



ISSUES PAPER FOR THE LEGAL COMMUNITY

ALBERTA RULES OF COURT PROJECT

October 2001

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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. While they are subject to an ongoing process of amendment, the Rules have not been comprehensively revised since 1968. The Alberta Rules of Court Project (the Rules Project) is a 3-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.

Legal Community Participation

[2] Rules reform should address the needs and concerns of the users of the civil 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 2001 when the project is launched and in late 2003 or early 2004 when the policies being proposed for inclusion in the new Rules have been formulated. In the interval, subcommittees convened to look at specific areas of procedure will maintain a continuing dialogue with the legal community.

Don't Wait to Participate

[3] Don't wait! Your early participation is essential to ensure that the Rules Project is properly informed about practice and policy issues, and is both forward-looking and pragmatic in its approach to Rules revision.

How You Can Participate

[4] This Issues Paper raises some of the many issues that will be addressed during the Rules Project. 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.

[5] 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. Comments may be written

(legibly please) on the Issues Paper in the space provided, or delivered separately. You can reach us with your comments or with questions about the Rules Project on our web-site (www.law.ualberta.ca/alri) or by fax, mail or e-mail to:

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[6] 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 PROJECT

[7] As noted earlier, the Rules have not been comprehensively revised since 1968, although they have been amended on numerous occasions. The Rules Project will address the need for rewriting that has arisen over the course of this lengthy period. As well, the legal community and the public have raised concerns about timeliness, affordability and complexity of civil court proceedings. 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.

[8] The Rules Project has four main objectives:

Objective # 1: Maximize the Rules' Clarity

Results will include:

- simplifying complex language
- revising unclear language
- consolidating repetitive provisions
- removing obsolete or spent provisions
- shortening Rules where possible

Objective # 2: Maximize the Rules' Useability

Results will include:

- reorganizing the Rules according to conceptual categories within a coherent whole
- restructuring the Rules so that it is easier to locate relevant provisions on any given topic

Objective # 3: Maximize the Rules' Effectiveness

Results will include:

- updating the Rules to reflect modern practices
- pragmatic reforms to enhance the courts' process of justice delivery
- designing the Rules so they facilitate the courts' present and future responsiveness to ongoing technological change, foreseeable systems change and user needs

Objective # 4: Maximize the Rules' Advancement of Justice System Objectives

Results will include:

- pragmatic reforms to advance justice system objectives for civil procedure such as fairness, accessibility, timeliness and cost effectiveness

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- **Do you agree with some or all of the stated objectives?**
 - **Are there other objectives that you would identify with the Rules Project?**
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KEEPING CIVIL CASES OUT OF COURT

[9] Civil cases may be brought in the Provincial Court of Alberta for debt, damages and similar and related relief to a value of \$7500. The Alberta Summit on Justice group (www.gov.ab.ca/justicesummit) recommended that this limit be increased to \$10,000, and an increase is currently under consideration by the Alberta Government. The Provincial Court also deals with residential tenancy agreements, child welfare matters and claims for spousal and child support and child custody and access.

[10] The civil jurisdiction of the Provincial Court overlaps with and duplicates some aspects of the jurisdiction of the Court of Queen's Bench, as both courts can hear claims less than \$7500 and both 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).

[11] 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.

[12] 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.

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- **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?**
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Alternative Dispute Resolution

[13] 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.

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- **Should there be mechanisms to encourage or to require ADR?**
 - **If ADR should be encouraged or required after the commencement of litigation, at what point in proceedings should this occur?**
 - **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?**
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PROCEDURAL ISSUES

Starting a Case

[14] There are two basic types of court proceedings in the Court of Queen's Bench: actions and applications. There are three types of commencement documents: Statements of Claim, Originating Notices and Petitions, the latter two of which are available only in prescribed circumstances. There is a prescribed form only for the Originating Notice.

- **Should there be a uniform procedure for commencing proceedings?**
 - **Should there be prescribed forms for all commencement documents and other court documents?**
 - **Should all forms be written in plain English?**
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Pleadings

[15] Pleadings are intended to define precisely the matters in dispute in an action. Documents including a statement of claim, a defence and, occasionally, a reply are exchanged. 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.

[16] 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.

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- **Do the cost and delay associated with formal pleadings outweigh their value?**
 - **Should pleadings be abolished and replaced by a less formal narrative of fact and law provided by each party?**
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Interlocutory Procedures, Flexibility and Tracking

[17] Interlocutory procedures are the various steps which take place between the commencement of a case and trial. Some of these steps are considered individually below. The 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. Perhaps there should be greater flexibility, with procedures tailored to suit a case. If so, the question is whether the tailoring should be left to the parties and their lawyers, or put into the hands of judges or other court officials. Another approach would be to create a system of different “tracks” for litigation, utilising different procedures or imposing different time constraints for different categories of cases. The tracks could be based on the amount in dispute or other indications of the seriousness or complexity of the case. For example, Alberta has a “Streamlined Procedure” for cases under \$75,000 and special rules and practices for “very long trial actions,” where trial is expected to last for more than 25 days.

- **Are the interlocutory procedures now in use too elaborate, time consuming and expensive?**
 - **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?**
 - **Is tracking a good idea?**
 - **Are the current tracking practices effective?**
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Interlocutory Procedural Disputes

[18] Interlocutory procedures become even more time consuming and expensive when disputes concerning those procedures erupt among the parties. Costs or other sanctions may be utilized to discourage such disputes. Lawyers may be held personally accountable for the costs of groundless disputes. Sometimes disputes

arise due to noncompliance with the Rules, and costs may be imposed as a penalty against parties or counsel in such instances. Methods such as case management may prevent disputes from developing in the first place.

