The Rules Project — Interim Report

The Rules Project is a three-year project undertaking a major review of the Alberta Rules of Court with a view to producing recommendations for a new set of Rules by 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. All Rules Project reports and publications are available on the ALRI website: <http://www.law.ualberta.ca/alri/>.

Consultation: First Stage

Legal Community

During the first year of the project, ALRI engaged in an extensive consultation process with the Alberta bench and bar, seeking information and views to guide the project. ALRI counsel met with 9 local bar associations across the province, 34 law firms and CBA sections in Edmonton and Calgary, and 3 judicial groups. An Issues Paper describing the Rules Project and seeking input on a range of issues was widely distributed. In addition to the input received through consultations, ALRI received 64 letters and e-mails from the legal community with feedback on the Rules Project.

Input received through this process was categorized and entered into a central ALRI database. As of September 23, 2002, this database numbered 288 pages and contained 783 comments on different aspects of the civil justice system. This input has been provided to Rules Project working committees on an ongoing basis, and has also been summarized in a Report on the Legal Community Consultation.

Public

A Public Consultation Paper and Questionnaire was also prepared and distributed to organizations with interests that relate to the civil justice system and to the general public. Despite extensive circulation of the Questionnaire, the return rate was disappointing. By the cutoff date of June 30, 2002, 98 responses had been received. Some of the respondents indicated a willingness to participate in focus groups about rules reform. In the fall of 2002, focus groups were conducted in Edmonton and Calgary. A Public

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Consultation Report describing the questionnaire responses and a Report on the Focus Groups have been prepared.

Overall, public respondents provided insightful feedback and suggestions on various aspects of the Rules of Court. While many areas were regarded with moderate to relatively high levels of satisfaction, there were areas of dissatisfactions, including the cost of legal fees, the time to resolve legal cases, and the ease (or lack thereof) of understanding of the legal process.

Consultation: Second Stage

We are now in the second stage of consultations, in which policies being proposed for inclusion in the new Rules are available for review and comments. Eight Consultation Memoranda have been circulated. They are set out below, with highlights of the recommendations (where comments have been received and considered), or proposals (where the period for comments is still open):

No.	Title	Date for Comments
12.1	**Commencement of Proceedings in Queen's Bench** (*issued October 2002*)	January 31/ 2003

Recommendations include:

Commencement Documents

- 2 methods of commencing proceedings: by statement of claim and notice of application (eliminate the petition and the special application procedure in Rules 394-395)

- applications available in 3 situations:
  (1) where authorized by statute or a rule
  (2) where there is unlikely to be a substantial dispute of fact
  (3) where there is no respondent

No.	Title	Date for Comments
12.1	**Commencement of Proceedings in Queen's Bench** (*issued October 2002*)	January 31/ 2003

Venue

- the same presumptive venue for the place of filing, interlocutory motions and trial - roll Rules 6.1 (place of commencement) and 237 (place of trial) into a single provision that would contain reference to the dual residence of parties and the location of land

Service

- modernize, simplify and reorganize personal service rules
- service on the address for service by ordinary mail to a mailing address anywhere in Alberta

Service ex juris

- service outside the province in r. 30 circumstances without a court order, with a 30 day time for defence in Canada, 45 days in the United States and 60 days elsewhere
- court may order service outside Alberta in other circumstances

No.	Title	Date for Comments
12.2	**Document Discovery and Examination for Discovery** (*issued October 2002*)	January 31/ 2003

Recommendations include:

Affidavit of Records

- the plaintiff's affidavit of records to be served within a set time from the statement of defence; the period for the defendant's affidavit to run from service of the plaintiff's affidavit

- counsel may agree to other time lines for affidavits of record

No.	Title	Date for Comments
12.2	**Document Discovery and Examination for Discovery** (*issued October 2002*)	January 31/ 2003

- relief from sanctions for late filing of an affidavit of records, with the onus on the party in default to show special circumstances justifying such relief

- a standard form affidavit of records, and rules regarding when a group of documents may be described as a bundle and how privileged documents are described

- an express statement of the implied undertaking of confidentiality regarding information obtained in the discovery process

Examination for Discovery

- court authority to direct discovery of persons with the best direct knowledge of corporate matters in issue

- an express duty on parties and corporate representatives to inform themselves prior to discovery

- codification of the method for having the corporate representative acknowledge the evidence of others as information of the corporation to be read in at trial

- written interrogatories as an alternative to oral discovery

- an express continuing duty to correct answers given at discovery

No.	Title	Date for Comments
12.3	**Expert Evidence and "Independent" Medical Examinations** (*issued February 2003*)	May 16/2003

