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LAW REFORM
INSTITUTE

CIVIL LITIGATION:

THE JUDICIAL MINI-TRIAL

DISPUTE RESOLUTION—SPECIAL SERIES

DISCUSSION PAPER NO. 1

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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The Institute's office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 492-5291; fax (403) 492-1790.

ACKNOWLEDGEMENTS

In the course of preparing this document we have talked to many members of the profession. The information we gathered is represented either by specific examples or by generalized comments on the mini-trial process.

In particular we have had the benefit of a review of earlier drafts of the report by Chief Justice Moore and former Associate Chief Justice Miller, both of whom provided very helpful information and insight.

We hope that the issues we have posed will enlighten the discussion and look forward to reponses from the profession.

We acknowledge, with thanks, the contribution of Institute counsel, Margaret A. Shone, who had the carriage of this project and authored the discussion paper.

THE HONOURABLE W KENNETH MOORE
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COURT OF QUEEN'S BENCH OF ALBERTA

July 2, 1993

Professor Peter Lown
Alberta Law Reform Institute
402 Law Centre
University of Alberta
Edmonton, Alberta
T6G 2H5

Dear Professor Lown:

Re: Mini Trials

The subject of Judicial Mini Trials is one about which I have spoken on several occasions and to which the Court devotes considerable resources. There have been favourable comments on the approach which has been taken in Alberta.

The Institute paper on this topic provides historical background, some informed analysis and a useful checklist for lawyers considering the use of a mini trial. I endorse it as profitable reading both for those contemplating mini trials and for those who have an interest in the dispute resolution process.

Yours truly,

WKM/aa

PREFACE

Currently, much attention is being paid to ways in which dispute resolution processes may be improved. The need for this attention stems from the growing complexity of modern society and the laws which govern its relationships. The present groundswell of interest signals the need for dispute resolution mechanisms that keep pace with the times. As we stated in the introduction to our Research Paper No. 19, *Dispute Resolution: A Directory of Methods, Projects and Resources*, this interest is largely the product of "the ongoing concern of lawyers, judges, governments and citizens to ensure that disputes are resolved through effective means, for the benefit of the disputants and of society in general."

The traditional litigation process cannot always meet contemporary dispute resolution requirements in a timely, cost-effective and satisfying way. Alternative methods of resolving disputes, both within and outside the judicial system, are being tried with varying success. We are living in an era of experimentation with innovative dispute resolution methods.

The Alberta Law Reform Institute has conducted a variety of research relating to the improvement of dispute resolution processes in Alberta. In some cases, this research has resulted in reports containing recommendations for reform. An example is *Report No. 51* on arbitration. In other cases, our research has produced information that we think will contribute to the discussion and creative experimentation that is taking place in practice. Examples include *Research Paper No. 18* on referees and *Research Paper No. 19* which provides a directory of dispute resolution methods, projects and resources. Our publications relating to dispute resolution are listed behind the table of contents to this paper.

We have also participated on a Civil Practice Steering Committee formed at the instigation of the Civil Practice Advisory Committee of the Law Society of Alberta. In addition to the Law Society and ourselves, this Committee includes representatives of the Court of Appeal and the Court of Queen's Bench of Alberta. In January 1993, the Steering Committee issued a report which proposes the reform of *Pre-Trial Procedures* in response to complaints that the litigation process is too slow and expensive. The report has been circulated to members of the legal profession in order to solicit the views of the profession on the suggestions contained in it.

This discussion paper on the *Judicial Mini-trial* launches a special publication series of papers aimed at disseminating ideas that hold the potential to lead to better dispute resolution. Previously, in the introduction to *Research Paper No. 19,* we spoke of the importance of developing a framework for the study of dispute resolution. Our decision to publish a special discussion paper series will take us one step further in this direction.

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ABBREVIATIONS

ADR	Alternative Dispute Resolution
ALRI	Alberta Law Reform Institute
ARC	*Alberta Rules of Court*
BC Rules	*British Columbia Supreme Court Rules*
FRCP	*Federal Rules of Civil Procedure,* United States Federal Court
Hughes Report	*Access to Justice: The Report of the Justice Reform Committee, 1988* (British Columbia), chaired by Hon. E.N. Hughes, Deputy A-G, pp. 135-39.
RP	*Research Paper*

PART I — DISCUSSION PAPER

CHAPTER 1 — INTRODUCTION

A. Dispute Resolution—Current Experimentation

Currently, much creative experimentation is taking place with the aim of improving dispute resolution processes. The experimentation embraces innovative dispute resolution methods, new models of dispute resolution, and variations and combinations of these methods and models.

Some of this experimentation is occurring in contexts that are independent of the judicial process. Some of it is connected tangentially with the judicial process. Some of it forms an integral part of the judicial process. It is going on throughout the English common law world and in legal systems in other jurisdictions that are characterized by large sophisticated populations and high regulation.[1] The interest is worldwide.

Within the judicial process, the use of expanded pre-trial procedures is finding favour in many jurisdictions.[2] One offshoot of these expanded procedures is experimentation with the use of what is commonly known as the "mini-trial".

In this paper, we will give a brief history of the introduction of the mini-trial as a method of private dispute resolution; discuss its adoption, with modification, for use by the courts in civil litigation cases; describe current Alberta experience with the judicial mini-trial; and develop a checklist for lawyers and judges to consider before going ahead with a judicial mini-trial.

B. Meaning of Mini-Trial

The word "mini-trial" has at least three meanings.

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1 ALRI *Research Paper No. 19—Dispute Resolution: A Directory of Methods, Projects and Resources* (July 1990) at 7.

2 See, for example, *British Columbia Supreme Court Rules*, Rule 35; *Saskatchewan Rules of the Court of Queen's Bench*, Rule 191; *Manitoba Queen's Bench Rules*, Rules 48.01(3) and 50; and *Ontario Rules of Civil Procedure*, Rule 50.

(1) Private Mini-Trial

In one context, a mini-trial is understood as a dispute resolution technique, developed for use without court intervention as part of the alternative dispute resolution (ADR) movement in the United States.[3] The "private mini-trial" was created in 1977 to settle a bitter and complex patent infringement case,[4] but its use has since been extended to other private disputes, particularly in the commerical area, and to disputes with government.

The private mini-trial involves the abbreviated presentation of evidence to representatives of the parties who have the authority to settle the dispute. The evidence is given in the presence of a neutral advisor who presides over the proceeding. The procedural details are determined by the parties who negotiate a mini-trial agreement before the proceeding commences. The neutral advisor serves only at the pleasure of the parties in the role defined by the parties. Depending on what is set out in the mini-trial agreement, the parties may ask the neutral advisor to:

- study the preliminary materials submitted by the parties,[5]
- issue written rulings on discovery matters,[6]
- hold joint discussions with counsel to resolve questions of procedure,[7]

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3 The "alternative dispute resolution" or "ADR" movement in North America is the outgrowth of concern about the effectiveness of adversarial court proceedings to resolve disputes. The move is toward the use of processes such as negotiation, mediation and arbitration. The ADR movement constitutes a major force in the United States, where it originated. It has also influenced thinking, practices and reforms in Canada. The main perimeters of the movement defy precise definition. ADR encompasses processes for dispute resolution that are truly alternative to the existing judicial system as well as processes that modify or improve upon practices and procedures currently in use within the existing court system. ALRI *RP19* at 1-2.

4 Eric D. Green, "Growth of the mini-trial" (Fall 1982) 9 Litigation 12 at 12.

5 Michael F. Hoellering, "The mini-trial" (December 1982) 37 The Arbitration Journal 48 at 50.

6 *Ibid.*

7 *Ibid.*

- serve as a sounding board,[8]

- preside over the mini-trial to keep the parties on the mutually established schedule,[9]

- answer legal/technical questions from the parties,[10]

- question witnesses and counsel to clarify facts and legal theories,[11]

- highlight crucial facts and issues,

- meet with the parties in informal negotiating sessions outside of the hearing room (sometimes in an *ex parte* manner),[12]

- make his or her views known to the parties,

- render a non-binding written opinion setting forth the strengths and weaknesses of the parties' positions and the likely outcome in court in the event of further litigation",[13]

- act as a mediator and facilitator during the negotiating sessions,[14]

- facilitate settlement by building "a sense of cooperation and rapport between the parties",[15]

- exercise "powers of persuasion rather than the judicial powers with which he may be cloaked."[16]

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8 Reba Page & Frederick J. Lees, "Roles of participants in the mini-trial" (October 1988) 18 Public Contract Law Journal 54 at 66.

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 *Ibid.* at 67.