- **How can interlocutory disputes be avoided?**
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Case Management

[19] “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).

- **What is the most appropriate model for supervising the progress of cases?**
 - **Does it vary for particular types of cases or from case to case?**
 - **What level of intervention by the Court is appropriate?**
 - **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

[20] Discovery is the process in which each party to an action is obliged to provide others access to all records relevant to any issue in the case by means of an Affidavit of Records, and in which each party and selected other persons are 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.

[21] 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. An Affidavit of Records is generally required in all cases. Examination for discovery can be even more time consuming and expensive than the Affidavit of Records. It

is available as a matter of right in all cases, although limits may be placed on the number of persons examined and/or the length of the examinations.

- **Should there be discovery in all cases?**
 - **Might it be dispensed with, for example, for claims below a certain amount?**
 - **Should the Court have the discretion to either allow or disallow 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?**
 - **Would some alternative method, such as written interrogatories or witness statements, be a preferable approach?**
 - **Is a list of documents necessary?**
 - **Is inspection without a list sufficient in some cases?**
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Summary Judgment and Summary Trial

[22] The trial of an action is a particularly time consuming and expensive feature of the civil justice system. Such trials are a fundamental part of the civil justice system and must be available in appropriate cases. But alternative methods by which judges may resolve cases without a full trial can provide very significant savings in terms of time and expense.

[23] 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.

- **Are summary judgment and summary trial procedures available in a sufficient number of cases?**
 - **Do they provide for a fair and cost-effective way of resolving disputes?**
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Separate Determination of Issues

[24] 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.

[25] 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.

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- **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?**
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Interlocutory Injunctions

[26] In civil cases parties commonly approach the Court for orders to preserve rights prior to trial. These proceedings can be complex, time consuming and expensive. Moreover, the whole process may be duplicated at trial.

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- **How can the time and expense of interlocutory injunction proceedings be reduced?**
 - **Would forms or guidelines assist?**
 - **Can interlocutory injunction hearings be combined with the final determination to avoid repeated determination of the same issues?**
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Sanctions for Delay

[27] A significant concern with civil court proceedings is the time involved in taking a matter to trial. Delay in prosecuting or defending an action can lead to sanctions of varying degrees of severity, up to and including dismissal. Delay for a five year period results in mandatory dismissal.

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- **Are the available sanctions for delay sufficient and reasonably balanced?**
 - **Should a five year delay result in mandatory dismissal?**
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Trial Readiness and Scheduling

[28] Alberta practice generally requires certification of trial readiness as a condition of scheduling a trial. 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 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

[29] 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.

- **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?**
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TECHNOLOGY

Audio/Video Communication

[30] The advent of sophisticated audio, video and satellite communications facilities permits people to meet “face to face” without being in the same room. With creative planning it may be possible to save money and serve the cause of justice by making greater use of audio or video facilities.

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- **Would it be desirable to create a “virtual” court for use in some cases?**
 - **If so, which ones?**
 - **What are the disadvantages of greater use of audio or video facilities and how can these be reduced?**
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Electronic Documentation

[31] Another area of technological development relevant to the court process is electronic communication. At present all court documents are produced on paper which is physically exchanged between the parties and filed at the Court. Document storage consumes space in court facilities and the entire system of managing court records is costly.

- **Should the development of an electronic system for filing and service of documents be a priority?**
 - **What safeguards and security controls need to be built in?**
 - **Will electronic systems disadvantage the self-represented litigant or the smaller law practice?**
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COSTS

[32] At the conclusion of a court proceeding, as a general rule, the unsuccessful party is ordered to pay the “costs” of the successful party. These include the reasonable expenses of the lawsuit including an amount for legal fees calculated on the basis of a court tariff that takes into account the legal “steps” undertaken and the amount of the claim. Such a costs order will typically cover only a portion of the successful party’s actual legal fees, which are determined by the arrangement between the party and the lawyer. In special circumstances, a judge can order that a higher amount of costs be paid by the losing party, occasionally to the full extent of the winning party’s legal fees.

[33] 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.

[34] Legal fees are determined by agreement between client and lawyer. They may be charged by the hour worked, or may be “contingency fees” in which the lawyer receives a percentage of the client’s award if the case is successful. Contingency fee agreements and lawyers’ accounts are also 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?**
 - **Is security for costs an appropriate guarantee for costs that may be payable in the future?**
 - **Does court review provide adequate protection to ensure the reasonableness of contingency agreements and legal fees?**
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APPEALS

[35] 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 civil proceedings appeals of interlocutory rulings are not restricted as they are in criminal proceedings. Such appeals can play a particularly significant role in causing delay. Further, appeals may be commenced without realistic prospects of success.

[36] 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?**
 - **What about rulings on interlocutory disputes?**
 - **Should the Court of Appeal summarily dismiss appeals that have no significant prospect of success?**
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- **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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OTHER TOPICS

[37] In addition to the topics referred to above, specialized committees of the Rules Project will address such issues as Judicial Review, Foreclosure, Enforcement of Judgments, Family Law, Insolvency, Surrogate Rules and Criminal Rules. Please feel free to comment on these areas.

[38] A list of headings from the current Rules is appended for your reference. We welcome your comments on any areas that are included in the Rules, or that in your view should be included.