Recommendations include:

Expert Evidence

- incorporation or deletion of the very long trial rules, so that there is one set of expert rules - special provisions for complex matters can be ordered by a case management judge

- sequential, not simultaneous exchange of expert reports

- prescribed content for expert reports, including:
    - the expert's qualifications
    - materials and literature relied upon in making the report
    - identities of persons who carried out tests upon which the expert relied
    - facts and assumptions used in preparing the report,
    - photographs, plans, calculations or other extrinsic materials used in making the report
    - a summary of opinion(s) provided, and reasons for each

- retain the framework for notice of objections to expert evidence in Rules 218.4 and 218.5

- retain current system re: expert testimony at trial – oral testimony may be replaced by written report upon notice, subject to objection by opposing party

- no set limit on the number of experts, but the trial judge may impose sanctions for excessive number of experts

- present rules for court appointed experts, referees and assessors retained and consolidated

- very long trial rules re: discovery of expert witnesses with court leave to be adapted for general use

No.	Title	Date for Comments
12.3	**Expert Evidence and "Independent" Medical Examinations** (*issued February 2003*)	May 16/2003

"Independent" Medical Examinations

- retain Rule 217 with only a few changes:
  - medical examinations by health practitioners, not only "duly qualified medical practitioners"
  - permit any party to be examined if that party's physical or mental condition is in issue
  - party being examined to have the option of videotaping the examination rather than having a nominee attend

No.	Title	Date for Comments
12.4	**Parties** (*issued February 2003*)	June 2/2003

Recommendations include:

Deceased person without a personal representative

- retain recent rule amendment allowing a representative appointed under Rule 50 to litigate for an estate where there is no personal representative

Partnerships

- a partnership should not have to carry on business within Alberta in order to litigate in its firm name

- disclosure of partners' identities may be sought concerning any material time specified in the notice, but the partnership can show cause against production

- an individual partner or former partner sought to be held personally liable to be served with the originating process and a notice alleging partnership at the material time

- such a partner or former partner may defend separately

No.	Title	Date for Comments
12.4	**Parties** (*issued February 2003*)	June 2/2003

Sole proprietorships operating under a trade name

- individuals and corporations operating under a trade name should be able to both sue and be sued using the trade name

Interveners

- intervention rule to reflect current practice now formulated under the courts' inherent jurisdiction

- the rule should facilitate the continued use by our courts of the common law test used in this area, without codification or alteration

Persons under disability

- no more distinction in terminology between "next friend" and "guardian ad litem"

- a litigation representative may serve without court appointment, regardless of whether acting on behalf of plaintiff or defendant, unless a court orders otherwise, an enactment provides otherwise or the representative is a non-resident

- the litigation representative must file an affidavit concerning fitness to act

- the litigation representative is responsible for preparing the affidavit of records and may be examined for discovery, if the person under disability lacks capacity

- rules to provide that all settlements affecting a person under disability must be approved by a court, subject to specified exceptions

No.	Title	Date for Comments
12.5	**Management of Litigation** (*issued March 2003*)	June 30/2003

Proposals include:

(we are still accepting comments)

- changes should be made to the operation of the civil litigation system in Alberta to respond to problems of delay and excessive cost, with a view to creating a "made in Alberta" solution, tailored to local conditions and needs

- maintain the traditional system of litigation management in Alberta, with the central element of litigant/lawyer responsibility for the progress of an action, but add certain elements drawn from Caseflow Management systems that have been adopted in other jurisdictions

- maintain and build on case management tools that have already been introduced by the Court of Queen's Bench, while adding additional elements such as time standards and litigation tracks

- three litigation "tracks": simple, standard and customized, as selected by the plaintiff (subject to consent of the defendant, or a court order) and a timetable schedule for each track to apply unless the parties file a different timetable

- resources made available and allocated appropriately to provide the kinds and types of judicial intervention at intervals that will assist in moving cases through the judicial system in an efficient manner

No.	Title	Date for Comments
12.6	**Promoting Early Resolution of Disputes by Settlement** (*issued July 2003*)	November 14/ 2003

Proposals include:

- promote settlement using processes (ADR) that are alternative to court adjudication; such processes may be offered entirely outside the civil justice system, or as a program or service connected to the court, or by judges of the court acting in a facilitative rather than an authoritative role (JDR)

- focus the attention of litigants and counsel on the possibilities of settlement early in the dispute and successively thereafter, as meaningful opportunities present themselves in the litigation process