13 Hoellering, *supra*, note 5 at 50.

14 Page & Lees, *supra*, note 8 at 66.

15 *Ibid.* at 67.

16 *Ibid.*

With the concurrence of the parties, the neutral advisor's role may shift during the hearing.[17] The neutral advisor does not, as a rule, act as an arbitrator or judge or even a mediator, or limit the parties in their presentations.[18] Unlike a judge, the neutral advisor "has no power to direct or enforce actions or procedures."[19]

Understood in this context, the mini-trial is not really a trial at all. It is, instead, a formalized structure for settlement negotiation. The structured presentation of evidence and argument to the parties to a dispute enables them to settle the dispute themselves on the merits.

(2) Judicial Mini-Trial

In a second context, the mini-trial is understood as a settlement technique introduced to expedite the resolution of a dispute within the civil litigation system. The "judicial mini-trial" is the subject of this paper. It is described in greater detail in chapters 2 and 3.

The judicial mini-trial has its origin in the private mini-trial which the British Columbia Supreme Court adapted for use in civil litigation proceedings. For this reason, the judicial mini-trial has many, but not all, of the characteristics of the private mini-trial. It also has some characteristics that are more like those of the summary jury trial. The summary jury trial is another judicial settlement technique that has been introduced by way of experiment in the United States in response to pressures on the civil litigation system in recent years.[20]

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17 *Ibid.* at 66.

18 Hoellering, *supra*, note 5 at 50.

19 Page & Lees, *supra*, note 8 at 67.

20 As explained by Glenn Newman, "The Summary Jury Trial as a Method of Dispute Resolution in the Federal Courts" [1990] U. of Illinois Law Rev. 177 at 181-86, essentially the summary jury trial is just what it says, an abbreviated informal trial. The procedure involves lawyers in the presentation of a summary of the case before a small panel of jurors. After hearing the presentation, the jury deliberates and reaches an advisory verdict. In addition to promoting settlement, the summary jury trial increases community involvement in the settlement process and increases lawyer preparedness for trial if settlement is not reached.

(3) Separate Trial of an Issue

In a third context, mini-trial refers to the separate trial of an issue which forms part of a larger litigation. This meaning has no part in this discussion.

C. Purpose

As already stated, the private mini-trial is looked upon as a settlement technique. Its aim is to facilitate the prompt, cost-effective resolution of civil cases, generally those involving mixed questions of fact and law.[21] In order to encourage a fair and equitable settlement, the private mini-trial narrows the dispute, promotes a dialogue on the merits of the case, and converts "what had grown into a typical lawyers' dispute back into a businessmen's [or litigants'] problem by removing many of the collateral legal issues in the case."[22] In the commercial world, the purposes of the mini-trial include avoiding management disruptions, as well as saving money and time.[23]

The judicial mini-trial can be conceptualized, philosophically, either as an "advanced negotiation technique" or as an "expedited litigation".[24] The resolution of the litigation will have been expedited if settlement is achieved. Short of settlement, the mini-trial process may help counsel to clarify and narrow the issues, eliminate some, and thus shorten the length of the trial that does take place. Participating in the mini-trial process will give the lawyers a headstart on their preparation to present and argue the case at trial, thereby promoting "more efficient use of legal time than may occur during the drawn-out preparation that takes place over many years in the typical big case."[25] The fact that a mini-trial is pending has been instrumental in itself in bringing about settlement. These advantages can exist even where, as in Alberta, the judicial mini-trial is not a step in the action.

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21 Hoellering, *supra*, note 5 at 48, citing Eric D. Green, "The Minitrial Approach to Complex Litigation" in *Dispute Management: A Manual of Innovative Corporate Strategies for the Avoidance and Resolution of Legal Disputes* (New York: Center for Public Resources, 1980) at I-A.1-I(v).1.

22 Green, *supra*, note 4 at 12.

23 Frank Carr & Lester Edelman, "The mini-trial: an alternative dispute resolution procedure" (March 1987) 42 The Arbitration Journal 7 at 11.

24 Page & Lees, *supra*, note 8 at 68.

25 Green, *supra*, note 4 at 14.

The "expedited litigation" analysis modifies the dynamics of the process. For example, in a private mini-trial, the parties control the process and the neutral advisor who presides over the hearing does only what the parties ask, no more and no less. In contrast, in a judicial mini-trial, the judge presides, participates actively in setting the mini-trial procedures, and gives an opinion on the likely outcome. To take another example, in the private mini-trial the lawyers present the case to the parties whereas in the judicial mini-trial, the parties are present but the lawyers present the case to the judge. Where the mini-trial is incorporated into the civil litigation process, systemic goals occasionally may conflict with the desire of the parties. For example, from an individual viewpoint, the parties may wish to have their day in court, whereas, from a systemic viewpoint, the judiciary may be concerned about the efficient and cost effective use of judicial resources and savings in the cost to the government of producing justice.

It is difficult, on the basis of current provisions and experience, to make a definitive statement about the purpose of the judicial mini-trial. As a general statement, it is probably intended essentially for use as a settlement technique. If the mini-trial is successful and settlement is reached, the mini-trial will clearly have expedited the litigation. There will be savings in costs—both public and private—and time, and in the avoidance of the uncertain results and strain of trial. If the mini-trial is not successful, it will add further expense and delay the resolution of the dispute. Nevertheless, there will be some benefits. For example, many of the expenses are recoverable in trial preparation.[26] That is because, at the very least, participating in a mini-trial will force the parties to clearly formulate the issues, marshal all the relevant evidence and assess their respective positions early in the litigation process.[27]

The answers to some of the questions raised later in this discussion paper will vary depending on which philosophical view is taken of the judicial mini-trial. However, no single analysis need be rigidly adopted. The mini-trial process is evolving through experimentation and flexibility in the evolutionary process is highly desirable.

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[26] Green, *supra*, note 4 at 14.

[27] Edelman & Carr, *supra*, note 23 at 14.

CHAPTER 2 — THE JUDICIAL MINI-TRIAL

A. Origin: The BC Mini-Trial

When talked about in the context of civil litigation in Alberta, mini-trial usually means a judicial mini-trial of the sort provided in the *British Columbia Supreme Court Rules* (the "*BC Rules*").

In fact, the *BC Rules* say very little about the mini-trial. The mini-trial is mentioned in Rule 35 on the pre-trial conference. Subrules (4), (5) and (8) contain the relevant provisions.[28] They state:

> **35**(4) At a pre-trial conference, the judge or master may, whether or not on the application of a party, order that:
>
> > (j) the parties attend a mini-trial or a settlement conference.
>
> (5) Where the judge or master orders or directs that the parties attend a mini-trial, the parties shall attend before a judge or master who shall, in camera and without hearing witnesses, give a non-binding opinion on the probable outcome of a trial of the proceeding.
>
> (8) A judge who has heard a mini-trial or who has attended at a settlement conference shall not preside at the trial, unless all parties of record consent.

In short, under the *BC Rules*, (i) the judge or master may order a mini-trial, with or without a request from a party; (ii) the parties must attend; (iii) the mini-trial is held in camera; (iv) no witnesses are heard; (v) the results are non-binding; and (vi) if a trial proceeds, another judge must hear it unless the parties agree otherwise.

The BC mini-trial is described in *Access to Justice: The Report of the Justice Reform Committee, 1988* (the "Hughes Report"), as follows:[29]

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[28] *BC Rule* 35 is reproduced in full in Appendix A.

[29] At 138-39. The Justice Reform Committee was convened by the Attorney General.

The Mini-Trial is another tool for promoting out-of-court settlements which counsel should always consider in seeking ways to economically resolve a lawsuit.

The Mini-Trial resembles an actual trial, but in abbreviated form. The format is flexible, usually worked out with counsel and the presiding judge in advance. Parties with full authority to settle the case should be required to be present throughout.

There are certain items that are usually agreed upon in order to encourage participation in the process. Some of these are:

- no court reporter is present;
- the judge conducting the mini-trial will not conduct the trial, if there should be one;
- no communication may be made to the judge presiding at the actual trial of the events of the Mini-Trial.

An Agreed Statement of Facts and a Statement of Issues of Fact and Law in dispute should be filed in a form which the Mini-Trial judge can readily incorporate into his opinion. However, if this formality interferes with the holding of a mini-trial it should be waived.

