, if in a civil case all the preliminary proceedings have been completed, a notice of trial has been served, a certificate of readiness has been filed, and the parties want the case tried, provision should be made in proper cases for the matter to be brought to trial without the delay inherent in a concept of court vacation.[15]

Because, however, there are difficulties in implementing the principle of abolition of court vacations, we now turn to consider in detail what administrative arrangements should be made for court sittings in the months of July and August and at Christmas.

We stress primarily the need for administrative flexibility in the scheduling of trials as determined by the Provincial Director of Court Administration in consultation with the Chief Justice or the Chief Judge as the case may be. This flexibility may well mean a certain slowing down of trial activity during the summer or at Christmas in view of the very real difficulties of empanelling juries or the lack of air-conditioning or to accommodate parties, witnesses, jurors, lawyers and judges who will still regard these times as primary holiday periods. Indeed, what happens in other jurisdictions such as California where the concept of court vacations is not recognized is that proportionately fewer civil cases are actually tried in the summer months because the court administrators "set civil light".

We do not recommend that the administrators together with the Chief Justice or Chief Judge be given an unfettered discretion with regard to the scheduling of trials during these periods. Instead, we recommend the following principles or guidelines for the scheduling of trials during the summer months and for the period at Christmas:

1. The scheduling of criminal trials should take precedence over the scheduling of civil trials, particularly if the accused is in custody.

2. Where it is not convenient, economic or efficient to hold Supreme Court or County Court trials in a given trial centre, then it should be possible to give civil litigants the right to a prompt trial in a neighbouring trial centre where trials are being conducted. Similarly, an accused person to be tried before a High Court or a County Court judge, while entitled at common law to a trial in the county where the crime was alleged to have been committed and to have the jury selected therefrom,[16] should

[15] In England the Beeching Commission recommended that the closure of the High Court for summer vacation (August and September) be shortened to one month and that the closure be less complete than at present. Cmnd., paras. 422-425.

[16] *R.* v. *Lynn* (1910), 19 C.C.C. 129. In view of the jurisprudence which has developed concerning the interpretation of s. 527 of the *Criminal Code*, some amendments to the Code would appear to be necessary.

have the right to apply to be tried during the summer months in a neighbouring trial centre when it will result in the more prompt disposition of his case.

3. In the smaller trial centres, trials should not be scheduled in the Supreme Court during the same period of time as trials are scheduled in the County and District Courts. However, it may be convenient to schedule summer Assizes back-to-back with the General Sessions of the Peace so that the jury empanelling process need only take place once.

4. Except under emergency circumstances no new trials in the Supreme Court or the County and District Courts should be scheduled to commence during the week December 25 to January 1. This should not preclude, however, the completion during that week of trials commenced prior to Christmas.

5. Criminal cases in the Supreme Court and County and District Courts should be assigned trial dates in the summer as the circumstances require in the same manner as at other times of the year. This of course would not preclude counsel from making representations respecting the avoidance of a particular date in July or August because of his own vacation plans or those of others involved in the case.

6. In civil cases in the Supreme Court and the County and District Courts trials should be held in the months of July and August where counsel for the parties consent or where counsel for one of the parties applies to the Court for an order that there should be a summer trial.

In the event that counsel for all the parties agree, they should communicate this fact to the Court by the middle of May, together with an indication of the approximate suitable dates. Once this communication was received from counsel the Regional Director, in consultation with the Chief Justice or Chief Judge, would be free to schedule the trial on the dates indicated, or attempt to arrange alternative dates.

We envisage, however, that there may be cases where some counsel refuse to agree to a summer trial for reasons which are unacceptable. For example, some counsel may not agree to a summer trial purely for the purpose of introducing unnecessary delay into the proceedings. In such a case, we think it proper to allow counsel to apply to the Court for a hearing in the nature of a pre-trial conference in order to establish that his case is ready for trial and that the objections of counsel who do not wish to go on are not valid. Such applications should be made and heard during the period encompassing the last two weeks of May and the early part of June.

By June 15 in each year a list of cases should be prepared for hearing during the months of July and August. Cases should not be entered on the list except by consent of all parties or on the order of a judge.

A fixed number of judges should be assigned to be available to sit as and where they may be required to dispose of the cases entered for trial during the months of July and August.

7. The jurisdiction of the Divisional Court is such that it is essential that it should sit during the months of July and August to exercise its original jurisdiction. It would not be an undue burden to convene a court at least twice a month to hear applications that may be made ready for hearing. If the Court is given the appellate jurisdiction that we recommend, sittings should be held for the prompt disposition of such appeals as are made ready for hearing.

8. Small Claims Courts and Surrogate Courts should be available twelve months a year except in the smaller trial centres where it is more convenient, economic and efficient to transfer trials to neighbouring trial centres during July and August.

9. Provincial Courts (Criminal Division and Family Division) should continue to operate on a twelve month a year basis.

Normally it will not be necessary for the Court of Appeal to sit during the months of July and August to hear civil appeals. Appellate duties put an extraordinarily heavy burden on judges, and we see no case made out for changing the present practice of hearing appeals in the summer months. Sittings are now held for hearing criminal appeals and the Court may be convened if the circumstances are such that it is urgent to hear a civil appeal. However, in all cases time should run during the months of July and August in all matters relating to appeals.

We think that the collegiality of the appeal judges, the control which they have over their docket and their proven ability in past years to avoid backlogs, all indicate that the hearing of civil appeals in the summer should remain purely a matter for the discretion of the Chief Justice of Ontario.

It is implicit in our general recommendation that Rules 180-184 of the *Rules of Practice* relating to pre-trial procedure be repealed. Time should run during the summer and at Christmas for all pre-trial proceedings, and there should be no requirement of proving urgency in bringing applications before a High Court judge in Weekly Court or chambers, or before the Master in chambers. Although, as we have pointed out, the proposal to abolish court vacations did not meet with general approval, we found little disagreement among lawyers throughout the Province that Rules 180-184 ought to be repealed. Indeed, most lawyers indicated that pre-trial proceedings were conducted in any event during long vacation on a consent basis and that they had noticed a progressive relaxation of the rule respect-

ing urgency in Weekly Court or chambers. In other words, the repeal of Rules 180-184 would amount to little more than a regularization of existing practice as far as most lawyers are concerned. The only additional obligation that would be imposed on the judiciary would be the availability of perhaps one additional High Court judge to hear chambers or Weekly Court applications during the summer, and the availability of perhaps one additional Master during that time.

D. Summary of Recommendations and Conclusions

1. The statutory provisions and the Rules of Practice concerning vacations as they relate to the operation of the Court of Appeal, the Divisional Court, the High Court, and the County and District Courts should be repealed.

2. Trials should not take place during July and August on the same basis as at other times of the year, but fixed court vacations should no longer remain as an inflexible rule entrenched in the law.

3. We suggest the adoption of the following procedures for the High Court and the County Courts:

   (a) The scheduling of criminal trials should take precedence over the scheduling of civil trials, particularly if the accused is in custody.

   (b) Where it is not convenient, economic or efficient to hold Supreme Court or County Court trials in a given trial centre, then it should be possible to give civil litigants the right to a prompt trial in a neighbouring trial centre where trials are being conducted. Similarly, an accused person to be tried before a High Court or a County Court judge, while entitled at common law to a trial in the county where the crime was alleged to have been committed and to have the jury selected therefrom, should have the right to apply to be tried during the summer months in a neighbouring trial centre when it will result in the more prompt disposition of his case.

   (c) In the smaller trial centres, trials should not be scheduled in the Supreme Court during the same period of time as trials are scheduled in the County and District Courts. However, it may be convenient to schedule summer Assizes back-to-back with the General Sessions of the Peace so that the jury empanelling process need only take place once.

   (d) Except under emergency circumstances no new trials in the Supreme Court or the County and District Courts should be scheduled to commence during the week December 25 to January 1. This should not preclude, however, the completion during that week of trials commenced prior to Christmas.

   (e) Criminal cases in the Supreme Court and County and District Courts should be assigned trial dates in the summer as the circumstances require in the same manner as at other times of the year. This of course would not preclude counsel from making representations respecting the avoidance of a particular date in July or August because of his own vacation plans or those of others involved in the case.

   (f) In civil cases in the Supreme Court and the County and District Courts trials should be held in the months of July and August where counsel for the parties consent or where counsel for one of the parties applies to the Court for an order that there should be a summer trial.

   In the event that counsel for all the parties agree, they should communicate this fact to the Court by the middle of May, together with an indication of the approximate suitable dates. Once this communication was received from counsel the Regional Director, in consultation with the Chief Justice or Chief Judge, would be free to schedule the trial on the dates indicated, or attempt to arrange alternative dates.

   We envisage, however, that there may be cases where some counsel refuse to agree to a summer trial for reasons which are unacceptable. For example, some counsel may not agree to a summer trial purely for the purpose of introducing unnecessary delay into the proceedings. In such a case we think it proper to allow counsel to apply to the Court for a hearing in the nature of a pre-trial conference in order to establish that his case is ready for trial and that the objections of counsel who do not wish to go on are not valid. Such applications should be made and heard during the period encompassing the last two weeks of May and the early part of June.

   By June 15 in each year a list of cases should be prepared for hearing during the months of July and August. Cases should not be entered on the list except by consent of all parties or on the order of a judge.

   A fixed number of judges should be assigned to be available to sit as and where they may be required to dispose of the cases entered for trial during the months of July and August.

4. The Divisional Court should sit in the months of July and August to hear such cases within its original and appellate jurisdiction as are made ready for hearing.

5. Small Claims Courts and Surrogate Courts should be available twelve months a year except in the smaller trial centres where it is more convenient, economic and efficient to transfer trials to neighbouring trial centres during July and August.

6. Provincial Courts (Criminal Division and Family Division) should continue to operate on a twelve month a year basis.

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7. No changes should be made with respect to the convening of the Court of Appeal in July or August. However, in all cases time should run during the months of July and August in all matters relating to appeals.

8. We do not recommend the curtailment of the usual vacation periods of judges and court officials. Only the time of the year at which vacations may be taken would be affected.

CHAPTER 10

CASE SCHEDULING AND TRIAL LISTS IN THE HIGH COURT AND COUNTY AND DISTRICT COURTS

SUMMARY

A. INTRODUCTION

Our terms of reference call for us to consider reforms for the more "convenient, economic and efficient" disposal of business in the Ontario Courts. Central to this task is a concern for delay in litigation and convenience in the operation of the courts.

"Delay" in the courts is difficult to define in general terms. What may be an excessive length of time between commencement and termination of one case may be a necessary interval in another. It must be kept in mind that the just resolution of a case takes time; a dispute cannot be resolved instantaneously. On the other hand, justice delayed may, in a variety of senses, be justice denied. Today it is generally felt that most

litigation takes too long and that there is an excessive delay between the commencement of proceedings and their termination. Ideally the time taken from commencement to disposition should be kept to the minimum that is consistent with the just resolution of the litigation. When we speak of "delay" in this chapter we are not to be taken as criticizing the courts or any members of the legal profession. We use the term to connote an excessive period of time whether or not it is unavoidable in the context of the existing system.

In one sense convenience in the operation of the courts is closely related to delay, for if the ultimate resolution of a dispute takes an inordinate length of time persons are usually inconvenienced. But convenience may be unrelated to delay. For instance, a system which offered to litigants a trial within two weeks of the commencement of proceedings but required litigants, lawyers and witnesses to make themselves continually available all day for the period of a week with no advance notice of when they would be called would not be a convenient one.

It is to these matters, delay and inconvenience in the operations of the High Court and the County and District Courts, that we address ourselves in this chapter.

B. Delay in the Courts

1. *Delay Analysed*

Court proceedings may be conveniently broken down into two phases. The first encompasses the period from the commencement of proceedings to the point at which the case is ready for trial. The second covers the period from the point at which the case is ready for trial to the time at which it is reached.

In civil cases whether there is an excessive delay in the first phase is largely dependent on the activities of the litigants and their legal advisors, and the court's operations have little impact.[1] On the other hand, from the point at which the case is set down for trial, the court's ability or inability to afford an early trial date is the major element in delay. This is not to say, however, that conflicting engagements of counsel, illness, etc., are not factors in the second phase.

Analysing delay in the criminal process is more complicated. While most civil cases involve no court appearances prior to trial, criminal cases always do. For example, in those criminal cases which go through to trial there will be a first appearance to set a date for trial, there may be a bail application, and for those cases not tried in the Provincial Courts there will be a preliminary inquiry and, for jury cases, a grand jury proceeding. Consequently, in criminal cases delay during the first phase is connected with not only the speed with which the parties prepare the case, but also

[1]Of course in many civil cases there will be pre-trial proceedings involving court appearances. But it is not essential that there be any pre-trial court appearances in civil cases and in many cases none takes place. We shall be considering pre-trial proceedings in civil cases in a subsequent Part of our Report.

with the ability of the court system to facilitate promptly the necessary pre-trial hearings. As with civil cases, once the Crown attorney and defence are ready for trial, delay is again primarily dependent on the court's ability to offer an early trial date.

Since the factors contributing to delay differ as between these first and second phases of litigation, it is often helpful to consider them separately in developing methods to combat delay.

2. *Delay and Administrative Goals*

We have come to the conclusion that the only effective way to combat and minimize delay in the courts is to establish time goals and then to make such adjustments to the system as are necessary to ensure that the goals are met. We believe that no other approach will work. Pious statements to the effect that delay in the courts is excessive and must be reduced, even when accompanied by positive action, have proved to be insufficient. Such statements and action alone afford no solution because they provide no standard by which to measure achievement. Only by first establishing goals and then making the necessary adjustments to the system will delay be effectively combated.

We have suggested in chapter 1 guidelines for the processing of both criminal and civil cases. The court should seek to dispose of all criminal cases within 90 days of the arrest or summonsing of an accused person, and civil cases should be disposed of within one year from the date of commencement of proceedings. We have previously outlined the nature of these administrative goals and how they should operate. We here explore the implications of these goals for the administration of the courts.

The implications of the 90 day goal for the criminal process are essentially three.

First, the court system must be structured and operated in such a way as to ensure that all pre-trial proceedings (*e.g.*, first appearance, bail hearings, preliminary inquiry, etc.) can be completed in time to permit the 90 day goal to be achieved.

Secondly, steps must be taken to assure that party delay (particularly at the pre-trial stage) is minimized. Techniques available for coping with this problem include restrictive policies on the part of the court towards remands or adjournments, procedures permitting one party who is ready to proceed to trial to require the other party (after 90 days) to show cause why the case should not be brought on peremptorily, or giving the court administrator or registrar power to schedule the case for trial notwithstanding that either party appears to be reluctant to proceed.

Thirdly, the courts must operate in such a way as to be able to offer those cases that are ready for trial a trial date within the 90 day time limit.

In implementing the goal of one year from commencement of proceedings to final disposition of civil cases, the distinction between the first

and second phase as described above becomes an important consideration. The length of time taken to complete phase one is, under our existing practice, largely dependent on the speed with which the litigants' legal advisors move the case along. As we indicated in chapter 1 a majority of the Commission is not in favour of a change in the existing principle that the conduct of civil litigation should be, up to the point at which the case is set down for trial, the responsibility of the litigants' legal advisors without intervention or control by the court. Two members of the Commission, Mr. Leal and Mr. Bell, dissent from this position and would recommend that the court exercise supervision of the conduct of litigation from the commencement of proceedings.

Techniques undoubtedly exist by which the court could exercise supervision over the conduct of litigation from its inception. Procedures could be established setting up time limits for the completion of various steps in litigation, with power in the court itself to enforce these time limits. Provision could be made for mandatory pre-trial hearings at which a court officer could inquire into the conduct of litigation and issue directions as to how it should proceed.[2] Alternatively, provision could be made for a court officer to notify lawyers involved in cases before the court when time limits have not been observed, and to call upon them to explain and justify such delays. At the present time the majority of the Commission does not recommend that we resort to such court control over the conduct of private litigation prior to a case being set down for trial. Such a requirement would inevitably lead to additional expenses in the administration of justice and could be justified only if it were clearly demonstrated that a significant number of the legal profession were not conducting litigation in the best interests of their clients.

On the other hand, we are of the unanimous view that once the parties have certified that a case is ready and have set it down for trial, the conduct of the litigation should come under the direct control of the court. We are appreciative of the fact that this will place a heavy onus on the courts to provide for speedy trials if the one year goal is to be meaningful. To enable the courts to meet this heavy onus we recommend that in civil cases a subsidiary goal be established in respect of the time a case should spend on a ready list awaiting trial. At present in Ontario the waiting time for trial varies, depending on the court and the trial centre. In certain instances the waiting period is as much as eighteen months and we believe that this is clearly undesirable.

What is an acceptable goal in terms of the time a case should spend on a trial list awaiting trial? It would be ideal, of course, if a trial date could be offered to all cases within a few weeks of the filing of a certificate of readiness and setting down for trial.[2a] But this could not be achieved without having a very large number of judges and courtrooms that would not always be used efficiently. We believe that a realistic goal, given the

[2]This is essentially what takes place in England through the procedure of the Summons for Directions.

[2a]It should be remembered that some cases are tried within a short period. The provisions of Rule 249 of the *Rules of Practice* make it possible for certain cases to be tried within ten days of serving and filing notice of trial.

fact that the High Court goes on circuit, is that all cases should be offered a trial date within six months of being placed on a trial list. We recommend that six months be established as the maximum acceptable waiting period for civil cases on trial lists anywhere in Ontario in both the High Court and in the County and District Courts. Efforts should be made to reduce this goal to a maximum waiting period of three months. Indeed, at those trial centres where the High Court and County and District Courts sit continuously a three month waiting period could be the immediate goal.[3] To achieve these goals concentrated effort, and change, will be necessary. In particular close attention will need to be paid to a number of factors: assuring that sufficient judges are available; care in the manner in which available judges are deployed; and care in the methods by which cases are scheduled. It is to these matters that we now turn.

3. *Delay in the High Court*

The best measure of court delay in civil cases — the average time lapse between setting a case down and its disposition — cannot be determined at present from the available statistics. We have, however, set out in Appendix I a number of tables which give a picture of the present operations of the High Court throughout the Province. Table E in Appendix I, indicating the age of the civil trial lists at the various High Court trial centres, is the best available indicator of the present extent of delay in the High Court. Two features of this table give cause for concern: the extent of delay at certain trial centres, and the disparity in delay as between various trial centres.

The goal of a maximum of six months waiting time on a civil trial list can be attained at non-metropolitan trial centres of the High Court if our recommendation made in chapter 4, that sittings at such centres should not close until all cases on the trial list have been disposed of, is implemented. Since the High Court will visit all such centres a minimum of once every six months, if the sittings do not close until all cases are tried, no case should have to wait more than six months on a trial list before being disposed of.

High Court delay is at present most acute at certain metropolitan centres, in particular Toronto and Ottawa, where the waiting time for trial in non-jury cases exclusive of divorce is in the order of eighteen months.[3a]

[3]As indicated later in this chapter, the Queen's Bench Division of the High Court in London is currently able to offer civil litigants a non-fixed trial date within nine to twelve weeks of their case reaching the ready list. We believe that three months is a preferable goal, but difficulties would be experienced in meeting this goal on a province-wide basis since the High Court visits certain centres only once every six months. There seems little reason why a three months waiting period should not be the goal at those trial centres where courts sit continuously.

[3a]As of September, 1972 it appeared that the waiting time on London non-jury lists was becoming excessive. Since then the situation has improved in the High Court (although there is evidence that there may be lengthy delays in the County Court). The availability of courtroom space in London is a factor which must be considered when analyzing the statistics for both the High Court and County Court. At the present time there are only three High Court and County Court courtrooms. Cases are sometimes heard in the grand jury rooms, the citizenship court, University moot courtroom or such other places as may be available on an *ad hoc* basis.

This delay is primarily due to the fact that insufficient judges have been available at these centres to dispose of the cases ready for trial. While illness and assignment to non-judicial duties have caused an overall shortage of judges within the High Court of late, Table E of Appendix I indicates that this shortage has had a disproportionate effect on the trial lists at Toronto and Ottawa. While shortages of judicial resources of necessity create problems for a court, we believe that the effect of such shortages should not be concentrated at a few centres in this way. Such disparities between the waiting time on the various trial lists within one court are difficult to justify. A litigant at one trial centre should not have to wait a significantly longer time for a trial date than a litigant at another centre.[4] The present situation appears to have arisen through failure to give sufficient attention to the relative age of cases on the various trial lists in deciding how the available judges should be deployed (*i.e.*, when and where to hold sittings, and for how long). We recommend that in future the relative age of cases on the lists at the various trial centres should be a *major factor* in deciding how to deploy available judicial resources.

Immediate steps should be taken to reduce the backlogs at certain trial centres, and in particular in the non-jury lists in Toronto. This can and should be achieved by concentrating sufficient judicial resources at these centres. For example, we have calculated from available statistics[5] that if six judges were to sit regularly in Toronto non-jury for the next six

[4]Disparity between the waiting time on various trial lists is, in fact, most apparent within Toronto itself. While the delay on the Toronto civil non-jury list excluding undefended divorce is eighteen months, on the Toronto jury list cases are at present being reached within nine weeks of being set down for trial. The way in which the lists have been run has had the effect of giving preference to jury trials over non-jury trials. Close attention should be paid to ensuring that the relative disparity between such lists does not become too great. In any event giving preference to civil jury cases over civil non-jury cases in Toronto is questionable. The argument in favour of the present practice appears to be that most of the jury cases involve personal injury plaintiffs and such cases should be expedited. However, the force of this argument is weakened when one observes that in 1971 while some 400 motor vehicle cases were added to the jury list almost 300 motor vehicle cases were added to the non-jury list.

[5]This figure, which is at best a rough one, is arrived at in the following manner. As of the middle of December, 1972, the number of cases on the Toronto non-jury list, excluding undefended divorces, is approximately 1,400. The settlement rate of cases on this list is running at the rate of 58%, which means that of the cases at present on this list no more than some 600 cases will actually require trial. Recent experience indicates that each judge sitting on the Toronto non-jury list can dispose of approximately four cases per week, on the average, by trial. Hence, if six judges per week sat regularly in Toronto non-jury, 96 cases could be disposed of by trial each month. This would mean that within six months all cases at present on the list would be disposed of by trial or settled. By the end of that six-month period, at the present rate at which cases are being added to the list (approximately 100 cases per month), there would be 600 new cases on the non-jury list. At the present rate of settlement only some 240 of those cases would require trial and six judges sitting regularly could dispose of those cases within a further three months.
This analysis indicates that with six judges sitting regularly in Toronto in non-jury by about the seventh month all cases then being tried would have been on the list less than six months. Of course, as already indicated, these figures are approximate only. Also if any significant change were to take place in the settlement rate of cases or the rate at which cases were being added to the list the picture could be changed significantly.

or eight months, then within that period the waiting period on that list would be reduced to less than six months.

Our recommendations in chapter 4 for a reduction in the number of trial centres should facilitate the attainment of this goal.

An obvious question raised by our recommendations that the waiting time on lists in the High Court should not exceed six months, is whether an increase in the complement of judges will be necessary. As explained elsewhere[6] it is difficult for us to state at present whether such an increase is indicated.

We make many recommendations which would affect the workload and efficiency of the High Court. In addition, the statistics necessary to measure accurately even the present capability of the High Court are not available. We believe that a deadline of January 1, 1975 should be established for attaining the goal of a six month maximum waiting period for trial in the High Court. The impact of our recommendations on the High Court's workload, particularly in respect of the number of judges needed should be carefully monitored throughout the implementation of our Report. At the earliest possible time it should be determined what, if any, increase in the number of judges is needed. If an increase is indicated the necessary appointments should be made without delay.

Although detailed and specific statistics on criminal cases are not available, there seems to be little difficulty in obtaining a trial date for criminal cases in the High Court. Criminal cases are given preference over civil cases in assigning trial dates. In High Court criminal cases the major cause of delay is not the waiting period between the point at which a case is ready for trial and receiving a trial date, but lies rather at the stage of the pre-trial procedures making the case ready for trial and, in some cases, in the securing of legal aid counsel. This stage is conducted, for the most part not in the High Court but in the Provincial Courts (Criminal Division). Obviously there is a need to expedite these pre-trial proceedings if the overall goal of 90 days in disposing of criminal cases is to be achieved. We will have more to say on this matter when we consider the Provincial Courts (Criminal Division). Within the High Court itself the time necessary to obtain a trial date to meet the 90 day goal will be a problem at those trial centres which the High Court visits only infrequently. If this problem cannot be met by the holding of special sittings, in order to facilitate a speedy trial the applicable legislation should be amended to permit the transfer of criminal cases to nearby trial centres, on consent of the accused.

4. *Delay in the County and District Courts*

No statistics accurately reflecting the extent of delay in the County and District Courts are at present available. Appendix II contains a number of tables depicting the current workload and disposition rate in these courts. These figures give some indication of the extent of delay. As of

[6]In chapter 4.

September 30, 1972, 26.8% of civil cases not yet reached had been on trial lists for more than six months. Some 63% of summary conviction appeals have been on the list and not reached for more than six months. The criminal statistics are less revealing in terms of the delay in waiting trial, but it would appear that at least at certain centres (*e.g.*, Toronto, Ottawa and Sudbury) difficulty is being experienced in trying cases promptly at the General Sessions of the Peace.

As with the High Court, considerable improvement will have to be made if the County and District Courts are to be able to meet the goals we have recommended for both civil and criminal trials. Elsewhere we have made a number of recommendations which should enable the County and District Courts to cope more effectively with their caseloads: the transfer of certain minor adjudicative and some administrative functions from the judges to other bodies or officials; the replacement of trials *de novo* under *The Summary Convictions Act* by appeals on the record; the reorganization of the County and District Courts into circuits; and giving power to the Chief Judge to arrange for County and District Court judges to sit anywhere in the Province. The latter two recommendations, in particular, should permit more effective use of the available judges.

Whether an immediate increase in judges is called for is difficult to measure on a province-wide basis. Recently in individual County or District Courts the need for additional judges has become apparent and new appointments have been made. More appointments may well be necessary in the near future in some courts even if significant economies are achieved as a result of our recommendations, since the caseload of the judges of the County and District Courts is increasing as a result of a number of legislative changes, *e.g.*, the increase in the jurisdiction of the County Courts to $7,500, the granting of divorce jurisdiction to local judges of the Supreme Court and the amending of the *Criminal Code*.[7]

C. Case Scheduling

1. *The Problem Defined*

Once the parties have indicated that their case is ready for trial, unless the case is otherwise disposed of, the court system must provide a trial date. Doing this is essentially a problem in court administration and is carried out by a process generally referred to as case scheduling.

It is important to note that in case scheduling an attempt must be made to resolve a number of different demands on our court system: to make efficient use of judicial resources and existing court facilities; to ensure that cases are tried reasonably promptly after they become ready for trial; and, to do so in such a way as to take into account the convenience of the participants who are not judges (*i.e.*, litigants, witnesses

[7]There is evidence that, at least in Toronto, the recent bail reforms have led to more accused persons' electing to be tried at the General Sessions or in the County Court Judges' Criminal Court, rather than by Provincial judges.

and lawyers). The problem of case scheduling would be a quite minor one if society were prepared to ignore one or more of these factors since the difficulty lies in balancing them. For example, were we prepared to incur the social and economic costs involved in ensuring that we had available at all times, sufficient judges to try by fixed appointment every case that became ready for trial, case scheduling would almost cease to be a problem. Under such a system there would be no delay in waiting for a trial date and the convenience of all participants could be met. But any such system would involve a very inefficient use of judges and physical resources. At any time there would be many judges with no work to occupy them and courtrooms standing idle. It has never been suggested that we should incur the cost necessary to maintain generally such a system. While there is a consensus that judicial resources should be adequate at all times, there is an assumption that judges are, and should be, a limited resource. The scheduling of cases must be managed in such a way as to make effective and efficient use of that resource.

Most case scheduling systems vary in their responsiveness to the three demands on the courts articulated above. On the one hand, systems which make use of long, running weekly lists place most emphasis on the efficient use of judges and on affording a speedy trial, but give little weight to the convenience of the participants in the trial. On the other hand, systems (found at present in some Ontario County Courts) which make exclusive use of fixed appointments, maximize convenience to the participants. But they often do so at the expense of efficient use of judges (which may be wasted through adjournments and settlements) and under such systems a speedy trial may not be afforded for all cases if there is a limitation on the available number of judges.

Below we examine the case scheduling systems at present in use in the High Court and the County and District Courts, and put forward a number of specific recommendations for change. Before doing so we wish to make some general observations with regard to the subject of case scheduling.

A variety of case scheduling systems exists in Ontario. Variation in case scheduling is not necessarily a negative feature. Indeed, variation may be essential since case scheduling systems should be responsive to the type and volume of a court's caseload, the court's location, and whether it is a circuit or permanent court. Differing systems may be appropriate for criminal and civil cases.

Three factors were identified above as being particularly important in case scheduling: the efficient use of judicial resources and court facilities; ensuring a speedy trial; and taking into account the convenience of non-judicial participants in the trial. As we have already indicated in chapter 1 we believe that, in general, to date too little weight has been given to the convenience of the non-judicial participants. Uncertain case scheduling systems waste the time of lawyers, litigants and witnesses. This not only produces inconvenience, but also contributes to the high cost of litigation, principally through the wastage or inefficient use of lawyers' time, the cost of which is ultimately passed on to litigants. A traditional management

assumption throughout our court system has been that the judge's time is to be fully utilized, even if it means that lawyers, witnesses and litigants must be kept waiting. While we do not suggest that judges should be idle for any length of time, we do recommend that in future greater emphasis be placed upon scheduling of cases in such a way as to minimize the inconvenience to and the time wasted by, lawyers, witnesses and litigants.

Despite the fact that different case scheduling systems may be best suited for different courts, there are certain general principles applicable to any sound system of case scheduling. There is evidence that these principles are not observed universally in Ontario. First, to operate efficiently, any case scheduling system should attempt to have available accurate and up-to-date projections as to the likely length of time a trial will occupy. Only if those responsible for case scheduling possess information of this kind can they maximize the use of judicial resources and minimize the inconvenience to participants awaiting trial. Procedures should be established to gather such information, as accurately as possible, and it should be used in the drawing up of trial lists and in alerting counsel for trial. Counsel should be required to indicate the number of witnesses (including experts) they propose to call and their own estimate of trial length at the time a case is set down for trial. Persons responsible for case scheduling should attempt themselves to develop expertise in estimating trial length. Also they should communicate with counsel immediately prior to assigning a case for trial to reassess the estimate of trial length. If necessary it might prove useful to conduct studies with the aid of a computer, to develop data on average trial length given a range of variables (*e.g.*, type of case, number of witnesses, number of experts, particular judges, etc.).

Secondly, comes the need to establish, wherever possible, projections as to the likely settlement or adjournment rates of cases on the trial list. If those responsible for case scheduling possess such information they can maximize the use of court time by the rational oversetting of cases. Experience, accompanied by careful record keeping, can aid in the accumulation of this information. Also it should be made mandatory for counsel to inform the court by telephone immediately upon the settlement of any case on the ready or trial list. Similarly counsel should be required to inform the court as early as possible of his intention to request an adjournment.

2. *Case Scheduling in the High Court*

In discussing case scheduling in the High Court a convenient distinction can be made between sittings in Toronto and those on circuit, and between the scheduling of criminal and civil cases.

(a) *Civil Cases — Toronto*

At present most civil cases in Toronto are scheduled by the use of a ready list — weekly list system.[8] After a case has been certified ready for trial and set down it is placed at the bottom of the ready list. As cases

[8]A somewhat different system is used for the scheduling of undefended divorces.

above it on the list are disposed of by trial or settlement the case works its way to the top and is eventually placed on the weekly list. From the weekly list cases are assigned to court rooms for trial. The weekly list is operated as a running list and counsel are expected to follow closely the progress of the list. They are given no definite indication of when their cases will be reached and cases may be called to go on with only a few hours notice.

This system for the most part keeps judges well supplied with cases to try, at least when the list does not collapse through adjournments and settlements. But it does so at the cost of short notice and uncertainty for the non-judicial participants. Counsel, and their clients and witnesses, have only a very rough idea as to when their case will be reached, particularly since the unexpected settlement of cases may lead to a collapsing of the list.

Of late a number of problems have plagued the running of the Toronto civil list. The practice of liberally granting fixed trial dates has been a source of difficulty. No established and publicized procedure or standards exist in respect of this practice and cases have been given fixed dates in a manner that destroys the expectations of those counsel who have unfixed cases on the weekly list. The cases fixed to go on first in a particular week do not appear as such until the weekly list is drawn up, usually on the Friday preceding the week for which the list is drawn. Consequently, counsel may not know until Monday morning that they are to be preceded by a number of fixed cases. The lack of established and published procedures and standards for the granting of applications for fixed trial dates has led to criticism from the bar. Many are of the opinion that the granting of fixed trial dates has been too liberal and is being used as a method of obtaining unwarranted preference on crowded trial lists. Recently the practice of granting fixed dates has been somewhat curtailed. Applications for fixed trial dates are now centralized in the assignment court which was introduced in the last few months.

The unavailability of a sufficient number of judges in Toronto to cope with the caseload has also been a problem. In large part this difficulty can be traced to a high rate of absenteeism among judges through illness and assignments to non-judicial duties in the last year. The effect has been concentrated in the Toronto non-jury list due to a general unwillingness, when there is a shortage of judges, to cancel civil jury sittings in Toronto and prescheduled sittings outside Toronto. It is often not known until the Friday preceding the week of sittings, or even the Monday on which they commence, how many judges will be available.

Difficulties are also caused by the granting of adjournments and by settlements which lead to a collapsing of the list. This may not only leave judges without cases to try but also means that cases are often called, at very short notice, sooner than expected. In an attempt to alleviate this problem an assignment court has recently been instituted in the High Court in Toronto. It sits on Thursday mornings to accept notice of settlements and to hear requests for adjournments in respect of cases on the upcoming weekly list for civil jury and defended non-jury cases excluding divorce.

(The assignment court for defended divorce sits on Monday mornings.) It also hears applications for fixed trial dates which, when granted, are usually fixed for several weeks in advance. The assignment court has been of some value in removing from the weekly list at an earlier stage in the proceedings certain cases requiring adjournments.

(b) *Fixed Trial Dates in the Queen's Bench Division in London, England*

In the course of our work we have made a close study of the case scheduling system in use in the Queen's Bench Division of the High Court in London. This system offers fixed trial dates to a significant percentage of cases by combining the granting of fixed trial dates and the use of a running list. It makes efficient use of judicial resources while offering to a significant proportion of cases fixed trial dates, and to the remaining cases reasonable notice of when they will be reached for trial. We recommend that a similar system be introduced, at least on an experimental basis, in the High Court in Toronto.

Under the Queen's Bench Division system when a case is set down it is placed at the bottom of a General List. Once on this list, if no application is made by either party for a fixed trial date, the case will come on to the Warned List[9] in about eight weeks and be tried that week or, at most, within the next week or two. Consequently, if both parties are content to leave a case on the General List and not to seek a fixed date of any kind, the case will be heard quite speedily (usually within two or three months from setting the case down for trial) but at a time which can be predicted only very roughly in advance.

Instead of leaving a case on the General List, either party may apply to the Clerk in charge of the lists for a fixed trial date.[10] At the hearing of the application before the Clerk the parties are usually represented by a solicitor's or barrister's clerk. It is within the discretion of the Clerk whether an application for a fixed trial date is granted and it is by no means a matter of right. While the Clerk attempts to accommodate the parties and their legal advisors, he must be sure to maintain a substantial number of cases on the General List[11] to supply "fillers" when cases are needed. This is a vitally important aspect of the system, since the overall system would not operate if everyone applied for, and were granted, a fixed trial date. On the hearing of the application (which generally takes no more than a few minutes) four dispositions are possible: a case may be given a "fixture", an "after-fixture", a "K.P.", or returned to the General List.