- prior to setting a trial date, require litigants to have used at least one settlement process chosen from the selections offered on a "menu" of dispute resolution choices

- exempt litigants from the requirement in appropriate cases

- include lawyer and client obligations to pursue settlement in the Rules

- encourage the development by Alberta Justice and the Court of Queen's Bench of court-annexed alternative dispute resolution programs and services that provide the opportunity for early, non-binding dispute resolution

- continue the role of judges in facilitating settlement in a JDR – a flexible process voluntarily entered into by the parties which often leads to an evaluative non-binding opinion or otherwise assists the parties in achieving a consensual outcome using techniques that are alternative to court adjudication

- provide for pre-planning of the JDR so that the process is predictable

No.	Title	Date for Comments
12.6	**Promoting Early Resolution of Disputes by Settlement** (*issued July 2003*)	November 14/ 2003

- protect the common law rules of privilege and without prejudice communications in settlement situations
- confer immunity from legal action for persons (judges or others) conducting court-annexed settlement processes
- render a judge who facilitates settlement non-compellable and incompetent to testify
- disqualify a judge who facilitates settlement from presiding at trial

Inquiries seek views on:

- development of pre-action or action protocols for early exchange of information and conduct of meaningful settlement discussions
- how JDR standards should be implemented (rules, practice notes, statute, custom)

No.	Title	Date for Comments
12.7	**Discovery and Evidence Issues: Commission Evidence, Admissions, Pierringer Agreements and Innovative Procedures** (*issued July 2003*)	November 14/ 2003

Proposals include:

Taking Evidence out of Court

- simplify the procedure for obtaining an order for commission evidence through the use of standard, plain language forms
- incorporate the examination for discovery procedure into the commission evidence procedure (with necessary modifications)

No.	Title	Date for Comments
12.7	**Discovery and Evidence Issues: Commission Evidence, Admissions, Pierringer Agreements and Innovative Procedures** (*issued July 2003*)	November 14/ 2003

- clarify that examinations for discovery of witnesses who are out of the jurisdiction may be obtained through the commission evidence procedure

Admissions

- modify the costs consequences of failing to admit requested facts or opinions

Pierringer Agreements

- allow the court to grant remedies that are deemed necessary as a result of Pierringer agreements, such as discovery of settling parties or permitting non-settling parties to read in the discovery transcripts of settling parties

Inquiries seek views on:

- exchange of witness lists prior to discovery or trial

- requirement for witness statements to be served prior to discovery or trial

- permitting any party to use discovery transcripts of a witness who is unavailable for trial

- replacing Rule 192, which provides that 30 days after service of an affidavit of records the records therein are automatically deemed to be authentic and to have been sent and received, with a Notice to Admit records

No.	Title	Date for Comments
12.8	**Pleadings** (*issued October 2003*)	January 31/ 2004

Proposals include:

Contents of Pleadings

- retain the system of fact pleading
- no requirement for certification or verification of pleadings
- clarify the requirements of the rules and good pleading practice, through the following measures:
  - adopt a new general pleadings rule that lists clearly the separate elements of Rule 104 together with other basic rules of pleading
  - make explicit the need to plead supporting facts when pleading a conclusion of law or point of law
  - bring together and build on the examples of matters requiring specific pleading already found in the rules
- provide that remedies should be specifically pleaded in a claim for relief, including:
  (a) type of remedy sought, including type of damages;
  (b) amount of damages; and
  (c) for a claim for interest, the basis for the claim and the calculation of the interest
- require particulars in the pleading of fraudulent intention, malice and bad faith
- make express provision for a demand for particulars, and requiring that a demand for particulars precede the bringing of a motion for particulars
- repeal or modify a number of subsidiary pleadings rules

No.	Title	Date for Comments
12.8	**Pleadings** (*issued October 2003*)	January 31/ 2004

Formalities of Pleadings

- provide for a short style of cause on documents after the statement of claim or other originating document

- eliminate backers and having notices appear in a document as the first paragraph after the style of cause

To be issued soon:

No.	Title	Date for Comments
12.9	**Joining Claims and Parties Including Counterclaims, Third Party Claims and Representative Actions** (*expected February 2004*)	April 30/2004

Recommendations in the area of amendment of pleadings include:

- An unlimited number of amendments without leave should be available before the close of pleadings.

Recommendations in the area of joinder of claims and parties include:

- Where necessary, all parties (including trustees in bankruptcy) should be able to litigate in different capacities in the same proceedings.