The Mini-Trial usually takes place in a courtroom and usually follows this general format:

a) Counsel in turn relate the evidence of each of the witnesses they would call if there were a trial. They do not embellish that evidence or withhold anything which may assist their opponent's case. (Their purpose in requesting a Mini-Trial—to achieve early settlement—could well be frustrated unless there is a full and frank disclosure of the merits and weaknesses of their respective cases.)

b) Counsel then refer to discovery questions in support of their cases and to any expert reports relied upon.

c) All counsel in turn make oral submissions and provide the court with the authorities on which they rely and any memoranda of legal propositions.

d) The presiding judge gives detailed oral reasons at the close of the Mini-Trial or as soon after as possible. The parties attend to hear the opinion.

e) The judge does not take any further part in settlement discussions, or any proceeding relating to the litigation.

It is important that a judge deliver full reasons, in order to have persuasive effect on counsel and the parties. It is also important that there be no 'arm-twisting'; the judge is a neutral participant, giving the parties an opinion of the probable outcome.

On the whole, the response to Mini-Trials has been favourable. The Supreme Court Judges say that mini-trials have good results in major litigation, but they are time-consuming. However, the favourable results justify continuing with the procedure.

B. The Alberta Mini-Trial

The Court of Queen's Bench of Alberta has offered "a mini-trial or an expanded pre-trial settlement conference" to litigants for over three years.[30] The "Alberta mini-trial" is described in two recent published accounts, one by the Honourable W. Kenneth Moore, Chief Justice of the Court of Queen's Bench of Alberta[31] and the other by the Honourable Tevie H. Miller, prior to

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30 The *Alberta Rules of Court* (*ARC*) provide for a pre-trial conference in *ARC* 219 (reproduced in Appendix B). Pre-trial conferences should be distinguished from judicial mini-trials. The purpose of a pre-trial conference is to ensure that an action is ready to be set down for trial. At the pre-trial conference, the judge often explores with the parties the possibility of settlement. The possibility of holding a judicial mini-trial is present on the agenda of Alberta judges conducting pre-trial conferences. The mini-trial is a discrete technique that may be used to produce a settlement. The mini-trial does not form part of the pre-trial conference, although it may come about because of it.

31 "Mini Trials Reduce Clients' Stress and Expense" (July 1992) The Law Society of Alberta Bencher's Advisory, Issue 27 at 11.

his retirement from the position of Associate Chief Justice.[32] In this discussion paper, the information in these accounts is supplemented by information obtained from subsequent correspondence, conversations and presentations made at legal forums.

The most important feature of the judicial mini-trial procedure is its flexibility to accommodate the requirements of the case at hand. The description given below of the Alberta mini-trial should be read in the light of this characteristic.

The stated object of the Alberta mini-trial is settlement of the action by the parties. The mini-trial is a free service offered by the court to lawyers who request it. This judicial assistance lies outside the ordinary court process—it is not a "step in the action".[33] Where a settlement results and court time is saved, economy in the use of judicial resources becomes an additional benefit. Conversely, where a settlement is not reached and the action proceeds to trial, the mini-trial process may introduce some additional cost and delay the resolution of the dispute.

Because the authority for the mini-trial is informal, the procedure remains flexible, varying from judge to judge and case to case. Nevertheless, a common practice is evolving. Chief Justice Moore has identified six key elements:[34]

1. All counsel must agree to participate in the mini trial process.

2. The clients must be present while the lawyers are presenting their arguments to the judge.

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32 "Mini-Trials" (May 1992) Edmonton Bar Association Notes at 2-5.

33 Chief Justice Moore, *supra*, note 31 at 11. No specific authority for the mini-trial exists in the *ARC*. That is why the consent of the parties to participate in the mini-trial is crucial. In the absence of party consent, three possible sources of authority exist. The source most commonly cited is *ARC* 219 (*supra* note 30 and Appendix B), the wording of which is thought by some to be broad enough to permit a mini-trial to be held. It is generally regarded as appropriate for the pre-trial conference judge to suggest a mini-trial to counsel for the parties. A second possible source is the inherent statutory jurisdiction of superior courts provided in the *Judicature Act*. A third possible source is the inherent jurisdiction of superior courts at common law.

34 Chief Justice Moore, *ibid.*, modified in accordance with his letter to ALRI dated July 2, 1993.

3. At the end of arguments, the judge will render a non-binding opinion.

4. No costs are assessed at a mini trial.

5. Examination for discovery evidence may be referred to but no other evidence is to be adduced during a mini trial — just argument based upon facts that are agreed upon or facts essentially agreed upon.

6. Counsel should meet with the mini trial judge in advance of the mini trial to discuss generally how the mini trial will be conducted.

7. It is to be made clear at the outset that the judge who renders the non-binding opinion at the conclusion of the mini trial will not be the trial judge and will not discuss the opinion with anyone else on the Bench.

These elements, although commonly present, are not rigidly limiting. The experimentation is ongoing and new practices are evolving. To take three examples:

(1) As stated in item 3, the opinion rendered by the judge in a mini-trial is generally non-binding. Sometimes a lawyer will add weight to the judge's opinion ahead of time by asking a client who is resisting settlement to agree, in writing, to be bound by it. It is too soon to assess whether this is a good approach.[35]

(2) Although the rule in item 4 is that no costs are assessed at a mini-trial, costs were assessed in a consent order under *ARC* 219 that provided for a special chambers application in the nature of a pre-trial conference hearing held "for the purpose of considering and receiving a [judge's] pre-trial opinion."[36] Although the *ARC* 219 order does not refer to a mini-trial, the purpose appears to be identical.

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35 If the parties were to agree with each other to accept the opinion as binding, the nature of the procedure would be an arbitration, not a mini-trial.

36 The *ARC* 219 order is reproduced in Appendix D. Interesting questions arise about enforcement of an order relating to costs or other sanctions if, as indicated by item 7, the mini-trial proceedings are confidential.

(3) The prohibition, in item 5, on the adducement of evidence is not absolute. On occasion, where counsel for the defendant consents, the judge will permit the plaintiff in a personal injury case to describe the effect of the injury. Some judges encourage the litigants themselves to speak up at the mini-trial. These judges believe that litigants who have had an opportunity to express to a judge what was troubling them and hear the judge's opinion are more likely to accept settlement. Litigants in this situation are more likely than others to feel satisfied that they have had their day in court.

The request for a mini-trial is made to the Chief Justice in Calgary or the Associate Chief Justice in Edmonton. They may decide to conduct the mini-trial themselves or assign it to another judge.[37] Usually, the mini-trial judge will meet with counsel to discuss the procedure and will ask counsel to provide a brief containing the agreed (or substantially agreed) facts, authorities and argument about a week beforehand.

Depending on the preference of the judge, the mini-trial may take place in a courtroom or around a large conference table in the judge's chambers. The mini-trial procedure is informal to eliminate the intense adversarial atmosphere of formal trial. To underscore the informality, the judge wears no robes. The mini-trial is held off the record and no court reporter is present.

Ordinarily, but not necessarily, the judge will:[38]

(a) when the mini-trial commences, explain the procedure that will be followed;

(b) ask counsel to provide summaries of the testimony that witnesses would give at trial and of the written materials that would be entered as exhibits;

(c) take notes and ask questions for clarification as the presentations unfold;

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37 Not all judges conduct mini-trials. Five judges in Calgary and four judges in Edmonton have been designated.

38 Chief Justice Moore, *supra*, note 31 at 11; Associate Chief Justice Miller, *supra* note 32 at 2-5.

(d) refer to examination for discovery transcripts and expert reports that have been exchanged;

(e) examine exhibits;

(f) give the clients an opportunity to speak;

(g) invite counsel to present closing argument similar to the argument that would be presented at the end of the trial;

(h) before rendering an opinion, verify with all sides that the mini-trial judge knows as much about the issues as the trial judge would after a full trial hearing;

(i) point out that both sides are free to accept or reject any of the judge's conclusions;[39]

(j) emphasize to the litigants that

(A) enormous expense is involved in going to trial—the expense includes the cost of their own lawyer and the potential costs they may have to pay to the other side if they lose,

(B) trial is a stressful process where pressure may be put on them,

(C) the lawyers may encounter difficulties with their factual evidence at trial,

(D) going to trial gives no guarantee of success, and

(E) judges are not infallible and are sometimes reversed on appeal;

(k) encourage the parties to negotiate a settlement within a reasonable time, on the basis of what they heard at the mini-trial; and

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[39] This would not be the case where counsel has taken an agreement from a party to accept the judge's opinion as binding: see *supra*, note 35 and accompanying text.

(l) ask counsel to let the judge know the outcome.

The average mini-trial takes from one to four days with time for presentation being allotted equally to each party. Where a trial was scheduled for three months, some mini-trials have lasted for as long as two weeks. It is anticipated that the judicial time allotted for mini-trials will be increased in the fall of 1993, from one week a month to two weeks for judges on the mini-trial lists in Calgary and Edmonton.