(1) "*Fixtures*". Whether a case is given a "fixture" (*i.e.*, a fixed trial date) depends on the showing of a need for it. Relevant considerations are the length of the case, the number of witnesses to

[9]The Warned List in the Queen's Bench Division is roughly equivalent to the Weekly List in Ontario. As will become apparent from the text the case scheduling system in use in the Queen's Bench Division produces many "Weekly Lists".

[10]The procedures for obtaining a fixed trial date are regulated by a Practice Direction given by the Lord Chief Justice on December 9, 1958, *Practice Direction (Trials in Middlesex)*, [1958] 1 W.L.R. 1291; [1958] 3 All E.R. 678.

[11]As is explained below "K.P's" also perform the function of providing fillers.

be called, whether expert witnesses will be involved or whether any witnesses will have to travel a long distance to court. Those cases in which the estimated length of trial is long (*i.e.*, five days or more) will invariably be given a fixture[12] since they are difficult to arrange on short notice. An estimate of the length of trial must be furnished prior to the application for a fixed trial date and it is continually revised by the parties, if necessary, thereafter.[13] If a fixture is given, it will usually be for a date about five months hence, for a case of average length.[14] A fixed trial date is what it implies: the case will almost always be heard at 10:30 on that date, if not settled beforehand. Applications to vary a fixed trial date are rarely made and only granted on the showing of very good cause indeed.

(2) "*After-fixtures*". A case granted an "after-fixture" will be heard on a given date *after* all the fixtures for that date have been honoured. In practice, it provides a virtual certainty that the case will be heard on the given date[15] and after-fixtures are considered by all concerned to be as good as fixtures. The considerations which govern the granting of after-fixtures are much the same as for fixtures. After-fixtures are slightly "shorter dated" than fixtures, being given for dates about four months hence.

In assigning dates for fixtures and after-fixtures, the Clerk usually accommodates counsel by not giving a date on which it is known in advance that he will be unavailable. Typically the clerks who appear on the applications come to the hearing armed with a diary and can readily inform the Clerk of the days on which counsel will be unavailable.

(3) "*K.P.'s*" *(or "not befores")*. A "K.P." is the assignment of a case to a particular Monday, usually between one to three months hence. A case granted a K.P. will not appear on the Warned List before that date (and therefore will not be reached before then), but it will appear on the list for that week immediately below the fixtures and after-fixtures. This is the fate of the majority (50–65%) of applications for fixed trial dates. K.P.'s are listed on the Warned Lists in the order in which the K.P. is given. (This is the origin of the term K.P., meaning "keeping place" since such a case goes on to the Warned List in the order in which it is given.) A K.P. is therefore not a fixed trial date in the same sense as a "fixture" or an "after-fixture". The utility of K.P.'s

[12]Or, as may sometimes be the case, an "after-fixture" (see below).

[13]For example, the estimate of trial length is reconsidered at the application for a fixed date under the watchful eye of the Clerk who can himself make a fairly accurate assessment from a reading of the pleadings, etc., and from other information supplied by the parties. By the Rules the legal advisors of the parties are required to notify promptly the Clerk of any change in the estimated length of trial.

[14]If the case is above average in length, the fixture may be for a date a month or two further on. Requests for long dated fixtures, e.g., a year hence, are invariably refused on the basis that they are an attempt to avoid the evil day of trial.

[15]In the last nine months only once has an after-fixture not been reached on the given day.

from the lawyers' and litigants' viewpoint is that they know they will not be called before a particular week. There is a 50% chance that the case will be tried in that week, and it will certainly be tried within the week or two following. A large number of K.P.'s are given for each week and this suits the desires of lawyers and litigants.[16]

While it is theoretically possible for an application to the Clerk to be completely refused this rarely happens. However, in some cases the Clerk might point out that the parties would be better off in the terms of a speedy trial by staying on the General List.

The above described process produces two types of lists: a General List, consisting of all those cases set down for trial and not assigned any kind of fixed date; and a number of Weekly Lists consisting of all those cases given fixtures, after-fixtures and K.P.'s for any given week. Eventually these two lists are consolidated in such a way as to produce the trial list, called the Warned List, for any given week. This consolidation takes place on Wednesday afternoon each week, when the Warned List for the following week is settled. The Clerk decides how many cases from the General List will be needed to be added to the fixtures, after-fixtures and K.P.'s and draws up the Warned List. This list is then immediately published, thereby apprising those whose cases have been moved from the General List to the Warned List. Those remaining on the General List are assured that they will not be reached before the week next following. The Warned List prepared on Wednesday for the following week will thus consist of the (still current) fixtures, after-fixtures, and K.P.'s, for that week plus cases moved up from the General List as well as any K.P.'s and General List cases from the current week, not reached in that week. (These cases will appear on the Warned List ahead of the K.P.'s and General List cases for the next week.)

The Queen's Bench Division, in addition to publishing a weekly Warned List, also publishes a daily list known as the Daily Cause List which is drawn up at 2 p.m. each day and consists of the cases to be tried the following day. These will include still active fixtures and after-fixtures for the following day and sufficient K.P.'s and General List cases from the Warned List to fill the available time. The Daily Cause List indicates the courtrooms in which cases will be tried, before whom, and the exact starting time (or "not before" a particular time). The Clerk assigns to the Daily Cause List only as many cases as he estimates will be reached. (He usually "oversets" to the extent of two cases. These "floaters" are assigned to a particular courtroom and are then assigned from there to be tried when other cases settle or are finished. These cases are invariably reached on the day.) By 4.30 p.m., when the Daily Cause List is published, all those on the Warned List know whether their cases will be heard the following day or not. Simultaneously, a revised and updated version of the Warned List (reflecting settlements) is published.

[16]This practice also suits the court since there is some evidence that the settlement rate is higher among cases in the K.P. category than in cases that remain on the General List.

The Clerk operates on certain principles in setting the fixed dates of various kinds. Working on the assumption that in any one week he will have available eight to ten judges, he sets six to eight fixtures, and six to eight after-fixtures per day (taking into account, of course, those fixtures and after-fixtures which he expects to run through from the previous day). In addition, he will give approximately 100 K.P.'s for the first week of each term, decreasing these numbers each week as the term proceeds. This pattern of case setting involves a high degree of "over-setting" premised on the expected settlement rate that varies between 50-65%. By the time the dates given these cases are reached, more than half of the cases will have disappeared, thus reducing drastically the number of dates that have to be honoured. Since cases are overset from the outset, fixtures, after-fixtures and K.P.'s for a given day or week which have vacated by settlement are not usually reassigned.[17] When it comes time to draw up the Warned List for the following week (which as explained above is done on the preceding Wednesday) the Clerk will usually aim at including on such a list from 100 to 150 cases in total.

There are certain factors which are key to the successful operation of the system.

First, the available judicial resources must be predictable. The Queen's Bench Division suffers from a problem which also plagues the hearing of civil non-jury cases in the High Court at Toronto: a tendency to assign to it what is left over in terms of judicial resources, after meeting the commitments of circuit assignments and criminal work. With a varying demand for criminal judges and variations in the absenteeism through illness, etc., the number of judges available to try civil cases can be highly variable. If this situation is allowed to occur the effective running of the system becomes impossible. The person responsible for assigning fixed trial dates must be able to rely on the fact that in a given week, often many months ahead, he will have a certain number of judges available. Without this assurance, it is impossible to make a fixed trial date system work.[18]

Secondly, there must be a considerable number of cases without fixed trial dates. Without resorting to a system of a vast number of judges, many of whom would be left with nothing to do for substantial periods of time, it is impossible to set up a system under which all cases can be given fixed trial dates. The key to the operation of the Queen's Bench Division system is the limiting of the number of fixtures and after-fixtures which are given, and the maintenance of a large body of cases in the K.P. or general list categories. This enables the Clerk to draw on a pool of cases to fill up courtrooms for each day when the lists collapse through settlement. It is these cases that provide the flexibility which makes the operation of the fixed trial date system for the other 50% of cases possible. Also, the system must

[17]Except when it can be seen in advance that the settlement rate of such cases in a particular day or week is running unusually high.

[18]In London the Lord Chief Justice is cognizant of this problem and does his best to ensure a consistent pool of judges for Queen's Bench Division work. When it becomes impossible to find the necessary number of judges from the High Court Bench to service the Queen's Bench Division, the Lord Chief Justice can rely upon the expediency of appointing senior Queen's counsel to sit as temporary High Court judges.

operate in such a way as to ensure that the cases in the K.P. or general list category get on to trial reasonably quickly (in relation to fixed trial date cases). Otherwise, all litigants will want a fixed trial date. The Queen's Bench Division system is deliberately designed to ensure that the fastest way to get on to trial is to stay on the general list or to be put into the K.P. category. The price one pays for a fixture or after-fixture is a later trial date.

Thirdly, it is accepted that judge time may not be utilized 100% in the trial of cases. Under a running list system of the type in use in Toronto, at least in theory, all available judicial resources are utilized 100%, since cases wait in the corridors to suit the availability of judges. Under the Queen's Bench Division system this is not so. Each day the Clerk predicts, somewhat conservatively, how many cases will be reached the following day and sets the appropriate number, and no more, safe in the expectation that they will all be reached. Since more cases than he expects may finish or settle, judges may be left without cases to try. In fact, in the Queen's Bench Division, little judge time is lost in this way since the Clerk has developed excellent judgment. When a judge is left without cases to try his time is often used by reassigning him to motion work, or leaving him to catch up on paper work.

Fourthly, it is necessary to have up-to-date information regarding settlements, the anticipated length of trials and the status of cases being tried. To manage effectively the lists the person in charge must have this information in an up-to-date and accurate form. In the Queen's Bench Division this is achieved in various ways. Lawyers are under a duty to keep the Clerk constantly informed of any changes in the anticipated length of trial. Lawyers are also under a duty to inform him promptly, by telephone, of the settlement of a case and to follow this up by letter. Indeed, the duty goes further: they must inform him of any *likely* settlement of the case. In fact, he is usually informed promptly of all developments touching upon possible settlement, including the mere fact that the parties are talking about settlement. The courtroom clerks are in constant communication with the Clerk informing him of the progress of cases in the courts. By 1.45 p.m. each day the Clerk has an extremely accurate assessment of the status of work in all cases in the courts. This information is essential to the scheduling of cases for the following day.

Fifthly, a capable administrator who is forceful and respected is essential. In the final analysis the successful operation of the Queen's Bench Division system depends to a considerable extent upon the ability of the Clerk in charge of the lists. The present incumbent is a forceful person who at the same time is respected by those who appear before him. Moreover, he has a very definite conception of the responsibilities of his office. He pays some deference to the wishes of counsel but, on the whole, his attitudes are known and respected, and favours and special considerations are rarely sought. He attempts to get all cases on as quickly as possible and the Rules are structured in such a way as to assure him of his power to carry this out.

We believe that, with whatever modifications are necessary, the Queen's Bench Division model should be adopted on an experimental basis

in the High Court in Toronto. Obviously, very careful planning will be needed prior to the introduction of such a system. The most important prerequisite is to assure that there will be a predictable pool of judges available to try cases in Toronto. Without resorting to the use of *pro tem* judges, as is sometimes done in England,[10] the only way this can be achieved is to make sure that there are sufficient judges on the High Court so that there always will be available a sufficient and predictable number of judges in Toronto for the trial of civil cases.[20] Other changes which will be necessary to accommodate the operation of this system are Rule changes to assure that the assistant registrar in charge of the running of the lists is kept informed properly of current estimates as to the length of trial and told promptly of settlements or probably settlements of cases.

In the event that our recommendation with regard to the abolition of the use of civil juries in most types of cases is not implemented, we do not believe that any attempt should be made to introduce a fixed trial date system for jury cases. Experience indicates that the settlement rate and trial length of cases on the jury lists is so difficult to predict that the running of any type of fixed trial date system would probably prove unsuccessful.

Finally, we should point out that we realize that, as with the English experience,[21] it is unlikely that the introduction of this proposed system of fixed trial dates can be achieved in Ontario without some disruption and temporary inefficiency. But because of the benefits that such a system, once established, offers in terms of convenience to the public we believe that a major effort in the direction of establishing such a system is warranted.

(c) *Civil Cases — Circuit Sittings*

Sittings of the High Court outside Toronto are either jury sittings for the trial of criminal and civil cases (the Assizes), or non-jury sittings for the purpose of hearing non-jury civil cases.

In the large metropolitan trial centres such as Ottawa, London, Hamilton, etc., where the High Court sits more or less continuously, case

[10]See n. 18, *supra. The Judicature Act*, R.S.O. 1970, c. 228, s. 51 (1) provides that High Court sittings may be presided over, *inter alia*, by a retired judge of that court or by a Queen's counsel. This provision has been little used, if at all, and considerable doubts exist as to its constitutionality: see *Martin* v. *Cornhill Insurance Co.*, [1935] O.R. 239.

[20]It should be pointed out that this does not necessarily mean that there must always be a constant number of judges available in Toronto. The important thing is that the number of judges available in any given week be predictable, and predictable many months in advance. Consequently, while it might be necessary to have available, say, six judges in Toronto for the trial of civil actions to adequately deal with the caseload, provision could be made, if done well in advance, for there to be some weeks in which only four judges would be available, thus freeing more judges to do criminal or circuit work.

[21]The Evershed Committee's Interim Report (Cmnd. 7764, (1949) *Interim Report of the Committee on Supreme Court Practice and Procedure*) pp. 18-55 contains a detailed discussion of some of the difficulties encountered in the establishment of fixed trial dates in England. The difficulties encountered are also referred to in Abel-Smith and Stevens, *Lawyers and the Courts* 269 and in Abel-Smith and Stevens, *In Search of Justice* 33, 85.

scheduling is carried out along much the same lines as in Toronto. The local registrar draws up a trial list which is operated by him as a running list with counsel being notified when their case is called for trial.

In non-metropolitan trial centres cases are set down for trial for a particular sittings of the court. How the cases are heard from the list at the sittings varies with the judge, though at the Assizes criminal cases are always heard first. One method is for the judge to settle the order in which cases will be heard after discussions with counsel in open court at the commencement of the sittings. Another method is for the judge to settle the order in which he will hear cases after discussions with the local registrar. Alternatively, the judge may simply hear the cases in the order in which they appear on the list as drawn up by the local registrar.

A number of complaints regarding sittings outside Toronto have been brought to our attention. A major criticism is that sittings are often concluded before all cases are disposed of, since by his circuit assignments the judge must move on to another centre. At the Assizes the principle that criminal cases always go on first often means that civil jury cases may not be reached at all and in any event it produces great uncertainty as to when the civil jury cases will be reached. We have also heard complaints regarding undue judicial interference in the running of the sittings list as drawn up by the local registrars.

Elsewhere we have made recommendations which we believe will meet the major problems regarding sittings outside Toronto. In chapter 4 we recommend that in future, circuit sittings of the High Court should continue until all the cases on the list are disposed of. If the judge presiding at the sittings is required to move on to another trial centre, then another judge should be brought in to continue the sittings and complete the list. A sufficient number of judges must be made available in the High Court for this purpose. We also recommend in chapter 4 that where it becomes apparent that at the Assizes the total volume of civil and criminal cases is such that one judge will not be able to dispose of both classes of cases within the duration of the Assizes, parallel sittings for both criminal and civil trials should be established at short notice. Flexibility could be introduced in coping with both of the above problems by making provision for the transfer to nearby trial centres of cases at the bottom of the lists where this is necessary.

We do not recommend the introduction of the fixed trial date system that we have proposed for the High Court in Toronto, at trial centres outside Toronto. The efficient operation of such a system depends upon a high volume of cases and the presence of a number of judges sitting at any one time. In its deliberations the Beeching Commission paid close attention to the possibility of extending the Queen's Bench Division system of fixed trial dates to the circuit sittings of the High Court in England.[22] The research carried out by the Beeching Commission confirmed that such a system would not operate efficiently unless there were enough cases to be

[22]Cmnd. 4153, para. 129 *et seq.*

tried to keep more than three judges busy at any given sittings.[23] At present it is the practice of at least some local registrars occasionally to give fixed trial dates to cases, in the sense that they will go on first at the sittings, on the showing of very good reasons for having a fixed date. We believe this practice might well be continued provided it is limited to a *very few cases* and carried out in such a way that the existence of the fixed dates is made clearly apparent in advance to other lawyers with cases on the list.

While we believe that the Queen's Bench Division fixed trial date system should not be introduced at trial centres outside Toronto, one innovation from the English practice does seem worthy of consideration. That is the practice of drawing up a daily cause list for the following day of a sittings. This has the advantage of giving everyone on the trial list at least one clear day's notice of when they will be reached. When drawn up and published it designates which cases must be ready to go on the following day and informs all counsel in other cases that they will not be reached before the day after next. This practice would make the running of the lists more convenient for lawyers, litigants and witnesses, and if carried out with care, wastage of judge time could be kept to a minimum.

Finally, we recommend that during the sittings of the court outside Toronto the control of the trial list be left in the hands of the local registrar, under the supervision of the Regional Director of Court Administration in the region in which the sittings are held, and that judicial intervention in the running of the list be kept to a minimum. As recommended earlier in this chapter, it is essential to the efficient running of the lists that counsel advise the local registrar by telephone immediately of any settlement or settlement negotiations of cases on the list. Also we recommend that the Provincial Director of Court Administration should conduct studies regarding the handling of trial lists outside Toronto with a view to making innovations or to standardizing practices if this is thought to be desirable.

(d) *Criminal Cases*

In Toronto and throughout the Province the scheduling of criminal cases in the High Court is carried out by the Crown attorneys working in conjunction with the court. Owing to the relatively small volume of criminal trials in the High Court and the principle that preference should be given to the trial of criminal cases, little difficulty is experienced with scheduling such cases.

However, one aspect of the present practice causes us concern.[24] The High Court lacks the information regarding its criminal caseload necessary

[23]It follows from the work of the Beeching Commission that it might be feasible to introduce such a system in metropolitan trial centres outside Toronto if the High Court instead of holding sittings so frequently were to send four or more judges to each sittings. However, any such innovation should await the results of the experiment we have recommended for Toronto. In any event such an innovation should not be considered without prior close consultation with members of the local bar. It may well be that litigation work is so concentrated in such centres that to have the High Court sit with four or more courts for any sittings might simply produce impossible scheduling conflicts.

[24]We have expressed similar concern, and made an appropriate recommendation, regarding the keeping of records in criminal cases in the County Courts. See chapter 5.

for it to carry out its supervisory role. It appears that at present the High Court itself is not kept regularly and systematically informed of all cases that have been committed for trial in that Court. While the Crown attorneys have this information, it is not conveyed directly to the High Court by the committing court. We believe this is wrong. We recommend that the High Court should be informed immediately of all cases committed for trial to that Court. We also recommend that the Court keep an up-to-date register[25] listing all cases committed to the Court for trial showing the date of arrest of the accused, the date upon which he was committed for trial and the date upon which his trial took place. Only if the Court is possessed of this information can it maintain ultimate control over the progress of criminal cases and assess the state of the lists in criminal matters.

3. *Case Scheduling in the County and District Courts*

(a) *Toronto*

As the result of a study carried out by His Honour Judge Waisberg and others in 1969, assignment courts have been established for the scheduling of both criminal and civil cases in the County Court for the Judicial District of York.

The civil assignment court takes place every Thursday afternoon during the sittings of the County Court. As cases move toward the top of the ready list counsel are informed by mail, usually about three weeks in advance, that their case is to be placed on the assignment court list for a particular date and will be spoken to at that time. The function of the assignment court, which is presided over by a judge assisted by the Trial Coordinator, is to determine what cases are ready to proceed during the following week and to draw up the Weekly List. Settlements and adjournments on consent can be reported to the Trial Coordinator by telephone in which event the case need not be spoken to at the assignment court. Essentially the work of the court consists of hearing opposed requests for adjournments and assigning a date for trial for those cases which are to proceed. The fate of most applications for adjournment is that the case is adjourned to the assignment court for the following week. The general rule is that two such adjournments will be granted on request, but the third time the case comes up it will usually be assigned to the Weekly List for trial. In drawing up the Weekly List the court assigns cases to be tried on a particular day of the week, usually chosen on consent of the parties. Cases are not assigned to a particular courtroom or judge by the assignment court, but on the day a case is actually called it is assigned to whatever judge is free at the time.

The civil assignment court gives considerable weight to the convenience of parties and counsel, since cases are given a date for trial, albeit only a short time in advance, and are never called before that day.[26]

[25]This register should be open to public inspection in the same manner as are the books of the Supreme Court under *The Judicature Act*, R.S.O. 1970, c. 228, s. 126.

[26]In fact, most cases are heard on the day they are set to be called. That the system gives very considerable weight to the convenience of parties and counsel is evidenced by the fact that, in general, at each assignment court 50% of all cases are adjourned.

While it is to be expected that any system which gives significant weight to the convenience of the non-judicial participants will not fully utilize judge time, there is some evidence that the civil assignment court may be resulting in an avoidable underutilization of available judge time.[27] However, this problem is somewhat alleviated by the fact that the Trial Coordinator is also the Executive Officer to the senior judge. In the latter capacity he assists in the assignment of judges so that when a judge is left without cases to try from the civil list, the Coordinator can often arrange for the judge to switch to other work.[28]

The criminal assignment court sits each Wednesday afternoon. Unlike the civil assignment court, the purpose of this assignment court is not to settle a list for the following week but to assign trial dates usually for about a month from the assignment court. Defence counsel receive a notice from the Crown attorney's office, which is primarily responsible for the scheduling of criminal cases, stating that the case will come up at the assignment court on a particular day. He may then communicate with the Crown attorney's office and agree upon a trial date acceptable to both sides. If there is agreement he need not appear at the assignment court. Otherwise he must appear.

The assignment court, presided over by a judge assisted by a Trial Coordinator, arranges trial dates and hears requests for adjournments. When called, most cases are ready to proceed and the major problem is finding a mutually agreeable trial date. Each week approximately 80% of cases on the list are assigned trial dates. In the remaining cases an adjournment to the next assignment court is usually sought.[29] Unlike the civil assignment court, there is no policy of granting two adjournments on request. The judge demands an adequate reason before an adjournment will be granted. If satisfactory reasons are given, an adjournment may be granted, otherwise a trial date is set. A court-wide policy against the granting of adjournments on the day of trial once a trial date has been set

[27]It would seem that a tightening of the scheduling system could overcome this problem. Another problem is the general unwillingness of counsel to accept Monday or Tuesday as a trial day and the unwillingness of the judges presiding at the assignment court to force cases on for trial on those days. To the extent that this reticence is based on a belief that Monday and Tuesday are often taken up with the trial of cases carried over from the preceding week, it would appear to be unfounded since 95% of all cases are currently being disposed of in the week in which they are set for trial. At present lost judge time through this phenomenon is being kept to a minimum by assigning civil trial judges to other work on Monday and Tuesday. (For a *caveat* on the overall efficiency of this practice see the following footnote.) However, this means that in reality only three days a week are currently being used fully for the trial of civil actions, and problems may arise as the volume of such cases increases. A change in this "few trials on Monday and Tuesday" practice seems desirable.

[28]While this is a commendable practice care must be taken to see that it does lead to an efficient use of judge time through permitting the Court to dispose, in total, of more cases than it would have if these judges had remained idle. If the switching of judges, who are without cases to try on their own list, to other work merely enables the Court to dispose more easily of cases that the judges originally assigned to that work would have completed anyway, this represents no improvement in the use of the available judges over what would have been achieved had the judge who was switched remained idle.

[29]Adjournments are not always sought by the defence. On the average in 50% of the cases it is the prosecution which seeks the adjournment.

by the assignment court has been a key factor in the efficient operation of this system.

Subject to the minor qualifications expressed above, the assignment courts operating in the County Court of the Judicial District of York appear to be operating well. We believe the criminal assignment court certainly should be continued. With regard to civil cases, the fixed trial date–running list system we have recommended for the High Court in Toronto would be well suited to the scheduling in the County Court in Toronto. It has certain advantages over the assignment court system at present in operation in that it offers fixed trial dates several months in advance, rather than on just one week's notice, and permits a more efficient use of judicial resources. On the other hand, it affords trials on a day certain only to a percentage of cases on the list. Steps could be taken to implement a fixed trial date–running list system in the County Court in Toronto. Alternatively, implementation in that Court might be delayed pending experience with the High Court experiment.

(b) *Outside Toronto*

Generalization with regard to the operations of the County and District Courts outside Toronto is not possible, since there are as many systems as there are counties and districts. Typically the problems faced by particular courts vary in relation to the volume of their caseloads and the variations in caseloads are great. Some courts, particularly in metropolitan areas have heavy caseloads, while those in rural areas often handle only a few cases in any one year. In the time available to us we have been unable to make a detailed and comprehensive study of case scheduling problems throughout the Province in the County and District Courts. We make, however, the following observations and recommendations.

We believe that the utility of the continued use of "court sittings" in the County and District Courts is questionable. There seems little reason why the trial of actions should take place only twice or four times a year as is now the case in some centres. It would seem clearly preferable that cases be tried as they become ready for trial rather than having to wait until the next sittings. With regard to jury trials,[29a] which involve the summoning of a jury some time in advance, the retention of sittings is probably inevitable.

The statistics on the operation of the County and District Courts contained in Appendix II indicate great imbalance among the workloads of the various counties and districts. In some areas the workload is not sufficient to occupy fully the time of the resident judge, while in others the workload is more than enough to occupy the one or more judges available. In chapter 5 we recommend that the County and District Courts be organized into circuits. We believe that through an increased emphasis on the movement of judges[30] within the circuits a more efficient usage of their time and talents will be facilitated and the public will be better served.

[29a] In chapter 11 we recommend the abolition of the civil jury for all but a limited category of cases.

[30] Provision for rotating County and District Court judges within districts is already to be found in *The County Judges Act*, R.S.O. 1970, c. 95, s. 15(7). Under the proposed circuit system, we envisage considerably greater rotation of judges than has occurred to date.

There is evidence that the present practice of using fixed appointments in the County and District Courts is inefficient and contributing to backlogs at some trial centres. When such a system is used in a one or two judge court, adjournments and settlements are likely to lead to a considerable waste of judge time. In such courts it may be necessary to make greater use of running lists if the time of judges is to be used effectively.

The courts in large metropolitan areas, if the practice is not already followed, may find that their operations can be assisted by the introduction of assignment courts similar to those now in use in the Judicial District of York. If the volume of non-jury civil work is such that if concentrated into one or two weeks each month four judges would be kept busy hearing such cases[31] a fixed trial date system of the kind we have recommended for the High Court in Toronto could be considered in County Courts sitting in metropolitan areas.

We recommend that the Provincial Director of Court Administration, as a major priority item, carry out a full study of scheduling of cases that come before County Court judges (whether exercising jurisdiction as *persona designata*, of the Court, as local judges of the Supreme Court, Surrogate Court judges or Small Claims Court judges) with a view to proposing and implementing whatever changes are necessary and developing uniformity of practices and procedures if desirable. In doing this he should involve the Regional Directors, and work closely with the Chief Judge, senior judges, and the members of the local bar.

D. Summary of Recommendations

1. The relative age of cases on the lists at the various trial centres should be a major factor in deciding how to deploy available judges in the High Court.

2. Immediate steps should be taken to reduce the backlogs at certain trial centres and in particular in the non-jury lists in Toronto. The waiting period on trial lists should be reduced to six months maximum by January 1, 1975. Efforts should be made to further reduce this period to three months.

3. If the 90 day goal in criminal cases cannot be met by the holding of special sittings in the High Court, provision should be made for the transfer of criminal cases to nearby trial centres, on the consent of the accused.

4. In scheduling cases, greater emphasis should be placed on convenience to lawyers, witnesses and litigants.

[31] As indicated earlier, (see *supra* n. 23), English studies indicate that a fixed trial date–running list system will not operate effectively unless there is sufficient work to keep more than three judges busy.

5. At the time a case is set down for trial, counsel should be required to provide those responsible for case scheduling with the number of witnesses to be called and an estimate of the length of time required for the hearing of the case.

6. Projections of settlement and adjournment rates in the courts should be developed.

7. Counsel should be required to inform the court by telephone immediately on the settlement or likely settlement of any case on the ready list, and to inform the court as soon as possible of his intention to request an adjournment.

8. A system of fixed trial dates such as that operating in the Queen's Bench Division of the High Court in London, England should be introduced at least on an experimental basis, for civil non-jury cases in the High Court in Toronto.

9. A daily cause list for the following day of the sittings should be drawn up for each day of the sittings of the High Court outside Toronto.

10. In sittings of the High Court outside Toronto the control of the trial lists should be left in the hands of the local registrar under the supervision of the Regional Director of Court Administration in the region in which the sittings are held and judicial intervention should be kept to a minimum.

11. The Provincial Director of Court Administration should conduct studies regarding the handling of trial lists outside Toronto with a view to making innovations or to standardizing practices if this is thought to be desirable.

12. The High Court should keep an up-to-date register of all criminal cases committed for trial in that Court showing the date of arrest, the date of committal for trial and the date of the trial.

13. The criminal assignment court in the County Court of the Judicial District of York should be continued.

14. Consideration should be given to adopting for civil non-jury cases in the County Court in the Judicial District of York the fixed trial date system recommended for the High Court in the Judicial District of York.

15. The utility of court sittings for the hearing of civil non-jury cases in the County and District Courts should be reviewed.

16. The Provincial Director of Court Administration, working closely with the Chief Judge, senior judges and the bar, should carry out a full study of scheduling of cases coming before County Court judges (whether exercising jurisdiction as *persona designata*, of the Court, as local judges of the Supreme Court, Surrogate Court judges or Small Claims Court judges) with a view to proposing and implementing whatever changes are necessary and developing uniformity of practices and procedures if desirable.

APPENDIX I

TABLE A

HIGH COURT

Civil Actions Commenced
January 1, 1972 – September 30, 1972

County/District	General Writs and Petitions				Specially Endorsed Writs		Mechanics Lien Actions	Total
	M.V. (1)	Divorce (2) SCO	Divorce (2) MCA	Others	Mortgage	Others		
Algoma	21	1	151	21	27	9	9	239
Brant	18	0	173	21	20	5	20	257
Bruce	2	0	20	2	9	27	12	72
Cochrane	25	0	54	10	15	7	22	133
Dufferin	2	12	8	1	16	1	9	49
Elgin	6	7	94	12	18	7	6	150
Essex	83	124	390	110	98	73	74	952
Frontenac	28	49	161	24	24	6	34	326
Grey	7	19	48	5	20	9	19	127
Haldimand	5	0	17	1	2	1	1	27
Halton	30	28	197	143	50	18	44	510
Hastings	17	12	138	9	19	5	18	218
Huron	14	3	34	7	8	2	9	77
Kenora	6	0	51	4	10	3	4	78
Kent	16	0	116	8	15	13	9	177
Lambton	23	0	159	16	30	7	4	239
Lanark	3	7	45	8	1	1	7	72
Leeds & Grenville	7	2	94	6	10	5	8	132
Lennox & Addington	5	1	20	6	7	6	2	47
Manitoulin	1	0	5	2	1	0	3	12
Middlesex	60	5	494	88	115	56	62	880
Muskoka	6	5	41	6	8	3	16	85
Niagara North	65	52	168	58	67	30	34	474
Niagara South	45	1	288	31	58	17	30	470
Nipissing	10	0	78	13	10	7	24	142
Norfolk	1	0	52	8	11	12	5	89
Northumberland & Durham	2	6	73	7	20	13	28	149
Ontario	51	5	236	37	75	15	53	472
Ottawa-Carleton	113	66	751	213	111	75	112	1,441
Oxford	5	0	84	7	13	6	6	121
Parry Sound	6	0	29	5	8	2	5	55
Peel	30	77	170	35	63	34	59	468
Perth	10	0	60	2	12	3	7	94
Peterborough	23	16	139	22	61	10	14	285
Prescott & Russell	2	5	11	3	7	1	8	37
Prince Edward	1	0	13	0	3	1	7	25
Rainy River	0	7	33	2	1	1	7	51
Renfrew	23	0	72	3	6	6	17	127
Simcoe	33	156	88	19	45	27	54	422
Stormont, Dundas & Glengarry	7	3	74	9	20	8	5	126
Sudbury	105	13	183	62	207	38	160	768
Temiskaming	5	1	38	9	5	2	9	69
Thunder Bay	62	3	208	30	24	10	10	347
Victoria & Haliburton	4	1	16	6	16	2	19	64
Waterloo	76	22	403	58	121	36	43	759
Wellington	17	12	68	5	36	11	50	199
Wentworth	239	59	672	120	142	88	65	1,385
York	864	2,790	1,695	1,626	1,174	796	374	9,319
Total	2,184	3,570	8,212	2,900	2,839	1,515	1,597	22,817

(1) M.V. – Motor Vehicle Accident Actions
(2) Divorce S.C.O. – filed for hearing by a High Court judge.
M.C.A. – filed for hearing by a local judge of the High Court.
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.

TABLE B
HIGH COURT

Dispositions of Civil Actions on Lists for Trial
Provincial Summary
January 1, 1972 – September 30, 1972

Disposition	Jury		Non-Jury				
	M.V. (1)	Other	M.V. (1)	Divorce (2) SCO	Divorce (2) MCA	Other	Total
Tried	130	34	241	4,627	5,677	426	11,135
Settled	518	56	416	15	29	377	1,411
Struck Off	47	17	67	215	78	96	520
Total	695	107	724	4,857	5,784	899	13,066
Untried (Sept. 30/72)	302	34	731	1,616	1,423	1,458	5,564

(1) M.V. – Motor Vehicle Accident Actions
(2) Divorce S.C.O. – filed for hearing by High Court judge
M.C.A. – filed for hearing by local judge of the High Court
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.

TABLE C
HIGH COURT

Dispositions of Civil Actions on Lists for Trial
January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury				
		M.V. (1)	Other	M.V. (1)	Divorce (2) SCO	Divorce (2) MCA	Other	Total
Algoma	Tried	0	0	9	17	117	11	154
	Settled	0	0	3	0	0	1	4
	Struck Off	0	1	0	4	2	2	9
	Total	0	1	12	21	119	14	167
	Untried (Sept. 30/72)	1	1	1	2	16	6	27
Brant	Tried	0	0	2	28	139	6	175
	Settled	4	2	6	0	0	11	23
	Struck Off	0	0	1	3	4	2	10
	Total	4	2	9	31	143	19	208
	Untried (Sept. 30/72)	2	0	2	5	20	4	33
Bruce	Tried	0	0	4	4	19	1	28
	Settled	0	0	1	0	0	0	1
	Struck Off	1	1	0	0	0	0	2
	Total	1	1	5	4	19	1	31
	Untried (Sept. 30/72)	0	0	2	0	1	1	4
Cochrane	Tried	0	0	0	6	32	0	38
	Settled	3	0	1	0	0	0	4
	Struck Off	0	1	0	0	0	1	2
	Total	3	1	1	6	32	1	44
	Untried (Sept. 30/72)	0	0	6	0	8	4	18
Dufferin	Tried	0	2	1	3	17	1	24
	Settled	0	1	1	0	0	1	3
	Struck Off	0	0	0	0	1	0	1
	Total	0	3	2	3	18	2	28
	Untried (Sept. 30/72)	0	0	0	1	0	0	1
Elgin	Tried	6	0	1	13	70	0	90
	Settled	3	1	3	1	0	3	11
	Struck Off	4	1	0	2	0	0	7
	Total	13	2	4	16	70	3	108
	Untried (Sept. 30/72)	1	0	2	6	18	2	29

(1) M.V. – Motor Vehicle Accident Actions
(2) Divorce S.C.O. – filed for hearing by High Court judge
M.C.A. – filed for hearing by local judge of the High Court
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.

