



ISSUES PAPER: FAMILY LAW RULES

ALBERTA RULES OF COURT PROJECT

October 2002

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INTRODUCTION

The Rules Project

[1] The Alberta Rules of Court (the Rules) govern practice and procedure in the Alberta Court of Queen's Bench and the Alberta Court of Appeal. They also apply to the Provincial Court of Alberta whenever the *Provincial Court Act* or regulations do not provide for a specific practice or procedure. The Alberta Rules of Court Project (the Rules Project) is a three-year project which will undertake a major review of the Rules with a view to producing recommendations for a new set of Rules by mid-2004. The Project is funded by the Alberta Law Reform Institute (ALRI), the Alberta Department of Justice, the Law Society of Alberta and the Alberta Law Foundation, and is managed by ALRI.

Family Law Rules

[2] Part 44 of the Alberta Rules are the Divorce Rules, and there are forms in Schedule B. In addition, there are eight Queen's Bench Family Law Practice Notes which apply to divorce actions, actions for judicial separation, proceedings under the *Domestic Relations Act*, and proceedings under the *Parentage and Maintenance Act*.

[3] The steps taken in a Family Law matter, such as discovery, interlocutory applications, expert evidence, preparation for trial, and trial, are governed generally by the Rules of Court and the Queen's Bench Civil Practice Notes, where those are not in conflict with the Queen's Bench Family Law Practice Notes.

[4] Additional procedures relating to Provincial Court Family Law matters are contained in the *Provincial Court Act*, and in various statutes and regulations.

Legal Community Participation

[5] Family Law Rules reform should address the needs and concerns of the users of the Family Law courts. As informed users of the system, and as representatives for public users, lawyers play a particularly essential role in reform. ALRI will look to you to provide the information and views that guide the project. Consultations will take various forms at various stages of the Rules Project. Major consultations will occur in the fall of 2002 and in late 2003 or early 2004 when the policies being proposed for inclusion in the new Rules have been formulated.

Don't Wait to Participate

[6] Don't wait! Your early participation is essential to ensure that the Family Law Rules Working Committee is properly informed about practice and policy

issues, and is both forward-looking and pragmatic in its approach to Family Law Rules revision.

How You Can Participate

[7] This Issues Paper raises some of the many issues that will be addressed in the Family Law Rules Committee. These issues and the questions posed in the Paper seek to start the discussion going. They are not intended to limit your contributions, which are welcome with regard to any issues that are or should be included in the Rules. The issues and questions are also not intended to reflect the views of ALRI. ALRI has not formulated final views in relation to any issue in the Rules Project.

[8] You may answer one, a few or many of the questions posed below, provide general observations, or deal in a more detailed way with specific issues about which you are concerned. All comments are welcome. You can reach us with your comments or with questions about the Rules Project on our web-site, or by fax, mail or e-mail to:

Alberta Law Reform Institute
402 Law Centre, University of Alberta
Edmonton AB T6G 2H5
Phone: (780) 492-5291
Fax: (780) 492-1790
E-mail: reform@alri.ualberta.ca
Web-site: www.law.ualberta.ca/alri

[9] The process of law reform is essentially public. Unless you request otherwise, ALRI assumes that all *written comments are not confidential*. ALRI may quote from or refer to your comment in whole or in part and may attribute them to you, although usually we will discuss comments generally and without specific attributions. *If you wish your comments to be treated as confidential, you must indicate this expressly.*

OBJECTIVES OF THE FAMILY LAW RULES COMMITTEE

[10] Family Law Rules, which are contained both in the Rules of Court and in various statutes and regulations, have been revised from time to time. The Alberta Rules of Court are being rewritten and Family Law Rules need to be reviewed to see whether they continue to meet the objectives set out below. Concerns have been raised by counsel and the public about timeliness, affordability and complexity of Family Law proceedings, and reforms have been adopted in Alberta

and elsewhere to address these issues. In Alberta, some of these new procedures have been included in amendments to the Rules, others have been implemented by other means, such as practice directives. The Rules Project will review and assess reform measures that have been adopted and consider other possible reforms.