Where settlement is not negotiated, the defendant may make a payment into court, under *ARC* 166, in the amount suggested by the mini-trial judge, or serve an offer of judgment on the plaintiff under *ARC* 169. Alternatively, the plaintiff may serve an offer to settle on the defendant under *ARC* 170. By taking one of these steps, a party puts additional pressure on the other party to settle.

The mini-trial procedure has been used successfully to facilitate the settlement of complex cases that would have taken months to litigate. For example, in Calgary, one complicated case that involved six counsel was settled as a result of a one-week mini-trial.[40] The procedure also can be made available for less complex issues where only two or three days of trial time is estimated to be involved. The mini-trial has been helpful in a wide range of cases, including personal injury cases, family disputes, construction contracts and unlawful dismissal actions. It is particularly useful where a client resists settlement.

The procedure is not well suited to resolve cases where the evidence is conflicting and the result will turn on witness credibility. However, mini-trials can work where the facts are not completely agreed upon.

Based on the letters they have received from the legal profession reporting mini-trial outcomes, the Chief Justice and Associate Chief Justice believe that the mini-trial has enjoyed a high rate of success in bringing about settlement.

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40 During this mini-trial, the judge took a view of the construction site involved in the litigation.

C. The Mini-trial Elsewhere

Although *ARC* 219 is not broad enough to encompass it, the Alberta mini-trial would fit within the scope of the more expansive pre-trial conference rules that exist in several other provinces.[41] Most of these pre-trial conference rules are based on Rule 16 of the *Federal Rules of Civil Procedure* (*FRCP*) that govern civil proceedings in the federal courts in the United States. *FRCP* Rule 16(c)(7) goes further than any Canadian rule to permit a judge to direct or suggest that the parties arrange a private mini-trial.[42]

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41 These rules are cited *supra*, note 2.

42 *FRCP* Rule 16(c)(7) is reproduced in Appendix C.

CHAPTER 3 — MINI-TRIAL DESIGN

Several questions relating to the conduct of the judicial mini-trial arise from a review of the descriptions of the Alberta mini-trial provided by Chief Justice Moore and Associate Chief Justice Miller, the BC mini-trial Rules, and the literature on the private mini-trial and on the summary jury trial (to which the judicial mini-trial bears some similarity). Persons who are thinking about using a judicial mini-trial should take them into account.

In this chapter, we will identify two key features of the mini-trial that should be present in every case. We will then identify matters for litigants, lawyers, judges to consider in making the decision to conduct a mini-trial and in planning the procedure to be followed. This will lead to the production of a judicial mini-trial checklist that lawyers and judges could use as a guide.

A. Key Features of Judicial Mini-Trial

Two key features of the mini-trial should be honoured in all cases.

(1) Voluntary Participation

Participation in a judicial mini-trial should be VOLUNTARY.

The literature on the private mini-trial emphasizes that the technique is only useful where both parties are "committed to resolving the dispute with a minimum of expense, delay, and disruption."[43] Both parties must agree to use the mini-trial, and either may withdraw at any time during the proceedings without prejudicing its case.[44]

Voluntary participation in a judicial mini-trial is the current practice in Alberta. It is important that all parties agree to participate because settlement is unlikely to follow if one or more counsel lack enthusiasm for the mini-trial

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43 Edelman & Carr, *supra*, note 23 at 12.

44 *Ibid.* at 9 and 13.

process.[45] This does not rule out the possibility that a judge will use powers of persuasion to talk counsel into taking part in a mini-trial.

The *BC Rules* permit the judge to order a mini-trial without a request from the parties. In other words, the mini-trial can be imposed compulsorily. If the view taken in this literature is correct, a doubt arises about the utility of compelling the parties, or even one of them, to participate in a mini-trial.[46]

(2) Flexible Design

The judicial mini-trial design should be FLEXIBLE to meet the needs of the case at hand.

Chief Justice Moore regards the informality of the Alberta mini-trial, and hence its flexibility, as "a singular advantage".[47] The literature on the private mini-trial likewise emphasizes that flexibility is one of its greatest strengths. This flexibility enables each of the elements of the mini-trial procedure to be tailored to achieve the best fit for the dispute at issue.[48]

Flexible design also facilitates the evolution of the judicial mini-trial process through experimentation to build up experience with the success of one practice or another.

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45 Associate Chief Justice Miller, *supra*, note 32 at 3.

46 *Supra* notes 43 and 44 and accompanying text.

47 Chief Justice Moore, *supra*, note 31 at 11.

48 Edelman & Carr, *supra*, note 23 at 9.

B. Initiation of Mini-Trial

(1) Decision to Initiate

Is the mini-trial procedure appropriate for the case at hand?

The suggestion that a mini-trial be conducted may be made by counsel, the judge or the parties through counsel. The parties must agree to a mini-trial, either by requesting it initially or accepting the suggestion of a judge that a mini-trial be held.

In addition to the use of litigant resources, the mini-trial involves the use of judicial resources paid for at public expense. Therefore, before proposing or agreeing to a mini-trial, the participants should consider whether the mini-trial procedure is appropriate for the case at hand.

The literature on the private mini-trial indicates, as stated in the previous section, that the "most important criterion in case selection" is a committed desire by the parties to settle the dispute.[49] The following factors tend to make a private mini-trial suitable:

(a) the case involves issues of mixed fact and law or the factual disputes are technical ones and promise a battle of the experts at trial,[50] and the legal rules are reasonably clear so that the factual issues will determine the outcome;[51]

(b) the parties to an ongoing dispute—in this case, usually business entities—wish to preserve the relationship; or

(c) the case involves the public sector and "the imprimatur of a respected neutral advisor that the mini-trial places on the merits of a negotiated compromise" may give a public official "the confidence

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49 *Ibid.* at 12.

50 Hoellering, *supra*, note 5 at 49.

51 Edelman & Carr, *supra*, note 23 at 11.

> needed to put his name to a settlement he may already believe reasonable."[52]

The private mini-trial is appropriate for small as well as large disputes.

The factors that affect the selection of cases appropriate for a judicial mini-trial are different in some respects from those that affect the selection of cases appropriate for a private mini-trial. For example, cases that "turn solely on issues of law"[53] may be more suitable for attempted resolution by judicial mini-trial because a judge will preside. Cases where the client resists settlement will also be specially suitable (in this case, counsel, as the voluntary participant, must persuade the client to agree). If witness testimony is precluded, cases that turn on issues of disputed fact and law may be less suitable.

Like a private mini-trial, a judicial mini-trial appears to be less appropriate for cases involving constitutional problems, unsettled or novel questions of law—especially if the unresolved legal issue involves the establishment of important legal precedent—, the credibility of witnesses,[54] multiple parties,"[55] unusually "factually complex, lengthy, or factually contested cases,"[56] multiple party disputes,[57] and cases that are "potentially tainted by fraud".[58]

The parties may wish to be satisfied that they are more or less evenly balanced in financial resource, litigation experience and expertise and therefore roughly equally able to participate in a mini-trial.

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52 Green, *supra*, note 4 at 15.

53 *Ibid.* at 17.

54 *Ibid.*

55 Hoellering, *supra*, note 5 at 49.

56 Page & Lees, *supra*, note 8 at 60.

57 *Ibid.*

58 *Ibid.*

(2) Stage of Civil Litigation

At what stage of the civil litigation proceeding should the mini-trial be conducted?

Judicial mini-trials tend to be held later in the proceedings, at the conclusion of examination for discovery if not after a certificate of readiness for trial has been filed. Waiting until after discovery gives counsel an opportunity to refer to sworn testimony during the course of the mini-trial.[59]

Some of the literature on the private mini-trial indicates success where the mini-trial takes place early in the proceeding and the mini-trial agreement expedites discovery by limiting its scope.[60] Certainly, where the mini-trial offers the prospect of success, the sooner it is initiated, the quicker and cheaper the dispute being litigated is likely to be resolved. At the same time, however, the facts and issues need to be "sufficiently developed to permit a meaningful analysis."[61]

(3) Effect

Will the result be binding or non-binding?

When used as a settlement technique, the mini-trial is necessarily non-binding in effect. However, one use of the judicial mini-trial is to help lawyers bring their clients to reason in order to expedite the litigation. As has been seen, some lawyers are asking their clients to agree to accept the decision rendered by the mini-trial judge. This practice transforms the judicial mini-trial from a settlement technique into a procedure in the nature of an arbitration or abbreviated trial. The point of this observation is simply to note that the practice produces a philosophical shift in outcome.

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59 Letter from Chief Justice Moore to ALRI, April 28, 1993.