TABLE C—*continued*

HIGH COURT

Dispositions of Civil Actions on Lists for Trial
January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury				
		M.V. (1)	Other	M.V. (1)	Divorce (2) SCO	Divorce (2) MCA	Other	Total
Essex	Tried	6	4	21	174	189	20	414
	Settled	10	0	11	0	0	11	32
	Struck Off	5	0	6	11	7	12	41
	Total	21	4	38	185	196	43	487
	Untried (Sept. 30/72)	7	0	13	119	183	13	335
Frontenac	Tried	0	0	0	76	97	4	177
	Settled	0	0	12	0	0	1	13
	Struck Off	1	1	2	3	3	4	14
	Total	1	1	14	79	100	9	204
	Untried (Sept. 30/72)	0	0	2	5	15	2	24
Grey	Tried	2	0	0	6	47	1	56
	Settled	4	0	6	0	0	0	10
	Struck Off	0	1	0	0	0	0	1
	Total	6	1	6	6	47	1	67
	Untried (Sept. 30/72)	1	1	4	0	4	4	14
Haldimand	Tried	0	0	3	7	11	2	23
	Settled	2	0	0	1	0	2	5
	Struck Off	1	2	2	3	0	0	8
	Total	3	2	5	11	11	4	36
	Untried (Sept. 30/72)	0	0	0	0	0	1	1
Halton	Tried	3	0	2	68	85	2	160
	Settled	5	1	3	0	0	4	13
	Struck Off	0	0	1	2	0	2	5
	Total	8	1	6	70	85	8	178
	Untried (Sept. 30/72)	0	0	4	4	49	2	59
Hastings	Tried	1	0	1	36	96	0	134
	Settled	2	0	7	0	0	4	13
	Struck Off	0	0	0	5	2	1	8
	Total	3	0	8	41	98	5	155
	Untried (Sept. 30/72)	1	0	2	4	43	3	53

(1) M.V. – Motor Vehicle Accident Actions
(2) Divorce S.C.O. – filed for hearing by High Court judge
M.C.A. – filed for hearing by local judge of the High Court
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.

TABLE C—*continued*

HIGH COURT

Dispositions of Civil Actions on Lists for Trial
January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury				
		M.V. (1)	Other	M.V. (1)	Divorce (2) SCO	Divorce (2) MCA	Other	Total
Huron	Tried	0	0	3	36	23	4	66
	Settled	5	1	7	0	0	1	14
	Struck Off	1	0	0	4	2	0	7
	Total	6	1	10	40	25	5	87
	Untried (Sept. 30/72)	3	0	1	1	3	2	10
Kenora	Tried	0	0	1	10	38	1	50
	Settled	0	0	0	1	6	0	7
	Struck Off	0	0	0	0	1	0	1
	Total	0	0	1	11	45	1	58
	Untried (Sept. 30/72)	0	0	0	1	7	1	9
Kent	Tried	0	0	7	13	88	5	113
	Settled	4	0	5	0	0	2	11
	Struck Off	4	0	0	2	2	3	11
	Total	8	0	12	15	90	10	135
	Untried (Sept. 30/72)	0	0	3	1	9	3	16
Lambton	Tried	2	0	9	21	115	7	154
	Settled	2	1	1	0	0	0	4
	Struck Off	0	1	0	4	2	1	8
	Total	4	2	10	25	117	8	166
	Untried (Sept. 30/72)	2	0	2	0	4	5	13
Lanark	Tried	0	0	1	25	36	0	62
	Settled	1	0	0	0	0	1	2
	Struck Off	0	0	0	0	0	0	0
	Total	1	0	1	25	36	1	64
	Untried (Sept. 30/72)	0	1	1	1	1	1	5
Leeds & Grenville	Tried	0	0	2	11	69	0	82
	Settled	0	0	2	0	0	2	4
	Struck Off	1	0	0	0	1	0	2
	Total	1	0	4	11	70	2	88
	Untried (Sept. 30/72)	0	0	0	0	1	0	1

(1) M.V. – Motor Vehicle Accident Actions
(2) Divorce S.C.O. – filed for hearing by High Court judge
M.C.A. – filed for hearing by local judge of the High Court
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.

TABLE C—*continued*

HIGH COURT

Dispositions of Civil Actions on Lists for Trial
January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury				
		M.V. (1)	Other	M.V. (1)	Divorce (2) SCO	Divorce (2) MCA	Other	Total
Lennox & Addington	Tried	2	1	0	4	17	1	25
	Settled	1	0	1	0	0	1	3
	Struck Off	0	0	1	5	0	3	9
	Total	3	1	2	9	17	5	37
	Untried (Sept. 30/72)	1	1	0	1	6	0	9
Manitoulin	Tried	0	1	0	0	1	0	2
	Settled	0	0	0	0	0	0	0
	Struck Off	0	0	0	0	0	0	0
	Total	0	1	0	0	1	0	2
	Untried (Sept. 30/72)	0	0	0	0	0	0	0
Middlesex	Tried	11	0	9	112	299	6	437
	Settled	26	3	18	0	0	19	66
	Struck Off	1	0	1	19	5	5	31
	Total	38	3	28	131	304	30	534
	Untried (Sept. 30/72)	25	2	48	34	57	28	194
Muskoka	Tried	0	0	0	10	29	0	39
	Settled	0	0	0	0	0	0	0
	Struck Off	0	0	2	2	0	0	4
	Total	0	0	2	12	29	0	43
	Untried (Sept. 30/72)	0	0	1	1	3	0	5
Niagara North	Tried	3	0	2	55	173	4	237
	Settled	20	0	2	1	0	7	30
	Struck Off	0	0	0	3	5	0	8
	Total	23	0	4	59	178	11	275
	Untried (Sept. 30/72)	16	1	4	8	13	9	51
Niagara South	Tried	1	1	2	8	212	6	230
	Settled	6	1	8	0	0	0	15
	Struck Off	2	0	4	1	2	2	11
	Total	9	2	14	9	214	8	256
	Untried (Sept. 30/72)	3	0	2	0	10	1	16

(1) M.V. – Motor Vehicle Accident Actions
(2) Divorce S.C.O. – filed for hearing by High Court judge
M.C.A. – filed for hearing by local judge of the High Court
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.

TABLE C—*continued*

HIGH COURT

Dispositions of Civil Actions on Lists for Trial
January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury				
		M.V. (1)	Other	M.V. (1)	Divorce (2) SCO	Divorce (2) MCA	Other	Total
Nipissing	Tried	0	0	1	10	66	2	79
	Settled	3	0	2	1	0	3	9
	Struck Off	0	0	0	2	0	1	3
	Total	3	0	3	13	66	6	91
	Untried (Sept. 30/72)	1	0	5	3	15	3	27
Norfolk	Tried	0	0	0	5	51	1	57
	Settled	0	0	2	0	0	1	3
	Struck Off	0	0	0	0	0	1	1
	Total	0	0	2	5	51	3	61
	Untried (Sept. 30/72)	2	0	0	1	3	1	7
Northumberland & Durham	Tried	1	0	0	34	59	2	96
	Settled	2	0	4	0	0	2	8
	Struck Off	0	0	0	0	0	2	2
	Total	3	0	4	34	59	6	106
	Untried (Sept. 30/72)	0	0	0	2	21	0	23
Ontario	Tried	2	3	2	26	140	7	180
	Settled	22	6	23	1	0	13	65
	Struck Off	4	0	5	1	1	1	12
	Total	28	9	30	28	141	21	257
	Untried (Sept. 30/72)	4	0	8	3	70	3	88
Ottawa-Carleton	Tried	5	1	17	476	348	36	883
	Settled	5	1	35	0	0	18	59
	Struck Off	1	1	1	82	9	9	103
	Total	11	3	53	558	357	63	1,045
	Untried (Sept. 30/72)	1	2	82	113	281	92	571
Oxford	Tried	0	0	4	7	69	1	81
	Settled	2	0	0	0	0	0	2
	Struck Off	1	0	1	1	0	2	5
	Total	3	0	5	8	69	3	88
	Untried (Sept. 30/72)	4	3	3	2	4	3	19

(1) M.V. – Motor Vehicle Accident Actions
(2) Divorce S.C.O. – filed for hearing by High Court judge
M.C.A. – filed for hearing by local judge of the High Court
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.

TABLE C—*continued*

HIGH COURT

Dispositions of Civil Actions on Lists for Trial
January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury				
		M.V. (1)	Other	M.V. (1)	Divorce (2) SCO	Divorce (2) MCA	Other	Total
Parry Sound	Tried	0	0	0	7	19	0	26
	Settled	0	0	2	0	0	1	3
	Struck Off	0	0	0	1	0	0	1
	Total	0	0	2	8	19	1	30
	Untried (Sept. 30/72)	0	0	2	1	8	3	14
Peel	Tried	3	1	10	112	120	7	253
	Settled	0	0	1	0	0	5	6
	Struck Off	0	3	3	6	4	0	16
	Total	3	4	14	118	124	12	275
	Untried (Sept. 30/72)	4	0	2	31	18	2	57
Perth	Tried	0	1	1	6	48	0	56
	Settled	1	0	2	0	0	0	3
	Struck Off	0	0	1	0	3	1	5
	Total	1	1	4	6	51	1	64
	Untried (Sept. 30/72)	2	0	4	0	4	1	11
Peterborough	Tried	0	0	0	27	94	5	126
	Settled	1	0	9	4	1	5	20
	Struck Off	1	0	1	3	2	0	7
	Total	2	0	10	34	97	10	153
	Untried (Sept. 30/72)	4	1	12	10	28	10	65
Prescott & Russell	Tried	0	0	0	9	6	1	16
	Settled	0	0	2	0	1	2	5
	Struck Off	0	0	1	0	0	0	1
	Total	0	0	3	9	7	3	22
	Untried (Sept. 30/72)	0	0	1	0	1	3	5
Prince Edward	Tried	0	0	0	13	13	0	26
	Settled	0	0	2	0	0	1	3
	Struck Off	0	0	0	0	1	1	2
	Total	0	0	2	13	14	2	31
	Untried (Sept. 30/72)	1	0	0	0	4	0	5

(1) M.V. – Motor Vehicle Accident Actions
(2) Divorce S.C.O. – filed for hearing by High Court judge
M.C.A. – filed for hearing by local judge of the High Court
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.

TABLE C—*continued*

HIGH COURT

Dispositions of Civil Actions on Lists for Trial
January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury				
		M.V. (1)	Other	M.V. (1)	Divorce (2) SCO	Divorce (2) MCA	Other	Total
Rainy River	Tried	0	0	0	10	26	0	36
	Settled	0	0	0	0	0	0	0
	Struck Off	0	0	0	0	0	0	0
	Total	0	0	0	10	26	0	36
	Untried (Sept. 30/72)	0	0	0	0	4	0	4
Renfrew	Tried	0	1	4	19	55	1	80
	Settled	0	0	1	0	0	1	2
	Struck Off	0	0	1	0	1	1	3
	Total	0	1	6	19	56	3	85
	Untried (Sept. 30/72)	1	0	3	1	16	1	22
Simcoe	Tried	1	0	6	119	194	10	330
	Settled	6	1	12	2	0	9	30
	Struck Off	0	0	3	11	0	4	18
	Total	7	1	21	132	194	23	378
	Untried (Sept. 30/72)	0	0	0	0	0	2	2
Stormont, Dundas & Glengarry	Tried	0	1	1	23	28	2	55
	Settled	2	0	1	0	17	1	21
	Struck Off	0	0	0	1	0	1	2
	Total	2	1	2	24	45	4	78
	Untried (Sept. 30/72)	1	0	4	0	10	0	15
Sudbury	Tried	4	0	28	47	133	16	228
	Settled	3	2	10	0	1	14	30
	Struck Off	4	0	6	2	4	1	17
	Total	11	2	44	49	138	31	275
	Untried (Sept. 30/72)	0	0	25	11	26	10	72
Temiskaming	Tried	0	1	1	4	25	0	36
	Settled	4	0	5	0	0	0	1
	Struck Off	0	0	1	0	0	0	1
	Total	4	1	7	4	25	0	41
	Untried (Sept. 30/72)	0	0	0	0	3	0	3

(1) M.V. – Motor Vehicle Accident Actions
(2) Divorce S.C.O. – filed for hearing by High Court judge
M.C.A. – filed for hearing by local judge of the High Court
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.

TABLE C—*continued*

HIGH COURT

Dispositions of Civil Actions on Lists for Trial
January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury				
		M.V. (1)	Other	M.V. (1)	Divorce (2) SCO	Divorce (2) MCA	Other	Total
Thunder Bay	Tried	1	0	7	24	177	5	214
	Settled	4	0	10	0	0	0	14
	Struck Off	2	3	6	2	1	1	15
	Total	7	3	23	26	178	6	243
	Untried (Sept. 30/72)	0	0	13	1	12	5	31
Victoria & Haliburton	Tried	0	0	0	4	21	3	28
	Settled	2	0	0	0	0	3	5
	Struck Off	0	0	0	0	1	0	1
	Total	2	0	0	4	22	6	34
	Untried (Sept. 30/72)	0	0	1	0	7	5	13
Waterloo	Tried	8	2	14	71	267	10	372
	Settled	9	3	12	1	1	9	35
	Struck Off	5	0	10	10	6	16	47
	Total	22	5	36	82	274	35	454
	Untried (Sept. 30/72)	1	1	6	0	13	4	25
Wellington	Tried	2	1	2	17	44	2	68
	Settled	4	0	3	0	0	1	8
	Struck Off	0	0	0	1	2	1	4
	Total	6	1	5	18	46	4	80
	Untried (Sept. 30/72)	11	2	8	7	7	11	46
Wentworth	Tried	14	0	19	213	516	42	804
	Settled	52	4	53	0	0	7	116
	Struck Off	1	0	5	1	2	11	20
	Total	67	4	77	214	518	60	940
	Untried (Sept. 30/72)	7	3	60	46	18	82	216
York	Tried	52	13	44	2,601	1,139	191	4,040
	Settled	298	28	127	2	2	210	667
	Struck Off	7	1	2	18	2	4	34
	Total	357	42	173	2,621	1,143	405	4,741
	Untried (Sept. 30/72)	195	15	392	1,190	379	1,125	3,296

(1) M.V. – Motor Vehicle Accident Actions
(2) Divorce S.C.O. – filed for hearing by High Court judge
M.C.A. – filed for hearing by local judge of the High Court
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.

TABLE D

HIGH COURT

Current Record of Latest Sittings Concluded
High Court Judge Presiding
Period Ending September 30, 1972

County/District	Actions on List	Tried or Settled	Struck Off	Traversed	Not Reached	Month Concluded
Algoma	16	5	1	0	10	September 72
Brant	21	12	0	9	0	September 72
Bruce	13	11	0	1	1	June 72
Cochrane	1	0	0	1	0	September 72
Dufferin	6	5	0	1	0	April 72
Elgin	20	11	1	8	0	September 72
Essex	108	41	7	1	59	June 72
Frontenac	23	14	2	7	0	September 72
Grey	14	6	0	8	0	June 72
Haldimand	3	3	0	0	0	September 72
Halton	23	19	1	3	0	September 72
Hastings	60	15	6	20	19	June 72
Huron	13	5	0	8	0	September 72
Kenora	1	0	0	0	1	September 72
Kent	12	6	0	6	0	September 72
Lambton	15	5	2	8	0	September 72
Lanark	17	15	0	2	0	June 72
Leeds & Grenville	13	13	0	0	0	April 72
Lennox & Addington	14	10	1	3	0	April 72
Manitoulin	1	1	0	0	0	May 72
Middlesex	162	63	9	17	73	June 72
Muskoka	12	10	2	0	0	March 72
Niagara North	32	14	0	7	11	June 72
Niagara South	11	7	0	4	0	September 72
Nipissing	8	1	0	7	0	September 72
Norfolk	5	4	0	1	0	May 72
Northumberland & Durham	12	10	0	2	0	September 72
Ontario	40	24	5	0	11	September 72
Ottawa-Carleton	407	42	2	0	363	June 72
Oxford	18	9	4	5	0	June 72
Parry Sound	3	2	1	0	0	April 72
Peel	76	66	2	8	0	June 72
Perth	6	3	0	3	0	September 72
Peterborough	56	23	5	9	19	May 72
Prescott & Russell	13	10	0	3	0	April 72
Prince Edward	2	1	1	0	0	May 72
Rainy River	10	10	0	0	0	May 72
Renfrew	9	4	1	4	0	September 72
Simcoe	63	56	6	1	0	September 72
Stormont, Dundas & Glengarry	10	6	0	4	0	September 72
Sudbury	69	17	6	0	46	September 72
Temiskaming	7	7	0	0	0	September 72
Thunder Bay	31	12	2	17	0	September 72
Victoria & Haliburton	7	3	0	4	0	June 72
Waterloo	28	15	3	10	0	September 72
Wellington	38	30	0	7	1	April 72
Wentworth	95	50	4	8	33	June 72
York	NOT SUBMITTED					

Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.

TABLE E

SUPREME COURT

Number of Actions on List and Not Reached
Period Ending September 30, 1972

County/District	Number on List (1)	Not Reached (Number of Months) 6–12 No.	6–12 %	13–18 No.	13–18 %	Over 18 No.	Over 18 %
Algoma	27	5	19.2	0	—	0	—
Brant	33	0	—	0	—	0	—
Bruce	4	0	—	0	—	0	—
Cochrane	18	0	—	0	—	0	—
Dufferin	1	0	—	0	—	0	—
Elgin	29	2	6.8	1	3.4	2	6.8
Essex	335	0	—	0	—	0	—
Frontenac	24	0	—	0	—	0	—
Grey	14	7	50.0	1	7.1	0	—
Haldimand	1	0	—	0	—	0	—
Halton	59	0	—	0	—	0	—
Hastings	53	11	20.7	1	1.8	0	—
Huron	10	0	—	0	—	0	—
Kenora	9	0	—	1	11.1	0	—
Kent	16	0	—	0	—	2	12.5
Lambton	13	0	—	2	15.3	0	—
Lanark	5	0	—	0	—	0	—
Leeds & Grenville	1	0	—	0	—	0	—
Lennox & Addington	9	3	33.3	0	—	0	—
Manitoulin	0	0	—	0	—	0	—
Middlesex	194	43	22.1	15	7.7	14	7.2
Muskoka	5	0	—	0	—	0	—
Niagara North	51	0	—	0	—	0	—
Niagara South	16	3	21.4	0	—	1	7.1
Nipissing	27	5	18.5	1	3.7	1	3.7
Norfolk	7	0	—	0	—	0	—
Northumberland & Durham	23	0	—	0	—	0	—
Ontario	88	2	2.2	7	7.9	1	1.1
Ottawa-Carleton	571	66	11.5	54	9.4	10	1.7
Oxford	19	0	—	0	—	0	—
Parry Sound	14	0	—	0	—	0	—
Peel	57	1	1.7	0	—	0	—
Perth	11	3	27.2	0	—	0	—
Peterborough	65	19	27.6	2	3.0	0	—
Prescott & Russell	5	1	20.0	0	—	0	—
Prince Edward	5	1	20.0	0	—	0	—
Rainy River	4	0	—	0	—	0	—
Renfrew	22	0	—	0	—	0	—
Simcoe	2	0	—	0	—	0	—
Stormont, Dundas & Glengarry	15	0	—	0	—	0	—
Sudbury	.72	6	9.6	0	—	0	—
Temiskaming	3	1	33.3	0	—	0	—
Thunder Bay	31	0	—	0	—	0	—
Victoria & Haliburton	13	0	—	0	—	0	—
Waterloo	25	0	—	1	4.0	1	4.0
Wellington	46	0	—	0	—	0	—
Wentworth	216	13	6.0	0	—	0	—
York	3,296	425	12.8	366	11.1	172	5.2
Total	5,564	617	11.1	452	8.1	204	3.6

Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.
(1) Number on List includes M.C.A. cases. See Table C for breakdown.
Note: Percentage of total cases on list, September 30, 1972, is indicated above.

APPENDIX II

TABLE A

COUNTY OR DISTRICT COURTS

Actions Commenced
Period January 1, 1972 – September 30, 1972

County/District	General Writs: Motor Vehicle	General Writs: Other	Specially Endorsed Writs: Mortgage	Specially Endorsed Writs: Other	Total
Algoma	82	56	7	197	342
Brant	89	53	11	159	312
Bruce	26	9	6	66	107
Cochrane	39	31	10	95	175
Dufferin	19	17	7	53	96
Elgin	48	27	9	138	222
Essex	702	214	46	683	1,645
Frontenac	113	59	12	265	449
Grey	95	38	18	159	310
Haldimand	9	4	2	34	49
Halton	137	238	7	331	713
Hastings	94	65	22	247	428
Huron	42	16	8	97	163
Kenora	22	36	2	60	120
Kent	54	17	13	196	280
Lambton	111	31	23	185	350
Lanark	24	8	6	94	132
Leeds & Grenville	51	31	6	125	213
Lennox & Addington	15	11	7	54	87
Manitoulin	0	4	1	7	12
Middlesex	433	239	54	825	1,551
Muskoka	16	18	13	35	82
Niagara North	225	125	20	347	717
Niagara South	284	55	20	248	607
Nipissing	80	49	4	123	256
Norfolk	21	22	2	64	109
Northumberland & Durham	35	24	6	94	159
Ontario	171	71	21	270	533
Ottawa-Carleton	705	323	13	1,118	2,159
Oxford	62	27	2	120	211
Parry Sound	5	9	2	14	30
Peel	155	120	36	399	710
Perth	45	26	2	131	204
Peterborough	107	79	33	292	511
Prescott & Russell	27	24	3	71	125
Prince Edward	9	7	4	27	47
Rainy River	4	20	1	19	44
Renfrew	52	14	5	89	160
Simcoe	179	70	48	358	655
Stormont, Dundas & Glengarry	68	19	14	148	249
Sudbury	289	146	10	522	967
Temiskaming	31	34	1	28	94
Thunder Bay	139	39	7	195	380
Victoria & Haliburton	19	36	3	56	114
Waterloo	268	173	19	639	1,099
Wellington	99	44	19	193	355
Wentworth	909	253	21	1,133	2,316
York	5,589	3,123	186	11,491	20,389
Total	11,798	6,154	792	22,294	41,038

Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.
Note: For divorce cases in Matrimonial Causes Court see Appendix I

TABLE B
COUNTY OR DISTRICT COURTS
Disposition of Actions on Lists for Trial
Provincial Summary
Period January 1, 1972 – September 30, 1972

Disposition	M.V. (1)	Other	M.V. (1)	Other	Total
Tried	90	39	689	610	1,428
Settled	331	44	601	495	1,471
Struck Off	122	13	246	305	686
Total	543	96	1,536	1,410	3,585
Untried (September 30, 1972)	205	50	794	729	1,778

(1) M.V. – Motor Vehicle Accident Actions
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.
Note: For divorce cases in Matrimonial Causes Court see Appendix I.

TABLE C
COUNTY OR DISTRICT COURTS
Dispositions of Actions on Lists for Trial
Period January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury		Total
		M.V. (1)	Other	M.V. (1)	Other	
Algoma	Tried	1	1	14	16	32
	Settled	1	0	7	5	13
	Struck Off	0	0	0	1	1
	Total	2	1	21	22	46
	Untried (Sept. 30/72)	0	0	15	17	32
Brant	Tried	1	1	7	5	14
	Settled	1	0	8	11	20
	Struck Off	0	0	0	4	4
	Total	2	1	15	20	38
	Untried (Sept. 30/72)	0	1	8	12	21
Bruce	Tried	0	0	1	1	2
	Settled	0	0	1	1	2
	Struck Off	0	0	3	3	6
	Total	0	0	5	5	10
	Untried (Sept. 30/72)	0	0	1	1	2
Cochrane	Tried	0	0	4	3	7
	Settled	0	0	2	3	5
	Struck Off	0	0	4	2	6
	Total	0	0	10	8	18
	Untried (Sept. 30/72)	0	1	2	2	5
Dufferin	Tried	0	0	8	10	18
	Settled	0	0	1	1	2
	Struck Off	0	0	0	0	0
	Total	0	0	9	11	20
	Untried (Sept. 30/72)	1	0	1	3	5
Elgin	Tried	1	0	2	4	7
	Settled	6	3	6	7	22
	Struck Off	1	1	1	0	3
	Total	8	4	9	11	32
	Untried (Sept. 30/72)	6	1	6	9	22

(1) M.V. – Motor Vehicle Accident Actions
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.
Note: For divorce cases in Matrimonial Causes Court see Appendix I

TABLE C—*continued*
COUNTY OR DISTRICT COURTS
Dispositions of Actions on Lists for Trial
Period January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury		Total
		M.V. (1)	Other	M.V. (1)	Other	
Essex	Tried	1	0	41	14	56
	Settled	3	1	36	7	47
	Struck Off	0	1	8	3	12
	Total	4	2	85	24	115
	Untried (Sept. 30/72)	4	1	62	24	91
Frontenac	Tried	0	4	4	2	10
	Settled	2	0	4	9	15
	Struck Off	0	0	0	3	3
	Total	2	4	8	14	28
	Untried (Sept. 30/72)	0	0	6	9	15
Grey	Tried	2	0	3	3	8
	Settled	1	0	4	3	8
	Struck Off	0	0	0	1	1
	Total	3	0	7	7	17
	Untried (Sept. 30/72)	0	1	4	8	13
Haldimand	Tried	0	0	1	3	4
	Settled	0	0	1	1	2
	Struck Off	0	0	2	0	2
	Total	0	0	4	4	8
	Untried (Sept. 30/72)	0	0	1	0	1
Halton	Tried	1	1	1	15	18
	Settled	2	0	2	1	5
	Struck Off	0	1	4	1	6
	Total	3	2	7	17	29
	Untried (Sept. 30/72)	1	4	0	13	18
Hastings	Tried	3	1	6	8	18
	Settled	1	0	14	9	24
	Struck Off	3	1	0	0	4
	Total	7	2	20	17	46
	Untried (Sept. 30/72)	1	0	17	17	35

(1) M.V. – Motor Vehicle Accident Actions
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.
Note: For divorce cases in Matrimonial Causes Court see Appendix I

TABLE C—*continued*
COUNTY OR DISTRICT COURTS
Dispositions of Actions on Lists for Trial
Period January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury		Total
		M.V. (1)	Other	M.V. (1)	Other	
Huron	Tried	0	0	7	2	9
	Settled	0	0	10	6	16
	Struck Off	0	0	3	4	7
	Total	0	0	20	12	32
	Untried (Sept. 30/72)	0	0	1	2	3
Kenora	Tried	0	0	0	4	4
	Settled	0	0	0	1	1
	Struck Off	0	0	0	0	0
	Total	0	0	0	5	5
	Untried (Sept. 30/72)	0	1	1	3	5
Kent	Tried	0	0	6	12	18
	Settled	1	0	8	2	11
	Struck Off	2	1	0	1	4
	Total	3	1	14	15	33
	Untried (Sept. 30/72)	1	0	5	9	15
Lambton	Tried	9	4	6	14	33
	Settled	5	3	9	5	22
	Struck Off	2	0	0	2	4
	Total	16	7	15	21	59
	Untried (Sept. 30/72)	1	0	10	3	14
Lanark	Tried	0	0	0	1	1
	Settled	0	0	0	3	3
	Struck Off	0	0	0	1	1
	Total	0	0	0	5	5
	Untried (Sept. 30/72)	0	0	0	2	2
Leeds & Grenville	Tried	0	0	5	3	8
	Settled	0	0	0	1	1
	Struck Off	0	0	5	2	7
	Total	0	0	10	6	16
	Untried (Sept. 30/72)	0	0	1	2	3

(1) M.V. – Motor Vehicle Accident Actions
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.
Note: For divorce cases in Matrimonial Causes Court see Appendix I

TABLE C—*continued*
COUNTY OR DISTRICT COURTS
Dispositions of Actions on Lists for Trial
Period January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury		
		M.V. (1)	Other	M.V. (1)	Other	Total
Lennox & Addington	Tried	0	1	1	1	3
	Settled	2	0	0	0	2
	Struck Off	0	0	0	0	0
	Total	2	1	1	1	5
	Untried (Sept. 30/72)	1	2	1	4	8
Manitoulin	Tried	0	0	0	0	0
	Settled	0	0	0	0	0
	Struck Off	0	0	0	0	0
	Total	0	0	0	0	0
	Untried (Sept. 30/72)	0	0	0	1	1
Middlesex	Tried	3	1	36	14	54
	Settled	10	2	74	23	109
	Struck Off	2	1	26	14	43
	Total	15	4	136	51	206
	Untried (Sept. 30/72)	27	6	135	82	250
Muskoka	Tried	0	0	0	3	3
	Settled	0	0	0	0	0
	Struck Off	0	0	1	0	1
	Total	0	0	1	3	4
	Untried (Sept. 30/72)	0	0	0	1	1
Niagara North	Tried	0	0	6	10	16
	Settled	5	1	7	5	18
	Struck Off	0	0	0	1	1
	Total	5	1	13	16	35
	Untried (Sept. 30/72)	2	1	23	16	42
Niagara South	Tried	0	0	8	11	19
	Settled	3	2	11	5	21
	Struck Off	0	0	0	0	0
	Total	3	2	19	16	40
	Untried (Sept. 30/72)	0	1	14	6	21

(1) M.V. – Motor Vehicle Accident Actions
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.
Note: For divorce cases in Matrimonial Causes Court see Appendix I

TABLE C—*continued*
COUNTY OR DISTRICT COURTS
Dispositions of Actions on Lists for Trial
Period January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury		
		M.V. (1)	Other	M.V. (1)	Other	Tota
Nipissing	Tried	1	0	8	5	14
	Settled	0	1	11	12	24
	Struck Off	0	0	0	5	5
	Total	1	1	19	22	43
	Untried (Sept. 30/72)	0	0	8	8	16
Norfolk	Tried	0	0	2	2	4
	Settled	0	0	0	3	3
	Struck Off	0	0	0	0	0
	Total	0	0	2	5	7
	Untried (Sept. 30/72)	0	0	4	3	7
Northumberland & Durham	Tried	0	1	0	3	4
	Settled	0	0	1	4	5
	Struck Off	1	0	0	0	1
	Total	1	1	1	7	10
	Untried (Sept. 30/72)	2	0	0	2	4
Ontario	Tried	1	0	7	4	12
	Settled	4	0	12	10	26
	Struck Off	0	0	0	0	0
	Total	5	0	19	14	38
	Untried (Sept. 30/72)	4	0	16	12	32
Ottawa-Carleton	Tried	2	2	45	51	100
	Settled	0	2	45	69	116
	Struck Off	1	0	13	12	26
	Total	3	4	103	132	242
	Untried (Sept. 30/72)	4	2	74	68	148
Oxford	Tried	0	1	3	3	7
	Settled	2	0	5	0	7
	Struck Off	1	0	0	1	2
	Total	3	1	8	4	16
	Untried (Sept. 30/72)	0	0	7	4	11

(1) M.V. – Motor Vehicle Accident Actions
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.
Note: For divorce cases in Matrimonial Causes Court see Appendix I

TABLE C—*continued*
COUNTY OR DISTRICT COURTS
Dispositions of Actions on Lists for Trial
Period January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury		
		M.V. (1)	Other	M.V. (1)	Other	Total
Parry Sound	Tried	0	0	0	0	0
	Settled	0	0	2	0	2
	Struck Off	0	0	0	0	0
	Total	0	0	2	0	2
	Untried (Sept. 30/72)	0	0	1	0	1
Peel	Tried	1	1	8	15	25
	Settled	1	1	6	11	19
	Struck Off	0	0	1	3	4
	Total	2	2	15	29	48
	Untried (Sept. 30/72)	0	0	2	5	7
Perth	Tried	0	0	7	5	12
	Settled	0	0	4	0	4
	Struck Off	0	0	1	4	5
	Total	0	0	12	9	21
	Untried (Sept. 30/72)	0	0	1	5	6
Peterborough	Tried	3	2	21	15	41
	Settled	3	0	14	2	19
	Struck Off	1	1	0	1	3
	Total	7	3	35	18	63
	Untried (Sept. 30/72)	11	3	6	5	25
Prescott & Russell	Tried	0	0	2	4	6
	Settled	0	0	3	2	5
	Struck Off	0	0	0	4	4
	Total	0	0	5	10	15
	Untried (Sept. 30/72)	0	0	1	3	4
Prince Edward	Tried	0	0	0	0	0
	Settled	0	0	2	0	2
	Struck Off	0	0	0	0	0
	Total	0	0	2	0	2
	Untried (Sept. 30/72)	0	0	0	0	0

(1) M.V. – Motor Vehicle Accident Actions
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.
Note: For divorce cases in Matrimonial Causes Court see Appendix I

TABLE C—*continued*
COUNTY OR DISTRICT COURTS
Dispositions of Actions on Lists for Trial
Period January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury		
		M.V. (1)	Other	M.V. (1)	Other	Total
Rainy River	Tried	0	0	0	2	2
	Settled	0	0	0	0	0
	Struck Off	0	0	0	0	0
	Total	0	0	0	2	2
	Untried (Sept. 30/72)	0	0	0	0	0
Renfrew	Tried	0	1	0	4	5
	Settled	0	0	0	3	3
	Struck Off	0	0	0	0	0
	Total	0	1	0	7	8
	Untried (Sept. 30/72)	0	0	5	2	7
Simcoe	Tried	0	0	10	11	21
	Settled	4	1	2	1	8
	Struck Off	1	0	0	0	1
	Total	5	1	12	12	30
	Untried (Sept. 30/72)	2	3	4	6	15
Stormont, Dundas & Glengarry	Tried	0	0	4	4	8
	Settled	0	0	6	4	10
	Struck Off	0	0	0	2	2
	Total	0	0	10	10	20
	Untried (Sept. 30/72)	0	0	4	1	5
Sudbury	Tried	0	0	30	24	54
	Settled	0	0	6	1	7
	Struck Off	0	0	9	3	12
	Total	0	0	45	28	73
	Untried (Sept. 30/72)	2	1	4	3	10
Temiskaming	Tried	0	0	3	1	4
	Settled	0	0	6	2	8
	Struck Off	0	0	0	0	0
	Total	0	0	9	3	12
	Untried (Sept. 30/72)	0	0	1	2	3

(1) M.V. – Motor Vehicle Accident Actions
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.
Note: For divorce cases in Matrimonial Causes Court see Appendix I

TABLE C—*continued*
COUNTY OR DISTRICT COURTS

Dispositions of Actions on Lists for Trial
Period January 1, 1972 – September 30, 1972

County/District	Disposition	Jury		Non-Jury		
		M.V. (1)	Other	M.V. (1)	Other	Total
Thunder Bay	Tried	0	0	12	5	17
	Settled	0	0	3	0	3
	Struck Off	0	0	1	1	2
	Total	0	0	16	6	22
	Untried (Sept. 30/72)	3	0	11	10	24
Victoria & Haliburton	Tried	0	0	1	2	3
	Settled	0	0	2	2	4
	Struck Off	0	0	0	0	0
	Total	0	0	3	4	7
	Untried (Sept. 30/72)	1	1	0	11	13
Waterloo	Tried	1	0	40	37	78
	Settled	0	0	26	15	41
	Struck Off	0	0	25	59	84
	Total	1	0	91	111	203
	Untried (Sept. 30/72)	0	2	9	10	21
Wellington	Tried	0	0	9	8	17
	Settled	1	0	3	5	9
	Struck Off	0	0	3	0	3
	Total	1	0	15	13	29
	Untried (Sept. 30/72)	1	3	7	30	41
Wentworth	Tried	7	6	43	24	80
	Settled	5	0	26	14	45
	Struck Off	1	0	5	2	8
	Total	13	6	74	40	133
	Untried (Sept. 30/72)	15	2	101	56	174
York	Tried	52	11	267	222	552
	Settled	268	27	211	226	732
	Struck Off	106	6	131	165	408
	Total	426	44	609	613	1,692
	Untried (Sept. 30/72)	115	13	214	237	579

(1) M.V. – Motor Vehicle Accident Actions
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.
Note: For divorce cases in Matrimonial Causes Court see Appendix I

TABLE D
COUNTY AND DISTRICT COURTS OF ONTARIO

Record of Latest Sittings Concluded
As of September 30, 1972

County/District	Number on List for Last Sittings	Tried or Settled	Struck Off	Traversed	Not Reached	Month Concluded
Algoma	19	3	0	0	16	September '72
Brant	25	4	0	0	21	September '72
Bruce	3	2	1	0	0	June '72
Cochrane	4	3	0	1	0	June '72
Dufferin (2)						
Elgin	16	5	1	10	0	June '72
Essex	95	24	2	0	69	September '72
Frontenac	15	3	0	5	7	April '72
Grey	14	4	1	1	8	May '72
Haldimand	1	1	0	0	0	June '72
Halton	12	5	1	6	0	June '72
Hastings	46	18	2	0	26	June '72
Huron	8	2	0	6	0	June '72
Kenora	5	1	0	0	4	Sep ember '72
Kent	16	9	0	2	5	April '72
Lambton	18	16	1	1	0	June '72
Lanark	1	0	0	1	0	September '72
Leeds & Grenville	2	1	1	0	0	May '72
Lennox & Addington	9	4	0	5	0	June '72
Manitoulin	0	0	0	0	0	
Middlesex	203	38	2	16	147	June '72
Muskoka	2	2	0	0	0	June '72
Niagara North	38	13	1	0	24	June '72
Niagara South	24	16	0	2	6	September '72
Nipissing	30	14	3	13	0	April '72
Norfolk	3	2	0	1	0	June '72
Northumberland & Durham	10	7	0	3	0	June '72
Ontario	39	21	0	4	14	May '72
Ottawa-Carleton (2)						
Oxford	10	2	1	7	0	June '72
Parry Sound	3	1	0	1	1	June '72
Peel	7	3	0	4	0	September '72
Perth	10	2	2	6	0	September '72
Peterborough	31	20	0	11	0	September '72
Prescott & Russell	5	4	0	1	0	June '72
Prince Edward	1	1	0	0	0	September '72
Rainy River	1	1	0	0	0	March '72
Renfrew	13	9	0	0	4	September '72
Simcoe	6	4	0	0	2	June '72
Stormont, Dundas & Glengarry	6	4	1	1	0	June '72
Sudbury	25	13	2	0	10	September '72
Temiskaming	4	2	0	1	1	September '72
Thunder Bay	14	4	1	9	0	September '72
Victoria & Haliburton	10	5	0	5	0	September '72
Waterloo	46	35	4	7	0	September '72
Wellington (1)	39	31	0	0	7	July '72
Wentworth	141	8	0	1	132	June '72
York	308	123	51	0	134	September '72

(1) Number on List includes M.C.A. cases.
(2) Information not provided. See Table D.
Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.
Note: For divorce cases in Matrimonial Causes Court see Appendix I.