[11] The Rules Project has four main objectives: to maximize the Rules' clarity, useability, and effectiveness, and to advance justice system objectives.

KEEPING FAMILY LAW CASES OUT OF COURT

[12] Family Law cases may be brought in the Provincial Family Court for custody, access, and support in the context of separation, as well as child welfare matters. It is necessary to file in the Court of Queen's Bench for divorce, division of property, and corollary issues to divorce such as support, custody, and access. Some types of actions, such as guardianship may be brought in either Provincial Family Court or Court of Queen's Bench, while others, such as adoption, can only be heard in Court of Queen's Bench.

[13] There is an overlap in the jurisdiction of the Provincial Court and the Court of Queen's Bench, as both courts deal with spousal and child support and child custody and access. However, there are also Family Law areas in which each court has exclusive jurisdiction (child welfare for the Provincial Court, divorce and matrimonial property actions for the Court of Queen's Bench).

[14] There are some initiatives in the Family Law Courts to assist in resolving disputes short of a trial, or even a court application. These include mediation, counselling, and the provision of information to enable the parties to conclude matters by agreement rather than through means of a court dispute.

[15] **The Alberta Government's Unified Family Court Task Force, in its 2001 Report, identified a number of issues arising from divided and duplicated jurisdiction in Family Law, and recommended the creation of a Unified Family Court. The creation of such a court, and the review of the jurisdiction of Alberta Courts, are outside the scope of this Project.**

[16] In addition, "collaborative law," essentially a negotiation technique, has been introduced in Alberta and will likely have a significant impact on the future practice of Family Law.

[17] Court of Queen's Bench proceedings are open to all, provided the dispute is within the jurisdiction of the court. Proceeding in the Court of Queen's Bench is

arguably the most formal and expensive means of resolving disputes. It may be thought that not all cases require or should have such unrestricted access. If this is accepted, the issue then becomes how to determine which cases should or should not have access.

- **Should the court system be reserved to those cases that require a formal, full scale judicial resolution?**
 - **Should there be some cases that bypass the court system?**
 - **If so, which classes of cases should not be decided by the Court?**
 - **Should there be a screening process before court cases are commenced?**
 - **If so, who should do the screening: Judges or other court officials?**
 - **Should a court be able to refuse to hear certain cases?**
 - **Are there sufficient alternatives available to full dispute resolution through the court system?**
 - **Should litigants be provided with written materials indicating that there are alternatives available such as mediation and ADR, and if so, should the materials be required to be served with an initiating document?**
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Alternative Dispute Resolution

[18] Dispute resolution through mediation, conciliation, counselling and early neutral evaluation has been used increasingly during the past decade and already plays a significant role in Alberta. These procedures are generally called “alternative dispute resolution” (ADR). In Alberta, when these techniques are employed within the justice system and have involved judges, through such means as settlement conferences, mini-trials and caucusing, they have been labelled “judicial dispute resolution” (JDR). Litigants may prefer settlements achieved through ADR or JDR for various reasons, for example the confidentiality of proceedings and resolutions, the ability to select one’s “judge” in ADR, and, perhaps, improved timeliness and affordability. ADR and JDR sometimes achieve results in pending cases.

- **Are there sufficient mechanisms available to encourage or to require ADR?**
- **At what point in proceedings should ADR be required or encouraged?**
- **Who should have responsibility for initiating ADR: the Court or the parties?**
- **Should ADR be performed by judges (JDR), or other court personnel or specialist ADR practitioners?**

- **Does the legal profession understand the advantages of ADR and JDR well enough to recommend their use wherever appropriate?**
 - **How are clients encouraged or discouraged from using ADR or JDR?**
 - **Should the procedure for JDR be set out in the Rules? Should the practice (which currently differs somewhat in each judicial centre) be standardized?**
 - **Should more than one option for JDR be available; i.e., binding result or non-binding result; sworn evidence or informal evidence; courtroom setting or informal office setting?**
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PROCEDURAL ISSUES

Starting a Case

[19] A divorce is commenced by Statement of Claim, and a proceeding that is both a divorce proceeding and a matrimonial property proceeding is commenced by Statement of Claim for Divorce and Division of Matrimonial Property.