60 Green, *supra*, note 4 at 14.

61 Edelman & Carr, *supra*, note 23 at 11.

C. Mini-Trial Planning

(1) Mini-Trial Agreement or Order

How will the mini-trial procedure be determined?

(a) Private mini-trial

In a private mini-trial, the parties negotiate the procedural details that will govern the exchange of information and enter into an agreement before the proceeding commences. This is a critical part of the mini-trial process, and the literature emphasizes the importance of taking time to plan the mini-trial carefully at the outset. The mini-trial agreement, which is highly specific to the requirements of the subject mini-trial and "may require a planning period of some weeks to properly draft",[62] should be reached early along in the mini-trial process. That is because much momentum toward settlement follows the negotiations on the procedures of a mini-trial.[63] Put another way, joint design of the mini-trial procedure increases the chances of success.[64]

The mini-trial agreement may do all or any of the following:

(a) specify the names of the principals, that is, the parties or representatives who have full authority to settle the dispute for the parties;

(b) identify the issues in controversy;

(c) state the name of the neutral advisor, if one is to be used, and clarify the neutral advisor's role—for example, "the parties may want the neutral advisor to actively participate in asking questions of witnesses and controlling the time schedule";[65]

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62 Page & Lees, *supra*, note 8 at 61.

63 Green, *supra*, note 4 at 18.

64 *Ibid.*

65 Edelman & Carr, *supra*, note 23 at 13.

(d) outline an abbreviated discovery process, which may include provision for the limited discovery of witnesses, consisting perhaps of short written statements from key witnesses in answer to written questions put by the opposing party;

(e) mandate the exchange of essential documents, which may include witness statements, brief statements of position, and exhibits to be used at the mini-trial,[66] and specify the length, scope and format of the documents;[67]

(f) where both entitlement and damages are at issue, require the claimant to submit an analysis of the requested damages;[68]

(g) establish time schedules that specify the dates and times for discovery (including filing deadlines), hearing and discussions commencing after hearing[69]—time schedules will discourage "the tendency to postpone events necessary to complete the process;"[70]

(h) state the exact time of each presentation at the mini-trial hearing, and the order of presentation;[71] and

(i) allocate the expenses of the proceeding between the parties;[72]

(b) Judicial mini-trial

Who will decide how the judicial mini-trial will be conducted? The answers are not readily apparent from the Alberta practice or the *BC Rules*.

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66 Green, *supra*, note 4 at 13.

67 Edelman & Carr, *supra*, note 23 at 13.

68 *Ibid.*

69 *Ibid.* at 12.

70 *Ibid.*

71 *Ibid.* at 13.

72 *Ibid.* at 12.

In Alberta, it is unlikely, under the present *ARC*, that the judge has power to insist that a mini-trial be held. The mini-trial is offered as a free service to voluntary participants. As has been seen, the flexibility that comes with informality is hailed as an advantage. Therefore, the parties should be able to settle the procedure by agreement, subject to obtaining the approval of the mini-trial judge.

In British Columbia, the *Hughes Report* says simply that the "format is flexible, usually worked out with counsel and the presiding judge in advance". An agreed statement of facts and a statement of issues of fact and law is usually filed with the mini-trial judge, but the requirement can be waived.

(2) Participants

Who will participate in the mini-trial?

The participants in a judicial mini-trial are the judge, the lawyers, the parties and, possibly, the key witnesses.

(a) Role of judge

What role will the judge take?

In the private mini-trial, the case is presented to the parties. The third party acts as a neutral advisor on terms specified by the parties.[73]

The role of the judge in a judicial mini-trial is less well settled. In Alberta, according to current practice, the judge presiding at the mini-trial renders a non-binding opinion. The judge's comments provide an objective appraisal of the case and are intended to promote settlement. Because the judge is required to give an opinion, counsel tend to present the case to the judge rather than the parties.

In British Columbia, the Hughes Report envisages the judge as having "persuasive effect on counsel and the parties" through the delivery of "detailed oral reasons at the close of the Mini-Trial or as soon after as possible" with the

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73 See *supra*, at 4-6.

parties in attendance. The Report emphasizes that it is "important that there be no 'arm-twisting'; the judge is a neutral participant, giving the parties an opinion of the probable outcome."[74] It also states that the "judge does not take any further part in settlement discussions, or any proceeding relating to the litigation."

(b) Choice of judge

How will the judge be selected?

In many cases, the judge who presides over the pre-trial conference will suggest to the parties that they conduct a mini-trial. This does not mean that the same judge need preside. In practice, for scheduling reasons, parties seeking a mini-trial are asked to approach the Chief Justice, in Calgary, or Associate Chief Justice, in Edmonton, to request a mini-trial. Where a mini-trial is appropriate, the case is assigned to one of the judges on the mini-trial list.

(c) Alternative to judge

Should a technical expert or skilled negotiator preside instead of a judge?

There are no set requirements for the job of neutral advisor in a private mini-trial, but "normally a legal expert or skilled negotiator is recommended."[75] However, if the issues at hand are highly technical, then a "suitable technical expert may be indicated."[76] A "not insignificant benefit of the employment of a neutral advisor is the legitimacy which that person lends to the proceedings."[77]

It is open to ask whether there is any good reason why a mini-trial undertaken as part of a civil litigation should not be conducted by a person

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74 *Hughes Report*, *supra*, note 29 at 139.

75 Page & Lees, *supra*, note 8 at 66.

76 *Ibid.*

77 *Ibid.* at 67-68.

other than a judge—in Alberta, for example, by referral to a referee.[78] Because the lawsuit will be adjudicated by a judge, a judge's assessment may be particularly persuasive to the parties. Nevertheless, where the result turns on the resolution of a technical issue, there may be an advantage in asking a technical expert to conduct the mini-trial.

Under comprehensive pre-trial conference rules, such as the *FRCP*, the choice exists. A judge may preside over a mini-trial (which would not be called that but would merely be a thorough pre-trial conference), or the judge may refer the matter to a private mini-trial under *FRCP* Rule 16(c)(7). In Alberta, however, the mini-trial is not sanctioned as a judicial procedure in the *ARC*. The parties could agree to choose a technical expert or skilled negotiator as a neutral advisor to preside over a private mini-trial, but it is unlikely that the present judicial process could be extended.

(d) Role of lawyer

What role will counsel take?

(i) Presentation of case

In both the private and judicial mini-trial, the lawyers "make informal, abbreviated, and confidential presentations of each side's best case."[79] The lawyer is generally "responsible for structuring the party's presentation so as to put forth the best case for its side" on matters of entitlement, or quantum, or both, in the limited time available.[80] In this respect, the typical mini-trial is trial-like.

In a private mini-trial, in addition to structuring the party's presentation, the lawyer is expected to cooperate "with opposing counsel within the special rules of the mini-trial agreement in a genuine effort to effect resolution of the contract dispute without further protracted litigation."[81] (As

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78 In Alberta, a judge can refer any question in an action for inquiry by a referee. For further information, see ALRI *RP18—Referees* (February 1990) and *ARC* 403, 424-26 and 500.

79 Green, *supra*, note 4 at 12.

80 Page & Lees, *supra*, note 8 at 62.

81 *Ibid.*

well, if the mini-trial agreement permits, experts and other witnesses may also make informal abbreviated presentations of each side's best case.[82])

(ii) Advocate or negotiator?

Should the lawyer in a mini-trial act as an advocate or a negotiator?

In a private mini-trial, lawyers may be asked to adopt "the typical settlement posture as opposed to that normally employed at trial."[83] Because of their training and experience, lawyers may be inclined to approach the judicial mini-trial more like a dry run for trial, with counsel as advocates, though possibly with some softening of the adversarial position. If one lawyer adopts a conciliatory posture and the other adopts a "hardened advocacy position",[84] the parties and judge may hear an invalid or unbalanced view.

More than this, the potential exists for counsel or a party to abuse the mini-trial process. Abuse would occur where one party participates in the mini-trial for the purpose of gaining advantage at trial by discovering the other side's case, but having no real intention to settle and perhaps failing to disclose fully.[85]

The desire to settle must be genuine for the essential cooperation to occur. It is important that a common ground be agreed to and followed. This is another reason why voluntary participation is important.

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82 Green, *supra*, note 4 at 12.

83 Page & Lees, *supra*, note 8 at 62-63.

84 *Ibid.* at 63.

85 See *infra*, pp. 35-36 on sanctions.

(e) Selection of lawyer

Should counsel in the case conduct the mini-trial or should independent counsel be appointed to act?

