

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

***ALBERTA RULES OF COURT PROJECT***

**Commencement of Proceedings  
in Queen's Bench**

Consultation Memorandum No. 12.1

October 2002

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## **ACKNOWLEDGMENTS**

This consultation paper was written by June Ross, Q.C., who is seconded to the Institute by the University of Alberta Faculty of Law, as lead counsel to the Rules Project. She was greatly assisted by the members of the Rules Project General Rewrite Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the committee are:

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## PREFACE AND INVITATION TO COMMENT

**Comments on the issues raised in this Memorandum should reach the Institute on or before January 31, 2003.**

We encourage your comments on the issues and the proposals contained herein. You may respond to one, a few or many of the issues addressed. You can reach us with your comments or with questions about this consultation memorandum or the Rules Project on our website, by fax, mail or e-mail to:

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## BACKGROUND

### A. The Rules Project

The Alberta Rules of Court 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 3-year project which has undertaken a major review of the rules 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. Overall leadership and direction of the Rules Project is the responsibility of the Steering Committee, whose members are:

The Hon. Mr. Justice Neil C. Wittmann (Chair); Court of Appeal of Alberta

The Hon. Judge Allan A. Fradsham; Provincial Court of Alberta

Geoff Ho, Q.C. (Observer); Secretary, Rules of Court Committee

Peter J.M. Lown, Q.C.; Director, Alberta Law Reform Institute

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### B. Project Objectives

The Alberta Rules of Court 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 the timeliness, affordability and complexity of civil court proceedings.<sup>1</sup> Reforms have been adopted

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<sup>1</sup> Notable recent civil justice reform projects responding to these concerns include: Ontario Civil Justice Review, *Civil Justice Review: First Report* (Toronto: Ontario Civil Justice Review, 1995) and Ontario Civil Justice Review, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, 2004) (continued...)

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.

The Steering Committee approved four Project Objectives that address both the need for rewriting the rules and reforming, or at least rethinking, practice:

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

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<sup>1</sup> (...continued)

Review, 1996) [hereinafter *Ontario Civil Justice Review, 1996*]; The Right Honourable H.S. Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Lord Chancellor's Department, 1995) and The Right Honourable H.S. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996) [hereinafter *Woolf Report*]; and Canadian Bar Association, Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Toronto, Ontario: Canadian Bar Association, 1996).

- 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

### **C. Purpose Clause**

In all Canadian jurisdictions other than Alberta and Saskatchewan, the rules contain a general principle to the effect that they are to be interpreted liberally to secure the just, most expeditious and least expensive determination of every proceeding on its merits. The Steering Committee views such a purpose clause as consistent with the Project Objectives and proposes the inclusion of a similar clause in the new rules.

### **D. Legal Community Consultation**

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. In conducting the Rules Project, ALRI has been looking to the legal community to provide the information and views that give the project its direction.

Consultation with the legal community commenced in the fall of 2001 with ALRI presentations to 9 local bar associations across the province. This was followed by 17 meetings with law firms and Canadian Bar Association (CBA) sections in Edmonton and 17 meetings with law firms and CBA sections in Calgary. In addition, there were meetings with three judicial groups. An Issues Paper describing the Rules Project and seeking input on a range of issues was widely distributed in paper form and made available on the ALRI website and through links on the Law Society of Alberta, Alberta Courts, Alberta Justice and Justice Canada websites. In addition to the input received through consultations with local bar associations, firms and CBA sections, ALRI received 64 letters and e-mails from the legal community with feedback on the Rules Project.

Input from the legal community, whether in the form of letters, e-mails or notes from meetings, 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 the Rules Project working committees on an ongoing basis, and is summarized in a Report available on our website <<http://law.ualberta.ca/alri/>>. An excerpt from that Report is set out below.

## **E. Legal Community Comments**

### **1. Objectives and approach of the rules project**

There was widespread agreement among those who commented on this issue that one of the objectives of the Rules Project should be to make the existing rules shorter, more organized and generally more user friendly. Many respondents also expressed the view that some degree of flexibility and informality needed to be retained in the rules such that counsel may reach agreements as to scheduling and other matters amongst themselves. In a similar vein, while some felt that fairly detailed rules are required, others expressed the view that the rules should stay away from "micro managing" and instead provide broad directions and principles for counsel to abide by.

Another theme running through many of the responses in this area was that the Rules Project should not go too far in trying to rewrite the substance of the rules—if it is not "broke", the Project should not try to fix it. Some respondents voiced concerns about the existing rules annotation becoming redundant and procedural points needing to be re-litigated if there are too many significant changes.