[20] Other Family Law proceedings, such as guardianship applications, adoption proceedings, and applications for support, custody, or access, are commenced in forms set out in regulations to a statute, or by Originating Notice.

- **Should there be a uniform procedure for commencing proceedings?**
 - **Should the Parenting After Separation seminar be mandatory before an action is started?**
 - **Should there be prescribed forms for all commencement documents and other court documents?**
 - **Should all forms be written in plain English?**
 - **Should there be a provision for sealing Family Law matters?**
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Pleadings

[21] Pleadings are intended to define precisely the matters in dispute in an action. Some think that pleadings obscure the issues in dispute rather than disclose and clarify. The identification of the “real” issues in a case may be hampered by the reluctance of either party to make any significant admissions prior to trial.

[22] The process of preparing, filing and exchanging pleadings is time consuming and expensive. Opposing parties may attack each other’s pleadings in

interlocutory hearings. The time and cost of these hearings may outweigh the significance of the issues involved.

- **Do the cost and delay associated with formal pleadings outweigh their value?**
 - **Should we do away with the “plaintiff” and “defendant” designations and use more neutral terms, such as “claimant” and “respondent”?**
 - **What should be served with the Statement of Claim: the Notice of Parenting after Separation Seminar, the Notice to Disclose?**
 - **Is the response time on pleadings sufficient?**
 - **Should the default procedure be changed for Matrimonial Property actions?**
 - **Should the Rules be clarified to ensure they work better with the Federal legislation (the Divorce Act); for example, when 2 divorce actions have been commenced; when there is a joint request for divorce, or when the parties reconcile for more than 90 days?**
 - **Should pleadings be abolished and replaced by a less formal narrative of fact and law provided by each party?**
 - **Should a Statement of Claim for divorce and division of matrimonial property be allowed to be served anywhere in Canada without the need for an Order for Service Ex Juris? How should subsequent documents be served? For example, should a Notice of Motion be served outside the province without an Order for Service Ex Juris?**
 - **Should the Rules allow for telephone conference call applications where the other party, or counsel, are in another province?**
 - **After a divorce has become final, should subsequent documents (such as a Notice to Disclose to adjust child support) be served on the (former) solicitor of record, or be personally served upon the party?**
 - **Should the Rules clarify situations where counsel ceases to act for a party, such as finalizing orders granted while on the record, service of variation documents?**
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Interlocutory Procedures

[23] Existing interlocutory procedures have been criticized as overly elaborate, time consuming and expensive. Another recurrent criticism is that generally speaking, procedures operate on a “one size fits all” basis. That is to say, the various procedures are available and in some cases required without regard to the amount in dispute, the seriousness or complexity of the issues involved, or the relevance of the procedure to the ultimate resolution of the case.

[24] Alberta has a “Streamlined Procedure” for cases under \$75,000 and special rules and practices for “very long trial actions,” where a trial is expected to last for more than 25 days; however at the present time, the streamlined procedure is not available for divorce and matrimonial property proceedings.

[25] In Family Law matters, often the result of an interlocutory application is the conclusion of the entire action; as for example, where the only issue between the parties is the quantum of support.

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- **Are the interlocutory procedures now in use too elaborate, time consuming and expensive for Family Law matters?**
 - **Should interlocutory procedures be specifically tailored to suit particular cases?**
 - **If so, who should do the tailoring, the parties and their lawyers, or judges or other court officials?**
 - **Should procedures for interlocutory applications be different from other actions: for example, should the notice period be different for family law; should there be a requirement that Affidavits be served a certain number of days before Chambers hearings; should there be standardized forms for Notices of Motion and Affidavits? Should the terminology be changed to use more Plain Language (i.e., “application” instead of “motion”)?**
 - **Should there be an automatic right to examine on an Affidavit?**
 - **Should there be a limit on the number of Affidavits filed?**
 - **Should *viva voce* evidence be more available on interlocutory matters?**
 - **Are special Rules required for custody and access matters, similar to the present QB Family Practice Note 7 (Experts)?**
 - **Should additional procedures be available for Family Law matters?**
 - **Should there be a shorter time period for filing Orders obtained in Chambers?**
 - **Should there be a different type of application available in Family Law where the disposition of the application is likely to end the entire action?**
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Case Management