Some private mini-trial experts recommend the appointment of independent counsel to conduct the mini-trial because of the difficulty involved in asking a lawyer "to advocate a position in a trial atmosphere one moment and then in the next moment to evaluate in an unbiased manner the [client's] presentation of the facts and law."[86] In the private mini-trial, the use of different counsel to conduct the mini-trial may provide "further objectivity to the decision making process".[87]

In a judicial mini-trial, the benefit of using independent counsel may be outweighed by the increased costs, particularly the additional cost of preparation by the trial lawyer if settlement is not achieved.

(f) Parties

What role will the parties take?

For settlement to occur, the persons present must have the authority to settle. In a private mini-trial, the case is presented to the parties themselves (the "principals") who receive "a crash course on the subject of the dispute".[88] The principals "are responsible for hearing the presentations and making decisions for each party."[89] The persons selected must have "positions of organizational authority sufficient to allow them to make unilateral decisions regarding the disputes."[90] Furthermore, they must not have been "personally

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86 Page & Lees, *supra*, note 8 at 64.

87 *Ibid.* at 63-64.

88 Green, *supra*, note 4 at 12.

89 Page & Lees, *supra*, note 8 at 64.

90 *Ibid.*

or closely involved" in any part of the dispute.[91] They must also "be prepared for some amount of second-guessing upon successful conclusion of a mini-trial" and "be of sufficient stature to withstand" pressures from within the organization.[92] In addition to the qualities already identified, they "must possess the temperament and skills to negotiate a settlement fair and reasonable to both parties based on both the facts presented and on their background knowledge."[93]

A basic requirement of the judicial mini-trial in both Alberta and British Columbia is that the parties, represented by persons who have the authority to settle, must attend.

(g) Witnesses

Will witness testimony be allowed?

Should expert witnesses be permitted to question each other and engage in debate?

In a private mini-trial, the parties may decide to hear key witnesses. Witnesses as to fact may be permitted "to give their testimony in narrative form, with minimal prompting by trial counsel."[94] To expedite the hearing, the witnesses who do so "must be capable of giving a clear, concise . . . presentation"[95] within a limited period of time. This requires "careful preparation by both witnesses and trial counsel".[96] The lawyer can also, "in essence, 'testify' by leading the witness."[97]

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91 *Ibid.*

92 *Ibid.* at 65.

93 *Ibid.*

94 *Ibid.* at 68.

95 *Ibid.*

96 *Ibid.*

97 *Ibid.* at 62.

Where the case turns on a technical issue, an effective technique may be to let the "experts engage in a face to face debate, answering questions" from each other, the parties and the judge.[98] This technique has been used with success in the private mini-trial.

In judicial mini-trials, witness testimony is excluded under the *BC Rules*. It is generally excluded in practice in Alberta, although occasionally, where counsel for the defendant consents, a judge will permit the plaintiff to make a statement about the effect of a personal injury. As well, mini-trial judges stress that the process encourages the litigants to speak up during the mini-trial.

Without witness testimony, the mini-trial becomes much like an appeal in that the evidence is submitted in the form of written witness statements, discovery evidence, expert reports, legal briefs, and oral argument."[99]

Possible objectionable features of permitting witnesses to testify at a private mini-trial are that the rules of evidence are ordinarily suspended, "the witnesses are not testifying under oath," and "the opportunity for cross-examination is very limited."[100] In a judicial mini-trial, it would be a simple matter to provide for testimony to be given under oath. However, the confidentiality of the mini-trial procedure may impede the enforcement of the duty to tell the truth by the usual sanction of prosecution for perjury.

(3) Pre-hearing Preparation

What provision should be made for pre-trial preparation?

Typically, all steps preliminary to preparation for trial will have occurred before a judicial mini-trial takes place. In Alberta, mini-trial judges prefer to hold the mini-trial after discovery because "the mini-trial is of greatest benefit where the information has been properly prepared and exchanged in advance."[101]

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98 *Ibid.* at 68.

99 Green, *supra*, note 4 at 14.

100 Page & Lees, *supra*, note 8 at 68.

101 The Hon. Mr. Justice Tevie Miller, by telephone to ALRI Director, April 15, 1993.

If a decision to hold a mini-trial is taken early in the litigation, the participants will want to consider what provision to make for discovery and the exchange of information in advance of the mini-trial.

(a) Discovery

A private mini-trial is likely to be conducted earlier in the dispute. Usually, the mini-trial agreement will provide for a discovery that is limited in both time and scope. The parties may agree, for example:[102]

(a) to restrict the number of questions that may be asked of witnesses,

(b) to limit the time, in advance of the mini-trial date, by which the discovery must be completed, or

(c) to place the mini-trial discovery on the record for use in subsequent proceedings in the event the mini-trial is not successful.

(b) Exchange of information

In a private mini-trial, the mini-trial agreement will usually provide for the exchange of written position papers, witness lists and exhibits at the conclusion of discovery.[103]

In Alberta, in a judicial mini-trial, the participants will likely work out the details of exchange when they meet with the mini-trial judge a week or so beforehand. Usually, they will have completed any exchange of information required by the *ARC*. At the mini-trial, the judge may examine documents intended to be entered as exhibits. The proper exchange of information in advance is one of the keys to the success of the mini-trial procedure. For example, in matrimonial property actions, the mini-trial should only proceed where there has been a proper and comprehensive exchange of statements of property. In a personal injury claim, it is essential that the judge have the medical reports in advance. The lawyers may tell the judge what the last settlement offer was. This provides some comfort so that the judge does not give an opinion which is off base.

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102 Edelman & Carr, *supra*, note 23 at 12-13.

103 *Ibid*. at 13.

In British Columbia, according to the *Hughes Report*, "an Agreed Statement of Facts and a Statement of Issues of Fact and Law in dispute" is usually filed "in a form which the Mini-Trial judge can readily incorporate into his opinion."[104] The Report goes on to say that "this formality . . . should be waived" if it "interferes with the holding of a mini-trial". The preparation of these statements by the parties presupposes the prior exchange of basic information about the case.

(4) Hearing

According to what standards will the mini-trial hearing be conducted?

How long will the hearing last?

The hearing in both private and judicial mini-trials, although similar to a hearing at trial, is informal. The rules of evidence are suspended. Counsel summarize the evidence and present argument similar to the closing argument that would be presented at a trial. As discussed previously, the private mini-trial differs from a civil trial in that the lawyers present their cases to the parties for the purpose of settlement rather than to the judge for the purpose of opinion. The opinion of the judge in a judicial mini-trial likewise is rendered for the purpose of settlement.

In Alberta, the judge conducting a judicial mini-trial may take notes, ask questions and give the parties an opportunity to speak. In a private mini-trial, an open question and answer session by the neutral advisor and parties commonly follows the presentation of evidence by the witnesses for one party and the rebuttal of that evidence by the other party.[105] The neutral advisor's questions and comments can be helpful to show where the serious problems for each side lie.[106] Where the dispute is technical in nature, the parties may agree to let the opposing experts question each other directly to refine their views and clarify the technical points.[107]

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104 *Hughes Report, supra,* note 29 at 138-39.

105 Green, *supra,* note 4 at 13; Edelman & Carr, *supra,* note 23 at 13.

106 Green, *ibid.*

107 *Ibid.*

As stated, the average Alberta mini-trial requires from one-half day to two days for the presentation of each side although some mini-trials have lasted for as long as two weeks. The hearing in a private mini-trial usually is not more than two or three days and the parties adhere strictly to the time limits set.

(5) Settlement Negotiation

What role, if any, should the judge have in settlement negotiation following the mini-trial hearing?

In a private mini-trial, the parties meet immediately after the hearing to begin settlement discussions. The neutral advisor does not attend unless the parties request it. If necessary, the hearing can be resumed for further questioning of witnesses. The mini-trial agreement commonly specifies a closing date for negotiation, for example, not more than fifteen days following the hearing.

In Alberta, the mini-trial judge encourages settlement by giving an opinion at the conclusion of the hearing and emphasizing the expense, stress and uncertainty involved in going to trial.

In British Columbia, after rendering detailed oral reasons the mini-trial judge does not take any further part in settlement proceedings.

(6) Confidentiality

Will any record of the mini-trial be kept?

Will the confidentiality of the mini-trial receive specific protection?

Most private mini-trial agreements require complete confidentiality in all phases of the proceeding.[108] As a matter of practice, the judicial mini-trial

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108 *Ibid.* at 18.

is conducted as a confidential procedure. It is held in private and no formal record is kept.

Because the mini-trial, whether private or judicial, is in fact a carefully structured settlement negotiation, it should attract the same protection as other settlement discussions and compromise offers which would be inadmissible at trial. It may be desirable to introduce an explicit provision with respect to the confidentiality of a judicial mini-trial to ensure that the confidentiality of the mini-trial process is capable of enforcement.