TABLE E
COUNTY OR DISTRICT COURTS
Number of Cases on List and Not Reached
Period Ending September 30, 1972

County/District	Number on All Lists (Sept. 30/72)	Not Reached (Number of Months) 6–12 No.	6–12 %	13–18 No.	13–18 %	Over 18 No.	Over 18 %
Algoma	32	10	31.2	2	6.2	0	—
Brant	21	0	—	0	—	0	—
Bruce	2	0	—	0	—	0	—
Cochrane	5	0	—	0	—	0	—
Dufferin	5	5	100.0	0	—	0	—
Elgin	22	2	9.0	4	18.1	1	4.5
Essex	91	6	6.5	0	—	0	—
Frontenac	15	0	—	0	—	0	—
Grey	13	0	—	0	—	0	—
Haldimand	1	0	—	0	—	0	—
Halton	18	0	—	0	—	0	—
Hastings	35	17	48.5	4	11.4	0	—
Huron	3	0	—	0	—	0	—
Kenora	5	2	40.0	1	20.0	0	—
Kent	15	3	20.0	2	13.3	0	—
Lambton	14	2	14.2	0	—	0	—
Lanark	2	0	—	0	—	0	—
Leeds & Grenville	3	0	—	0	—	0	—
Lennox & Addington	8	0	—	0	—	0	—
Manitoulin	1	0	—	0	—	0	—
Middlesex	250	104	41.6	2	0.8	0	—
Muskoka	1	0	—	0	—	0	—
Niagara North	42	0	—	0	—	0	—
Niagara South	21	7	33.3	1	4.7	0	—
Nipissing	16	3	18.7	3	18.7	2	12.5
Norfolk	7	0	—	0	—	0	—
Northumberland & Durham	4	0	—	0	—	0	—
Ontario	32	5	15.6	6	18.7	2	6.2
Ottawa-Carleton	148	24	16.2	0	—	0	—
Oxford	11	0	—	0	—	0	—
Parry Sound	1	0	—	0	—	0	—
Peel	7	0	—	0	—	0	—
Perth	6	0	—	0	—	0	—
Peterborough	25	7	28.0	4	16.0	4	16.0
Prescott & Russell	4	0	—	0	—	0	—
Prince Edward	0	0	—	0	—	0	—
Rainy River	0	0	—	0	—	0	—
Renfrew	7	1	14.2	0	—	0	—
Simcoe	15	0	—	0	—	0	—
Stormont, Dundas & Glengarry	5	0	—	0	—	0	—
Sudbury	10	0	—	0	—	0	—
Temiskaming	3	0	—	1	33.3	1	33.3
Thunder Bay	24	0	—	0	—	0	—
Victoria & Haliburton	13	0	—	0	—	0	—
Waterloo	21	1	4.7	0	—	0	—
Wellington	41	0	—	0	—	0	—
Wentworth	174	26	14.9	17	9.7	14	8.6
York	579	164	28.3	15	2.5	1	0.1
Total	1,778	389	21.9	62	3.5	25	1.4

Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.
Note: (1) Percentage of total cases on list, September 30, 1972, is indicated above.
(2) Includes divorce cases in Matrimonial Causes Court.

TABLE F
COUNTY OR DISTRICT COURTS
Disposition of Mechanics Lien Actions on List
January 1, 1972 – September 30, 1972

County/District	Cases Pending Jan. 1/72	Added During the Period	Tried	Settled	Total	Cases Untried Sept. 30/72
Algoma	0	0	0	0	0	0
Brant	2	11	4	0	4	9
Bruce	1	7	1	7	8	0
Cochrane	0	5	3	1	4	1
Dufferin	0	5	3	1	4	1
Elgin	0	4	0	2	2	2
Essex	15	18	10	13	23	10
Frontenac	12	2	8	4	12	2
Grey	1	7	4	4	8	0
Haldimand	0	1	1	0	1	0
Halton	4	17	11	6	17	4
Hastings	2	5	5	1	6	1
Huron	0	1	0	1	1	0
Kenora	0	0	0	0	0	0
Kent	3	3	4	1	5	1
Lambton	2	1	3	0	3	0
Lanark	3	1	1	3	4	0
Leeds & Grenville	0	6	4	2	6	0
Lennox & Addington	0	0	0	0	0	0
Manitoulin	0	2	1	0	1	1
Middlesex	36	62	20	26	46	52
Muskoka	5	6	4	2	6	5
Niagara North	55	34	5	8	13	76
Niagara South	0	4	4	0	4	0
Nipissing	0	3	3	0	3	0
Norfolk	0	1	1	0	1	0
Northumberland & Durham	23	28	5	4	9	42
Ontario	1	5	1	0	1	5
Ottawa-Carleton (1)	N/A	N/A	N/A	N/A	N/A	N/A
Oxford	0	0	0	0	0	0
Parry Sound	0	2	1	0	1	1
Peel	12	21	17	11	28	5
Perth	0	1	0	1	1	0
Peterborough	2	1	1	2	3	0
Prescott & Russell	0	2	2	0	2	0
Prince Edward	0	0	0	0	0	0
Rainy River	0	1	1	0	1	0
Renfrew	0	0	0	0	0	0
Simcoe	2	21	21	2	23	0
Stormont, Dundas & Glengarry	0	0	0	0	0	0
Sudbury	0	31	20	1	21	10
Temiskaming	0	0	0	0	0	0
Thunder Bay	3	10	1	7	8	5
Victoria & Haliburton (2)	N/A	N/A	1	0	1	2
Waterloo	0	19	16	0	16	3
Wellington	16	50	9	9	18	48
Wentworth	3	9	7	3	10	2
York	N/A	N/A	N/A	N/A	N/A	N/A
Total	203	407	203	122	325	288

Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.
(1) Date not available.
(2) Problems located. County Court office is investigating.

TABLE G
COUNTY OR DISTRICT COURTS
Disposition of Summary Conviction Appeals
January 1, 1972 – September 30, 1972

County/District	Cases Pending Jan. 1/72	Cases Added	Dispositions			Cases Untried Sept. 30/72
			Tried	Abandoned	Total	
Algoma	8	29	20	2	22	15
Brant	7	12	12	4	16	3
Bruce	1	6	1	0	1	6
Cochrane	3	7	7	0	7	3
Dufferin	0	12	10	0	10	2
Elgin	0	6	0	1	1	5
Essex	14	50	29	9	38	26
Frontenac	1	11	7	4	11	1
Grey	2	17	8	3	11	8
Haldimand	0	5	4	1	5	0
Halton	21	44	29	6	35	30
Hastings	3	14	3	5	8	9
Huron	0	4	3	1	4	0
Kenora	3	6	4	3	7	2
Kent	4	10	7	1	8	6
Lambton	9	13	11	4	15	7
Lanark	0	4	4	0	4	0
Leeds & Grenville	7	3	5	2	7	3
Lennox & Addington	5	10	6	2	8	7
Manitoulin	1	0	0	0	0	1
Middlesex*	21	88	75	8	85*	24
Muskoka	3	10	6	4	10	3
Niagara North	10	60	26	10	36	34
Niagara South	0	12	11	0	11	1
Nipissing*	7	30	6	1	11*	26
Norfolk	0	8	4	3	7	1
Northumberland & Durham	0	14	4	1	5	9
Ontario	10	40	14	7	21	29
Ottawa-Carleton	22	45	31	10	41	26
Oxford	8	8	5	0	5	11
Parry Sound	4	15	9	0	9	10
Peel	61	76	59	15	74	63
Perth	1	0	0	1	1	0
Peterborough	9	15	12	1	13	11
Prescott & Russell	0	5	1	0	1	4
Prince Edward	0	1	0	0	0	1
Rainy River	3	1	1	0	1	3
Renfrew	2	12	12	0	12	2
Simcoe	1	28	24	1	25	4
Stormont, Dundas & Glengarry	0	4	2	1	3	1
Sudbury	30	45	19	7	26	49
Temiskaming	5	6	5	3	8	3
Thunder Bay	5	25	19	3	22	8
Victoria & Haliburton	6	10	5	1	6	10
Waterloo	8	41	22	1	23	26
Wellington	8	12	11	3	14	6
Wentworth	32	108	62	10	72	68
York	424	1,008	796	144	940	492
Total	769	1,990	1,411	283	1,700*	1,059

Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.

* Adjournments *Sine Die*. Middlesex – 2 (April, 1972); Nipissing – 4 (February, 1972); Total – 6.

TABLE H
COUNTY OR DISTRICT COURTS
Number of Summary Conviction Appeals on List and Not Reached
Period ending September 30, 1972

County/District	Number on All Lists (Sept. 30/72)	Not Reached (Number of Months)					
		6–12		13–18		Over 18	
		No.	%	No.	%	No.	%
Algoma	15	2	13.3	0	—	0	—
Brant	3	0	—	0	—	0	—
Bruce	6	0	—	0	—	0	—
Cochrane	3	0	—	0	—	0	—
Dufferin	2	2	100.0	0	—	0	—
Elgin	5	0	—	0	—	0	—
Essex	26	5	19.2	2	7.6	0	—
Frontenac	1	0	—	0	—	0	—
Grey	8	1	12.5	0	—	0	—
Haldimand	0	0	—	0	—	0	—
Halton	30	9	30.0	10	33.3	2	6.6
Hastings	9	0	—	0	—	0	—
Huron	0	0	—	0	—	0	—
Kenora	2	0	—	0	—	0	—
Kent	6	0	—	0	—	0	—
Lambton	7	0	—	0	—	0	—
Lanark	0	0	—	0	—	0	—
Leeds & Grenville	3	2	66.6	0	—	0	—
Lennox & Addington	7	1	14.2	0	—	1	14.2
Manitoulin	1	0	—	1	100.0	0	—
Middlesex	24	5	20.8	0	—	0	—
Muskoka	3	0	—	0	—	0	—
Niagara North	34	0	—	0	—	0	—
Niagara South	1	0	—	0	—	0	—
Nipissing	26	14	53.8	5	19.2	0	—
Norfolk	1	0	—	0	—	0	—
Northumberland & Durham	9	0	—	0	—	0	—
Ontario	29	10	34.4	0	—	0	—
Ottawa-Carleton	26	0	—	0	—	0	—
Oxford	11	3	27.2	7	63.6	0	—
Parry Sound	10	0	—	0	—	0	—
Peel	63	42	66.6	15	23.8	6	9.5
Perth	0	0	—	0	—	0	—
Peterborough	11	0	—	0	—	1	9.0
Prescott & Russell	4	0	—	0	—	0	—
Prince Edward	1	0	—	0	—	0	—
Rainy River	3	0	—	0	—	0	—
Renfrew	2	1	—	0	—	0	—
Simcoe	4	0	—	0	—	0	—
Stormont, Dundas & Glengarry	1	0	—	0	—	0	—
Sudbury	49	20	40.8	10	20.4	0	—
Temiskaming	3	3	100.0	0	—	0	—
Thunder Bay	8	0	—	0	—	0	—
Victoria & Haliburton	10	0	—	0	—	0	—
Waterloo	26	10	38.4	1	3.8	0	—
Wellington	6	0	—	0	—	0	—
Wentworth	68	1	1.4	2	2.9	0	—
York	492	268	54.5	168	34.1	48	9.8
Total	1,059	399	37.6	221	20.8	58	5.4

Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.

Note: Percentage of total cases on list, September 30, 1972, is indicated above.

TABLE I
COUNTY OR DISTRICT COURTS
The Landlord & Tenant Act
January 1, 1972 – September 30, 1972

County/District	Appointments	Total Resolved	Number Resolved Within			
			30 Days	30–60 Days	60–90 Days	Over 90 Days
Algoma	14	9	8	0	0	1
Brant	22	20	18	2	0	0
Bruce	3	2	2	0	0	0
Cochrane	10	10	10	0	0	0
Dufferin	3	3	3	0	0	0
Elgin	17	9	6	3	0	0
Essex	78	59	52	7	0	0
Frontenac	10	2	2	0	0	0
Grey	6	6	6	0	0	0
Haldimand	0	0	0	0	0	0
Halton	31	23	22	1	0	0
Hastings	13	11	11	0	0	0
Huron	2	1	1	0	0	0
Kenora	2	2	2	0	0	0
Kent	11	5	5	0	0	0
Lambton	6	5	5	0	0	0
Lanark	1	1	1	0	0	0
Leeds & Grenville	3	3	3	0	0	0
Lennox & Addington	0	0	0	0	0	0
Manitoulin	0	0	0	0	0	0
Middlesex	103	77	67	9	0	1
Muskoka	0	0	0	0	0	0
Niagara North	38	24	24	0	0	0
Niagara South	30	4	4	0	0	0
Nipissing	10	10	10	0	0	0
Norfolk	7	7	7	0	0	0
Northumberland & Durham	7	6	6	0	0	0
Ontario	52	20	17	2	0	1
Ottawa-Carleton	246	123	119	4	0	0
Oxford	5	1	1	0	0	0
Parry Sound	3	2	2	0	0	0
Peel	152	143	100	40	1	2
Perth	3	1	1	0	0	0
Peterborough	17	8	8	0	0	0
Prescott & Russell	4	0	0	0	0	0
Prince Edward	2	2	2	0	0	0
Rainy River	1	1	1	0	0	0
Renfrew	4	0	0	0	0	0
Simcoe	27	26	26	0	0	0
Stormont, Dundas & Glengarry	20	15	15	0	0	0
Sudbury	73	40	40	0	0	0
Temiskaming	0	0	0	0	0	0
Thunder Bay	26	13	13	0	0	0
Victoria & Haliburton	3	0	0	0	0	0
Waterloo	53	27	27	0	0	0
Wellington	6	6	6	0	0	0
Wentworth	65	47	47	0	0	0
York	2,002	1,771	1,380	313	42	36
Total	3,191	2,545	2,080	381	43	41

Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.

TABLE J
COUNTY OR DISTRICT COURTS
Number of Half Days Spent in Court by the Court Clerk
January 1, 1972 – September 30, 1972

County/District	Criminal Cases	Civil Actions	Summary Conviction Appeals	Total
Algoma	50	54	22	126
Brant	72	57	15	144
Bruce	3	6	2	11
Cochrane	13	27	8	48
Dufferin	1	36	12	49
Elgin	31	18	0	49
Essex	168	66	40	274
Frontenac	82	40	1	123
Grey	14	18	8	40
Haldimand	5	14	2	21
Halton	44	80	66	190
Hastings	19	50	0	69
Huron	1	12	2	15
Kenora	8	5	6	19
Kent	23	21	13	57
Lambton	8	42	10	60
Lanark	1	5	2	8
Leeds & Grenville	12	19	6	37
Lennox & Addington	12	10	3	25
Manitoulin	0	2	0	2
Middlesex	127	193	57	377
Muskoka	9	33	7	49
Niagara North	77	57	24	158
Niagara South	48	83	9	140
Nipissing	51	42	8	101
Norfolk	14	33	4	51
Northumberland & Durham	25	22	6	53
Ontario	92	25	19	136
Ottawa-Carleton	198	264	23	485
Oxford	15	12	16	43
Parry Sound	0	14	2	16
Peel	81	71	61	332
Perth	14	29	0	21
Peterborough	14	64	4	84
Prescott & Russell	0	38	2	40
Prince Edward	6	2	0	8
Rainy River	0	7	0	7
Renfrew	16	24	1	41
Simcoe	43	93	20	156
Stormont, Dundas & Glengarry	32	21	3	56
Sudbury	85	186	4	275
Temiskaming	12	18	5	35
Thunder Bay	23	36	21	80
Victoria & Haliburton	58	12	0	70
Waterloo	144	95	11	250
Wellington	24	34	11	69
Wentworth	223	169	92	484
York	N/A	3,495	N/A	3,495
Total	1,998	5,754	628	8,380

Source: Supreme, County and Surrogate Courts Monthly Statistical Report submitted through the Local Registrar's office.

TABLE K

COUNTY OR DISTRICT COURTS

County Court Judges' Criminal Court Activity Summary
January 1, 1972 – September 30, 1972

County/District	Cases on Hand Jan. 1, 1972	Cases Added: True Bill or Re-election	Cases Added: Enforcement of Bench Warrants	Cases Disposed: Trial	Cases Disposed: Guilty Plea	Cases Disposed: Bench Warrant	Cases Disposed: Re-election	Cases Remaining Sept. 30, 1972
Algoma	7	21	0	14	7	0	0	7
Brant	3	9	0	5	3	0	0	4
Bruce	NIL	NIL	NIL	NIL	NIL	NIL	NIL	NIL
Cochrane	9	9	0	6	0	0	0	12
Dufferin	0	12	0	8	1	0	0	3
Elgin	14	4	0	5	11	0	0	2
Essex	7	20	0	17	0	0	0	10
Frontenac	2	11	0	11	0	0	0	2
Grey	4	5	0	6	2	0	0	1
Haldimand	1	2	0	3	0	0	0	0
Halton	4	8	0	6	2	0	2	2
Hastings	0	4	0	1	0	0	2	1
Huron	1	2	0	3	0	0	0	0
Kenora	0	11	0	8	0	0	0	3
Kent	2	0	0	1	1	0	0	0
Lambton	0	4	0	1	1	0	1	1
Lanark	2	0	0	0	2	0	0	0
Leeds & Grenville	0	3	0	3	0	0	0	0
Lennox & Addington	5	0	0	1	3	1	0	0
Manitoulin (1)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Middlesex	6	29	0	13	9	1	1	11
Muskoka	NIL	NIL	NIL	NIL	NIL	NIL	NIL	NIL
Niagara North	4	8	0	8	2	0	0	2
Niagara South	4	6	0	8	0	0	0	2
Nipissing	2	22	0	7	12	0	0	5
Norfolk	1	11	0	5	1	0	0	6
Northumberland & Durham	0	3	0	0	2	0	0	1
Ontario	2	25	0	7	17	0	0	3
Ottawa-Carleton	14	10	0	14	0	0	6	4
Oxford	2	3	0	3	0	1	1	0
Parry Sound	NIL	NIL	NIL	NIL	NIL	NIL	NIL	NIL
Peel (2)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Perth	2	8	0	3	2	0	1	4
Peterborough	2	1	0	0	1	1	0	1
Prescott & Russell (4)	NIL	NIL	NIL	NIL	NIL	NIL	NIL	NIL
Prince Edward	0	1	0	1	0	0	0	0
Rainy River	NIL	NIL	NIL	NIL	NIL	NIL	NIL	NIL
Renfrew	1	9	0	6	2	0	0	2
Simcoe	1	13	0	6	4	0	1	3
Stormont, Dundas & Glengarry	2	7	0	5	1	0	0	3
Sudbury	29	30	0	8	13	5	2	31
Temiskaming	1	4	0	0	2	1	0	2
Thunder Bay	3	2	0	3	1	0	1	0
Victoria & Haliburton	7	12	0	10	0	0	1	8
Waterloo	9	29	0	18	10	1	0	9
Wellington	10	29	0	14	14	0	0	11
Wentworth	1	5	0	2	0	0	1	3
Total	164	392	0	240	126	11	20	159
York (3)	60	82	4	34	47	2	0	63

Source: County or District Court – Criminal Statistics (Monthly Statistical Report) submitted through the respective Crown attorneys' offices.
(1) Manitoulin does not have a Crown attorney's office
(2) Non-reporting
(3) September 1972 figures only
(4) Period reported: April 1, 1972–September 30, 1972

TABLE L

COUNTY OR DISTRICT COURTS

General Sessions of the Peace Activity Summary
January 1, 1972 – September 30, 1972

County/District	Cases on Hand Jan. 1, 1972	Cases Added: True Bill or Re-election	Cases Added: Enforcement of Bench Warrants	Cases Disposed: Trial	Cases Disposed: Guilty Plea	Cases Disposed: Bench Warrant	Cases Disposed: Re-election	Cases Remaining Sept. 30, 1972
Algoma	4	14	0	9	1	0	1	7
Brant (1)	13	5	0	8	2	0	4	1
Bruce	0	1	0	0	0	0	0	1
Cochrane	0	4	0	2	0	0	0	2
Dufferin	0	0	0	0	0	0	0	0
Elgin	1	12	0	2	0	0	4	7
Essex	31	26	0	30	1	0	11	15
Frontenac	2	17	0	10	1	0	2	6
Grey (1)	0	4	0	1	0	0	0	0
Haldimand	0	0	0	0	0	0	0	0
Halton	2	13	0	8	0	0	2	5
Hastings	2	9	0	3	0	0	0	4
Huron	1	1	0	0	0	0	1	1
Kenora	0	1	0	1	0	0	0	0
Kent	1	4	0	5	0	0	0	0
Lambton	4	7	0	1	1	1	7	1
Lanark	0	1	0	0	1	0	0	0
Leeds & Grenville	2	0	0	1	0	0	1	0
Lennox & Addington	0	1	0	0	0	0	0	1
Manitoulin	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Middlesex	8	26	1	11	2	3	6	13
Muskoka	0	2	0	2	0	0	0	0
Niagara North	7	12	0	8	0	1	6	4
Niagara South	7	21	0	16	0	0	2	10
Nipissing	6	18	0	2	1	0	15	6
Norfolk	0	12	0	3	0	0	1	8
Northumberland & Durham	2	5	0	3	0	0	2	2
Ontario	15	31	0	4	0	3	27	12
Ottawa-Carleton	19	89	1	42	0	1	8	58
Oxford	1	2	0	1	0	0	0	2
Parry Sound	0	0	0	0	0	0	0	0
Peel	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Perth	1	3	0	1	0	0	1	2
Peterborough	6	11	0	6	0	0	1	10
Prescott & Russell (2)	1	1	0	1	0	0	0	1
Prince Edward	1	0	0	1	0	0	0	0
Rainy River	0	0	0	0	0	0	0	0
Renfrew	1	10	0	0	0	0	7	4
Simcoe (1)	9	8	2	4	0	0	2	3
Stormont, Dundas & Glengarry	2	1	0	2	0	0	0	1
Sudbury	17	40	0	7	1	0	6	43
Temiskaming	0	1	0	1	0	0	0	0
Thunder Bay	3	4	0	3	0	0	0	4
Victoria & Haliburton	5	23	0	15	0	0	2	11
Waterloo	8	11	0	3	2	0	14	0
Wellington	2	2	0	0	0	0	4	0
Wentworth	13	54	0	40	11	0	0	16
Total	197	507	4	257	24	9	141	261
York (3)	373	155	6	10	0	13	53	458

Source: County or District Court – Criminal Statistics (Monthly Statistical Report) submitted through the respective Crown attorneys' offices.
(1) Included "No Bill" under Cases Added prior to March 31, 1972. Adjusted "On Hand" totals as of April 1, 1972: Brant – 11 instead of 14 (3 No Bills); Grey – Nil instead of 3 (3 No Bills); Simcoe – 2 instead of 12 (10 No Bills)
(2) Reported April 1, 1972–September 30, 1972
(3) September 1972 figures only

TABLE M
SURROGATE COURT
January 1, 1972 – September 30, 1972

County/District	(A) Applications Received: Probates and Administration	(A) Guardianship	(A) Total	(B) Certificates Issued: Probates and Administration	(B) Guardianship	(B) Total	(C) Passing of Accounts	(D) Number of Half Days Spent in Court by the Registrar
Algoma	194	2	196	193	2	195	8	42
Brant	293	8	301	302	5	307	17	12
Bruce	242	0	242	207	0	207	8	0
Cochrane	186	1	187	182	1	183	3	6
Dufferin	89	0	89	60	0	60	4	9
Elgin	264	1	265	253	2	255	6	6
Essex	824	6	830	759	2	761	19	50
Frontenac	241	2	243	229	1	230	12	27
Grey	300	1	301	303	1	304	13	9
Haldimand	112	1	113	121	1	122	0	2
Halton	344	6	350	328	4	332	14	4
Hastings	259	0	259	257	0	257	12	12
Huron	238	0	238	209	0	209	10	7
Kenora	119	0	119	99	0	99	2	5
Kent	373	1	374	381	1	382	7	3
Lambton	369	1	370	348	0	348	3	0
Lanark	158	1	159	153	1	154	0	1
Leeds & Grenville	256	0	256	259	0	259	7	3
Lennox & Addington	65	0	65	56	0	56	0	2
Manitoulin	46	1	47	44	1	45	0	0
Middlesex	785	6	791	761	3	764	43	23
Muskoka	125	1	126	121	0	121	0	15
Niagara North	415	0	415	400	0	400	11	6
Niagara South	481	1	482	409	1	410	14	31
Nipissing	160	2	162	163	2	165	4	0
Norfolk	193	0	193	196	0	196	12	26
Northumberland & Durham	298	0	298	250	1	251	10	6
Ontario	417	2	419	410	0	410	20	29
Ottawa-Carleton	980	26	1,006	1,018	23	1,041	46	28
Oxford	280	1	281	286	1	287	9	12
Parry Sound	109	1	110	109	1	110	8	15
Peel	384	33	417	369	23	392	12	22
Perth	275	8	283	279	8	287	6	5
Peterborough	256	2	258	217	2	219	12	4
Prescott & Russell	118	0	118	119	0	119	2	8
Prince Edward	80	0	80	68	0	68	4	21
Rainy River	31	0	31	24	0	24	0	0
Renfrew	202	5	207	173	5	178	4	5
Simcoe	512	1	513	528	1	529	15	21
Stormont, Dundas & Glengarry	248	3	251	243	3	246	7	4
Sudbury	328	0	328	283	0	283	6	11
Temiskaming	113	0	113	106	0	106	0	0
Thunder Bay	341	0	341	342	0	342	3	0
Victoria & Haliburton	199	0	199	197	0	197	6	4
Waterloo	645	8	653	479	80	559	13	5
Wellington	350	6	356	331	4	335	10	7
Wentworth	1,026	1	1,027	1,026	2	1,028	49	23
York	5,265	261	5,526	5,028	235	5,263	361	111
Total	19,580	400	19,988	18,678	417	19,095	832	642

Source: Supreme, County and Surrogate Courts Monthly Statistical Report – Section 8–11 submitted through the Local Registrar's office

CHAPTER 11

THE JURY IN CIVIL CASES

SUMMARY

A. History and Development

We are here concerned only with trial by jury in civil cases and whether that form of trial is necessary to a good administration of justice in Ontario. To keep in perspective the arguments for and against the present day jury system a brief discussion of the history of the jury is useful.

In Norman England jurors took on the character of witnesses, as the Courts relied on the local knowledge of jurors in the community for the resolution of disputes. With the growth of urban communities towards the end of the Middle Ages, however, it became increasingly difficult to find jurors who were personally informed of the issues in question. Consequently, the jury slowly developed a different function. The evidence was presented to the jurors upon which their verdict was rendered rather than their determining the dispute on the basis of their own personal information. The jury continued to function in this form for 300 years and was successful to some degree in bringing a certain measure of justice to the populace. It prevented such abuses as interference by the state with the judicial system to further its political goals, and the attempt by judges of one class of society to impose standards foreign to that of the general community at large.

As centuries passed and society became more industrialized and complex, court procedures were simplified in order to cope with the great volume of litigation. With the trend towards more expeditious trials, and

with the greater democratization of society and more stringent control on executive power, the popularity of the jury diminished.[1]

The rights of litigants to trial by jury went through the following metamorphosis in Ontario:

(a) The traditional reverence for the jury was enshrined in an early statute of Upper Canada in 1792. It provided that "trial by jury has long been established and approved in our mother country and is one of the chief benefits to be attained by a free constitution".[2] It also provided that jury administration was to conform with the law and custom of England.

(b) Until 1856 trial by jury in civil cases in Upper Canada and England was the only form of trial recognized by the Courts of common law.

(c) After 1856, on consent of all parties, the litigants could have their disputes resolved by a judge alone. A judge also had power to refer to an official referee matters of account which in the past were normally tried before a jury.[3]

(d) In 1868, it was enacted that all civil actions were to be tried by a judge alone unless a jury was requested by either party.[4]

(e) In 1873, trial by jury was preserved for certain specified tort actions such as defamation and malicious prosecution unless the parties agreed to dispense with the jury.[5]

By virtue of the provisions of *The Judicature Act*,[6] the emphasis continues to be on a trial by judge alone in civil cases except in certain actions in which the reputation and dignity of a party is involved. The relevant provisions are:

59. Actions of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment shall be tried by a jury, unless the parties in person or by their solicitors or counsel waive such trial.

61. (1) Subject to the rules and except where otherwise expressly provided by this Act, all issues of fact shall be tried and all damages shall be assessed by the judge without the intervention of a jury.

(2) The judge may nevertheless direct that the issues or any of them be tried and the damages be assessed by a jury.

[1] A more detailed account of the development of the jury can be found in such works as Devlin, *Trial by Jury* 3-14 (1966); Stenton, *English Justice 1066-1215* 13-21 (1964); 1 Holdsworth, *History of English Law* 312-50 (3rd ed. 1922).
[2] *An act to establish trials by jury*, 32 Geo. 3, c. 2.
[3] *The Common Law Procedure Act 1856*, 19 Vict., c. 43.
[4] 32 Vict., c. 6, s. 18(1).
[5] *The Administration of Justice Act 1873*, 36 Vict., c. 8, s. 17.
[6] R.S.O. 1970, c. 228.

62. (1) Subject to the rules, if a party desires that the issues of fact be tried or the damages be assessed by a jury, he may, at any stage of the proceedings, but not later than the fourth day after the close of the pleadings, or, if notice of trial or assessment is served before that time, within two days after service of such notice or within such other time as is allowed by a judge, file and serve on the opposite party a notice in writing requiring that the issues be tried or the damages be assessed by a jury, and if such notice is given, subject to subsection 3, they shall be tried or assessed accordingly.

(3) Notwithstanding the giving of the notice, the issues of fact may be tried or the damages may be assessed without the intervention of a jury if the judge presiding at the sittings so directs or if it is so ordered by a judge.

(4) Subsection 1 does not apply to causes, matters or issues over the subject of which the Court of Chancery had exclusive jurisdiction before the commencement of *The Administration of Justice Act of 1873*.

Under Rule 400[7] of the Rules of Practice on an application made in chambers, a judge may make an order striking out a jury notice if it appears to him that the action is one that ought to be tried without a jury, a judge presiding at the trial of an action may try the action without a jury and a judge presiding at a jury sittings in Toronto may in his discretion strike out the jury notice[8] and transfer the action to the non-jury sittings.

In 1955 the size of the civil jury in Ontario was reduced from 12 to six, of whom five may render a verdict.[9]

B. Other Jurisdictions

1. *Other Canadian Provinces*

In Newfoundland and Labrador civil cases are tried by jury in less than 10% of cases. The applicable statutory provisions specify that the judge may at any time direct trial with a jury and that certain actions must be tried by jury on the election of either plaintiff or defendant as follows:

(a) issues of fact in actions of slander, libel, false imprisonment, malicious prosecution, seduction and breach of promise of marriage;

[7] "The rule was passed at a meeting of the entire Bench after a very full discussion and the intention was to impose upon the Judge to whom the application is made in Chambers the duty of deciding whether the case should or should not be tried by a jury, and to avoid the expense incidental to having a long non-jury case tried while the jury sits idle or in the alternative a postponement of the case if the jury notice is struck out:" *per* Middleton J. A. in *Foster* v. *Prudential Insurance Co.*, [1941] O.R. 145, at p. 151.
[8] *Arrow Transit Lines Ltd.* v. *Tank Truck Transport Ltd.*, [1968] 1 O.R. 154.
[9] *The Judicature Amendment Act, 1955*, S.O. 1955, c. 36, s. 1; see now *The Judicature Act*, R.S.O. 1970, c. 228, s. 64.

(b) all other causes or matters where any party applies to have the cause matter or any issue of fact tried with a jury except as set out below.

The judge has an overriding power to direct trial without a jury in the following cases:

(a) cases which before the passing of *The Judicature Act* were heard or determined by the Supreme Court in equity;

(b) cases involving a question or issue of fact or mixed law and fact which, before the passing of *The Judicature Act,* could without consent of the parties have been tried without a jury;

(c) cases requiring any prolonged examination of documents or accounts or any scientific or local investigation which in the opinion of the judge cannot conveniently be conducted with a jury.

In Nova Scotia, we are advised that civil juries are employed in not more than 5% of cases in the Supreme Court and infrequently in the County Courts.

There is no provision for trial by jury in the justices' courts which have jurisdiction in actions of debt up to $80, nor in the municipal courts having general civil jurisdiction up to $500. In the County Courts which have general jurisdiction over $20 and up to $10,000, provision is made for the trial of matters of fact or assessment of damages by juries either at the discretion of the judge or at the request of a party. In the Supreme Court which has unlimited civil jurisdiction actions for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment are tried by jury. In other cases the judge at his discretion may direct issues of fact or assessment of damages be tried by a jury or a party may apply for a jury trial subject to an overriding power in the judge to direct trial without a jury.

Trials by jury in New Brunswick in civil cases are extremely rare. Actions for libel, slander, breach of promise of marriage, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment are to be tried by a jury unless the party waives such mode of trial. All other cases are tried without a jury unless at the request of one of the parties where the questions at issue are more fit to be tried by a jury than a judge the judge directs the action, matter or issue to be tried or damages assessed by a jury.