[26] “Case Management” systems have been put in place in recent years whereby judges or court officials supervise the progress of cases from inception to trial. The systems vary from orders specifying a timetable for the performance of major steps in a case (often called Case Flow Management), to a more interventionist model in which a case manager determines what steps are to be taken prior to trial and actively supervises compliance with those steps (usually called Case Management).

[27] A Pretrial Conference must be held in Family Law cases before a trial date can be obtained, as part of the management of the case.

- **What is the most appropriate model for supervising the progress of Family Law cases?**
 - **Should case managers be judges or other officials?**
 - **Is case management effective?**
 - **Does it increase or decrease the parties' costs?**
 - **Should case management be mandatory or at the election of the parties?**
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Discovery

[28] In Family Law matters, the initial discovery is usually by way of the Notice to Disclose, which is available in divorce, matrimonial property, parentage and maintenance, and domestic relations actions. There are two different types of Notice to Disclose, one that results in an immediate application to the court for disclosure and the other that contains only a warning of the effect of non-disclosure.

[29] The Notice to Disclose can be used in any Family Law action where there is an outstanding issue for determination; and also can be used for annual disclosure of financial information related to support, for variation of support actions.

[30] The Notice to Disclose is a limited disclosure and is not intended to duplicate or be substituted for other kinds of Discovery available to the parties.

[31] Fuller disclosure can be made by means of an Affidavit of Records, and by examining the parties for Discovery, in which each party is required to answer relevant questions in the course of an Examination for Discovery. Discovery allows the parties to an action to learn the case they will have to meet and to assess the strength of their own case. They are then in a better position to make or assess settlement offers or to prepare for trial.

[32] The discovery of records takes place through a procedure which begins with the creation of a list of records verified by affidavit. In some cases the production of the list and affidavit can be extremely time consuming and expensive. Examination for discovery can be even more time consuming and expensive than the Affidavit of Records.

[33] Written Interrogatories are available in divorce, matrimonial property, parentage and maintenance and domestic relations actions. The purpose of written

interrogatories is to attempt to avoid the need for examination for discovery through the exchange of information in writing.

- **Has the Notice to Disclose worked well in practice?**
 - **Should a party be permitted discovery without complying with a Notice to Disclose?**
 - **Should the Affidavit of Records be required in every case as well, or should it be an option?**
 - **Should sanctions for non-disclosure be set out more clearly?**
 - **Should the Affidavit of Records be required in every case as well, or should it be an option?**
 - **Should a party be able to examine on an Affidavit of Records without filing their own Affidavit of Records?**
 - **Should there be oral discovery in all cases? If Written Interrogatories are allowed, should there be a return date in the Rules to enforce a response in a timely manner?**
 - **Might oral discovery be dispensed with, for example, for claims below a certain amount?**
 - **Should the Court have the discretion to either allow or disallow oral discovery after considering the real issues in dispute?**
 - **Are the expense and delay associated with discovery disproportionate to its benefits?**
 - **Should there be a more flexible procedure permitting discovery on particular topics?**
 - **Should there be more procedures for obtaining evidence of non-parties (for example, s. 10 of the *Matrimonial Property Act*)?**
 - **Are written interrogatories a preferable approach in Family Law; for example, if the issues are limited, or the quantum of the claims such that the cost of oral discovery exceeds their utility?**
 - **Would sworn witness statements be preferable to oral discovery?**
 - **Is a list of documents necessary?**
 - **Is inspection without a list sufficient in some cases?**
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Expert Evidence

[34] The general Rules relating to expert evidence apply to Family Law matters. In addition, the Court has the ability to appoint Independent Experts to assist the court in custody and access disputes at the pretrial, trial and post-trial stages of Family Law disputes.