Of course, a major practical limitation on the effectiveness of confidentiality is that once a party has told the other side what a witness will say, they know.

(7) Trial Judge

Will the mini-trial judge be precluded from presiding at trial?

The confidentiality of the judicial mini-trial is further protected by the assurance that the judge who conducts the mini-trial will not be the trial judge and will not discuss the opinion with anyone else on the Bench. In Alberta, this understanding is an established part of judicial mini-trial practice. The protection is maintained by the cooperation, as a matter of policy, of the Chief Justice and Associate Chief Justice who assign the cases.

The *BC Rules* protect the confidentiality of the mini-trial procedure by stipulating that a judge who has heard a mini-trial or attended a settlement conference cannot act as the trial judge in the dispute except with the agreement of the parties.

(8) Costs

Who will bear the costs of a judicial mini-trial?

The *BC Rules* are silent. In Alberta, the judicial mini-trial service is free. The general rule is that no costs are assessed at a mini-trial. Unless otherwise

agreed, the parties would each assume their own costs in participating. If the parties settle, the responsibility for costs would be allocated as part of the settlement.

(9) Sanctions

What sanctions will be imposed on a party, or counsel, who does not cooperate in the mini-trial process, abuses the mini-trial process or does not improve their position at trial?

A party, or counsel, may fail to cooperate in the mini-trial procedure, abuse it or reject the opinion of the mini-trial judge and proceed to trial but fail to improve their position.

A potential abuse described previously would be to treat the mini-trial as a "dress-rehearsal" for trial, without making any genuine attempt to settle the dispute on its merits. This potential seems to be addressed by the use of pre-trial briefs under *FRCP* Rule 16(c)(5), Manitoba Rule 50.01(3), Saskatchewan Rule 191(3), and Ontario Practice Directions dated February 23, 1987, January 22, 1988 and June 6, 1988. The required briefs provide a summary of the issues and arguments the parties will raise at trial. Once filed, the briefs define the boundaries of the trial. The requirement of leave of the court to raise a new argument helps guard against any party attempting to raise an issue for the first time at trial to the surprise of another party.

The *ARC* do not provide similar protection. The parties could include sanctions in a mini-trial agreement. The consent order reproduced in Appendix E purports to assess costs and impose a penalty against a party that refuses to settle and fails to improve their position at trial. However, enforcement may be a problem because of the confidentiality that surrounds the mini-trial procedure.

(10) Mini-Trial Schedule

Should time limits be placed on the completion of steps leading to and following a judicial mini-trial?

The speed within which a mini-trial can be held is one of its "major attractive features".[109] The literature indicates that a private mini-trial should be able to be completed within 90 days of the signing of the mini-trial agreement. The time may vary depending on the complexity of the case.

In the judicial mini-trial, it may be desirable to specify in advance the time periods within which various steps relating to the mini-trial preparation, hearing and settlement negotiation are to be completed.

D. Summary

The judicial mini-trial is a technique that shows promise to achieve settlement and avoid the necessity of trial. Currently, the procedure, which is offered on an experimental basis and undertaken only voluntarily, offers a great deal of flexibility in cases where the judge, parties and counsel are willing to try it. Advance planning can assist. This discussion paper outlines questions for lawyers, judges and parties to consider when deciding whether to initiate a mini-trial and when planning the procedure for a mini-trial that has been undertaken. Appendix A provides a "judicial mini-trial checklist" of these points.

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[109] Page & Lees, *supra*, note 8 at 60.

PART II — JUDICIAL MINI-TRIAL CHECKLIST

MINI-TRIAL DESIGN

A. Key Features of Judicial Mini-Trial
(1) Voluntary Participation Participation in a judicial mini-trial should be VOLUNTARY. (16)
(2) Flexible Design The judicial mini-trial design should be FLEXIBLE to meet the needs of the case at hand. (17)

B. Initiation of Mini-Trial		
Topic	**Questions**	**Notes**
(1) Decision to Initiate	Is the mini-trial procedure appropriate for the case at hand? (17)	
(2) Stage of Civil Litigation	At what stage of the civil litigation proceeding should the mini-trial be conducted? (19)	
(3) Effect	Will the result be binding or non-binding? (20)	

C. Mini-Trial Planning

Topic	Questions	Notes
(1) Mini-Trial Agreement or Order	How will the mini-trial procedure be determined? (20)	
(2) Participants	Who will participate in the mini-trial? (23)	
(a) Role of mini-trial judge	What role will the mini-trial judge take? (a) Will the mini-trial judge be required to give an opinion, with reasons, on the likely outcome of the case at trial? (23) (b) Will the mini-trial judge be precluded from participating in negotiating sessions during or after the mini-trial? (23) (31)	
(b) Choice of mini-trial judge	How will the mini-trial judge be selected? (23)	
(c) Alternative to judge	Should a technical expert or skilled negotiator preside instead of a judge? (24)	
(d) Role of lawyer **(i) Presentation of case** **(ii) Advocate or negotiator**	What role will counsel take in presenting the case? (25) Should the lawyer in a mini-trial act as an advocate or a negotiator? (25)	
(e) Selection of lawyer	Should counsel in the case conduct the mini-trial or should independent counsel be appointed to act? (26)	
(f) Parties	What role will the parties take? (27)	

C. Mini-Trial Planning		
Topic	**Questions**	**Notes**
(g) Witnesses	Will witness testimony be allowed? (28) Should expert witnesses be permitted to question each other and engage in debate? (28)	
(3) Pre-hearing Preparation **(a) Discovery** **(b) Exchange of information**	What provision will be made for pre-trial preparation? (29)	
(4) Hearing	According to what standards will the mini-trial hearing be conducted? (30) How long will the hearing last? (30)	
(5) Settlement Negotiations	Will provision be made with respect to settlement negotiations?	
(6) Confidentiality	Will any record of the mini-trial be kept? (32) Will the confidentiality of the mini-trial receive specific protection? (32)	
(7) Trial Judge	Will the mini-trial judge be precluded from presiding at trial? (32)	
(8) Costs	Who will bear the costs of a judicial mini-trial? (33)	

C. Mini-Trial Planning		
Topic	**Questions**	**Notes**
(9) Sanctions	What sanctions will be imposed on a party, or counsel, who does not cooperate in the mini-trial process, abuses it or does not improve their position at trial? (33)	
(10) Mini-Trial Schedule	Should time limits be placed on the completion of steps leading to and following a judicial mini-trial? (34)	

PART III — APPENDICES

APPENDIX A

British Columbia Rules of Court, **Rule 35**

RULE 35
PRE-TRIAL CONFERENCE

Request for pre-trial conference

(1) A party, having delivered or received a notice of trial, may request the holding of a pre-trial conference at a time and place to be fixed by the registrar.

Order for pre-trial conference

(2) On a request being received or on his or her own initiative at any stage of an action, a judge or master may direct that a pre-trial conference, mini-trial or settlement conference be held.

Agenda of pre-trial conference

(3) A pre-trial conference shall be attended by the solicitors for the parties, or the parties themselves, and shall consider

- (a) the simplification of the issues,
- (b) the necessity or desirability of amendments to pleadings,
- (c) the possibility of obtaining admissions which might facilitate the trial,
- (d) the quantum of damages,
- (e) fixing a date for the trial, and
- (f) any other matters that may aid in the disposition of the action or the attainment of justice.

Order following pre-trial conference

(4) At a pre-trial conference, the judge or master may, whether or not on the application of a party, order that

- (a) the trial, or part of it, be heard by the court without a jury, on any of the grounds set out in Rule 39(27),
- (b) the pleadings be amended or closed within a fixed time,
- (c) a party file and deliver, within a fixed time, to each other party as specified by the judge, a list of documents or an affidavit verifying a list of documents in accordance with the directions that the judge or master may give,
- (d) interlocutory applications be brought within a fixed time or by a specified date,

(e) a statement of agreed facts be filed within a fixed time or by a specified date,
(f) a general application for directions be brought within a fixed time or by a specified date,
(g) all procedures for discovery be conducted in accordance with a schedule and plan that the court directs, and the plan may set limitations on those discovery procedures,
(h) the obligation to pay conduct money to any of the parties or persons to be examined be allocated in the manner specified in the order,
(i) a party deliver a written summary of the proposed evidence of a witness within a fixed time or by a specified date,
(j) the parties attend a mini-trial or a settlement conference,
(k) experts who have been retained by the parties confer, on a without prejudice basis, to determine those matters on which they agree and to identify those matters on which they do not agree, and
(l) the action be set for trial on a particular date or on a particular trial list, subject to the approval of the Chief Justice,

and, on making an order under this subrule, the judge or master may give other directions that he or she thinks just or necessary.