In Prince Edward Island, no civil cases have been tried with a jury in the past five years. The rules applicable to actions in the Supreme Court provide that issues of fact may be tried or damages assessed or enquired of with a jury if required by one of the parties subject to the following:

(a) on application to the court before the trial or at the direction of the judge at trial the issues may be tried or damages assessed or enquired of without a jury except where the action is for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution or false imprisonment, and

(b) the judge at the trial may direct at his discretion that the issues of fact shall be tried or damages assessed or enquired of with a jury.

In Alberta, the extent to which civil cases are tried by jury is negligible. Only actions commenced in or transferred to the Supreme Court may be tried by jury. Either party to an action in the Supreme Court may signify his desire for a jury trial in the following cases:

(a) actions for slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage;

(b) actions founded on tort or contract in which the amount claimed exceeds $1000;

(c) actions for recovery of real property unless otherwise directed by a judge on a motion for directions or on a subsequent application where it is made to appear to the judge that the action might involve

(i) a prolonged examination of documents or accounts or

(ii) a scientific or long investigation and in his opinion, it cannot be conveniently made with a jury.

The Court has an overriding power to direct any cause, matter or issue to be tried with a jury.

In Quebec, not more than 50 civil cases per year in the Province are tried by jury. A trial before a judge and jury may be had at the request of one of the parties if the amount claimed exceeds $5,000 in

(a) an action for the recovery of damages resulting from personal injuries;

(b) an action under section 1056 of the Civil Code;

(c) an action for damage to corporeal property resulting from an offence or quasi-offence.

The Court may refuse trial by jury if, because of the technical nature of the evidence or multiplicity of the parties or any other compelling reason, it considers it preferable that the case be heard by a judge alone.

Civil cases in Manitoba are almost never tried by a jury. Actions for defamation, criminal conversation, seduction, malicious arrest, malicious prosecution, and false imprisonment are tried with a jury unless the parties waive such trial in person or by their solicitors. In other actions where the right to trial by jury arises in the Queen's Bench or County Courts, the judge may order or direct a jury trial.

In Saskatchewan, a negligible number of civil cases in the Court of Queen's Bench are tried by jury. In the Court of Queen's Bench any party may demand a jury trial in actions for libel, slander, criminal conversation,

seduction, malicious arrest, malicious prosecution, false imprisonment and in actions arising out of tort, wrong or grievance where the amount claimed exceeds $5,000 and in actions for debt or on a contract in which the amount claimed exceeds $5,000. The judge is given an overriding power on application to direct actions or issues to be tried or damages assessed by a jury. Trials in the District Court where the dollar limitation is $5,000 are by judge alone.

In British Columbia, less than 10% of civil cases are tried by jury. The legislation establishing the Supreme Court and County Courts confirms the general right to trial by jury in actions where the amount claimed exceeds a small monetary amount.

2. *England*

Limitations on jury trials have been imposed over the last 40 years. Parties can no longer have a trial by jury as of right. An application for trial with a jury must be made before the Court fixes the place and mode of trial and must be made to a Master.[10] Where, however, the Court is satisfied, on the application of a party to an action to be tried in the Queen's Bench Division,[11] that

(a) a charge of fraud against the party; or

(b) a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage

is an issue, then there shall be trial with a jury unless the Court is of the opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot be conveniently made with a jury.[12] Consequently, in England, a party can demand an order for jury trial where the matter in issue is of a quasi-criminal nature and a party's honour is in question subject to the existence of any administrative reasons to the contrary. In all other cases in the Queen's Bench Division, the action may, in the discretion of the Court be tried with or without a jury.[13] In recent times, few orders have been made under this rule for trial by jury. A jury will not be ordered in a personal injury action unless there are exceptional circumstances such as the existence of unique, as opposed to severe, injuries.[14]

3. *Australia*

The right to trial by jury in the Supreme Courts of the respective States of the Commonwealth, except in South Australia where no such rights exist, are subject to an overriding discretion in the Court or judge to

[10] O. 33, r. 5.

[11] There are no trials by jury in the Chancery Division and juries are used only occasionally in the Probate, Divorce and Admiralty Division.

[12] *Administration of Justice (Miscellaneous Provisions) Act 1933*, s. 6(1). Actions for breach of promise of marriage and for seduction were abolished in England as of January 1, 1971 by the *Law Reform (Miscellaneous Provisions) Act 1970*, ss. 1, 5, 7(3).

[13] *Administration of Justice (Miscellaneous Provisions) Act 1933*, s. 6(1).

[14] *Ward* v. *James*, [1965] 1 All E.R. 563; *Hodges* v. *Harland & Wolff Ltd.*, [1965] 1 W.L.R. 523.

order the trial without a jury of any cause, matter or issue requiring any prolonged examination of documents or any scientific or local investigation which cannot be conveniently made with a jury. In Victoria, a jury may be obtained in any civil action at common law; in New South Wales, in any action on a common law claim except claims in motor vehicle accident cases where the right exists only if the parties consent; in Tasmania, in any common law action except motor accident cases; in Queensland, in any civil action at common law except motor accident cases and industrial accident cases; in Western Australia, in any civil action in which charges of fraud are made or in claims in respect of defamation, malicious prosecution, false imprisonment, seduction or breach of contract of marriage.

C. Incidence of Civil Jury Trials in Ontario

The use of the jury in Ontario, particularly since the turn of the century, has declined. It is apparent that now only a fraction of civil cases are being tried by a jury. Of 14,329 civil actions added to the list for trial in the Supreme Court of Ontario in 1971, 995 were added to the jury list. In the County and District Courts of Ontario, 1,067 actions were added to the list for jury trials out of a total of 7,212 civil actions added to the list for trial in 1971. Consequently, in 1971 approximately 6% of all actions on the list in the Supreme Court of Ontario and approximately 15% of all actions added to the list in the County Court were on the jury list. The percentage of these cases that would be tried by a jury would be much less, as most of the actions would be settled or discontinued, or ordered to be tried by judge alone. It has been estimated that only approximately 15% of the jury cases set down for trial are actually tried before a jury.

It is interesting to note that of all the civil jury actions set down for trial and actually tried, the great bulk are motor vehicle actions. For example, during the first quarter of 1971, 81 Supreme Court civil cases were tried by a jury, 69 of which were motor vehicle cases. During the same time period, the County and District Courts in the Province tried a total of 44 jury cases, 28 of which concerned motor vehicles. Moreover, at the end of the first three months of 1971, a total of 382 civil jury cases remained to be tried in the Supreme Court of Ontario. Of this number, 338 were motor vehicle cases. For the same time period in the County and District Courts of Ontario, 722 civil jury cases remained untried, 694 of which were motor vehicle cases. It seems clear, therefore, that the jury system in Ontario in civil cases serves primarily to try motor vehicle actions. In three of the Australian states in cases arising out of motor vehicle accidents trial by jury is specifically excluded.

The frequency of requests for a jury in non-motor vehicle cases is negligible. Similarly the number of actions falling within section 59 of *The Judicature Act* is statistically negligible.

Thus the issue as to whether this Province should retain the jury in civil actions resolves itself, for all intents and purposes, into the question whether motor vehicle actions warrant trial by jury, having regard to the expense and other problems involved.

D. Should the Jury be Preserved Substantially for Trial of Motor Vehicle Actions?

Analyzed in this context, a number of the most cherished reasons[15] for retaining the jury become irrelevant. It surely cannot be said that in maintaining juries for motor vehicle cases the jury stands as a "bulwark" of liberty.[16] Although this is the traditional argument for preserving the criminal jury, it is irrelevant in considering the present status of our civil jury. Mr. Justice Haines has stated that:

> [At] a time when the appointment of ombudsmen is being urged to protect citizens against government agencies, when free legal aid has been instituted at government expense to protect the rights of those who cannot afford a lawyer, when old rights are being limited and new obligations substituted, it seems paradoxical that some are advocating the abolition of the civil jury.[17]

This argument has little relevance in motor vehicle actions. The jury in these cases is primarily used by litigants solely for tactical advantage and not for the preservation of their liberties.

A second argument advanced by the proponents of the jury in civil cases is that it is important for members of the lay public to participate in the administration of justice. It is argued that this instils public confidence in our judicial process and at the same time serves as a check upon judges who may have a tendency to cloak themselves with the mantle of superiority which disassociates them from the common person. Accordingly a decision of one's peers is more acceptable to a litigant. It is further pointed out that a jury's assessment of damages tends to be more realistic and attuned to present day needs.

Most jurors, however, own and drive automobiles and therefore know that the dispute before them does not represent contention between the litigants and that, in fact, the issue is whether the defendant's insurance company will bear the loss. Jurors are aware that an insurer possesses a superior ability to absorb the plaintiff's loss and their verdict is tempered accordingly. Participation by citizens as jurors in order to adjust claims and administer loss distribution in motor vehicle cases is unlikely to nurture an appreciation of the administration of justice or to give "them a sense of identification with the law and the courts."[18]

[15]See Haines, "The Future of the Civil Jury" in *Studies in Canadian Tort Law* 10, at pp. 11-14 (A. Linden ed. 1968); Kennedy, "Should the Use of Juries for the Trial of Civil Actions be Abolished or Limited", (1966), Chitty's L.J. 367.

[16]Blackstone, *Commentaries on the Laws of England*, Vol. 3, 379 *et seq.*, Vol. 4, 342 *et seq.* (1768). See also letter from Ontario Advocates Society (April 17, 1970) to Attorney General for Ontario: "It is shocking that a system that has been developed by trial and error during many hundreds of years and has withstood the test of time as the bulwark of our liberties — a system that has become part of our heritage, a part of our tradition, should be abolished without overwhelming evidence that such action is necessary."

[17]Haines, *op. cit.* n. 15 *supra*, at p. 11.

[18]*Ibid.* at p. 14.

The greatest fear expressed by the abolitionists is that the jury in Ontario is used merely as a tactical weapon and not to promote the ends of justice. As stated in the McRuer Commission Report:

> The conclusion we have come to is that the trial of civil cases by a jury is a procedure that has outlived its usefulness in Ontario. Instead of the jury being used as a protection for the weak, it is now a weapon in the hands of the strong. The uncertainty of the verdicts of jurors increases the hazards of litigation. This uncertainty is a very compelling force brought to bear on the inexperienced litigant when considering settlement with a formidable and experienced opponent. In most personal injury cases the plaintiff is opposed by an opponent of great experience. The conclusion we have come to is that the trial by jury in all civil cases, except those based on defamation, should be abolished.[19]

Although it has been commonly held that a jury is prone to give higher awards for an injured plaintiff, and is thus a device to be feared by defence counsel acting on behalf of insurance companies,[20] a shift seems to have taken place in recent years in Ontario.

It now appears that the insurance companies (who are the usual real defendants) no longer fear jury trials. The rationale of this new position is that the losses sustained in jury awards in favour of sympathetic plaintiffs who have suffered grave and appalling injuries are more than compensated by the low awards given by juries in less horrifying fact situations.[21] Judicial cognizance has been taken of this new found sword — the jury — in the hands of defending insurance companies. In *Grey* v. *Alanco*[22] Mr. Justice Haines commented:

> It has been my experience that it is the insurers who serve jury notices. The reasons are not hard to find. Juries unacquainted with the value of these claims generally assess damages in an amount lower than a Judge, sometimes considerably lower. If a defendant must go to trial and lose, it is a good chance the verdict will be in modest proportions if the jury is composed of farmers and workmen. The exception is the occasional jury of businessmen in a metropolitan area.

A study of the jury notices filed in the counties in which a large number of motor vehicle jury actions are tried supports these views. A random monthly sampling was taken of motor vehicle jury cases tried or otherwise disposed of by the Supreme Court and the County Courts sitting at Toronto, Kitchener and Hamilton. By reason of time and manpower strictures only a very limited sampling could be made. The results of the survey are set out in the following chart:

[19]Report No. 1, Vol. 2, 860.

[20]See Kalven & Zeisel, *The American Jury* 64 (1965) where it is concluded that, on the average, American juries award damages at a rate 20% higher than judges would for the same cases; see also Belli, *Ready for the Plaintiff* (1966) in which is described the author's tactics as plaintiff's counsel in seeking high awards from American juries.

[21]Cornish, *The Jury* 254 (1971).

[22][1965] 2 O.R. 144, at p. 151.

SUPREME COURT MOTOR VEHICLE ACTIONS

County	Month	Number of jury cases tried, settled, or otherwise disposed of	Number of jury notices delivered by plaintiff's counsel	Number of jury notices delivered by defendant's counsel
YORK	February 1971	26	15	11
	May 1971	27	14	13
WATERLOO	January-February 1971	9	4	5
WENTWORTH	March 1971	13	8	5

COUNTY COURT MOTOR VEHICLE ACTIONS

County	Month	Number of jury cases tried, settled, or otherwise disposed of	Number of jury notices delivered by plaintiff's counsel	Number of jury notices delivered by defendant's counsel
YORK	February, 1971	13	9	4
	May, 1971	25	10	15
WATERLOO	May, 1971	5	2	3
WENTWORTH	March, 1971	13	5	8

In the above cases, it appears that defence counsel served the jury notices in 48% of the jury cases disposed of by the Supreme Court in the three counties in the months selected, and in the County Court sampling, defence counsel served the jury notices in 54% of the cases. This conforms with the study reported by Mr. Justice Haines that defence counsel served the jury notices in 53% of the jury cases awaiting trial in Toronto where notice of trial was filed in 1966 in the Supreme Court of Ontario. Of the 167 cases set down for trial by jury in 1966, that had not yet reached trial, jury notices were issued by the plaintiff in 79 of those cases and by the defendant in 88 of them.[23]

The number of cases awaiting trial on the Supreme Court jury list at Toronto as of September 1, 1971, totalled 210. Motor vehicle cases made up 192 of that number. Defendant's counsel served the jury notice in 104 of those actions whereas plaintiff's counsel served the jury notice in only 88.

These statistics, though rather sparse, make it clear that defence counsel acting for insurers are just as prone to request a jury as plaintiff's counsel.

It can no longer be said, therefore, that it is the prevailing opinion in Ontario that the jury is an instrument for the redress of wrongs inflicted upon the weak. In fact, there is some evidence that the jury is being used to oppress the injured plaintiff and this may account for the greater incidence of jury trials requested by insurers. Payment into court by defence counsel in conjunction with delivery of a jury notice often serves as a deterrent to a plaintiff's proceeding to trial. Because there is no objective basis for predicting the range of *quantum* that a jury will assess for the injuries in question, a plaintiff often settles for the amount paid into Court

[23]Haines, *op. cit.* n. 15 *supra*, at p. 16.

rather than risk the penalty of costs that he will incur should he recover less from the jury.[24]

An experienced solicitor acting for an insurer through the device of payment into Court and delivery of a jury notice may force a plaintiff's solicitor to a choice between accepting settlement or accepting the uncertainties of trial by jury, a forum that may be unfamiliar to him.

It has been said that the jury is being used for tactical reasons in another way. Solicitors for either the plaintiff or the defendant may file a jury notice in order to obtain a preferred position on the trial list, ahead of non-jury cases. As J. de N. Kennedy has indicated:

> Sometimes the right to a trial by jury is exercised as a means of getting ahead of the non-jury cases on the list of cases ready for trial — when the jury case is reached, counsel will request the judge to dispense with the jury and indicate that the parties are ready to proceed without a jury — in this way obtaining priority over cases on the non-jury list.[25]

The jury is not a tactical weapon over which defence solicitors have a monopoly. It has found its way into the plaintiff's arsenal and is exploited in an entirely different way. It is well known that plaintiffs' solicitors serve jury notices in cases where the evidence of the defendant's liability is weak, hoping that a jury which is sympathetic to the plaintiff's suffering will find liability.[26] As Lord Denning stated in *Ward* v. *James*:

> If a party asks for a jury in an ordinary personal injury case, the court naturally asks — why do you want a jury when nearly everyone is content with judge alone? I am afraid it is often because he has a weak case, or desires to appeal to sympathy.[27]

The question remains, is justice better served by trial by jury as opposed to trial by a judge alone determining issues of liability and damages in motor vehicle actions?

On the question of liability a single experienced trier lends uniformity and predictability to the outcome of disputes. Counsel who specialize in this type of litigation have to advise on whether a settlement should be effected without the necessity of trial. It is in their interests to be able to forecast with some measure of accuracy what attitude a Court will take on the question of liability. The degree of variance among judges as to what constitutes reasonable conduct will be much less than amongst juries. The years of judicial experience in such cases will guarantee a consistency of result which cannot be expected of juries.[28]

[24]*Rules of Practice*, Rule 316; *Maines* v. *Acme Plumbing & Heating*, [1952] O.W.N. 91; *Sherlock* v. *G.T.R.* (1920), 47 O.L.R. 473, affd. (1921), 62 S.C.R. 328.
[25]Kennedy, *op. cit.* n. 15 *supra*, at p. 369.
[26]*Ibid.*
[27]n. 14 *supra*, at p. 572.
[28]Mr. Justice Haines feels, however, that, on the basis of two American experiments, jury verdicts are quite predictable, there being, in his opinion, "no appreciable difference in assessment of damages as between judges and juries". *Op. cit.* n. 15 *supra*, at p. 18. Cf. *Grey* v. *Alanco*, n. 22 *supra*.

At one time it was important for an injured plaintiff to seek a jury trial on the question of liability. Juries were used to mitigate the severe consequences of the common law rule that a defendant could be exonerated if he could show contributory negligence on the part of the plaintiff.[29] Juries had a propensity to refuse to invoke the rule. It was abrogated by statute in 1924.[30] The plaintiff can now lose only a portion of his damages if he contributed to the cause of his injuries, and, consequently, a plaintiff need no longer resort to a jury in order to avoid the rigours of the old common law rule.[31]

A jury cannot determine issues of liability as effectively as a judge alone and its preservation for this purpose is only of assistance to counsel with a weak case on liability.

In recent years it has been the issue of damages for which most parties have sought jury resolution. Plaintiffs may seek a jury in the hope that it will return an award substantially greater than a judge's award. The other possible advantage accruing to a successful plaintiff is the great reluctance on the part of the Court of Appeal to interfere with a jury award unless perversity can be established.

Judges, unlike juries, try to follow a consistent pattern in awarding damages so as to achieve a relative fairness among all litigants. The existence of this pattern has given rise to surveys and studies of personal injury cases such as the *Advocates' Society Manual of Personal Injuries* and Goldsmith's *Damages for Personal Injury and Death in Canada*, which assist counsel in estimating the true worth of the claim thereby promoting settlement without trial. In contrast to its reluctance to inquire into the propriety of jury awards, the Court of Appeal has not been averse to scrutinizing judges' assessments in personal injury cases and to interfering with those which it considers to be inconsistent with the norm.

These factors, among others, led the Court of Appeal in England in 1965 in the case of *Ward* v. *James*[32] to the conclusion that personal injury cases should be tried by a judge alone. The plaintiff, a passenger in a car driven by the defendant, was seriously injured and rendered a permanent quadriplegic. There was no real issue as to liability, the substantial dispute being over the *quantum* of damages. Leave is required for a jury trial under the English practice and the plaintiff was successful before the Master on his application for trial by jury. The defendant appealed this decision but it was dismissed. The case was set down for trial on the jury list and, on the eve of trial, the defendant applied to the Court of Appeal for leave to appeal out of time. This application was granted but because the dependant had acquiesced too long the appeal was dismissed and the jury retained.

[29] *Butterfield* v. *Forrester* (1809), 11 East 60, 103 E.R. 926; *Pluchwell* v. *Wilson* (1832), 5 C. & P. 375, 172 E.R. 1016.
[30] S.O. 1924, c. 32.
[31] Juries appear to have a greater tendency to apportion fault than does a judge. See Linden & Sommers, "The Civil Jury in the Courts of Ontario: A Postscript to the Osgoode Hall Study" (1968), 6 Osgoode Hall L.J. 252.
[32] n. 14 *supra*.

The Court of Appeal, however, in its reasons for judgment set out guidelines for the exercise of the Court's discretion in determining whether an action should proceed with a jury or before a judge alone. Lord Denning pointed out that jury trials today are a rare occurrence. He stated that:

> [I]n personal injury cases trial by jury has given place of late to trial by judge alone, the reason being simply this, that in these cases trial by a judge alone is more acceptable to the great majority of people. Rarely does a party ask in these cases for a jury. When a solicitor gives advice, it runs in this way: If I were you, I should not ask for a jury. I should have a judge alone. You do know where you stand with a judge, and if he goes wrong, you can always go to the Court of Appeal. But as for a jury, you never know what they will do, and if they do go wrong, there is no putting them right. The Court of Appeal hardly ever interferes with the verdict of a jury. So the client decides on judge alone. That is why jury trials have declined. It is because they are not asked for.[33]

Because awards of judges tend to fall within a uniform pattern, there is a preference for the relative certainty of trial by judge alone. Accordingly, the practice in England is not to order jury trials in motor vehicle cases because of the desire for uniformity of decision that only judges can give:

> The judges alone, and not juries, in the great majority of cases, decide whether there is negligence or not. They set the standard of care to be expected of the reasonable man. They also assess the damages. They see, so far as they can, that like sums are given for like injuries. They set the standard for awards. Hence there is uniformity of decision. This has its impact on decisions as to the mode of trial. . . . Hence we find that nowadays the discretion in the ordinary run of personal injury cases is in favour of judge alone.[34]

The Court felt that even if a plaintiff sustained serious injuries such as loss of limbs in a motor vehicle accident, or was rendered a quadriplegic, a jury trial should not be ordered. It gave the following reasons:

> For many years, however, it has been said that serious injuries afford a good reason for ordering trial by jury. At any rate, it is a consideration which should be given great weight; see *Dolbey* v. *Goodwin*, *Burrows* v. *Metal Box Co.* and *Pease* v. *George*. Recent experience has led to some doubts being held on this score. It begins to look as if a jury is an unsuitable tribunal to assess damages for grave injuries, at any rate in those cases where a man is greatly reduced in his activities. He is deprived of much that makes life worthwhile. No money can compensate for the loss. Yet compensation has to be given in money. The problem is insoluble. To meet it, the judges have evolved a conventional measure. They go by their experience in comparable cases. But the juries have nothing to go by.[35]

[33] *Ibid.* at pp. 571-72.
[34] *Ibid.* at p. 572.
[35] *Ibid.*

The Court emphasized the need for uniformity in awards of damages, and that there should be some predictability of the amount. Because judges continually preside over cases involving similar injuries, they are aware of the conventional measure of damages for a particular injury and, accordingly, a pattern or scale of damages emerges. Juries, on the other hand, do not know the conventional figures and frequently give extraordinary awards. These awards may be unusual and yet not perverse. Consequently they would not be subject to review by the Court of Appeal. Lord Denning considered whether a solution to this problem would be to inform juries of previous awards in like cases, but rejected this argument on the following basis:

> Why should the jury not receive the same guidance as a judge?
>
> This sounds well in theory, but in practice it is open to strong objection. During the argument before us both counsel agreed that it would not do. See what would happen! Each counsel would refer the jury to cases which he believed were comparable, but which were not really so. Speeches would be taken up with the one counsel citing analogies and the other destroying them. Then the judge would have to review them all again in his summing-up. The inevitable result would be that the minds of the jury would be distracted from the instant case and left in confusion. If counsel cannot refer the jury to comparable cases, neither can the judge. He cannot, on his own initiative, drag out from the books, or from his own experience, other awards (and tell the jury of them) when counsel have not had an opportunity of commenting on them, or distinguishing them. All in all, I am quite satisfied that the present practice should be maintained where the jury are not told of awards in comparable cases.[36]

The Court reviewed a number of recent personal injury cases and said:

> These recent cases show the desirability of three things: First, assessability. In cases of grave injury, where the body is wrecked or the brain destroyed, it is very difficult to assess a fair compensation in money, so difficult that the award must basically be a conventional figure, derived from experience or from awards in comparable cases. Secondly, uniformity. There should be some measure of uniformity in awards so that similar decisions are given in similar cases; otherwise there will be great dissatisfaction in the community and much criticism of the administration of justice. Thirdly, predictability. Parties should be able to predict with some measure of accuracy the sum which is likely to be awarded in a particular case, for by this means cases can be settled peaceably and not brought to court, a thing very much to the public good. None of these three is achieved when the damages are left at large to the jury. Under the present practice the judge does not give them any help at all to assess the figure. The result is that awards may vary greatly from being much too high to much too low. There is no uniformity and no predictability.
>
> I would add this. The assessment of damages is almost as difficult as the sentencing of offenders. In each it is important that similar decisions should be given in similar cases. Some measure of uniformity is achieved in criminal cases by leaving the sentence always to the judge, with an appeal to the Court on a like footing, but cannot we do more than at present to secure some measure of uniformity?[37]

[36] *Ibid.* at p. 575.

The reasons enunciated by the English Court of Appeal for sharply curtailing trial by jury in personal injury cases apply equally in Ontario. Apart from these reasons, the following considerations ought also to be taken into account:

(a) A jury trial takes longer and is more expensive than a non-jury action. Linden and Sommers in their study discussed earlier concluded that the average time for jury trials in the Judicial District of York was somewhat less than 2½ days compared to the average time of 2 days for non-jury cases.[38] Estimates given by sheriffs of various counties indicate, however, that with most motor vehicle actions, a jury case will take twice as long to try as the same case before a judge alone. Time consuming factors such as the empanelling of the jury, opening and closing addresses by counsel, the charge to the jury, jury deliberation, the care that counsel take in examining witnesses before a jury and the occasions upon which the jury must be absent for rulings on evidential questions, result in lengthier trials. Mr. Justice Haines acknowledges the delay caused by jury trials but feels that it is not serious. He has stated that:

> One prominent American study estimated that jury trials take 67 percent longer than bench trials, but that figure was lowered to 40 percent after other factors were taken into consideration, because the jury is more likely to be waived in smaller cases. But there are ways in which time is saved in jury trials. For example, there are no adjournments from the time the empanelling of the jury begins down to when the verdict is recorded, no delays due to the absence of witnesses, as is often the case with bench trials, and no reserved judgments. Juries might spend longer deliberating their verdict than judges do, since a strong majority is required, but during this time the judge is free to dispose of any other business he may have. It is true that the 40 percent time difference in trials estimated in the United States study is not an insignificant one, but the difference shown by Linden and Sommers in their Canadian study, which is our primary concern, is only about 20 percent. Indeed, only 30.5 supreme court judge-days would have been saved in that year if the jury had been abolished in York County.[39]

Mr. Justice Haines bases his conclusion only on the Linden and Sommers' study. He concedes, however, that the jury trials are "somewhat more expensive to litigants because of the slightly longer trial."[40] In addition to these costs there is also the expenditure that the public must bear for the administration of the jury in civil cases, although no precise figures can be

[37] *Ibid.* at p. 574. See also Sir W. K. Diplock, "The Jury and Civil Actions in England" (1963-64), 45 Chicago Bar Record 321, at pp. 324-25.
[38] *Op. cit.* n. 31 *supra.*
[39] Haines, *op. cit.* n. 15 *supra*, at pp. 14-15.
[40] *Ibid.* at p. 15.

given as to the cost of jury administration for civil cases. The Advocates' Society doubts "that the cost to society of maintaining the jury system in Ontario for a year would exceed the costs of laying down one mile of super highway."[41] The Sheriff's Office in the Judicial District of York has estimated the cost of maintaining the jury in civil and criminal matters in that county alone for Supreme and County Court trials at approximately $400,000 per annum. Of that amount, $340,000 is attributable to compensation and travelling expense for jurors, $20,000 for administration costs, $35,000 for personnel, and $5,000 for stationery and office supplies. The cost of maintaining the civil jury in that county forms only a proportion of this because most cases that are tried by jury are criminal. Nevertheless, a broad estimate of approximately $80,000-$100,000 per year is given as the cost to society of preserving the civil jury in the Judicial District of York alone. These figures are rough estimates and therefore must be considered with great caution. Nevertheless, they give some idea of the public expenditure.

(b) In Canada, a Court of Appeal cannot interfere with the verdict of a jury "unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it".[42]

In England, in 1965, a formal change in the Court of Appeal's discretion to review jury awards was announced. Lord Denning stated that "in future this court [of Appeal] will not feel the same hesitation in upsetting an award of damages by a jury".[43] The results of this expressed change of attitude remain to be seen.[44]

As long as the Supreme Court of Canada continues to take a strict view of its power to interfere with jury awards, there exists the danger of juries returning unchallengeable verdicts based upon an improper consideration of the evidence. If the jury is to be preserved in civil cases then consideration should be given to widening the power to review the verdict of the jury. Section 30 of *The Judicature Act*[45] might be amended to give the Court of Appeal not only the power "to give any judgment which ought to have been pronounced" but also to substitute its judgment for the verdict of the jury.[46]

(c) Jurors may be improperly influenced by the knowledge or suspicion that an insurer rather than the personal defendant must bear the loss.

[41] n. 16 *supra*.

[42] *McCannell* v. *McLean*, [1937] S.C.R. 341, at p. 343; See also *C.N.R.* v. *Muller*, [1934] 1 D.L.R. 768, at pp. 769, 772; *MacMillan* v. *Brownlee*, [1937] S.C.R. 318, at p. 328; *Coca-Cola Co.* v. *Forbes*, [1942] S.C.R. 366; *Fingland* v. *Brown*, [1943] O.R. 13, at p. 22; *Scott* v. *Musial*, [1959] 2 Q.B. 429.

[43] *Ward* v. *James*, n. 14 *supra*., at p. 575.

[44] See further *Kansara* v. *Osram Ltd.*, [1967] 3 All E.R. 230 (general damages for consequences of electric shock increased from £40 to £100); and *Brown* v. *Thompson*, [1968] 1 W.L.R. 1003 (Court of Appeal reaffirmed its reluctance to interfere).

[45] R.S.O. 1970, c. 228.

[46] This was the recommendation of Master F. H. Barlow, K. C. in "Survey of the Administration of Justice in the Province of Ontario" 11-12 (1939).

This was the view of Master Barlow who stated in his study of the Administration of Justice in Ontario:

> [I]n an automobile damage action while it must not be disclosed to the jury that the defendant is protected by insurance, nevertheless as practically all jurymen drive motor cars they, without doubt, in many instances go on the assumption that the defendant is covered by insurance and out of their sympathy for the plaintiff they find against the defendant believing that the insurance company will ultimately have to pay. Several instances have been cited to me by members of the Bar where the sole discussion among the jurymen was to whether or not the defendant was insured, the real question of negligence being ignored entirely in their juryroom discussion.[47]

Mr. Justice Haines, on the other hand, does not feel that a jury is more likely to find liability because the defendant is insured, although he does feel that a jury will grant slightly higher damages against a defendant who is known to be insured. His view, however, is that not only juries, but judges as well, have a tendency to be influenced by the fact of insurance and consequently that both juries and judges have a propensity to award greater amounts in such situations.[48]

(d) The inconvenience and monetary loss to jurors who are compelled to arbitrate upon private disputes is a factor to be considered.[49]

Jury fees are not, for the most part, sufficient to compensate a juror fully for his loss of working time. Most individuals earn more than the *per diem* allowance, and if their wages cease while they are engaged in jury service, they then incur a financial loss. Labourers and manual workers generally fall into this class. They, more than white-collar workers, who generally continue to receive their salary, are likely to lose their wages entirely for absent days. Although some employers will compensate their employees for the difference between the payment received from the Court and their usual rate of earnings, the employees may still suffer financial hardship by reason of loss of overtime or other special privileges. Moreover, those jurors who operate sole proprietorships may have to shut down their businesses and incur loss of profits, or, engage others to manage their businesses in their absence. It is notable that at the time of the writing of this Report the fee payable to jurors is $10.00 per day, an amount below the minimum wage rate for Ontario.

Besides the pecuniary loss, jurors awaiting duty often become irritated by reason of the many hours of idleness passed in the jurors' lounge. This occurs because it is impossible for administrators to predict with any degree of accuracy whether a case will be settled at the last moment or how long particular cases will take and accordingly jurors suffer inconvenience and are kept waiting with nothing to do. Sheriffs may be overly concerned about there being a sufficient number of jurors available to meet every contingency and thus might summon considerably more jurors than are required; in-

[47] *Ibid.* at p. 9.

[48] Haines, *op. cit.* n. 15 *supra*, at pp. 16-17.

[49] See *The Jurors Amendment Act*, 1971, S.O. 1971, c. 9, s. 5.

convenience, however, remains as a fact of life for those individuals who are called upon to serve as jurors.

Is the inconvenience and financial loss to such individuals overborne by the traditional right of litigants to have their private controversy resolved by a jury? That which may be a right to one person may be a hardship to another.

(e) The complexity of questions involved in properly assessing damages must also be taken into account. The compensation for a plaintiff's loss of earning power, for example, depends upon prediction of what his ability to earn would have been but for the accident. Applying detailed data of average life and earning expectancies for persons of different ages and occupations, which must be presented through the testimony of actuaries, is difficult for a judge, and much more so for a jury. This evidence is made necessary by reason of the fact that the Court can award only a single lump sum payment for all time rather than periodic payments which can be adjusted to meet the needs of the victim. W. R. Cornish put it succinctly when he stated:

> In moving towards a scheme under which the assessment of damages is based upon specific and complex social data, inevitably one is leaving behind the world in which the rough judgments of a random group of jurors has any useful role. A great deal remains to be discovered and discussed before an adequate new system emerges, but there can be little doubt that when it does emerge it will require the judgment of experienced professionals and not of untrained laymen.[50]

(f) The civil jury requires the retention of rigid technical rules of evidence by reason of the acknowledged inability of untrained laymen sitting as jurors to distinguish between the probative value of different modes of proof. If questions of fact were to be determined by a judge alone, the need disappears for excluding all but the "best evidence". In England, the decline of the civil jury has contributed to statutory relaxations of the rules of evidence.[51]

E. Alternatives to the Present System

Three possible alternatives to the abolition of the civil jury system have been put forward:

(1) It has been suggested that there should be a division of the fact-finding task between judge and jury so that it will be the jury's duty to decide the question of liability and the apportionment of negligence between the parties, and that it will be the duty of the judge to assess damages.

The argument in support of this suggestion must be that a jury is better equipped than a judge to weigh the testimony relating to liability and decide whether evidence has been coloured by favoritism or emotion. A jury,

[50] *Op. cit.* n. 21 *supra*, at p. 259.
[51] *Civil Evidence Act 1968.*

drawing upon its own experience, can detect fabrication and weaknesses in observation. No specialized training is required to decide questions of credibility and the conduct of the reasonable man in the circumstances of the case.

However, it is difficult to believe that a jury which has had no experience in listening to testimony and assessing the demeanour of witnesses can be better qualified to weigh evidence than a skilled judge who as a member of bench and bar has had daily experience and has acquired expertise in this area.

(2) It has been suggested that the party who desires a jury trial should be required to pay into court a substantial sum of money to defray the extra cost to the public of a jury trial to settle a private dispute. This is the practice in Alberta, Manitoba, Saskatchewan, British Columbia and Quebec.[52]

At present, there is no fee for filing a jury notice in Ontario. The cost of setting down an action for a jury trial is, however, $3.00 more than setting down a non-jury action.

It is suggested that the proposed procedure would not only assist in reimbursing the Province for the cost of jury administration but would also deter many litigants from requesting jury trials. The rationale for compelling the litigants to provide full or partial security for the cost of the jury is founded upon the principle that the public should not bear the expense of providing six jurors to determine a private dispute.

We do not believe that the right to a jury trial in civil cases should depend in any way on the ability of a party to pay in whole or in part for the right. If it is decided that the jury in motor vehicle cases is of value in the administration of justice, it should be retained with the Province bearing the full expense so that it can be made available to all litigants. If the jury system is found to lend itself to abuse and is considered to be a tactical weapon in the hands of counsel, then it should not be preserved for those litigants who are prepared to pay the stipulated fee and can afford to take advantage of it.