Some of the responses raised the issue of implementation of the new rules—it was suggested that the educational and transitional process for the bench and bar should be an important component of the Rules Project.

## **2. Models from other jurisdictions**

Some recommended looking to the British Columbia Rules of Court as a model—the comments reflected the view that these rules are short, effective, well-organized and generally user-friendly. Others thought that the Ontario Rules are a model of good organization. Another model suggested for consideration in framing the new rules was the Code of Professional Conduct. The new rules could be fixed, kept fairly short and simple, and be amplified by commentaries and rulings which could change from time to time. Finally, some commented that the Federal Court Rules are not a good model.

## **3. Uniformity**

A frequent comment was that it would be useful to make Alberta practice as consistent with other provinces as possible, particularly the western provinces, due to the increase in inter-provincial litigation and the relaxation of mobility rules.

## **4. Regional concerns**

Some respondents commented that the concerns addressed by the rules don't necessarily apply in smaller centres. Sometimes the problems are "big city/big file" problems, but the "solutions" are imposed across the board. Another point raised was that judges visit from Edmonton, Calgary and elsewhere and each judge brings his or her own practice, which complicates practice in the smaller centres.

## **5. Application and enforcement of the rules**

A frequently expressed concern was that the rules are not being consistently applied and enforced. Respondents pointed out that people need to know that the rules will be applied in a predictable manner, that they will be enforced, and that judges will not impose steps not contemplated by the standard rules. Some also commented on the differences in application by clerks in Edmonton and Calgary. There were concerns that

clerks are making policy, for example, the "docketing statement" which is required in the Calgary Court of Appeal.

## **F. Public Consultation**

A Public Consultation Paper and Questionnaire was 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. A total of 98 questionnaires were received by the cutoff date of June 30, 2002. A Public Consultation Report has been prepared and is available on our website <<http://law.ualberta.ca/alri/>>. Copies of the Report will also be provided to Rules Project committees and other interested persons. An excerpt from the Report's Conclusions is set out below.

## **G. Public Consultation Report: Conclusions**

Overall, survey respondents provided insightful feedback and suggestions on various aspects of the Alberta Rules of Court. While many areas received moderate to relatively high satisfaction scores, the purpose of this study is to focus on areas of improvement, or areas receiving relatively high dissatisfaction ratings. Aspects under study can be grouped into high, medium and low levels of respondent dissatisfaction.

Aspects with **high** levels of dissatisfaction (50% or more of respondents dissatisfied) included:

- cost of legal fees;
- time to resolve legal cases; and
- the overall legal process.

Aspects with **medium** levels of dissatisfaction (40 - 49% of respondents dissatisfied) included:

- court forms;
- information available through the court;
- ease of understanding of the legal process;
- the trial;

- the discovery stage; and
- interlocutory hearing(s).

Aspects with **lower** levels of dissatisfaction (30 - 39% of respondents dissatisfied) included:

- documentation required;
- alternatives to a full trial;
- the pleadings stage; and
- formality of the legal process.

## **H. Working Committees**

Over the course of the Rules Project, working committees have been and will be established to examine particular areas of the rules. The committee structure reflects the "rewriting" and "rethinking" objectives of the Rules Project, and ensures that specialized topics will be reviewed by persons with relevant experience. To date, the General Rules Rewrite Committee and the "Rethink" Committees dealing with Early Resolution of Disputes, Management of Litigation, and Discovery and Evidence, have been created. At a later date, specialized areas of practice will be dealt with by committees dealing with rules relating to the Enforcement of Judgments, Appeals, Costs, Family Law and other matters. Family Law rules and practice are also the subject of a specialized legal community consultation, now underway with the issuance of an Issues Paper: Family Law Rules, available on our website <<http://law.ualberta.ca/alri/>>.

## **I. Process for Developing Policy Proposals**

The major task for working committees is the development of policy proposals regarding the topics included in their mandates. The committees consider the project objectives and purpose clause, rules from other jurisdictions, research prepared by ALRI counsel, and information received in the consultation process. At the current stage of the Rules Project, the committees are concerned with issues of policy, dealing with civil practice and the content of the rules. Drafting issues, such as the organization and the wording of the rules, will be addressed at a later stage.