Idem

(5) Where the judge or mater orders or directs that the parties attend a mini-trial, the parties shall attend before a judge or master who shall, in camera and without hearing witnesses, give a non-binding opinion on the probable outcome of a trial of the proceeding.

Idem

(6) Where the judge or master orders or directs that the parties attend a settlement conference, the parties shall attend before a judge or master who shall, in camera and without having witnesses, explore all possibilities of settlement of the issues that are outstanding.

Pre-trial judge may preside

(7) A judge who presides at a pre-trial conference is not seized of the action, and a trial of the action may be heard by that judge or by any other judge.

When judge shall not preside

(8) A judge who has heard a mini-trial or who has attended at a settlement conference shall not preside at the trial, unless all parties of record consent.

APPENDIX B

Alberta Rules of Court, ARC **219**

PART 16 — PRE-TRIAL CONFERENCE

[Court may direct hearing]

219.(1) In any action, cause or matter, the court, on application of a party, or on its own motion, may in its discretion direct the solicitors for the parties or the parties themselves to appear before it for a conference to consider

(a) the simplification of the issues,

(b) the necessity or desirability of amendments to pleadings,

(c) the possibility of obtaining any admission that will facilitate the trial, and

(d) any other matters that may aid in the disposition of the action, cause or matter.

(2) Following the conference, the court may make an order reciting the results of the conference and giving such directions as the court considers advisable.

(3) The order, when entered, shall control the subsequent course of the action, cause or matter, unless modified at the trial or hearing to prevent injustice.

(4) The judge who conducts a pre-trial conference in any action, cause or matter shall not be deemed to be seized of that action, cause or matter which may thereafter be tried by him or by any other judge of the court.

[Alta. Reg. 124/73]

APPENDIX C

U.S. *Federal Rules of Civil Procedure*, Rule 16

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating the settlement of the case.

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

(c) Subjects to be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a magistrate or master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party of party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (c), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.
(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

APPENDIX D

ARC 219 — Consent Order

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF _____

BETWEEN:

Plaintiff,

- and -

Defendants.

BEFORE THE HONOURABLE JUSTICE _____ IN CHAMBERS, LAW COURTS EDMONTON, ALBERTA	ON THE _____ DAY OF _____, A.D. 1992

CONSENT ORDER

UPON THE APPLICATION of the Plaintiff, AND UPON HEARING Counsel for the Plaintiff and Counsel for the Defendant on _____, 1993 with respect to a pre-trial conference, AND UPON NOTING THE CONSENT OF Counsel for each party, IT IS HEREBY ORDERED THAT:

1. THAT a pre-trial conference be heard before THE HONOURABLE JUSTICE _____ in this matter as a special chambers application on the afternoon of _____, A.D. 1993 commencing at _____ for the purpose of considering a receiving a pre-trial opinion from the said Honourable Justice on the following issues:

... / 2

a) is the chronic lower back pain of the Plaintiff a result of aggravation by the accident of Plaintiff's congenital condition (spondylolisthesis) or the result of the congenital condition becoming symptomatic for reasons not related to the accident;

b) is the Plaintiff in fact unable to perform the heavy physical activities claimed with respect to normal work functioning and has the Plaintiff suffered a loss of opportunity to earn income as a result thereof;

c) if the Plaintiff is so disabled and if the disability is so connected to the automobile accident in question, what are the past and future costs or losses of the Plaintiff.

Not later than fifteen days before the said pre-trial conference hearing each party shall file in Court, notify THE HONOURABLE JUSTICE _____ and serve upon the other party a copy of all expert reports which Counsel for each party will refer to upon the said application, a memorandum of its Counsel with respect to the foregoing issues, and an affidavit of documents.

3. The opinion of THE HONOURABLE JUSTICE _____ with respect to each of the foregoing issues following the said pre-trial conference hearing shall not be binding upon either party except:

a) if the Defendant within 45 days of receipt of the said opinion advises the Plaintiff in writing of his willingness to accept the said opinion and the Plaintiff does not within 45 days of receipt of the said opinion accept the said opinion, and if the Plaintiff recovers with respect to the aforesaid special damages a sum less than the total sum which THE HONOURABLE JUSTICE _____ by the said opinion considers recoverable, then

in such event the trial Judge or Court of Appeal shall, unless for special reasons, award costs to the Defendant for all steps in the matter after receipt of the said opinion by the Defendant; or

b) if the Plaintiff within 45 days of receipt of the said opinion advises the Defendant in writing of his willingness to accept the said opinion and the Defendant does not within 45 days of receipt of the said opinion accept the said opinion, and if the Plaintiff recovers with respect to the aforesaid special damages a sum equal to or greater than the total sum which THE HONOURABLE JUSTICE _____ by the said opinion considers recoverable, then in such event the trial Judge or Court of Appeal shall, unless for special reasons, award the Plaintiff double the amount of costs (excluding disbursements) he would otherwise have recovered for all steps in the matter after receipt of the said opinion by the Plaintiff.

4. Leave is hereby reserved to either party to apply for such further order or other orders as either of them may be advised before THE HONOURABLE JUSTICE _____.

5. If no settlement of the matter arises by reason of the said special chambers application, and the matter proceeds to trial any formal Offers of Settlement, or any Offers of Judgement, in this matter, before or after the said special chambers application, shall continue in accordance with, and subject to, the Alberta Rules of Court to be matters which either party may speak to on the matter of costs to the Justice at Trial.

... / 4

6. The costs of the said special chambers application shall for the purpose of speaking to costs in the cause in the event no settlement of the matter arises by reason of the said special chambers application, is hereby set to be the sum of $500.00 for the application and $500.00 for preparation for the application including the filing of the aforesaid memorandums and such costs do not include disbursements.

_____
JUSTICE OF THE COURT OF QUEEN'S BENCH
OF ALBERTA

Consented to by

Per: _____
Solicitors for the Plaintiff

Consented to by

Per: _____
Solicitors for the Defendant

ENTERED THIS _____ day of

_____, A.D. 1993

_____
CLERK OF THE COURT

APPENDIX E

Selected References

Alberta Law Reform Institute, *Dispute Resolution: A Directory of Methods, Projects and Resources* (July 1990) ALRI Research Paper No. 19 at 26-28, 31-33.

Annie Billings, "The Mini-Trial: Misunderstanding and Miscommunication May Short-circuit Its Effective Use in Settlements: *Lightwave Technologies, Inc.* v. *Corning Glass Works*" (1990) 2 Journal of Dispute Resolution 417-29.

British Columbia, Government of, *Access to Justice: The Report of the Justice Reform Committee, 1988* (B.C.), chaired by Hon. E.N. Hughes, Deputy A-G, at 135-39.

British Columbia, Government of, *Rules of Court and Related Enactments* (B.C., 1991), Supreme Court Rule 35.

Frank Carr & Lester Edelman, "The mini-trial: an alternative dispute resolution procedure" (March 1987) 42 The Arbitration Journal 7-14.

Belinda Cheney, "Commercial disputes: The mini-trial option" (May 1989) Victoria University of Wellington Law Review 153-81.

Eric D. Green, "Growth of the mini-trial" (Fall 1982) 9 Litigation 12-19).

Robert H. Gorske, "Alternative dispute resolution: the mini-trial" (February 1985) 58 Wisconsin Bar Bulletin 21-23.

Michael F. Hoellering, "The mini-trial" (December 1982) 37 The Arbitration Journal 48-50.

Leo Kanowitz, "Using the mini-trial in U.S.-Japan business disputes" (Winter 1988) 39 Mercer Law Review 641-50.

Honourable Associate Chief Justice Tevie H. Miller, "Mini-Trials" (May 1992) Edmonton Bar Association Notes at 2-5.

"The mini-trial: bifurcation as an efficient device to promote the resolution of civil cases" (Fall 1988) 53 Albany Law Review 19-31.

"Mini Trials Reduce Clients' Stress and Expense" (July 1992) The Law Society of Alberta Bencher's Advisory, Issue 27 at 11, reporting on Chief Justice Moore's description of the Alberta mini-trial.

Reba Page & Frederick J. Lees, "Roles of participants in the mini-trial" (October 1988) 18 Public Contract Law Journal 54-75.

United States Federal Court, *Federal Rules of Civil Procedure* (*FRCP*), Rule 16.

"Whose dispute is this anyway?: the propriety of the mini-trial in promoting corporate dispute resolution" (1987) Missouri Journal of Dispute Resolution 133-48.