(3) It has been suggested that a party be required to obtain leave from the Court to have the issues tried by a jury. A reflection of this suggestion can be found in *The Surrogate Courts Act*.[53] A judge may direct any question of fact to be tried by a jury. If this provision ever served any useful purpose it seems to have fallen into disuse.

In England, a party wishing to have a civil case tried by a jury must obtain leave. The case of *Ward* v. *James* has all but put an end to the court's granting leave for jury trials in actions for personal injuries. Only in very special circumstances will an application for a jury be granted in motor vehicle cases.[54] Consequently, if the discretion to allow jury trials in

[52] Barlow, *op. cit.* n. 47 *supra*, at p. 7.
[53] R.S.O. 1970, c. 451, s. 29.
[54] *Hodges* v. *Harland & Wolff Ltd.*, [1965] 1 W.L.R. 523.

motor vehicle actions is to be so closely circumscribed, a rule providing for applications to the court can be of little value.

We have come to the conclusion that none of the alternatives is satisfactory and that there no longer appears to be any rational ground for maintaining juries in motor vehicle cases. The appeal to retain the jury system seems to us to be mainly an emotional one based on the traditional view of the jury as the guardian of individual liberty and guarantor of impartiality before the courts. This cannot be enough to ensure its existence in motor vehicle actions. Having regard to all the factors mentioned we have concluded that jury trials are no longer appropriate for the determination of liability and damages in motor negligence cases. It cannot be maintained that justice between the parties can result by reliance upon some mystical spirit of the community for the finding of fault and the assessment of damages.

Apart from motor vehicle cases, in civil cases other than those coming within section 59 of *The Judicature Act* with which we are about to deal, little additional argument in favour of trial by jury can be presented.

F. Should the Jury be Preserved for Actions Now Required to be Tried by a Jury?

Section 59 of *The Judicature Act* reads as follows:

> Actions of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment shall be tried by a jury, unless the parties in person or by their solicitors or counsel waive such trial.

In our Report on Family Law we recommended that the right of action based on criminal conversation and seduction be abolished.[55] It remains to be considered whether the jury can still perform a valuable function in passing judgment in actions for libel, slander, malicious arrest, malicious prosecution and false imprisonment.

Whether the jury should try actions for defamation has not been emphasized by either those in favour of abolishing the jury in civil cases or those in favour of retaining the jury. Presumably this is because the number of cases of defamation coming before the courts are few. One author, however, has expressed his views for the use of the jury in such actions in the following terms:

> Civil juries are now used principally in cases of defamation and breach of promise, where the plaintiff hopes that the jury will mark their own importance and power by awarding the outrageous damages usual in these cases.[56]

Notwithstanding such criticism, it is our view that as the law of libel and slander is a limitation on the constitutional freedom of speech and

[55]Part I, Torts, pp. 98, 105 (1969).
[56]Williams, *The Proof of Guilt* 283 (3rd ed. 1963).

freedom of the press and it involves not only the right of free speech and the right of freedom of the press, but the right of the individual to his good name, it is desirable to retain the jury in this class of action. Where one of the basic liberties of the individual is restricted, the jury should be retained for the same reasons that it is a necessary and valuable safeguard in criminal trials. Lord Denning has stated forcefully that although the jury cannot be of assistance in personal injury actions, its presence in criminal and defamation actions is vital:

> Let it not be supposed that this court is in any way opposed to trial by jury. It has been the bulwark of our liberties too long for any of us to seek to alter it. Whenever a man is on trial for serious crime, or when in a civil case a man's honour or integrity is at stake, or when one or other party must be deliberately lying, then trial by jury has no equal.[57]

Similarly the actions for false imprisonment and malicious prosecution concern an individual's right to liberty and freedom in relation to the state. These causes of action give him a remedy against abuses perpetrated upon him by the police and other agencies who may overstep their powers of arrest and prosecution. It is therefore desirable that jury trials be allowed in this area of the civil law. There should be no room for suggestion that judges may favour police officers in such actions. It is important to ensure an appearance of total impartiality with respect to the litigants in these suits.

The types of actions falling within section 59 of *The Judicature Act* stand in contrast to other civil actions. In other actions, predictability becomes of paramount importance to a litigant. He will want to know prior to commencing an action what his chances of success are and whether it is worth the investment of costs. He will want to know whether the case warrants a compromise or not. In the cases set out in section 59, the element of predictability wanes in importance because a litigant has more at stake than his pocketbook. His dignity and reputation are in question and accordingly vindication from the community is sought. Lord Devlin has aptly said:

> If you want certainty or predictability, you must keep the judgment running close to the law. If you want the best judgment in the light of all the facts when they have emerged, then it will be one that has moved nearer to the aequum et bonum. The unique merit of the jury system is that it allows a decision near to the aequum et bonum to be given without injuring the fabric of the law, for the verdict of a jury can make no impact on the law.
>
> But such a decision may well injure the element of predictability, which has rightly a part to play in the administration of justice; and so you will find that in modern times the mode of trial is allowed to depend upon the importance of that element in relation to the type of case that is being tried. When, for example, a man is on trial for his

[57]*Ward* v. *James*, n. 14 *supra*, at p. 571.

liberty, predictability is quite unimportant. What is then wanted is a decision on the merits that will after the event satisfy the public that justice as the ordinary man understands it has been done. Likewise, when a man's honour or reputation is at stake, he is more concerned to have a judgment that fits his merits than to weigh the probable cost of a lawsuit against the offer of a compromise. In any case in which there is going to be hard swearing on both sides, the result is unpredictable anyway until the witnesses have been heard and compared. Cases which have one or more of these characteristics will be probably either criminal or, if civil, will fall into one of the categories in which trial by jury is given as of right. If the case is of a common type in which there is no hot dispute on the facts — for example, the ordinary accident case on the roads or in the factories; there is often an acute conflict on certain parts of the evidence but rarely wholesale perjury — a jury is not normally allowed, unless the case has some exceptional feature. . . .[58]

G. Conclusion

It is our view that the abolition of the jury in civil cases, other than those listed in section 59 of *The Judicature Act* (with the exception of the actions for criminal conversation and for seduction)[59] will not compromise our system of justice, but, on the contrary, will provide for more expeditious, less expensive and more just trials. These benefits will be of more value to the public than the limited and minimal participation of the jury in the adjudication of civil disputes.

H. Summary of Recommendations

1. Civil juries should be abolished except in the case of actions for libel, slander, malicious arrest, malicious prosecution and false imprisonment.

[58]Devlin, *op. cit.* n. 1 *supra*, at pp. 156-58.
[59]See n. 55 *supra*.

CHAPTER 12

THE GRAND JURY

SUMMARY

A. History and Development

It is widely conceded that at one point of time in history the grand jury performed a useful function. This function, however, must be contrasted with that which it performs today. Some historians such as Maitland and Holdsworth maintain that the grand jury had its roots in the old Frankish inquest introduced in England by William I. The King used the inquest to obtain information from representatives of the community summoned to give evidence with respect to certain matters, and it was by this method that the Domesday Book was prepared. In any event, early traces of the grand jury as we know it today were found in the reign of Henry II. Following the councils held by Henry II at Clarendon and Northampton in 1166 and 1176, two edicts — the Assizes of Clarendon and Northampton — were issued and it is in these that the grand jury took a recognizable form. The edicts, which formed instructions to the justices on circuit, required twelve lawful men from every hundred of each township to answer an intensive interrogation as to whether any crimes had been committed in their area. Their task was that of presenting crimes and in most cases they spoke not from personal knowledge but from rumour and information received from others. After the grand jury preferred charges the accused stood trial by the primitive methods of compurgation or ordeal.[1] Nothing in its early history supports today's notion that the grand jury stood as a protector of individual rights and freedom. Its sole function was to increase the power of the Crown by extending the King's authority into the judicial process.

As trial by jury replaced the more barbaric modes of trial, the grand jury, or the Grand Assize as it was known, began not only to indict accused persons but to try them as well. This two-fold function continued until 1351 when the trial jury or petit jury was separated from the grand jury. The

[1]1 Holdsworth, *A History of English Law* 321-23 (7th ed. 1956).

duties of the grand jury became restricted to the making of accusations and general investigations.[2]

The grand jury developed in the seventeenth century into a body that eliminated spiteful prosecutions and thereby afforded some measure of protection to the individual from the arbitrary power of the Crown. In two notable cases[3] the grand jury withstood pressure from the King's counsel and the judge to hear testimonial evidence in open court of serious charges against the accused. The grand jury refused and in each case demanded to hear the witnesses in private. The Court reluctantly granted this request. After considering the evidence they ignored the bill and refused to return an indictment. From that time forward the advocates of the grand jury have hailed it as a safeguard for the individual against the oppression of the State.

With the advent of the police and the public prosecutor system in England the investigative function of the grand jury diminished.[4] Its control over the presentment of charges, however, continued and still exists in Ontario today. Generally before an accused can be tried for an offence falling within the exclusive jurisdiction of the Supreme Court under section 427 of the *Criminal Code* or an offence for which he can elect to be tried by a Provincial judge and does not so elect or elects to be tried by a Court composed of a judge and jury under section 484 of the *Criminal Code*, a grand jury must first consider the bill of indictment submitted to it and return a true bill. (It is not necessary to discuss here the procedure by which a bill of indictment may be presented to a grand jury without a preliminary inquiry.) The grand jury returns a true bill if it finds that the prosecutor has made out a *prima facie* case.

It is questionable whether the presentment function of the grand jury stands as a necessary protection for the individual against wrongful conviction in the twentieth century. During the eighteenth century a number of safeguards concerning the rights of the individual after indictment became entrenched, and accordingly, the importance of the grand jury declined. By 1702, for example, an accused could call witnesses on his behalf; by 1758 he was entitled to be represented by counsel; by 1836 his counsel had the right to address the jury; and by 1898 a defendant could give evidence on his own behalf.[5] In 1967 it became possible for an accused to secure competent state subsidized legal assistance when faced with a serious criminal charge.

In 1848 the preliminary inquiry was introduced, conducted by justices of the peace or stipendiary magistrates, to determine whether there was cause to believe that the accused had committed a crime. From this time

[2]Kuh, "The Grand Jury Presentment: Foul Blow or Fair Play?" (1955), 55 Colum. L. Rev. 1103.
[3]*The Earl of Shaftesbury Trial* and *The Trial of Stephen Colledge*, reported in (1816), 8 Holwell State Trials 550 and 771.
[4]Whyte, "Is The Grand Jury Necessary?" (1959), 45 Virginia L. Rev. 461, at pp. 482-83.
[5]Eliff, "Notes on the Abolition of the English Grand Jury" (1938-39), 29 J. Crim. L. & C. 3.

the grand jury's presentment function became somewhat redundant.[6] By the twentieth century justices of the peace and stipendiary magistrates were conducting preliminary inquiries in an open and impartial way with the right given to Crown and accused alike to present evidence and make submissions. The purpose of the preliminary inquiry is to require the Crown to satisfy the Provincial judge that there is sufficient evidence against the accused to warrant his being put on trial. Consequently, the value of the grand jury, as a check upon the state's launching prosecutions without evidence to support them, greatly diminished in this country.

In addition to making a presentment in criminal cases, grand juries are now charged with the responsibility of inspecting institutions in the county maintained in whole or part by public moneys.[7] Moreover, the grand jury for the Supreme Court also has the power to ensure that all accused who have been committed for trial and who are in custody awaiting trial, are brought before the next court of competent jurisdiction for trial. Each of these functions must be analyzed to determine whether the grand jury now performs a useful and necessary function in the administration of justice.

B. The Presentment Function — A Review of the Crown's Case

The deliberation of the grand jury is a step between committal for trial following a preliminary inquiry and trial of the accused before judge and jury. Where an accused has been committed for trial by a Provincial judge the Crown is empowered to prefer a bill of indictment before a grand jury on the charge on which the accused was committed, or any other charge founded on the facts disclosed at the preliminary inquiry.[8] Even in a situation where no preliminary inquiry has been held, or where the Crown wishes to include a count in the indictment that is not founded on facts disclosed at the preliminary inquiry a bill of indictment may be preferred before a grand jury by the Attorney General or anyone by his direction or written consent, or by the written consent or order of a judge of a court constituted with a grand jury.[9] Moreover, the Attorney General can prefer an indictment before a grand jury, even though the accused has been discharged at a preliminary inquiry.[10]

The grand jury in Ontario is comprised of seven members[11] and the proceedings before it are conducted in secret. The names of the witnesses to be called must appear on the bill of indictment.[12] Their evidence is given under oath.[13] No witness may be examined whose name does not appear on the bill of indictment without leave of the presiding judge. The initials of

[6]*Ibid.* p. 4.
[7]*The Jurors Act*, R.S.O. 1970, c. 230, s. 46.
[8]The *Criminal Code*, R.S.C. 1970, c. C-34, s. 504.
[9]*Ibid.* s. 505. See *R.* v. *McGavin Bakeries Ltd. (No. 1)* (1950), 98 C.C.C. 1.
[10]*Re Ecclestone and Dalton* (1952), 102 C.C.C. 305; *R.* v. *Maynard and McKnight* (1959), 126 C.C.C. 46; *R.* v. *Pilot*, [1964] 1 C.C.C. 375. But see *R.* v. *Viau* (1962), 37 C.R. 41, and *R.* v. *Biernacki* (1962), 37 C.R. 226, *contra*. See Chasse, "The Use of Preferred Indictments in Toronto" (1972), 18 C.R.N.S. 32.
[11]*The Jurors Act*, R.S.O. 1970, c. 230, s. 45(2).
[12]The *Criminal Code*, R.S.C. 1970, c. C-34, s. 524.
[13]*Ibid.* s. 523.

the foreman of the grand jury are placed opposite the name of each witness examined.[14] The only witnesses examined are those called by the Crown. The accused cannot call witnesses, nor can he be represented or even present at the proceeding. Notwithstanding the secrecy of the proceeding, the grand jury should adhere to the rules of evidence in determining whether an accused should be subjected to a public trial.[15] If a majority[16] of the grand jurors is satisfied that a *prima facie* case exists, the bill of indictment is returned to the Court, with the endorsement "a true bill". It then becomes an indictment "found" or "presented" by the grand jury. In coming to a decision the jury need not hear all the witnesses whose names appear on the bill of indictment but it cannot find a "no bill" without hearing all the witnesses. If the evidence is found to be insufficient to put the accused on his trial, the jury makes a return of "no bill". The return of a "no bill" by the grand jury represents the end of the proceedings on that particular bill of indictment, although the Crown may present a new bill to a different grand jury.[17]

Those who favour the preservation of the grand jury maintain that by reason of its control over the indictments presented by the Crown, it serves as a necessary safeguard for the accused against a prosecution which may be politically or corruptly inspired. Mr. Justice Clute in *R.* v. *Bainbridge*[18] gave force to this contention:

> The intervention of the grand jury between the Crown and the subject seems to me to be a protection to the subject which must be jealously guarded.[19]

This argument, however, is based on the presumption that the grand jury acts independently in weighing the evidence and in its deliberations. By the very nature of the grand jury system in Ontario there is little opportunity for it to act free of the influence of the Crown. The Crown attorney alone has charge of the proceedings. He presents only the state's side of the case through those witnesses he desires to call.

Those who believe in the efficacy of the grand jury assert that the secret nature of the proceedings affords better protection to the name and reputation of the accused. Most grand jury hearings, however, are preceded by a preliminary inquiry which is held in public and accordingly the allegations made against the accused are known to the community. Although an accused has the right to obtain an order directing that the evidence taken at the preliminary inquiry shall not be published in any newspaper or broad-

[14] *Ibid.* s. 525.
[15] *R.* v. *Court* (1947), 88 C.C.C. 27.
[16] The *Criminal Code*, R.S.C. 1970, c. C-34, s. 554(2).
[17] *R.* v. *Lennett* (1934), 61 C.C.C. 256.
[18] (1918), 42 O.L.R. 203, at p. 220.
[19] See also *R.* v. *Gorbet* (1866), 1 P.E.I. 262, at p. 264 *per* Peters J:
"The great object of the institution of the grand jury is to prevent persons being even called on to answer for alleged crimes without reasonable ground for accusation. It has been described by great jurists as the grand bulwark of civil liberty — their proceedings are conducted in secret, so that an accused or suspected person may not, without reasonable proof of guilt, suffer the mortification of a public trial."

cast, that right does not preclude publication of the accused's name, the charges against him, or the fact that he has been committed for trial.[20] His reputation is therefore in issue before the case has reached the grand jury.

On the other hand, it has been said that the fact that the grand jury proceedings are conducted in secret gives an important advantage to the State by allowing Crown counsel to examine witnesses without fear that their evidence will be disclosed thereby preventing the accused from obtaining information which might facilitate suborning false testimony or threatening witnesses.[21] This argument is presented in support of a grand jury system in the United States that is quite different from that prevailing in Ontario. First, in Ontario most grand jury proceedings follow a preliminary inquiry held by a Provincial judge. The accused has already had an opportunity to discover to a large extent the nature of the Crown's evidence and the identity of the witnesses. Thus the very damaging evidence that a witness might disclose to a grand jury in secrecy may have been already revealed to the accused. When the true bill is returned the accused can learn the identity of all those witnesses who testified before the grand jury by an examination of the indictment.

One comment may be made about the secrecy of the grand jury proceedings. Although the accused can obtain a form of discovery of the case against him at the preliminary inquiry, it may or may not be a full discovery. Consequently, the secrecy of the grand jury lends itself to surprise, as in some instances the accused will not know part of the Crown's case until it is revealed at trial. The problem is accentuated in those cases where an indictment is preferred to the grand jury without a preliminary inquiry being held. Surprise should have little place in a criminal trial.

Another argument in favour of the grand jury system advanced by some Crown attorneys is that it makes the witnesses more familiar with the formality of giving testimony and that they will thus be more confident in giving evidence at the trial. We do not think that the grand jury system can be supported on the ground that it provides a secret rehearsal for the Crown's case.

If the preliminary inquiry is properly conducted it would appear that a subsequent proceeding before the grand jury is largely repetitive. Generally the same witnesses will give evidence at both the preliminary inquiry and before the grand jury. The Crown attorney will present, essentially, the same case at the two hearings.

The decision of the Provincial judge should be based on reasoned considerations. He is experienced in criminal matters and better equipped than a grand jury to determine whether there are proper grounds for putting an accused on trial. He will be less influenced by a Crown attorney than would a grand jury, and will be more likely to reject evidence which is inadmissible as hearsay or on other grounds. The Provincial judge has the advantage of hearing the Crown's witnesses tested by cross-examination and

[20] The *Criminal Code*, R.S.C. 1970, c. C-34, s. 467.
[21] See Calkins, "Grand Jury Secrecy" (1965), 63 Mich. L. Rev. 455.

has the benefit of hearing the accused's version of the incident should he desire to give evidence.

Experience indicates that if probable cause is shown after a preliminary inquiry, the grand jury, which subsequently hears only the Crown's witnesses unchallenged by cross-examination, is likely to return a true bill. The following is a survey prepared by the Clerk of the Peace of the bills of indictment returned by the Grand Jury for the General Sessions of the Peace in the Judicial District of York for the years 1964 to the first half of 1969.

BILLS BROUGHT IN BY THE GRAND JURY

Quarter Sessions	1964			1965			1966			1967			1968			1969		
	Bills	True	No	Bills	True	No	Bills	True	No	Bills	True	No	Bills	True	No	Bills	True	No
	"An Act respecting Legal Aid" Proclaimed in force March 29, 1967																	
January													128	120	8			
February																67	62	5
March	74	70	4	45	45	–	87	84	3	99	92	7	132	126	6	196	191	5
May	36	33	3	46	44	2	45	45	–	69	66	3	176	166	10	182	178	4
June																37	37	–
September	74	68	6	104	101	3	113	112	1	173	164	9	237	223	14			
December	69	62	7	66	64	2	74	70	4	75	67	8	82	80	2			
Totals	253	233	20	261	254	7	319	311	8	416	389	27	755	715	40	482	468	14
				Increase over 1964–9%			Increase over 1965–22%			Increase over 1966–25%			Increase over 1967–84%					

This study reveals that the grand jury returned "no bills" in only 7.9% of the cases presented to it in 1964; 2.7% of the cases in 1965; 2.5% of the cases in 1966; 6.5% of the cases in 1967; 5.3% of the cases in 1968; 2.9% of the cases in 1969. The records do not disclose how many of the "no bills" returned were for counts in indictments preferred directly to the grand jury without a preliminary inquiry being held first, or how many "no bills" were returned on one or more counts preferred in an indictment.

There has been some concern among defence counsel that the decision of the grand jury may prejudice the accused's defence at trial. It is feared that the return of a true bill sometimes may influence unduly the petit jury at trial against the accused. Accordingly, many members of the defence bar in Ontario see little utility in the grand jury for the accused and have recommended that the presentment function be removed. The brief submitted to us by the Advocates' Society of Ontario included the following statement:

> It is highly questionable whether a grand jury serves any useful purpose, in criminal matters, in being asked to pass on the sufficiency of evidence for a bill of indictment, where a preliminary hearing has already been held in that very matter and already decided by a more competent and judicial tribunal. Indeed in such cases, the grand jury really serves as a court of appeal for the Crown Attorney who may not have been satisfied to see the accused discharged at the preliminary hearing. Certainly the accused, and perhaps some members of the public, would question the wisdom and fairness of continuing a system where a secret tribunal, to which the accused and his counsel have no access, but to whom the Crown does, should be able to reverse the decision reached at a preliminary hearing where the accused and his counsel have a right of examination and cross examination of the witnesses.
>
> . . . [I]n cases where the preliminary hearing has resulted in the committal of an accused, it seems absurdly superfluous to permit or to ask a grand jury to pass on the same matter, particularly in the manner in which grand juries now pass on such matters.[22]

Abolition of the grand jury will afford benefits. It will save time in bringing a case to trial and will add a new element of efficiency in criminal prosecutions. It will also free the Crown attorney for other tasks. The accused may be benefited. Accused who are in custody may have to wait weeks before the grand jury meets to consider the charges against them. At the opening of a Court, be it a General Sessions of the Peace or an Assize, the Court will be able to proceed at once with the trial of cases. It will not be necessary to wait until the grand jury has made a presentment.

There are others to be considered in the judicial process — the witnesses. In criminal trials for the most part, the witnesses have no personal interest in the case. They are subpoenaed to give evidence and they usually attend in court at great sacrifice to themselves. In the grand jury proceedings most of the witnesses who are required to attend have given evidence at the preliminary inquiry. They attend again before the grand jury to repeat what they have said before. This is a trespass on the rights of witnesses unless it can be justified as an essential part of the process of administering criminal justice.

The maintenance of the grand jury for the purpose of returning indictments is costly. No precise figures are available but grand jurors must be paid;[23] a sheriff must be taken from other tasks to summon them; witnesses whose attendance is required at the grand jury hearing must be summoned and paid conduct money; a Crown attorney must prepare for and conduct the grand jury proceeding. It was on the ground of efficiency and economy that in England the grand jury was abolished.[24]

If the function of the grand jury as an instrument of indictment is abolished, are there adequate means of protecting the interests of the

[22]Brief of the Advocates' Society to the Commission, Re Criminal Justice in Ontario 59-61 (1971).
[23]*Jurors Amendment Act, 1971*, S.O. 1971, c. 9, s. 5.
[24]Eliff, *op. cit. supra* n. 5, at p. 21.

accused and society? In those provinces which do not have a grand jury, proceedings are commenced by the Attorney General or his agent presenting to the Court an indictment in writing setting out the offence or offences with which the accused is charged.[25] If a preliminary inquiry has not been held or if the accused has been discharged at the preliminary inquiry, an indictment may be presented with the consent of the court or by the Attorney General.[26] If the grand jury is abolished, we urge that the power given to the Attorney General to prefer indictments before a judge without first holding a preliminary inquiry be exercised sparingly and resorted to only in unusual circumstances.

An existing safeguard for the protection of the accused where unwarranted or ill-conceived criminal proceedings have been commenced against him is the right of the Attorney General or counsel instructed by him to enter a *nolle prosequi*.[27] At any time after an indictment has been found and before judgment, the Attorney General or the Crown attorney instructed by him can direct the clerk of the court to make an entry on the record that proceedings are stayed. This right does not arise until after an indictment has been found by a grand jury.[28] In those provinces where no grand jury exists, this right arises after a formal charge is made in an indictment.[29] In the absence of special circumstances and quite apart from any statutory authority, the Attorney General not only has the right but is under a duty to withdraw a charge against an accused where, in his opinion, the decision to prosecute has, in the light of events following the laying of the charge, turned out to be unfounded. The Attorney General, in withdrawing a charge, exercises a discretion in his capacity as the chief law enforcement officer of the province. The exercise of such discretion, in the absence of special circumstances, is not properly reviewable by the Court.[30]

Another means of protection for the accused, in lieu of the grand jury, is the review of committal proceedings. Although an accused has no formal right of appeal from a committal order made by a Provincial judge at a preliminary inquiry, he does have the right to contest the committal by way of a *certiorari* application or by way of a *habeas corpus* application with *certiorari* in aid. Both applications are made to a Supreme Court judge. On an application for *certiorari* alone, a judge cannot review the sufficiency of the evidence to justify a committal order. On such an application the committal order can only be challenged on the grounds that the Provincial judge lacked jurisdiction.[31] If there has been a violation of the principles of natural justice, for example, where the Provincial judge has denied an adjournment to permit accused's counsel time to prepare for the cross-examination of an unexpected witness, thereby depriving the accused of his right to put in a full defence, *certiorari* will lie.[32] Where there has been personal bias on the part of the committing judge, *certiorari* will also be

[25] The *Criminal Code*, R.S.C. 1970, c. C-34, s. 507(1).
[26] *Ibid.* s. 507(2), (3).
[27] *Ibid.* s. 508.
[28] *R.* v. *Weiss* (1915), 23 C.C.C. 460.
[29] *R.* v. *Edwards* (1919), 31 C.C.C. 330.
[30] *R.* v. *Dick*, [1968] 2 O.R. 351.
[31] *Patterson* v. *The Queen*, [1970] S.C.R. 409, at p. 411; *R.* v. *Botting*, [1966] 2 O.R. 121.
[32] *R.* v. *Dick*, n. 30 *supra*.

available.[33] The question whether there was sufficient evidence upon which a committal order could be based does not go to jurisdiction and thus is not reviewable upon a *certiorari* application. Where the accused wishes to challenge the committal order on the ground of insufficiency of evidence, the proper remedy is an application to a Supreme Court judge by way of *habeas corpus* with *certiorari* in aid. By virtue of an early statute of Upper Canada entitled *An Act for more effectually securing* the *Liberty of the Subject*,[34] the judge in *habeas corpus* proceedings has before him the evidence taken at the preliminary inquiry and thus can review it to determine the sufficiency of the evidence. To invoke the *habeas corpus* procedure the accused must be in custody at the time the motion is launched. If the accused is on bail he must first surrender himself into custody. The review is not in the nature of an appeal,[35] and, in considering the evidence, the test invoked by a judge is that if the evidence is of such a nature that a judge at trial would be justified in taking the case away from the jury and directing an acquittal, the committal order should be quashed and the accused discharged.[36]

The time has come to do away with the legal fictions surrounding review of committal orders. Whether the presentment function of the grand jury is abolished or not, the Supreme Court should be given full power to review the sufficiency of evidence before the Provincial judge upon a *certiorari* application and this power should not be dependent upon the accused's being in custody. This course would afford the accused a much greater protection against being put to his trial upon insufficient evidence than what may be described as a *pro forma* review by a grand jury at which he does not have a right to be heard. With adequate power in the Supreme Court to review the evidence given at the preliminary inquiry, committals for trial could be quashed at an early stage without subjecting the accused to the notoriety of trial and without the expense and inconvenience attendant upon preparation for trial.

C. Inspection of Public Institutions

The grand jury's right of inspection of institutions maintained in whole or part by public funds is set out in section 46 of *The Jurors Act*.

Grand jurors are not assisted in their inspections by independent experts and accordingly one or two days spent at an institution will not reveal underlying serious defects or problems that would escape a more or less formal inspection by untrained men. In experience, the relevant authorities do not pay much attention to the recommendations made by the jurors.

It has been said, however, that this function is of some value because it allows laymen to participate in the judicial system and provides to members of the public the rare opportunity to have access to and comment upon

[33] See Haines, "Committals and Certiorari" (1965-66), 8 C.L.Q. 141, at pp. 154-55.
[34] 29-30 Vict., c. 45. See now *The Habeas Corpus Act*, R.S.O. 1970, c. 197.
[35] *Ex parte McGinnis*, [1971] 3 O.R. 783.
[36] *Re Latimer* (1906), 10 C.C.C. 244; *R.* v. *Plouffe and Warren* (1958), 122 C.C.C. 291; *R.* v. *Schellenberg* (1958), 122 C.C.C. 132.

various institutions. Furthermore, their reports usually attract widespread coverage in the newspaper and broadcasting media and may have some influence.

The inspection function, however, does not form part of the administration of justice but only relates to how public funds are spent. Moreover, it seems that the grand jurors themselves do not have the same belief in the efficacy of the grand jury's role, for many of them in their reports between 1962 and 1966 have recommended its abolition.

It would appear, therefore, that more effective means of inspection can be devised to perform this function than having it performed ancillary to the administration of justice as it is at present. We recommend that a special jury consisting of seven members be summoned twice a year to make the inspections now made by grand juries and to report to the judge presiding in the Supreme Court.

D. Instrument of Gaol Delivery

The third function of the grand jury is to investigate and interrogate prisoners in an effort to determine whether or not any persons in custody are being held improperly or for an unwarranted length of time pending their trial. This function is indigenous to the grand jury for the Supreme Court only and arose originally out of the commission of Gaol Delivery.[37] This is an important and useful function and should be preserved. This inquiry, however, could be performed more effectively by the sheriff who could be held accountable to the Court for this task. The sheriff is not subject to outside pressure and is in a position to ensure, through inspection of the calendar of prisoners on a regular basis, that an accused who has been committed for trial and is in custody is brought to trial as soon as possible. We recommend that the sheriff report to all courts sitting with a jury and, to emphasize the importance of his function, we recommend that he report in open court. There will be greater safeguards with the adoption of the recommendations made in chapters 5 and 10 that a public register be kept by the court showing for every accused person the date of committal for trial, his election, and the date upon which the trial was held.

E. Conclusion

There is little, if any, case to be made out for the continuing existence of the grand jury. It is a relic of the times when preliminary inquiries were conducted by justices of the peace who were laymen and often of little education. In this Province preliminary inquiries are conducted by Provincial judges who have jurisdiction to try, on election of the accused, offences for which they may be sent to gaol for life. It is hard to contend in these circumstances that it is necessary to retain the grand jury to review a finding of a Provincial judge that there is sufficient evidence to put the accused on his trial. This is especially true in the light of *The Jurors Amendment Act, 1972*. Under this amendment anyone is qualified to serve as a grand juror

[37] See Ferguson, "The Grand Jury" (1962-63), 5 C.L.Q. 210.

whose name is entered on the last revised polling list prepared under *The Municipal Elections Act, 1972*.

As long ago as 1913 a committee headed by Viscount St. Aldwyn recommended the abolition of the grand jury in England because it

> had outlived the circumstances amongst which it sprang and developed, that it is little more than a historically interesting survival, and not an essential safeguard of innocence, and further, that it uselessly puts the country to considerable expense and numerous persons to great inconvenience.[38]

Master Barlow in his Survey of the Administration of Justice in the Province of Ontario in 1939 recommended the abolition of the grand jury in Ontario on the basis of the English experience.[39] Recently, Mr. Justice Laskin, now a member of the Supreme Court of Canada, in referring to the grand jury said:

> Its abolition was recommended by the Criminal Code Revision Commission which was responsible for the revised Criminal Code effective April 1, 1955. With trained magistrates conducting preliminary inquiries, and with independent power in the prosecuting authorities to prefer an indictment, the grand jury's role in the criminal process appears to be anachronistic.[40]

F. Summary of Recommendations

1. The grand jury should be abolished in Ontario.

2. Provision should be made for the review of the sufficiency of evidence to commit on an application for *certiorari* without the accused's being obliged to surrender himself into custody.

3. Provision should be made for a body to be chosen twice a year as the grand jury is now chosen, with power to inspect institutions in the receipt of public money and to report the result of their inspections to the judge sitting in the Assizes.

4. The sheriff should replace the grand jury as an instrument of gaol delivery. He should report fully on all persons in custody awaiting trial. His report should be made in open court at the opening of each court sittings in the judicial district with jurisdiction to try criminal cases with a jury.

[38] *Royal Commission on Delay in the King's Bench Division*, quoted in Eliff, *op. cit. supra* n. 5.
[39] *Survey of the Administration of Justice in the Province of Ontario* 1-4 (1939).
[40] Laskin, *The British Tradition in Canadian Law* 42 (The Hamlyn Lectures, 1969).

CHAPTER 13

FAMILY COURTS

SUMMARY

A. INTRODUCTION

The Commission is engaged at present in preparing a series of Reports on Family Law.[1] One of these Reports is concerned with Family Courts. The work on this Report was begun before we received the reference on the administration of Ontario courts from the then Minister of Justice and Attorney General, and it was decided that since reform of Ontario's Family Court system is so inextricably bound up with the substance of family law, it was best that we should adhere to our plan to submit the Report on Family Courts as part of our work on family law. At present a detailed Report on Family Courts is nearing completion.

In this chapter we make no attempt to set out in detail our recommendations with regard to Family Courts. We merely outline the two basic recommendations which we will be making in our Report on Family Courts to facilitate an appreciation of the place of the Family Court in the judicial system. We caution against regarding this chapter as in any way containing a complete and final exposition of our views.

[1]The Commission's Report on Torts was submitted in November, 1969, and its Report on Marriage was submitted in April, 1970. Reports on Property Subjects, Children, and Support Obligations are in progress.

B. The Need For Reform

Since 1968 Family Courts in Ontario have been part of the Provincial Courts structure.[2] In that year the Legislature passed *The Provincial Courts Act*[3] thereby ending some of the confusion surrounding the status and jurisdiction of Juvenile and Family Courts in Ontario. The purpose of the Act was to replace Magistrates' Courts, and Juvenile and Family Courts with Provincial Courts (Criminal Division) and (Family Division), and to make all magistrates, and juvenile and family court judges, Provincial judges. It was hoped that this would introduce an urgently needed measure of uniformity in policy, standards and resources. This hope has not been fully realized, but as the Act provides for central organization and provincial financing of Juvenile and Family Courts, its importance as a first step in achieving a system which operates uniformly and at a similar standard throughout the Province cannot be overlooked.

The Provincial Courts Act did not, nor was it designed to, eliminate the fundamental difficulties encountered by the Family Courts.

A plaque at the entrance to the Family Court building in Toronto expresses quite simply the goal of a Family Court. It reads in part: "This edifice . . . is dedicated to the task of strengthening family life." Unfortunately, laymen, lawyers and judges are unanimous in their view that Ontario's Family Courts fall short of the goal.

With society in transition, with changing social conditions, attitudes and mores, and with the impact that these changes are having on family life, increasing pressure is being brought to bear, not only for reform in substantive family law, but also for reform in its administration. More and more is being and will be demanded of family law, and it is the Family Courts that will have to carry the increased burden.

A number of factors make the Family Court system inadequate to respond properly to the needs of the community. These will be discussed fully in the Commission's Report on Family Courts. In this chapter, we simply outline a few of them.

There is confusion and uncertainty as to what the function of a Family Court should be. Should it function as a court of law or as a social agency? Some believe that it should be first and foremost a court of law. Others feel that what distinguishes the Family Court from all others is its social purpose, and that its proper function is to find social solutions to the problems that come before it. The conflict between the two approaches has serious repercussions for the efficient and uniform administration of family law. The answer to this problem, of course, is clear. It should not be a question of adopting one theory or another. By their very nature Family Courts have a two-fold function, judicial and therapeutic, and there is room for both theories to operate. Indeed, each complements the other in the

[2]A discussion of the historical development of the Family Court will be found in the Commission's Report on Family Courts.
[3]R.S.O. 1970, c. 369.

rather special context of a Family Court. The question really is how to incorporate the best of both approaches into the procedure of the Family Court. In our Report on Family Courts we will be making recommendations on how best, in our view, this can be accomplished.