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- **Do the existing expert Rules work well in the Family Law context?**
 - **Are the procedures for appointing Independent Experts to assist the court satisfactory?**
 - **Do the Rules interfere with the production of up-to-date expert reports for a contested custody or access trial?**
 - **Should the Rules set out the procedure for directing an assessment in custody matters?**
 - **Should the Rules incorporate QB Family Practice Note 7?**
 - **Would it be useful to specify the matters to be contained in an expert report, including the assumptions, the reasoning for selecting the assumptions, and the method chosen by the expert in reaching conclusions?**
 - **What material should the experts be required to provide to the court or to the opposing party (for example, working documents, summaries of interviews, results of psychological testing)?**
 - **Should a rebuttal report identify the information in the expert report which is disagreed with, and the reasons for the disagreement)?**
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Summary Judgment, Summary Trial and Separate Determination of Issues

[35] It is possible to have a judge review pleadings and written evidence in order to enter judgment without trial. Until recently, this procedure has been called summary judgment and has only been available for cases in which there is no serious question to be tried. When the parties disagreed over important facts, the only way to resolve the dispute was by trial. However, the availability of this procedure has now been expanded to include factual disputes, provided that a judge agrees that the disputes can be justly dealt with on the basis of written evidence. The expanded procedure is called summary trial.

[36] Summary judgment is not available for divorce proceedings or for combined actions consisting of a divorce proceeding and the division of matrimonial property.

[37] Another variation on the traditional trial of an action involves the separate determination of particular issues of fact or law before, at or after a trial. Early determinations can save time if the result is that a case is resolved without having to undertake a full trial. On the other hand, the division of a trial into two or more parts can also result in delay and duplication of effort.

[38] Another possible method for dealing with particular questions that arise in a proceeding is for the Court to refer them to a referee for an inquiry and report. This procedure is seldom used.

- **Should summary judgment be available in divorce proceedings or combined divorce and matrimonial proceedings?**
 - **Do these procedures provide for a fair and cost-effective way of resolving disputes?**
 - **Should there be greater use of the procedures relating to the separate determination of issues or references?**
 - **If so, how could these processes be encouraged?**
 - **Should quantum issues in Family Law proceedings be referred to referees more frequently?**
 - **Should there be a summary or administrative procedure for varying child support?**
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Interlocutory Injunctions and Emergency Protection Orders

[39] In Family Law cases parties sometimes approach the Court for restraining orders or orders to preserve property prior to trial. These proceedings can be complex, time consuming, and expensive.

[40] Emergency Protection Orders are dealt with according to regulation, and include the ability to make application by telecommunication and have oaths administered in that manner.

- **How can the time and expense of interlocutory injunction proceedings be reduced?**
 - **Would forms or guidelines assist?**
 - **Should QB Practice Note 4 be part of the Rules?**
 - **Should there be a procedure in the Rules for freezing assets pending trial?**
 - **Can interlocutory injunction hearings be combined with the final determination to avoid repeated determination of the same issues?**
 - **Given the procedures for Emergency Protection Orders is there a continuing need for restraining orders?**
 - **How can breaches of natural justice be reduced or eliminated on *ex parte* applications?**
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Sanctions for Delay

[41] A significant concern with Family Law proceedings is the time involved in taking a matter to trial.

- **Are the available sanctions for delay sufficient and reasonably balanced?**
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Trial Readiness and Scheduling

[42] Alberta practice generally requires certification of trial readiness as a condition of scheduling a trial. In Family Law matters, a Pretrial Conference is mandatory. This can lengthen pre-trial delay. There is provision for conditional trial scheduling where the parties are substantially ready for trial. Another approach would be to schedule trials in advance and require completion of interlocutory procedures by set dates.