- The test for joinder of parties and claims should be liberalized to match the approach used in the rest of Canada. Multiple parties or claims should be allowed where
  - the claim arises out of the same transaction or occurrence or series of transactions or occurrences, or
  - a common question of law or fact would arise, or
  - the court exercises a general discretion to allow joinder.

No.	Title	Date for Comments
12.9	**Joining Claims and Parties Including Counterclaims, Third Party Claims and Representative Actions** (*expected February 2004*)	April 30/2004

- There should be a single relief provision against joinder of multiple claims or parties. A court may grant relief where such joinder would unduly complicate or delay the hearing or cause undue prejudice to a party.

- Our rules should retain the saving effect of r. 38(1) so that misjoinder or non-joinder of parties is not fatal to litigation, but the rest of the convoluted and inadequate "necessary parties rule" should be replaced with general and wide court discretion. At any stage of a proceeding the court should be able by order to add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or by an adjournment. No person should be added as a plaintiff or applicant without that person's consent.

Third Party Notices

- Third party notice procedure should be broadened to permit the bringing of independent (but factually related) damage claims. While a very significant change, this is a step that promotes Rules Project objectives, and is also consistent with the procedure in place in the great majority of Canadian jurisdictions.

- The current 6-month time limit for filing a third party notice should be retained. This recommendation is not based on nor intended to address any concerns relating to limitation periods. Any such concerns that may exist should be dealt with in the Limitations Act, not the rules.

- The Committee reviewed other rules pertaining to: court leave for late filing of third party notices; content and form of third party notices and defences; service; setting aside of third party notices; trial or severance of third party claims; and notices to co-defendant. Some stylistic and redrafting

suggestions are made, but no changes of substance are recommended.

Counterclaims

- The Committee reviewed rules pertaining to counterclaims, including: parties; particular claims (e.g., set off); content and form; independent status; time for defending; and severance. Some stylistic and redrafting suggestions are made, but no changes of substance are recommended.

Representative Actions

Proposals include:

- repeal rule 42, Alberta's historic representative action rule of general application, for plaintiff classes
  - Alberta's *Class Proceedings Act*, S.A. 2003, c. 16.5 (unproclaimed) [*CPA*] enacts a modern procedure designed to overcome the problems that have arisen with the operation of the historic representative action rule
  - the *CPA* gives the court wide discretion over the conduct of a class action, allowing the court to tailor the procedure for steps that are not mandated by the statute
  - there should be no special rule concerning litigation by unincorporated associations; in order to sue, they should bring a class action under the *Class Proceedings Act* and ask the judge to simplify the procedure if necessary

- retain rule 42 for defendant classes
  - allowing for representation of the interests of members of a defendant class in an appropriate case is useful to reduce time and cost and to increase efficiency
  - Alberta's *CPA* does not cover defendant classes

No.	Title	Date for Comments
12.9	**Joining Claims and Parties Including Counterclaims, Third Party Claims and Representative Actions** (*expected February 2004*)	April 30/2004

    - the rule might be redrafted in more modern language

- repeal rule 41, on representation in actions for the prevention of waste or protection of property
    - other Canadian jurisdictions have functioned without a comparable rule
    - Alberta's *CPA* provides a modern procedure for cases that could have been brought under rule 41

These and other documents are available on the Institute website, <www.law.ualberta.ca/alri/>.

During 2004 the Rules Project will publish additional Consultation Memoranda, dealing with:

- chambers procedure
- default procedure
- enforcement of judgments
- judicial review
- costs and sanctions
- appeals
- trial evidence

We will also review Surrogate and Foreclosure Rules. We will not be undertaking a review of Family Rules – pending decision of the Unified Family court Implementation Committee.

With the elevation of June Ross to the Court of Queen's Bench, we have had to divide lead counsel responsibilities as follows:

Lead Council – Committee Responsibilities

W.H. Hurlbut, Q.C.

- General Rewrite
- Early Resolution of Disputes
- Discovery & Evidence
- Costs

H.J. Lyndon Irwin, Q.C.

- Enforcement of Judgments
- Judicial Review
- Criminal Rules
- Foreclosure

Peter J.M. Lown, Q.C.

- Appeals
- Management of Litigation
- Steering Committee
- Drafting
- Forms
- External Reporting

Institute Board and Rules Project Committees

This project is a collaborative effort. We would like to thank the members of the Institute's Board and the Rules Project Committees who have contributed and continue to do so.

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For More Information

Input from the legal community is of great assistance to the Rules Project. We urge any interested members of the legal community to look at the Report on the Legal Community Consultation and the Consultation Memoranda, and to get in touch with us with your comments. Check our website or contact us directly:

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