The most serious contributing factor to the present inadequacy of the Provincial Courts (Family Division) is their extremely limited jurisdiction. There is little doubt that the present jurisdiction of the Courts is not adequate. Four different branches in the judicial hierarchy, the Supreme Court, the County Courts, the Surrogate Courts and the Provincial Courts (Family Division) administer family law in Ontario,[4] and this results in overlapping and competing jurisdiction, fragmented jurisdiction, and conflicts in philosophy and approach to the same problems among the different courts. The end result is inefficiency, ineffective treatment of family problems, and totally unnecessary confusion. Only if a Family Court is given comprehensive jurisdiction in all family law matters will it be capable of meeting the needs of the community.

The fact that four distinct branches in the judicial hierarchy in Ontario administer family law leads to some anomalous situations. The Provincial Courts (Family Division) can take a child permanently from his natural parents and make him a ward of the Crown, but have no jurisdiction to take a child from one parent and order custody in favour of another except in a very limited situation under *The Deserted Wives' and Children's Maintenance Act*.[5] Custody is a matter for the Supreme Court or the Surrogate Court. Nor have the Provincial Courts (Family Division) power to make an adoption order. This right rests with the County Courts, or with the Supreme Court.[6] The Provincial Courts (Family Division) have the power to adjudge a man to be the father of a child born out of wedlock, and can order the father to pay thousands of dollars for the care and upbringing of the child, yet have no power to determine property rights as between husband and wife, or to dissolve their marriage.

Given the present fragmentation of jurisdiction in family law matters, it is possible and, indeed, not unusual, to have proceedings in three different courts, at the same time. The wife may proceed in a Provincial Court (Family Division) for maintenance for herself and her children. She may also be applying for custody in that Court. The husband may be claiming custody in the Surrogate Court. There may be a hearing before the Supreme Court to determine property questions between the spouses, and ultimately, one or both parties may petition for divorce, maintenance, and custody in the Supreme Court.

Clearly, the present division of jurisdiction involves a tremendous waste of both public and private resources, to say nothing of its resulting in confusion and inefficiency.

[4]See Appendix I to this chapter for a chart setting out the distribution of jurisdiction in family law matters.
[5]R.S.O. 1970, c. 128.
[6]While the Supreme Court also has power to make adoption orders, the majority of adoption orders are made by the County Courts.

There is a third factor contributing to the lack of confidence in the Family Courts' response. More than to any other agency, the public should and does look to the Family Court for assistance when family problems arise. The inadequacy of the ancillary services, such as Intake Counselling, Family Counselling, Probation Services, Detention and Observation Homes, Foster Group Homes, Psychiatric Services, Welfare Benefits, is quickly apparent.[7]

The provision of such ancillary services as exist (and these are by no means sufficient) has been haphazard, marked by lack of uniformity of policy and standards. One of the chief reasons for this is an historical one. Until 1968, and the passing of *The Provincial Courts Act*,[8] the provision of "essential resources" was left to the individual municipalities and counties. These inevitably varied according to the interests of the local councillors. Chief Judge Andrews has described the situation as depending on whether ". . . it was a good roads' council or one with a social conscience".[9] A great deal also depended on the "salesmanship" of the local Family Court judge. As a result, there was absolutely no uniformity in the type and quality of service available. In the counselling field, for example, some municipalities provided intake and family counselling through the Family Court, while some provided it through the Welfare Department. In some cases it was provided as an adjunct to the local Children's Aid Society. In still other cases it was left to the judge to develop some type of counselling service, and this he usually did by utilizing his probation staff.[10]

It was hoped that *The Provincial Courts Act* would remedy the situation but, unfortunately, the ancillary services have shown limited improvement since the passing of the Act. There is still no uniformity of policy, or of standards, or of resources.[11] Local support has been withdrawn, and, to date, there has been no legislation creating a statutory obligation on any public or private body even to provide counselling services, to say nothing of regulating their type and quality. Chief Judge Andrews has described the result.[12]

> The public suffers in consequence. There is a tendency to general disillusionment when an arbitrary system of priorities ignores the needs of the fundamental social unit, permits the disintegration of its image, fails to protect the security of the family. What does the family do when its equilibrium has been destroyed and there is nowhere to turn for help?

There will be no significant improvement in Ontario's Family Courts unless there is a dramatic improvement in the ancillary services available to them. The Commission has considered how best this can be done, and will make recommendations that will encourage development in this all-important facet of the Court's function.

[7]See Chief Judge H. T. G. Andrews, *Submission to the Ontario Committee on Government Productivity*, February, 1971.
[8]R.S.O. 1970, c. 103.
[9]Andrews, *Submission to the Ontario Committee on Government Productivity*, p. 6.
[10]*Ibid.*
[11]*Ibid.*
[12]*Ibid.* p. 7.

Another handicap under which the Family Courts labour is that, generally speaking, they are not as highly regarded as they might be by the public and the legal profession. There are many reasons for this, not the least of which is the fact that family law and its administration have not been regarded as matters of the highest importance. Hence, for example, the Family Court, since its inception, has been a division of the lower echelons of the Province's court structure. This in itself tends to militate against the Court's commanding the respect it should. In large part, the Court's own inadequacy has contributed to the prevalent attitude. The present Provincial Courts (Family Division) are not equipped with the necessary jurisdiction to serve the needs of society; they are not equipped, in all cases, with high-calibre judicial personnel; they are not equipped with adequate support services; they suffer from a conflict in philosophy as to their proper function; they suffer from a lack of standardization in administrative procedures, and they are hampered by the lack of a strong central administrative policy.

There is much that should and can be done to improve the public image projected by Ontario's Family Courts. Only if the public and the legal profession have confidence in the Court and respect for the work it does, will it be able to discharge fully its responsibilities to society. The Commission has studied this problem carefully and will be making recommendations which, if implemented, will, we think, greatly enhance the prestige of the Family Court.

The fragmentation of administrative responsibility for the various services associated with the Family Court system is another difficulty with which the Family Courts must cope. There is very little administrative co-ordination, and hence, there can be little uniformity of policy. Since five government ministries are involved in the administration of the Province's Family Courts, the Ministry of the Attorney General, the Solicitor-General, Correctional Services, Health, and Community and Social Services, the problem is not difficult to understand. Since definitive planning for the future development of the Family Court's services is one of the Court's most pressing needs today, the Commission has undertaken an examination of the sources of responsibility with a view to suggesting steps which might be taken toward achieving an integrated system for directing the planning, the operation and the development of the Court's essential services.

There is no question that a strong well-structured, well-equipped Family Court system, supported by adequate ancillary services can be of inestimable value to the community. The aim of the Commission's recommendations will be to provide Ontario with such a Family Court system.

Early in our Study the Commission formulated some general principles which have guided us in framing our proposals.

Recognizing the vital role that can be played in a community by the Family Court, we felt that greater use of it should be encouraged. This can only be brought about, however, if the Court can command more respect than it does currently, from both the public and the legal profession. This, in turn, can only be accomplished if there is a higher standard of judicial

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process, support services and dispositional facilities; if there is, as far as possible, uniformity in standards throughout the Province; if the Court has the ability to handle all family law problems, so as to reduce the multiplicity of proceedings to which people must resort, and hence the costs, delay, and frustration now experienced; and if the system has built into it the potential to progress and develop as the needs of the community it serves demand.

C. Proposals For Reform

In the Commission's Report on Family Courts we will be making recommendations which will eliminate many of the handicaps under which the Family Court system labours at present. For the purposes of this chapter, we confine mention of our tentative proposals for reform to two fundamental recommendations which will alter considerably the jurisdiction and the structure of the Family Court.

1. *A Family Court with Integrated Jurisdiction*

Since, in our view, the chief limiting factor in the administration of family law in Ontario is the fragmentation of jurisdiction in family law matters, and the severely restricted jurisdiction exercised by the present Family Courts, we propose that a new Family Court be established which will have comprehensive and integrated jurisdiction in all family law matters.[13]

For this purpose we expect that the definition of "family law matters" will include:

1. juvenile delinquency;
2. criminal charges arising under the *Criminal Code* from family disputes,[14] and quasi-criminal charges arising under provincial statutes;
3. children in need of care and protection;
4. custody and access not ancillary to divorce;
5. guardianship;
6. adoption;
7. paternity proceedings including declaratory judgments;
8. actions for alimony or maintenance not ancillary to divorce, and their enforcement;

[13]A full appreciation of the jurisdictional problem and our recommendations for its solution can be had only by referring to the discussion of this matter in the Commission's Report on Family Courts.

[14]Ss. 168, 197, 245, 663 and 745, except in the case of indictable offences, where the accused elects trial by jury.

9. support obligations, generally;
10. division of matrimonial property;
11. divorce and ancillary relief;
12. nullity of marriage;
13. declaration of status; and
14. some matters connected with the solemnization of marriage such as applications to dispense with parental consent, and applications for a declaration of presumption of death.

There are constitutional difficulties in the way of achieving a Family Court with comprehensive jurisdiction in all family law matters, and these will be discussed fully in the Commission's Report on Family Courts. The essential difficulty arises, of course, because of the division in legislative competence in family law matters between Parliament and the provincial legislatures, and because of a similar division in the power to appoint the judges to Canada's courts. The problem is further exacerbated by the fact that the power to administer the courts in Canada rests with the provinces.

While we appreciate that problems do exist, we are confident that they can be overcome in the interests of securing for the public the efficient administration of family law it so urgently needs, and is so urgently demanding.

The present complex system of independent courts, each with limited and often overlapping jurisdiction, is not, in our view, either an efficient or effective method of administering family law. Such a system has been described as a "non-system".[15]

Even the most cursory examination of some of the possible (and different) court actions that may be involved in family law matters[16] reveals incredible difficulties and complexities which can be solved only by the creation of a Family Court capable of exercising jurisdiction in the totality of family law. We are convinced that the ills of the present system can be cured only by having all family law problems brought to one specialized forum. For this reason we will be recommending that a unified Family Court with jurisdiction in all family law matters be established in Ontario.

Given the present fragmented jurisdiction, it is inevitable that there will be conflicts in philosophy among the different courts dealing with family law problems. Differing concepts among trial judges who are not specialists in family law can cause conflicting, perhaps harmful decisions to be made on different aspects of what is really one case. Adding to the conflicts is the

[15]See Pound, "The Place of the Family Court in The Judicial System" (1959), N.P.P.A.J. 161.

[16]For a discussion of this matter see the Commission's Report on Family Courts.

differing philosophy brought to bear by trial judges exercising general jurisdiction, on the one hand, and by Family Court judges, on the other, on similar matters.[17] Consolidating jurisdiction in family law matters, so that there is one court capable of dealing with all aspects of family litigation will avoid this problem and will also make consistency and certainty, hitherto unknown to family law, a characteristic of it.

Multiplicity of proceedings and complex conflicts of jurisdiction, common in our present "non-system", indeed, made inevitable by it, will be drastically reduced if one court is endowed with comprehensive jurisdiction. The result will be a considerable saving of time and effort for both bench and bar, and more importantly, a considerable saving of time, effort and expense for the family. The gains for the family are obvious. A number of family problems will be capable of resolution at one time, and in one court. This will avoid the necessity of instituting separate proceedings in separate courts at separate times, and will also eliminate the confusion attendant on trying to determine in which court to bring a particular action. Delays will be minimized. Given the nature of most family law problems, it is essential that they be dealt with expeditiously and efficiently. This may be one of the most important advantages to be gained from consolidated jurisdiction.

Another very important benefit to be gained from an integrated family court is that it will undoubtedly develop specialist judges.[18]

A court that has jurisdiction in all family law matters will provide a focal point around which can be grouped the ancillary services[19] so vital to its effective operation. At one central location can be gathered family histories and records of past orders so that the court will be kept up to date on the state of the family's legal health; representatives of social agencies to facilitate the carrying out of the court's social function; and an efficient staff capable of dealing with all aspects of a family's legal problems.

If the state is to discharge adequately its responsibilities toward the family it can delay no longer in the establishment of a comprehensive Family Court system. This concept has been the topic of much discussion in Canada in recent years,[20] and is now the subject of considerable study by law reform bodies across the country. The Alberta Institute of Law Research and Reform, the Office of the Revision of the Civil Code in Quebec, and the Law Reform Commission of Canada are actively engaged in preparing Reports on the matter, and others have expressed their intention of doing so in the near future.

[17]See, for example, Adrian Bradbrook, "An Empirical Study of the Attitudes of the Judges of the Supreme Court of Ontario Regarding the Workings of the Present Child Custody Adjudication Laws" (1971), 49 Can. Bar Rev. 557.

[18]For discussion of the need for special training of Family Court judges see the Commission's Report on Family Courts.

[19]See the Commission's Report on Family Courts for a discussion of the support services required for the Family Court.

[20]See, for example, Macdonald, "A Comprehensive Family Court" (1967), Can. Bar J. 10:323; Fraser, "Family Courts in Nova Scotia" (1968), 18 U. Toronto L.J. 164; Reagh, "The Need for a Comprehensive Family Court System" (1970), 5 U.B.C. L. Rev. 13; Purvis, "Rationale for a Family Court" (1971), 1 R.F.L. 402.

There is general agreement that the family is a unit which must be considered as a whole, and not piecemeal, and that in order to achieve this, there must be one Court which has power to deal with every legal problem that may arise in the family unit.

We recognize that as constituted at present, our Family Courts may not be competent constitutionally to exercise integrated jurisdiction. We also recognize that to be effective a Family Court must be capable of exercising jurisdiction in all family law matters. In our Report on Family Courts we give detailed consideration to the problem of how to create such a Family Court. In this chapter we merely outline our recommendation as to how this might be accomplished.

2. *The Structure of the Family Court*

It is not possible, in our view, to create a Family Court with integrated jurisdiction and, at the same time, retain the present structure of the Family Court in Ontario. Even if it were possible, we do not feel that it would be desirable.

We are convinced that the Family Court must be elevated from its present place in the court hierarchy, and we will be making recommendations to that effect. Not only is this necessary so that constitutionally the entire gamut of judicial processes affecting the family can be consolidated in one forum, but it is desirable in order to ensure that family law and its administration will be regarded as matters of the highest socio-legal importance. This has not been so in the past and has been one of the chief contributing factors to the lack of confidence in the Family Court system in Ontario.

It is imperative that family law be administered by a tribunal with increased status. Such a tribunal is needed urgently not only to enhance the prestige of the Family Court in the eyes of the public and of the legal profession, but also to attract judicial personnel of a high quality. There are able and dedicated men and women on the bench of the Provincial Courts (Family Division), but appointments have not always been made from among the most qualified. Part of the reason for this, of course, is that there is no requirement that Provincial judges (Family Division) be legally trained. Since a Family Court touches society at every level more intimately and more frequently than does any other tribunal, and since the problems with which it is concerned are, by their very nature, highly complex, men and women of the highest available qualifications must be appointed to it. We believe there is a greater probability that this will happen if the Family Court is elevated from its present position.

We disgress here, briefly, to outline what we consider to be the essential characteristics of a Family Court, whatever its structure.[21]

The court which administers family law must be, as the name court implies, a court of law. We are convinced that of all our institutions, a

[21]These are discussed at greater length in our Report on Family Courts.

court of law is the one most capable of approaching a determination of the truth in any given disputed matter. Its procedures discourage inquisitorial licence and are designed to safeguard the rights of the individuals who come before it. The adversary system, with its insistence on the observation of rules governing the admissibility of evidence, and its reliance on the doctrine of cross-examination has frequently been criticized, especially in its application to the resolution of family disputes on the ground that rigid adherence to it in an already emotionally charged atmosphere merely engenders bitterness, encourages hostility and tends to harden attitudes. We remain firm, however, in our belief that the adversary process has a value which outweighs these negative considerations, and that it is the most effective means available to resolve disputes judicially, while at the same time ensuring that every available safeguard is brought to bear to protect the rights of the individuals involved.

The possible disadvantages of the strict adversary system can be diminished to a large extent in the rather special context of a Family Court by making the procedure of the Court flexible enough to allow spouses and children to be treated as individuals with individual problems, to discourage further hostility between parties, to avoid jeopardizing any possible chance of reconciliation and settlement, and to minimize the inevitable insecurity and indignity felt by the parties.

While we are convinced that the Family Court must be first and foremost a court of law, we do appreciate that the Family Court has a two-fold function, judicial and therapeutic, and that therefore it must be more than a court of law. To fulfil its equally important therapeutic function it must be equipped with a professional staff trained in the behavioural and social sciences. The Court will have to rely heavily on the advice and assistance of people trained in disciplines other than the law, and these resources must be readily available. We will be recommending that whatever its place in the judicial system, the Family Court be equipped with an adequate social arm.

Two other essential characteristics of a properly functioning Family Court are that its procedures be as simple and inexpensive as possible, and that delays be minimized. Family law problems are generally urgent, and justice will be denied if the procedures of the Family Court do not permit them to be resolved quickly. The majority of the people who come to the Family Court have meagre resources, and it is imperative that the cost of litigation be kept to the barest minimum.

Having briefly outlined what we believe to be the essential characteristics of the Family Court, we turn now to set out our recommendation as to its structure and its place in the court system. We do not describe our recommendations in any final detail, as this will be done in our Report on Family Courts.

We will be recommending that the existing Family Courts — the Provincial Courts (Family Division) — be abolished, and that there be established a court of record to be known as the Family Court which is separate

from the existing courts,[22] and which is capable of exercising comprehensive and exclusive original jurisdiction in all family law matters.

The justification for creating a separate Family Court is clear. A Family Court is unlike any other court. Its work is of a highly specialized nature, and its two-fold function, judicial and therapeutic, demands that it have attached to it specialized services unlike those attached to any other court. The administrative requirements of a Family Court also differ from those required by other courts, chiefly because of the task of co-ordinating its two functions. A Family Court should be free to develop its own philosophy, its own procedures, and its own administrative techniques. We believe that this can best be fostered if the Family Court is a separate entity.

The method of appointing the judges to this court is, of course, crucial. The judges of such a court should be empowered to exercise all the jurisdiction in relation to family law matters exercised at present by judges appointed under section 96 of the *British North America Act*, and all the jurisdiction in relation to family law matters now exercised by judges appointed by the Lieutenant Governor in Council. We suggest two alternative structures for the Family Court which would result in the achievement of this goal and which we believe would overcome any constitutional obstacles.

(a) *A Separate Family Court Staffed by Judges of Equal Jurisdiction*

This alternative contemplates that the judges of the Family Court will be of equal rank, that is they will each be capable of exercising the totality of jurisdiction in family law matters. One proposal for achieving this result involves three steps:

1. The *Judges Act*[23] should be amended by Parliament to provide for a new class of judges known as Family Court judges. There need be no mention of their duties.[24]
2. Legislation should be passed by the Province to provide for the establishment of a separate Family Court in each county and district in the Province. This act might be known as *The Family Courts Act*.
3. An agreement should be reached that the Federal Government would not appoint a person a Family Court judge unless that person was approved by the Province. The result would be that such a person could then be vested by the Governor General with the jurisdiction of a section 96 judge and also vested by the Lieutenant Governor in Council with the jurisdiction of a provincially appointed judge.[25]

[22] As distinct from creating a Family Court which is a division of either the High Court, the County Courts or the Provincial Courts.

[23] R.S.C. 1970, c. J-1, as amended by S.C. 1971, c. 55.

[24] We would expect that the salaries of these judges would be commensurate with those of County Court judges in Ontario.

[25] There are a number of different agreements that might be reached. For example, an agreement might be reached which would allow the Federal Government and the Provincial Government each to appoint an equal number of judges to the Family Court. Each level of government could then vest the other's nominees with the powers it alone could confer.

While we appreciate that there may be difficulty in securing the federal-provincial co-operation so critical to the success of this proposal, we urge that every possible means of bringing it about be explored at both levels of government. We feel confident that the vital importance of providing the public with an efficient and effective system of treating family law problems will outweigh any difficulties that may be present, and that the desire to respond to this urgent public need will overcome any obstacles that may be put in the way of achieving an integrated Family Court.

Such a Family Court would have exclusive *original* jurisdiction in all family law matters as defined in our Report. It is important that all family legal problems be brought, at least initially, to a single forum. The advantages to be gained by such a consolidation are obvious. Chief among them is to minimize the opportunity for one spouse to harass the other by bringing a similar action in a court other than the one in which the first action was commenced.

While the Family Court should have exclusive original jurisdiction, we believe that it should be possible to have certain matters removed to the Supreme Court, either on the application of one party, or on a reference by a judge of the Family Court. In either case removal should be permitted only with leave of the Supreme Court. Such provision for removal should be confined to those family law matters over which the Supreme Court now exercises jurisdiction, either exclusively, or concurrently.

Should an action be commenced wrongly in the Supreme Court, hardship for the parties can be eliminated by a provision that on the application of one of them, the judge might refer the matter for hearing and disposition to the Family Court. Actions mistakenly commenced in the Supreme Court should not be declared null, but should, on application, be reinstated in the Family Court *nunc pro tunc*.

There may be cases which involve mixed issues, that is, some of the issues may properly belong in the Supreme Court, and some of them may properly belong in the Family Court. In such cases we believe that it should be possible, on application, for the Supreme Court to hear the case *in toto*. We recommend, therefore, that the Supreme Court have remedial power on application to direct that the whole case be heard before it.

In our Report on Family Courts we will be making a number of recommendations relating to the structure of the proposed Family Courts. We mention here only those which have importance for the subject matter of this Report.

We will be recommending, for example, that the proposed Family Courts Act provide that each Family Court judge have jurisdiction throughout Ontario. This is necessary in order to facilitate the assignment of judges to various court installations as circumstances require.

We will also be recommending that the proposed statute provide for the office of Chief Judge of the Family Courts. The Chief Judge would have *inter alia* general supervisory powers over the sittings of the Courts.

It is especially important that the Family Courts continue to have a Rules Committee to make rules regulating any matters relating to the practice and procedure of the Courts. Accordingly, we will recommend that the new statute provide for and set out the duties of the Rules Committee.[26]

(b) *A Separate Family Court Staffed by Judges of Differing Jurisdiction*

Our objective of creating a Family Court with comprehensive jurisdiction in all family law matters can be achieved by an alternative method of appointing its judges. This alternative contemplates the establishment of a separate Family Court staffed by two classes of judges, one class to be appointed under section 96 of the *British North America Act*, and one class to be appointed by the Province. The class appointed under section 96 would have jurisdiction in all family law matters, and especially in matters now heard by federally appointed judges, and the class appointed by the Province would exercise jurisdiction in the matters heard at the present time by the Provincial judges (Family Division).

If this alternative is accepted, the Family Courts Act would be divided into at least two Parts, one Part to set out the duties and the jurisdiction of the federally appointed judges, and another Part to set out the duties and the jurisdiction of the judges appointed by the Province. Then "judge" could be defined as

(i) under Part I, the judge of a County or District Court, or a judge appointed directly to the Family Court by the Governor General; or

(ii) under Part II, a Family Court judge appointed by the Lieutenant Governor under this Act.

In each county or district, the County or District Court judge would be *ex officio* a judge of the Family Court, but in large urban centres,[27] where the population and business of the Court require full-time Family Court judges, the judges should be appointed directly to the Family Court by the Governor General,[28] and these judges would be *ex officio* judges of the County and District Court.

Under this alternative it would be necessary to provide that the Part I judges should be subject to the supervision and direction of the Chief Judge of the County and District Courts with regard to their sittings, since it is inappropriate that this administrative responsibility be divided between two persons. In such event however, there would be an Associate Chief Judge, or a Senior Judge of the Family Courts whose sole responsibility would be for the general supervision of the Family Courts as a whole.

This second alternative lends itself to some variation. It is possible to avoid completely the necessity of calling upon the County Court judges to

[26] In terms similar to those in *The Provincial Courts Act*.
[27] For example, in the Judicial District of York, the Judicial District of Ottawa-Carleton, and the County of Wentworth.
[28] An amendment to the *Judges Act* to provide for a class of judges known as Family Court judges would be required.

perform the functions of the federally appointed Family Court judges. This could be accomplished by making provision for a smaller number of judges to be appointed by the Governor General directly to the Family Court. Each of these judges, while having province wide jurisdiction, would have a geographically limited circuit, so that one judge could serve the Family Court in more than one county. This variation is based on the premise that full-time federally appointed Family Court judges will not be required in every county.

All proposals related to the exclusive original jurisdiction of the Family Court proposed under the first alternative would apply equally to the Family Court proposed under this alternative. Similarly the proposals for removing certain matters to the Supreme Court would apply to the Family Court described under this second alternative.[29]

3. *Appeals*

(a) *A Separate Family Court Staffed by Judges of Equal Jurisdiction*

To avoid fragmenting the appeal procedures, appeals from a wholly integrated Family Court, staffed by judges appointed under section 96, should go to one court — the Divisional Court. Appeals to the Court of Appeal from a judgment or order of the Divisional Court should be taken only with leave, and only on questions that are not questions of fact alone.[30] These recommendations are consistent with our view that since the workload of the Court of Appeal is becoming intolerably heavy, every effort should be made to restrict its appellate jurisdiction to matters requiring the gravest consideration.

(b) *A Separate Family Court Staffed by Judges of Differing Jurisdiction*

If the second alternative is accepted, we suggest little change in the present appellate procedures. Appeals from the provincially appointed judges would be taken to the federally appointed judges, and appeals from the federally appointed judges would be taken to the Divisional Court. All appeals should be taken on the record, with leave to introduce new evidence. We do not think that the trial *de novo* should be retained. Appeals from a judgment or order of the Divisional Court should be taken to the Court of Appeal, and only with leave and only on questions that are not questions of fact alone.

An internal appeal procedure within the context of a court constituted under this alternative would give the advantage of an appeal as inexpensive as possible, expeditious, and heard in the community where the case originates. These criteria can be given expression only by an internal appeal procedure, and this, in turn, is possible only in the context of a two-tiered court.

[29]See p. 374 *supra*.
[30]See *The Judicature Amendment Act*, S.O. 1971, c. 57, s. 3.

D. Conclusion

In this chapter we have done no more than sketch our tentative recommendations. We have reserved a detailed and final discussion of them for our Report on Family Courts. Our sole purpose in including a chapter on Family Courts in this our Report on the Administration of Ontario Courts is to facilitate a general understanding of the proposed place of the Family Court in Ontario's judicial system.

E. Memorandum of Reservation and Explanation of the Honourable J. C. McRuer

While I am in general agreement with the philosophy of this chapter insofar as it pertains to the re-organization of the family courts, I do not wish it to be taken that I am concurring in the proposals for re-organization or the jurisdiction to be conferred on the court. In due course the Commission will be making a comprehensive Report on Family Property Law with recommendations. Until that Report and the final Report on Family Courts are completed, I do not feel that I am in a position to come to firm conclusions on what the organization and jurisdiction of the proposed family court should be. It is stated that "a new family court be established which will have comprehensive and integrated jurisdiction in all family law matters". Some items are enumerated that will come within the definition of family law but it is also indicated that the jurisdiction of the court is not to be confined to the enumerated items.

Apart from exercising jurisdiction as a juvenile or young persons court, the family court should be a court concerned with matters related to the family as a unit and not with disputes between members of the family where the family unit has ceased to exist. If the matter concerns disputes between a husband and wife or the maintenance or welfare of children under the age of 18 years, it may well be considered a matter for a family court, but if it concerns disputes that arise out of a mere family relationship of mature adults, this ought not to be a jurisdiction exercised by a family court set up for the purpose of preserving the concept of a family unit and resolving the difficulties of that unit. The concept and purpose of a family court should be clearly defined.

I am in disagreement with the proposals that appeals from decisions of the family court, however it may be set up, in respect of such matters as orders made under *The Deserted Wives' and Children's Maintenance Act* and *The Child Welfare Act* should be heard by the Divisional Court. It is of prime importance that the jurisdiction conferred on the family court should be exercised locally and with as little expense as possible. Whatever the structure of the court is, the rights of appeals in such matters as I have just mentioned should be heard locally by the local County or District Court judge.

I question that all appeals should be heard on the record with only a right to call further evidence with leave. The cost of a transcript of evidence

in many cases would be a denial of a right of appeal. Often the hearing may be held without the assistance of counsel and with little examination or cross-examination of witnesses. If the appellate court is dependent on the record alone in such cases it will be of little assistance. It may well be that some appeals should be heard on the record alone and some by a trial *de novo*.

All these matters I reserve until the final Report on Family Courts is prepared. I wish to make it quite clear that I am not supporting either of the proposed alternatives (a) or (b) at this time. There may be other alternatives to be considered. It may be when the jurisdiction of the court is more clearly defined, a family division of the County Court with judges appointed specially to that division, would be more appropriate than either proposals (a) or (b). This I reserve to consider further.

APPENDIX I

PROVINCIAL COURT (FAMILY DIVISION)

1. *The Provincial Courts Act*
   R.S.O. 1970, c. 369

   See ss. 9, 17, 18, 21, 23, 25

2. *The Deserted Wives' and Children's Maintenance Act*
   R.S.O. 1970, c. 128

   See ss. 2, 3, 12

3. *The Reciprocal Enforcement of Maintenance Orders Act*
   R.S.O. 1970, c. 403

   See s. 2(2)
   Under the practice evolved under this section the Family Court is empowered to enforce maintenance orders made in other jurisdictions.

4. *The Parents' Maintenance Act*
   R.S.O. 1970, c. 336

5. *The Children's Maintenance Act*
   R.S.O. 1970, c. 67

6. *The Minors' Protection Act*
   R.S.O. 1970, c. 276

7. *The Child Welfare Act*
   R.S.O. 1970, c. 64

   Part II (Wardship) See ss. 20-47

   Part III (Affiliation Orders)
   See ss. 48-68

8. *The Training Schools Act*
   R.S.O. 1970, c. 467

9. *The Schools Administration Act*
   R.S.O. 1970, c. 424

10. *Juvenile Delinquents Act*
    (Bill C-192 *Young Offenders Act*)

11. *Criminal Code*

    See ss. 168, 197, 245, 663, 745

12. *The Marriage Act*
    R.S.O. 1970, c. 261

    See s. 26

13. *The Married Women's Property Act*
    R.S.O. 1970, c. 262

    See s. 13(3)

COUNTY COURT

1. *The Judicature Act*
   R.S.O. 1970, c. 228

   See s. 118(3)
   which gives the county court judges jurisdiction in Divorce. This jurisdiction is conferred on them as local judges of the Supreme Court.

2. *The Child Welfare Act*
   R.S.O. 1970, c. 64

   Part II (Wardship) See s. 36(1)

   Part III (Affiliation Orders)
   See s. 64(1)

   Part IV (Adoption) See s. 70(1)

3. *The Married Women's Property Act*
   R.S.O. 1970, c. 262

   See s. 12

4. *The Marriage Act*
   R.S.O. 1970, c. 261

   See ss. 9(1), 11, 26

SURROGATE COURT

1. *The Infants Act*
   R.S.O. 1970, c. 222

   See ss. 1(1)(3)(4)(5); 16, 18

SUPREME COURT

1. *Divorce Act*
   R.S.C. 1970, c. D-8

2. *The Infants Act*
   R.S.O. 1970, c. 222

   See ss. 1(1)(3)(4); ss. 4-13; s. 18; s. 23

3. *The Child Welfare Act*
   R.S.O. 1970, c. 64

   Part IV (Adoption) See s. 70(1)

4. Actions under
   The Matrimonial Causes Act
   R.S.O. 1970, c. 265

5. *The Married Women's Property Act*
   R.S.O. 1970, c. 262

   See s. 12

6. *The Judicature Act*
   R.S.O. 1970, c. 228

   See s. 2 (alimony)

CHAPTER 14

SUMMARY OF RECOMMENDATIONS AND CONCLUSION

PART I

Chapter 1 A PHILOSOPHY OF COURT ADMINISTRATION

1. Ontario should adopt a "systems" approach to court administration based on sound management principles consonant with the administration of justice and not on the traditional judicial model which focuses on the judicial hierarchy and structures authority and lines of communication accordingly. The courts must be regarded as an assembly of interdependent parts forming a complex but unitary whole. (p. 4)

2. The premises underlying a sound approach to court administration are as follows:
   (a) the primary role of judges in our court system is to adjudicate, not to administer;
   (b) the primary goal of the court system is to serve the public; this involves adjudicative decisions which are not only fair and just but made without delay and at reasonable cost and convenience; and
   (c) sound court management in Ontario requires a fairer share of financial resources than has been accorded to the Ministry of the Attorney General to date. (pp. 4-5)

3. The principle of an independent judiciary must be preserved but it should not be regarded as justification for the operation of the courts independently of reasonable management constraints in the public interest. (p. 9)

4. Court administration should be the primary responsibility of government in order to provide the judges with more time to devote to adjudication. However, administrative decisions of government should never adversely affect the judges' adjudicative processes. (p. 9)

5. Because of the interrelationship of many adjudicative and administrative functions in the court system, court administrative personnel will have to work very closely and maintain a special relationship with the judges. This requires a blending of a management "systems" approach with an indispensable concept of judicial independence to create an efficient professionally-sensitive atmosphere in which judges have the maximum opportunity to adjudicate fairly and wisely. (p. 10)

6. As a management goal, every accused person charged with an offence should be brought to trial within 90 days of arrest or summons, regardless of the court to which he is committed for trial. (p. 11)

7. As a further management goal, every civil case should normally be disposed of within one year of the issuing and serving of the writ of summons, petition or claim. (p. 13)

8. Attempts should be made to reduce the cost of court proceedings through the application of management and jurisdictional techniques and the more efficient scheduling of cases to maximize the productive time of judges, lawyers, litigants and witnesses in the system. (p. 15)

9. Court structures, procedures and terminology should be simplified so that the court system will be better understood, utilized and accepted by the members of the lay public. (p. 15)

Chapter 2 A New Structure for Court Administration

10. A Provincial Director of Court Administration should be appointed to be responsible for the overall supervision and direction of all non-adjudicative, administrative aspects of the courts. (pp. 24, 26)

11. The Provincial Director of Court Administration should report directly to the Attorney General for purely administrative matters but should establish and maintain liaison with the Chief Justices and Chief Judges of the various courts. (p. 26)

12. Regional Directors of Court Administration should be appointed with responsibility for the administration of all courts operating in their respective regions. Each Regional Director should establish and maintain liaison directly with the Chief Justice of the High Court, the Senior County or District Court judges in his region, the Senior Judges of the Provincial Court (Criminal Division) in his region and with the Family Court judges in his region. (p. 26)

13. Answering directly to the Provincial Director will be the Regional Directors of Court Administration and where circumstances dictate, such other officials as the Registrar of the Supreme Court of Ontario. (p. 26)

14. The appropriate existing administrative personnel will report to the Regional Directors. (p. 28)

15. To the extent that it is necessary the Provincial Director and Regional Directors should develop their own staffs. (p. 28)

16. It should be made clear that to preserve the independence of the judiciary on matters of adjudication, including administrative matters which are regarded by the judges as bearing on adjudication, the judges' wishes must prevail. The Chief Justices and Chief Judges ought to be provided with executive assistants to assist them in the performance of their administrative duties. (pp. 28-29)

17. The Provincial Director and Regional Directors should be appointed on a contract basis for a fixed term, renewable on the advice of a committee composed of the Deputy Attorney General, all the Chief Justices and Chief Judges and the Chairman of the Civil Service Commission. The contract should provide for pension and employment benefits. (p. 28)

18. The duties of the Provincial Director should include the following:

(1) He should develop, organize and direct administrative systems for each class of court in the Province.

(2) He should evaluate the administrative requirements in each class of court and after consultation with the Chief Justice or Chief Judge respectively of the court affected make recommendations for change or improvements to the Attorney General.