- **Should the requirement for certification of trial readiness be retained or removed?**
 - **Should a Pretrial Conference be mandatory before a Family Law matter can be set for trial?**
 - **Should the availability of Pretrial Conferences be expanded, and include case management, settlement conferences, and trial scheduling conferences?**
 - **Should there be greater use of conditional certification of readiness?**
 - **Should such measures be taken generally or just for certain types of cases?**
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SELF-REPRESENTED LITIGANTS

[43] Litigants without legal representation pose special problems for the court system. Their lack of familiarity with court procedures and legal principles causes delay and may result in injustice.

[44] Self-representation is most prevalent in Family Law matters.

[45] The Alberta Courts website offers a series of informational booklets to assist the individual in preparing for a court case, which are also available for a small fee from the Queen's Printer.

[46] Additional burdens are placed on the court and on lawyers representing other parties when self-represented individuals are unsure of the procedures or documents required or fail to follow the Rules of Court.

- **How should the system respond to increasing numbers of people representing themselves in court?**
 - **Should court procedures be designed with self-represented litigants in mind?**
 - **For example, should there be greater use of forms or court-created documents?**
 - **Or are there other methods by which self-represented litigants can be accommodated?**
 - **Should a fee be charged for filing a Chambers application, to stop abuse of process by filing numerous applications which have little or no chance of success? If so, should there be exemptions available for appropriate situations?**
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COSTS

[47] While most costs are normally not payable until the conclusion of a lawsuit, a portion of the costs (e.g., regarding interlocutory disputes) may be payable earlier in the proceeding. Also, in some circumstances parties can be ordered to provide “security for costs” during the early stages of a proceeding. This sum of money or equivalent valuables is set aside to guarantee the payment of costs if the party is unsuccessful. In Family Law matters, security for costs, and even an advance payment in respect of costs, can be ordered if one party to the action is substantially in control of the assets of both parties to the action.

[48] Legal fees are determined by agreement between client and lawyer. Lawyers’ accounts are reviewable by the Court.

- **Are the methods for determining legal fees (between lawyer and client) and costs (from one party to another) appropriate?**
- **Do the costs cover a sufficient proportion of legal fees and other expenses of a lawsuit?**
- **Are costs payable at appropriate times during a court proceeding?**
- **Should there be a separate schedule of costs for Family Law matters?**

- **Is security for costs an appropriate guarantee for costs that may be payable in the future?**
 - **Should security for costs be dealt with differently in Family Law?**
 - **Does court review provide adequate protection to ensure the reasonableness of legal fees?**
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APPEALS

[49] The right to appeal to a higher court from an adverse decision is an established feature of our justice system. Appeals can significantly extend the time until there is a final resolution of a case. In Family Law proceedings there are some restrictions on appeals of interlocutory rulings. Appeals can play a particularly significant role in causing delay. Further, appeals may be commenced without realistic prospects of success, as a tactic to delay a matter.

[50] Appeals tend to be time consuming and expensive in part because it is necessary to prepare an Appeal Book containing relevant documents and a transcript of evidence. Large parts of the Appeal Book may never be referred to in the course of the appellate proceedings. Another cause of delay and expense arises from the requirement for both written and oral argument.

- **Should there be some types of cases or decisions for which there is no or a restricted right of appeal?**
 - **Should there be a procedure for hearing appeals without oral argument set out in the Rules?**
 - **Should there be a provision in the Rules for “stated case” appeals where the facts are not in dispute?**
 - **Should there be a restriction on appeals from interlocutory applications?**
 - **Should the Court of Appeal summarily decide appeals that have no significant prospect of success?**
 - **Should appeal procedures ensure that only directly relevant materials are included in Appeal Books? If so, how?**
 - **Should Appeal Books be "electronic", with the required documents compiled on a computer disk?**
 - **Should audio or video recordings replace transcripts?**
 - **How can delay in the preparation of appeals be managed?**
 - **Is oral argument necessary in every appeal?**
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402 Law Centre
University of Alberta
Edmonton, Alberta T6G 2H5
reform@alri.ualberta.ca
www.law.ualberta.ca/alri
t: (780) 492-5291
f: (780) 492-1790