(3) He should investigate all complaints regarding the administrative operations of each class of court.

(4) He should consult on a regular basis with the Chief Justice or Chief Judge of each class of court with respect to such matters as the judicial manpower needs, changes in jurisdiction, and methods of scheduling and arranging sittings, and should transmit any recommendations the judges wish to make on these matters to the Attorney General.

(5) He should be responsible for court facilities, particularly courtrooms.

(6) He should oversee the development and operation of a comprehensive statistical reporting system for each class of court throughout the Province and ensure the availability of current management reports on both a province-wide and regional basis.

(7) He should oversee the development, revision and distribution of instruction manuals for use of registrars, court clerks, local administrators, special examiners, court reporters, court interpreters and court statisticians throughout the Province, and should standardize and keep general oversight of all paper and manpower systems in court offices throughout the Province.

(8) He should develop training programmes for local registrars, County Court clerks, local administrators and court reporters, and should arrange for the administration of these programmes.

(9) In consultation with the respective Chief Justices and Chief Judges he should develop policies and standards regarding hours of court sittings throughout the Province.

(10) He should prepare budgets for the operation and maintenance of the various classes of courts in the Province after consultation with the respective Chief Justices and Chief Judges and should oversee the maintenance of budgetary and fiscal control.

(11) He should conduct a continuing examination and evaluation of court facilities and equipment and stay abreast of technological improvements in court and office equipment for potential application in the system.

(12) He should develop a public information facility so that the public might be better informed about the operation of the courts.

(13) He should be responsible for court reporting in all courts throughout the Province, directing the work of court reporters and keeping abreast of developments in electronic reporting techniques.

(14) He should oversee the hiring, employment and job assignment of all court personnel.

(15) He should continually evaluate the administrative operations of the courts, and oversee the conduct of studies to project the likely impact on the courts of legislative changes, and develop new administrative procedures and keep abreast of developments in court administration in other jurisdictions. (pp. 30-31)

19. The duties of each of the Regional Directors would to a large extent be delegated to them by the Provincial Director and would include:

(1) Consulting with the Chief Justice of the High Court and his staff with respect to providing all necessary facilities for High Court sittings in his region.

(2) Assisting the Senior County Court judges in his region in the rotation and reassignment of County Court judges in his region and consulting with respect to providing all necessary facilities for County Court sittings in the region.

(3) Assisting the Senior Provincial Court judges in his region in the assignment of judges in the region and consulting with respect to providing all necessary facilities for the Provincial Court sittings in the region.

(4) Investigating all complaints regarding the administrative operations of all courts in the region and reporting to the Provincial Director with recommendations.

(5) Attending periodic meetings with the Provincial Director to assist in the development, organization and coordination of administrative systems for the courts generally.

(6) Overseeing the employment and job assignment of all court personnel in the region, but according to the procedures and standards determined by the Provincial Director of Court Administration and his staff. (pp. 31-32)

20. The assigning of judges must remain a judicial function. (p. 32)

21. The Provincial Director should submit quarterly reports on the operations of the courts and his office to the Attorney General and a comprehensive annual report to the Attorney General which should by statute be required to be tabled in the Legislature. The annual report should include:

(1) A survey of the work of each class of court in the preceding calendar year, including proceedings commenced, dispositions, backlog, delay and weighted caseloads.

(2) A general report on the condition of the courts including a description of any recent changes or innovations, and any recommendations that the Director may have for improvements therein.

(3) A survey of studies undertaken in the preceding year relative to the administration of the courts, and the results and implications of such studies.

(4) Financial statements indicating the cost of operating the court system, taking into account both revenues and expenditures. (p. 32)

22. The Provincial Director and Regional Directors should have experience in modern business and management techniques. They should have a university degree in public administration or business and have a demonstrated capability to plan and conduct management studies and prepare recommendations and reports to higher authorities and to implement such recommendations when approved. They should possess a high degree of judgment, understanding and tact. (p. 33)

23. The salary for the Provincial Director should be at the level of a High Court judge and that of the Regional Directors at the level of a County Court judge. (p. 33)

24. The offices of the Provincial Director should be in the vicinity of Osgoode Hall. (p. 33)

25. An Attorney General's Advisory Committee on Court Administration should be established composed of:

(a) the two Chief Justices and all the Chief Judges;

(b) the Deputy Attorney General;

(c) the Deputy Minister of Government Services;

(d) the Provincial Director of Court Administration;

(e) four members of the legal profession, two active in civil litigation (one from within the Judicial District of York, and one from outside) and two active in criminal litigation (chosen on the same basis); and

(f) lay representatives.

The Committee should be responsible for monitoring the operations of the courts and making recommendations for long term planning. It should report annually and at such other times as the Attorney General should request or the Committee should decide. The annual report should be required by statute to be tabled in the Legislature. (p. 34)

26. An educational and research facility in court administration should be established in Ontario to provide education and training for professional court administrators and to assist in training court staff. It could assist in conducting seminars for the judiciary and could conduct research into all aspects of court administration. It should be interdisciplinary in nature. The government should make available the necessary financial support for its development and maintenance. (pp. 34-35)

27. A major responsibility of the Provincial Director should be the development and maintenance of an effective management information system. The necessary financial support for such system should be made available by the government. (p. 37)

Chapter 3 PROPOSAL FOR MERGER OF THE HIGH COURT OF JUSTICE OF THE SUPREME COURT OF ONTARIO WITH THE COUNTY AND DISTRICT COURTS

28. We do not recommend that there be a merger between the High Court of Justice of the Supreme Court of Ontario and the County and District Courts. (p. 91)

Chapter 4 HIGH COURT OF JUSTICE FOR ONTARIO

29. There should be no changes in the $7,500 maximum civil jurisdiction of the County Courts until there has been sufficient opportunity to assess fully the impact of the most recent changes on the distribution of civil workload between the High Court and the County and District Courts. (p. 109)

30. When an indictment is preferred in the High Court, High Court judges in Ontario should be empowered under the *Criminal Code* to hear the case without a jury, upon the election of the accused. (p. 111)

31. The Attorney General for Ontario and his agents should invoke the procedure to prefer indictments in the High Court to a much greater extent than in the past. His decision to prefer the indictment in the High Court might be influenced by the following considerations:

(a) the offence involves death or serious risk to life (other than a case of dangerous driving having no aggravating features), such as setting fire to a house;

(b) the offence is one of killing by dangerous driving where there are aggravating features;

(c) widespread public concern is involved;

(d) the case involves violence, or a threat of violence, of a serious nature;

(e) the offence involves dishonesty in respect of a substantial sum of money;

(f) the accused holds a public position or is a professional or other person owing a duty to the public;

(g) the circumstances are of unusual gravity in some respect other than those indicated above; and

(h) a novel or difficult issue of law is likely to be involved. (pp. 111-12)

32. *The Judges' Orders Enforcement Act* should be amended to give a right of appeal without leave where power is conferred under a statute of Ontario on a judge of the High Court or judge of the Supreme Court as *persona designata* and *The Judicature Act* should be amended to provide that where jurisdiction is conferred on a judge of the High Court or judge of the Supreme Court under any statute of the Legislature other than *The Judicature Act* the appeal shall lie to the Divisional Court. (p. 114)

33. There should be a presumption against the assignment of administrative or non-adjudicative duties to judges in the absence of strong countervailing considerations. The provincial and federal statutes conferring such duties should be reviewed with the object of transferring such duties to other judges or public functionaries. (p. 115)

34. Certain adjudicative duties conferred on the High Court or High Court judges should be transferred to other judges or public functionaries, according to the following guidelines:

(a) all adjudicative duties conferred by statute on judges requiring the simple and routine application of clearly defined standards in a consistent and uniform manner should be transferred to other public functionaries;

(b) a presumption should arise to the effect that an adjudicative duty conferred on a judge should be transferred when there is in existence another qualified and competent public functionary or tribunal which is equipped to perform these adjudicative duties; and

(c) adjudicative duties not falling within (a) and (b) above should remain with the judges unless with respect to specific duties there are compelling reasons relating to the inability of the judges to handle their normal workload of trial cases, which situation would suggest the transference of a specific duty to a new or existing public functionary or tribunal possessing the requisite specialization or expertise on such adjudicative matters. (pp. 116-17)

35. *The Constitutional Questions Act* should be amended to permit references to the Court of Appeal only and to delete the provision permitting such references to a single judge of the Supreme Court. (p. 117)

36. The province-wide circuit system should be retained but there should be a move towards regionalization through the gradual

reduction of the number of circuit centres which now exist. The present 48 circuit centres should be reduced to 32 for purposes of holding trials through amalgamation of some of the less-busy centres with adjacent centres. However, the office of the local registrar should be retained in each of the 48 county and district towns. For purposes of administrative flexibility, the Chief Justice of the High Court should have the power to assign a particular trial or sittings to any of the 16 circuit centres otherwise eliminated in situations of unexpected overload in any of the 32 trial centres. (pp. 127-28)

37. The assignment of judges to the various circuits and sittings should remain the collective responsibility of all the High Court judges. (p. 133)

38. The High Court circuits and sittings should be scheduled in such a way as to permit each judge to have one week in five for the writing of reserved judgments and staying abreast of developments in the law. (p. 134)

39. In the drawing of circuits and sittings, more use should be made of "open assignments" so that there are judges available to be assigned on short notice to substitute for judges who have become ill or have been held over at sittings, or to take a second list at a sittings where an overflow of cases has unexpectedly developed. (p. 134)

40. The requirement in the federal *Judges Act* that Supreme Court judges should reside in Toronto or within five miles thereof should be strictly enforced as an essential part of the administration of the circuit system. (pp. 134-35)

41. Wherever possible a High Court sittings should commence at 11 a.m. on the first day of the sittings, and should continue until 4 p.m. on the last day of the sittings assuming there are still cases to be heard. (p. 135)

42. There should continue to be a minimum requirement of two sittings annually in each of the 32 remaining circuit centres, and a flexible approach in respect of further sittings above the minimum. (p. 135)

43. There should be a principle that a High Court judge will not leave a particular sittings until the list of cases ready to go on is completed or alternatively a new judge is available to come in and complete the list. (p. 135)

44. In proper cases where it is apparent that the criminal and civil work of the Court cannot be concluded in the allotted time, concurrent courts should be set up if the necessary judges and courtroom accommodations are available. (p. 136)

45. It should be possible for cases ready to go on but not disposed of at a scheduled sittings to be placed on the list for the sittings in a neighbouring trial centre provided that the caseload there permits. (p. 136)

46. The Provincial Director of Court Administration in consultation with the Chief Justice of the High Court should be responsible for reviewing the caseload of the Court during the implementation of our recommendations with a view to determining whether the number of judges should be increased. (p. 139)

Chapter 5 THE COUNTY AND DISTRICT COURTS

47. The County Courts, the District Courts, the County Court Judges' Criminal Courts, the District Court Judges' Criminal Courts and the Courts of General Sessions of the Peace should be reconstituted as a single court of record with only one name. (p. 162)

48. County Court civil monetary jurisdiction should not be changed at the present time, but should be reexamined after an appropriate time has elapsed following legislative implementation of our recommendations. (p. 163)

49. The trial *de novo* in summary conviction offences should be replaced by an appeal on the record with power in the appeal court to consider not only the record but also to hear further and other evidence where it considers it to be in the interest of justice in the case. (p. 164)

50. The County and District Court districts should be renamed "circuits", and function as such. (p. 167)

51. The Chief Judge of the County and District Courts should have authority and responsibility to assign judges to sit outside their circuit if the volume of judicial work in other circuits warrants this. (p. 167)

52. The term "junior judge" should be abolished. (p. 168)

53. In counties where there are two or more judges, one judge should be designated by the appointing authority as "senior judge" with responsibility, subject to the supervision and direction of the Chief Judge, to supervise the day-to-day operations of the courts in the county, to deal with court problems that affect the county as a whole, to coordinate the efforts of all the judges in the county, and to ensure that the operations of the County Court in a county (and the Surrogate and Small Claims Courts in counties where they are presided over by County Court judges) are coordinated with the arrangements made under *The County Judges Act* for the functioning of the courts throughout the circuit. (p. 168)

54. Appointments of senior judges should be made on the basis of administrative ability rather than length of service on the bench. (p. 168)

55. The Province should create the office of "senior circuit judge" and one judge should be so designated by the appointing authority for each circuit, with responsibility, subject to the supervision and direction of the Chief Judge, in consultation with the judges of his circuit, to plan and carry into effect the assignment of judges to

the courts in the circuit, having regard to the desirability of rotating the judges within the circuit, and the need to equalize the burdens of the judicial duties of each judge, and having power to make such readjustment or reassignment as he considers necessary from time to time. (p. 168-69)

56. The senior circuit judges should, after the Chief Judge, take rank and precedence among themselves according to seniority of appointment, and should be appointed on the basis of administrative ability rather than length of service on the bench. (p. 169)

57. The appointment of judges at large should be terminated and those judges who are now appointed for the County and District Courts of the counties and districts of Ontario should be reappointed to particular counties and districts. (p. 170)

58. Employing the presumption against the assignment of administrative or non-adjudicative duties to judges in the absence of strong countervailing considerations as part of the terms of reference, a committee of County Court judges should be established:

(a) to give detailed consideration to the matter of non-adjudicative and administrative duties imposed upon County Court judges by statute;

(b) where it is concluded that certain of these duties are not properly within the functions of a judge, to consider the matter as to how the duties might otherwise be performed;

and to make appropriate proposals to those charged with the responsibility for drawing up the legislation implementing the recommendations of this Report. (p. 172)

59. Those provisions of *The Police Act* that make a County Court judge a statutory member of a board of commissioners of police should be repealed, and County Court judges should not be assigned to perform these duties in the future. (p. 173)

60. The matter of transferring certain adjudicative duties to other public officials or tribunals should be referred to a committee of County Court judges for detailed analysis and the formulation of specific legislative proposals in accordance with the following guidelines:

(a) All adjudicative duties conferred by statute on judges requiring the simple and routine application of clearly defined standards in a consistent and uniform manner should be transferred to other public functionaries.

(b) A presumption should arise to the effect that an adjudicative duty conferred on a judge should be transferred when there is in existence another qualified and competent public functionary or tribunal which is equipped to perform these adjudicative duties.

(c) Adjudicative duties not falling within (a) and (b) above should remain with the judges unless with respect to specific

duties there are compelling reasons relating to the inability of the judges to handle their normal workload of trial cases, which situation would suggest the transference of a specific duty to a new or existing public functionary or tribunal possessing the requisite specialization or expertise on such adjudicative matters. (pp. 173-74)

61. The three guidelines set out in the previous recommendation should be employed in the future whenever legislation is drafted under which adjudicative duties are created which might be assigned to the County Court judges. (p. 175)

62. *The County Courts Act* should be amended to provide that all appeals arising out of the exercise of County Court jurisdiction created under any Act other than *The County Courts Act*, except from interlocutory orders and decisions should lie to the Divisional Court. (p. 180)

63. The leave provisions should be removed from section 3 of *The Judges' Orders Enforcement Act*. (p. 180)

64. Extended jurisdiction to hear and deal with *persona designata* matters should be conferred on County Court judges under *The County Judges Act* in the same way in which that Act now confers extended jurisdiction on the judges to hear and deal with court matters. (p. 181)

65. County Court clerks should be assigned responsibility for dealing with the routine duties that are now performed by judges including:

(a) Solemnization of marriage under *The Marriage Act*;

(b) Permitting late filing of a renewal statement under *The Conditional Sales Act*;

(c) Permitting late registration of a mortgage or conveyance under *The Bills of Sale and Chattel Mortgages Act*;

(d) Revision of voters' lists under *The Municipal Franchise Extension Act*;

(e) Revision of voters' lists under *The Voters' Lists Act*;

(f) Revision of voters' lists under *The Municipal Act*; and

such other matters as may appear to fall within the same general terms of reference. (pp. 181-82)

66. Where it is appropriate for an appeal to be provided from the decision of a County Court clerk, such appeal should go to the County Court. (p. 182)

67. A policy should be adopted under which County Court clerks would be legally trained. (p. 182)

68. Where persons with legal qualifications are appointed as County Court clerks, they should be given extended responsibilities with jurisdiction to deal with minor adjudicative matters arising in the County Court in a way that is similar to the functions of the Master of the Supreme Court of Ontario. (p. 182)

69. The clerk of the County Court should maintain a register of all committals for trial showing the date of committal, indicating whether the accused person elected to be tried by a judge or by a court composed of a judge and a jury, the date upon which the trial was held, and for summary conviction appeals, the date upon which the notice of appeal was filed and the date upon which the appeal was heard. (p. 182)

70. The register described in the preceding recommendation should be open to public inspection in the same manner and on the same terms as are the books of the County Courts under the provisions of *The Judicature Act*. (p. 183)

71. The jurisdiction of the local judges of the High Court should be expanded through changes to the Rules so as to relieve, if not eliminate, the difficulties and expense encountered by litigants and their solicitors in those trial centres outside Toronto where there is not now a Weekly Court, subject to the proviso that the precise nature of the changes to the Rules that should be made in order to bring this about should be left to a body established to undertake a general revision thereof. (pp. 184-85)

Chapter 6 MOTIONS IN COURT AND CHAMBERS

72. *The Judicature Act* should be amended to abolish the present distinction between court and chambers. (p. 212)

73. All motions or applications heard by a judge should be required to be heard in open court, except with respect to a matter referred to in Rule 209 of the *Rules of Practice*, which should be permitted to be heard in the absence of the public on the *fiat* of the judge or the local judge in individual cases. (p. 212)

74. The hearing of motions or applications by the Master should be open to the public, except where the Master or local master hearing the motion gives his *fiat* in the individual case with respect to a matter referred to in Rule 209 of the *Rules of Practice* that it be heard in the absence of the public. (p. 212)

75. The *Rules of Practice* should be amended so that references to "chambers" be changed in accordance with the foregoing recommendations. (p. 213)

76. Appropriate amendments should be made either to *The Interpretation Act* or the relevant statutes to provide that where power is conferred on a "judge in chambers" it is to be exercised in accordance with these recommendations. (p. 213)

77. *The Judicature Act* should be amended to provide that nothing in the Rules made thereunder should be construed to deprive the court of any power it may have apart from the Rules, either inherent, statutory or otherwise, to hear matters in the absence of the public. (p. 212)

78. Separate court and chambers days in Toronto should be abolished and replaced by a daily "Motion Court". Weekly Court in Ottawa and London should also be replaced by "Motion Court". (p. 213)

79. It is suggested that gowns not be worn in Motion Court. (p. 213)

80. Notices of motion and orders for all motions should follow one basic form, except that an order made otherwise than in open court or at a hearing open to the public should expressly so state under the judge's or Master's name at the beginning of the order. Where a matter falling within Rule 209 is heard in the absence of the public and the order fails to so state, this should be treated as an irregularity and such an order should be subject to amendment in a proper case. (p. 213)

81. A provision along the lines of section 12 of the *Administration of Justice Act, 1960* in force in England respecting the publication of information relating to proceedings before any court sitting otherwise than in open court should be incorporated into *The Judicature Act*. (p. 214)

82. Where applicable, the foregoing recommendations should apply to the hearing of motions in the County and District Courts, as well as to the hearing of motions in the Supreme Court. (p. 196)

Chapter 7 THE COURT OF APPEAL

83. There should be no formal requirement for the Court to hold sittings outside Toronto. (p. 222)

84. The civil caseload of the Court of Appeal should be reduced by empowering the Divisional Court to hear:

(1) all appeals from judgments in uncontested divorce cases; and

(2) appeals from all judgments, orders or decisions made in the exercise of jurisdiction specifically conferred by section 14(1) of *The County Courts Act*. (p. 226)

85. The right of an appellant in custody to be present before the Court of Appeal should not be absolute but should depend on whether his presence will assist the court in coming to a proper conclusion in the case. (p. 231)

86. All appeals, whether on a stated case or otherwise, which now lie to the Court of Appeal under *The Summary Convictions Act*, except for appeals on important constitutional questions, should lie instead to the Divisional Court. (p. 232)

87. All summary conviction appeals whether on a stated case or otherwise arising under the *Criminal Code* which at present lie to the Court of Appeal should lie instead to the Divisional Court. (p. 232)

88. All appeals from conviction, acquittal and sentence in indictable matters from Provincial judges should lie to the Divisional Court rather than the Court of Appeal. (p. 234)

89. If our recommendations are adopted, the provisions of *The Judicature Act* specifying that appeals to the Court of Appeal from the Divisional Court may be taken only with leave of the Court of Appeal on questions that are not questions of fact alone should remain unchanged. Legislation implementing these recommendations, however, should safeguard the rights that an accused person now has to appeal to the Supreme Court of Canada. (p. 234)

90. An application for directions should be required in civil cases to determine what portion of the evidence and exhibits should be reproduced for the purposes of appeal. The application should be heard in the first instance by the Registrar with the right to have the decision reviewed by the Court of Appeal. (p. 236)

91. No change should be made to Rule 501 or Criminal Appeal Rule 20 either to permit written argument or to fix any specific length of time to present oral argument. (p. 238)

92. Judicial specialization is appropriate in the Court of Appeal only in the sense that the expertise of the various members of the Court is considered by the Chief Justice in assigning them to individual cases. (p. 238)

93. There should be immediate authorization for the appointment of one additional law clerk to the Court and for as many more as the Court may request from time to time. (p. 238)

94. The Court of Appeal and Divisional Court should have power to order the indemnification as to costs in proper cases, both civil and criminal from a fund established for that purpose. The fund should not be established by any form of tax on litigants who resort to the courts. (p. 240)

Chapter 8 THE DIVISIONAL COURT

95. During the course of implementation of our recommendations for increased jurisdiction, the workload of the Divisional Court should be kept under continuous review by the Attorney General's Advisory Committee on Court Administration with a view to considering whether a permanent court structured with judges appointed thereto, or a court with some judges specially appointed thereto and some judges drawn on a rotational basis from the High Court should be set up. (p. 246)

96. The Divisional Court should be specifically empowered but not required to hold sittings in locations other than those set out in section 48(3) of *The Judicature Act*. (p. 247)

97. No change should be made with respect to the provisions for leave to appeal to the Court of Appeal from the judgments and orders of the Divisional Court. (pp. 247-48)

Chapter 9 COURT VACATIONS

98. The statutory provisions and the *Rules of Practice* concerning vacations as they relate to the operation of the Court of Appeal, the Divisional Court, the High Court, and the County and District Courts should be repealed. (pp. 264-65)

99. Trials should not take place during July and August on the same basis as at other times of the year, but fixed court vacations should no longer remain as an inflexible rule entrenched in the law. (p. 264)

100. We suggest the adoption of the following procedures for the High Court and the County Courts:

(a) The scheduling of criminal trials should take precedence over the scheduling of civil trials, particularly if the accused is in custody.

(b) Where it is not convenient, economic or efficient to hold Supreme Court or County Court trials in a given trial centre, then it should be possible to give civil litigants the right to a prompt trial in a neighbouring trial centre where trials are being conducted. Similarly, an accused person to be tried before a High Court or a County Court judge, while entitled at common law to a trial in the county where the crime was alleged to have been committed and to have the jury selected therefrom, should have the right to apply to be tried during the summer months in a neighbouring trial centre when it will result in the more prompt disposition of his case.

(c) In the smaller trial centres, trials should not be scheduled in the Supreme Court during the same period of time as trials are scheduled in the County and District Courts. However, it may be convenient to schedule summer Assizes back-to-back with the General Sessions of the Peace so that the jury empanelling process need only take place once.

(d) Except under emergency circumstances no new trials in the Supreme Court or the County and District Courts should be scheduled to commence during the week December 25 to January 1. This should not preclude, however, the completion during that week of trials commenced prior to Christmas.

(e) Criminal cases in the Supreme Court and County and District Courts should be assigned trial dates in the summer as the circumstances require in the same manner as at other times of the year. This of course would not preclude counsel from making representations respecting the avoidance of a particular date in July or August because of his own vacation plans or those of others involved in the case.

(f) In civil cases in the Supreme Court and the County and District Courts trials should be held in the months of July and August where counsel for the parties consent or where counsel for one of the parties applies to the Court for an order that there should be a summer trial.

In the event that counsel for all the parties agree, they should communicate this fact to the Court by the middle of May, together with an indication of the approximate suitable dates. Once this communication was received from counsel the Regional Director, in consultation with the Chief Justice or Chief Judge, would be free to schedule the trial on the dates indicated, or attempt to arrange alternative dates.

We envisage, however, that there may be cases where some counsel refuse to agree to a summer trial for reasons which are unacceptable. For example, some counsel may not agree to a summer trial purely for the purpose of introducing unnecessary delay into the proceedings. In such a case we think it proper to allow counsel to apply to the Court for a hearing in the nature of a pre-trial conference in order to

establish that his case is ready for trial and that the objections of counsel who do not wish to go on are not valid. Such applications should be made and heard during the period encompassing the last two weeks of May and the early part of June.

By June 15 in each year a list of cases should be prepared for hearing during the months of July and August. Cases should not be entered on the list except by consent of all parties or on the order of a judge.

A fixed number of judges should be assigned to be available to sit as and where they may be required to dispose of the cases entered for trial during the months of July and August. (pp. 267-69)

101. The Divisional Court should sit in the months of July and August to hear such cases within its original and appellate jurisdiction as are made ready for hearing. (p. 269)

102. Small Claims Courts and Surrogate Courts should be available 12 months a year except in the smaller trial centres where it is more convenient, economic and efficient to transfer trials to neighbouring trial centres during July and August. (p. 269)

103. Provincial Courts (Criminal Division and Family Division) should continue to operate on a 12 month a year basis. (p. 269)

104. No changes should be made with respect to the convening of the Court of Appeal in July or August. However, in all cases time should run during the months of July and August in all matters relating to appeals. (p. 269)

105. We do not recommend the curtailment of the usual vacation periods of judges and court officials. Only the time of the year at which vacations may be taken would be affected. (p. 266)

Chapter 10 CASE SCHEDULING AND TRIAL LISTS IN THE HIGH COURT AND COUNTY AND DISTRICT COURTS

106. The relative age of cases on the lists at the various trial centres should be a major factor in deciding how to deploy available judges in the High Court. (p. 278)

107. Immediate steps should be taken to reduce the backlogs at certain trial centres and in particular in the non-jury lists in Toronto. The waiting period on trial lists should be reduced to six months maximum by January 1, 1975. Efforts should be made to further reduce this period to three months. (pp. 277, 279)

108. If the 90 day goal in criminal cases cannot be met by the holding of special sittings in the High Court, provision should be made for the transfer of criminal cases to nearby trial centres, on the consent of the accused. (p. 279)

109. In scheduling cases, greater emphasis should be placed on convenience to lawyers, witnesses and litigants. (p. 282)

110. At the time a case is set down for trial, counsel should be required to provide those responsible for case scheduling with the number

of witnesses to be called and an estimate of the length of time required for the hearing of the case. (p. 282)

111. Projections of settlement and adjournment rates in the courts should be developed. (p. 282)

112. Counsel should be required to inform the court by telephone immediately on the settlement or likely settlement of any case on the ready list, and to inform the court as soon as possible of his intention to request an adjournment. (p. 282)

113. A system of fixed trial dates such as that operating in the Queen's Bench Division of the High Court in London, England should be introduced at least on an experimental basis, for civil non-jury cases in the High Court in Toronto. (pp. 288-89)

114. A daily cause list for the following day of the sittings should be drawn up for each day of the sittings of the High Court outside Toronto. (p. 291)

115. In sittings of the High Court outside Toronto the control of the trial lists should be left in the hands of the local registrar under the supervision of the Regional Director of Court Administration in the region in which the sittings are held and judicial intervention should be kept to a minimum. (p. 291)

116. The Provincial Director of Court Administration should conduct studies regarding the handling of trial lists outside Toronto with a view to making innovations or to standardizing practices if this is thought to be desirable. (p. 291)

117. The High Court should keep an up-to-date register of all criminal cases committed for trial in that Court showing the date of arrest, the date of committal for trial and the date of the trial. (p. 292)

118. The criminal assignment court in the County Court of the Judicial District of York should be continued. (p. 294)

119. Consideration should be given to adopting for civil non-jury cases in the County Court in the Judicial District of York the fixed trial date system recommended for the High Court in the Judicial District of York. (p. 294)

120. The utility of "court sittings" for the hearing of civil non-jury cases in the County and District Courts should be reviewed. (p. 294)

121. The Provincial Director of Court Administration, working closely with the Chief Judge, senior judges and the members of the local bar, should carry out a full study of scheduling of cases coming before County Court judges (whether exercising jurisdiction as *persona designata*, of the Court, as local judges of the Supreme Court, Surrogate Court judges or Small Claims Court judges) with a view to proposing and implementing whatever changes are necessary and developing uniformity of practices and procedures if desirable. (p. 295)

Chapter 11 THE JURY IN CIVIL CASES

122. Civil juries should be abolished except in the case of actions for libel, slander, malicious arrest, malicious prosecution and false imprisonment (p. 348)

Chapter 12 THE GRAND JURY

123. The grand jury should be abolished in Ontario. (pp. 360-61)

124. Provision should be made for the review of the sufficiency of evidence to commit on an application for *certiorari* without the accused's being obliged to surrender himself into custody. (p. 359)

125. Provision should be made for a body to be chosen twice a year as the grand jury is now chosen, with power to inspect institutions in the receipt of public money and to report the result of their inspections to the judge sitting in the Assizes. (p. 360)

126. The sheriff should replace the grand jury as an instrument of gaol delivery. He should report fully on all persons in custody awaiting trial. His report should be made in open court at the opening of each court sittings in the judicial district with jurisdiction to try criminal cases with a jury. (p. 360)

Chapter 13 FAMILY COURTS

127. For our recommendations for the Family Court see our Report on Family Courts.

CONCLUSION

This Part of our Report makes final disposition of some of those matters under study and review in the Administration of Ontario Courts Project. Research was conducted concurrently on those other topics referred to in the Foreword.

In the Appendix to this Part we list all those who submitted briefs and made representations to the Commission. At the conclusion of Part III we will acknowledge all who contribute working papers or advice on the matters under consideration. Here we wish to recognize particularly the assistance we received in the completion of Part I.

We express our thanks to John W. Morden, Toronto, Harvey J. Bliss, Toronto, Paul Cavalluzzo, Toronto, all of the Ontario Bar, Sydney N. Lederman, Toronto, Professor of Law, Osgoode Hall Law School, York University and to Mrs. Katharine Newman and Mr. Michael Leshner, students at law at the University of Toronto Law School, all of whom gave generously of their time and assisted us greatly in the preparation of certain background materials.

We owe a special debt of gratitude to Ronald G. Atkey of the Ontario Bar, who was Counsel to the Project from its inception until September 1972; to Garrick D. Watson, Professor of Law, Osgoode Hall Law School, York University, who acted as Counsel to the Project from September through December, 1972; and to Mrs. Carol M. Creighton of the Ontario Bar, who has been Assistant Counsel to the Project throughout. They have all provided invaluable services in the production of this Report.

Finally, we record our thanks to E. F. Ryan, Esq., Counsel to the Commission, for his continual and resourceful assistance and to the Commission's Legal Research Officers, Miss Maureen J. Sabia and Messrs. Keith B. Farquhar and John F. Layton for their substantial contributions.

All of which is respectfully submitted.

H. ALLAN LEAL,
Chairman

JAMES C. McRUER,
Commissioner

RICHARD A. BELL,
Commissioner

W. GIBSON GRAY,
Commissioner

WILLIAM R. POOLE,
Commissioner

February 26, 1973.

APPENDIX

Briefs submitted to the Project on Administration of Ontario Courts:

The Advocates' Society, Toronto;
Mr. George Alexander, Kingston;
Mr. Donald Angevine, Law Student, London;
Associated Credit Bureaus of Ontario, Newmarket;
Mrs. Anne Barnard, Nobel;
Mr. Bruce Bokhout, P.Eng., Toronto;
Mr. R. Bradburn, of the Ontario Bar, Toronto;
Mr. D. I. W. Bruce, of the Ontario Bar, Hamilton;
Mrs. A. M. Burston, Toronto;
Dr. James M. Cameron, Maple;
Canadian Bar Association, Ontario Branch, The Jurisdiction of Courts Committee;
Mr. John Cassells, Crown Attorney & Clerk of the Peace for the Regional Municipality of Ottawa-Carleton, Ottawa;
Chartered Shorthand Reporters' Association of Ontario, Toronto;
His Honour Omer H. Chartrand, L'Orignal;
MacKenzie A. Chown, Mayor of St. Catharines;
His Honour S. L. Clunis, Essex County, Windsor;
His Honour F. J. Cornish, Toronto;
County of Carleton Law Association, Ottawa;
County and District Court Judges Association of Ontario, Toronto;
County of York Law Association, Toronto;
The Crown Attorney and Clerk of the Peace for the Judicial District of Niagara North, St. Catharines;
The Court of the General Sessions of the Peace and the District Court of the District of Algoma, His Honour I. A. Vannini and His Honour M. G. Gould, Sault Ste. Marie;
Mr. Phil Glanzer, Toronto;
Mr. Bernard J. Goodal, of the Ontario Bar, Chatham;
Hamilton Law Association, Hamilton;
Mr. H. W. Hockin, Q.C., of the Ontario Bar, London;
The Judges of the Supreme Court of Ontario, Toronto;
Mr. Donald R. Jury, of the Ontario Bar, London;
Justices of the Peace Association of Metropolitan Toronto;
Kenora District Law Association, Kenora;
His Honour Kenneth M. Langdon, Provincial Court (Family Division) Halton, Georgetown;
Mr. G. R. Lee, Sheriff of Algoma, Sault Ste. Marie;
Mr. Peter Lewington, Ilderton;
Mr. A. S. Marriott, Q.C., sometime Senior Master of the Supreme Court, Toronto;
Masters of the Supreme Court of Ontario, Toronto;
Mr. W. C. McBride, Master and Taxing Officer, Supreme Court of Ontario, Toronto;
Mr. Harvey McCulloch, Crown Attorney for the Judicial District of York, Toronto;
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Mr. Raymond Mitchell, of the Ontario Bar, Toronto;
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Muskoka Law Association, Gravenhurst;
New Democratic Party, Toronto;
Norfolk Law Association, Simcoe;
Ontario Crown Attorneys' Association, Toronto;
Ontario Sheriffs' and Court Registrars' Association, Toronto;
Ontario Association of Chiefs of Police, Toronto;
Ontario Apartment Board, Hamilton;
Ottawa-Carleton Judges of the Provincial Court (Criminal Division), Ottawa;
Perth County Bar Association, Stratford;
Mr. M. L. Piper, Q.C., Clerk of the Peace, Judicial District of York, Toronto;
Police Association of Ontario, Toronto;
Provincial Council of Women of Ontario, Toronto;
Provincial Court (Criminal Division) District of Algoma, His Honour C. E. Boyd and His Honour J. D. Greco, Sault Ste. Marie;
Provincial Judges' Association (Criminal Division), Toronto;
Mr. Redmond Quain, Q.C., of the Ontario Bar, Ottawa;
Mr. Robert K. Rankin, of the Ontario Bar, Chatham;
Mr. Clayton C. Ruby, of the Ontario Bar, Toronto;
Mr. Vernon M. Singer, Q.C., M.P.P., The Liberal Party of Ontario;
Mr. G. H. Smith, Deputy Clerk, County Court, Judicial District of York, Toronto;
Mr. C. B. Sproule, of the Ontario Bar, Peterborough;
Street Haven, Toronto;
Mr. Zoltan Szoboszloi, Toronto;
Thunder Bay Law Association, Thunder Bay;
The Town of Geraldton;
Mr. Arthur G. Veitch, C.S.R., Special Examiner, Toronto;
Mr. Thomas R. Warwick, of the Ontario Bar, Blenheim; and
Mr. R. E. Zelinski, Q.C., of the Ontario Bar, Thunder Bay.

END