## **J. The General Rewrite Committee**

The General Rewrite Committee has the task of providing comprehensive consideration of all areas in the Rules of Court. The Committee is charged with reviewing the large number of rules not allocated to a specialized committee. The Committee members are:

The Hon. Justice Brian R. Burrows (Co-Chair); Court of Queen's Bench of Alberta  
The Hon. Justice Terrence F. McMahon (Co-Chair); Court of Queen's Bench of  
Alberta

James T. Eamon; Code Hunter LLP

Alan D. Fielding, Q.C.; Fielding Syed Smith & Thronson

The Hon. Judge Allan A. Fradsham; Provincial Court of Alberta

Debra W. Hathaway; Counsel, Alberta Law Reform Institute

The Hon. Justice Eric F. Macklin; Court of Queen's Bench of Alberta

Alan D. Macleod, Q.C.; Macleod Dixon

June M. Ross, Q.C.; Special Counsel, Alberta Law Reform Institute

Wayne Samis; Clerk, Court of Queen's Bench of Alberta

The Committee met monthly between February 2002 and June 2002. During this time it completed a preliminary examination of rules addressed in this consultation memorandum.

## **K. Consultation Memorandum**

This consultation memorandum addresses issues concerning the commencement of proceedings in Queen's Bench, including rules prescribing commencement documents, and the place of commencement, and dealing with service of commencement (and other) documents. The Committee has identified a number of issues relating to these topics and made proposals regarding them. As noted above, the proposals are concerned with issues of policy, not drafting. At a later stage in the Rules Project, draft rules will be circulated for comment.

These proposals are not final recommendations, but preliminary proposals being put to the legal community for further comment. The proposals will be reviewed once comments are received, and may be revised accordingly. While this consultation

memorandum attempts to include a comprehensive list of issues relating to the commencement of proceedings, there may be other issues which should be addressed. Please feel free to provide comments regarding other issues relating to the commencement of proceedings.



## EXECUTIVE SUMMARY

### A. Commencement Documents

There are two basic types of court proceedings in the Court of Queen's Bench: actions and applications. Most stages of an action, including pleadings, discovery and trial, do not apply to an application, which is typically dealt with in a summary proceeding based on affidavit evidence. A blurring of the lines may occur: a trial of questions arising on an application may be ordered, and an action may be disposed of by means of various forms of summary process. But the two forms of proceedings remain distinct and continue to be reflected in Canadian and other court rules.

Rule 6 provides for three types of commencement documents: Statements of Claim, Originating Notices and Petitions. There is also a special application procedure in Rules 394-395 under which proceedings may be commenced without the issuance of a commencement document.

The General Rewrite Committee is of the view that the distinction between actions and applications should be retained, as there are situations in which it is useful to commence a proceeding as an application. The Committee favours having two ways to commence proceedings: one for actions and one for applications. The familiar terms, "statement of claim" and "originating notice," should be retained.

The Committee proposes to discard the archaic petition, and provide that in circumstances previously calling for the use of a petition, applications should be commenced by originating notice. Similarly, the special procedure in Rules 394-395 should be dispensed with, and applications formerly brought under this procedure should be commenced by originating notice.

The Committee proposes that there should be three situations in which an application may be commenced by originating notice:

- (1) where a statute or rule explicitly or implicitly authorizes it;
- (2) where there is unlikely to be a substantial dispute of fact;
- (3) where there is no one to serve as respondent.

These are alternative categories. Originating notices can be used in categories (1) and (3) even if there are facts in dispute. However, the existence of facts in issue may cause the court to exercise its discretion to direct the trial of a question arising in an application.

## **B. Place of Commencement**

Rules governing the place of commencement of an action within a jurisdiction determine one aspect of civil venue. Canadian rules regarding civil venue are “far from uniform”. Limits on the place of trial are more common than limits on the place of commencement of proceedings. Venue rules determine presumptive venue by relying on varied grounds, including where the subject of an action is situated, where the defendant or both parties reside or carry on business, or where the cause of action arose. However, all provinces provide for court discretion to change venue where the circumstances make this appropriate.

A consideration of venue rules entails a determination of what aspects of venue, such as place of commencement or place of trial, should be regulated, and on what grounds.

The Committee proposes that Rule 6.1 (place of commencement) and Rule 237 (place of trial) be rolled into a single provision that would contain reference to the dual residence of parties as currently found in Rule 6.1 and to the location of land as found in Rule 237. The place of commencement should govern applications and trial. The court should continue to have overriding jurisdiction to alter venue in appropriate circumstances.

## **C. Service Within Alberta**

Service of process has traditionally performed two functions, both of which should be taken into consideration when reflecting on the adequacy of service rules:

1. The court acquires territorial jurisdiction over persons at common law by serving them in accordance with its procedural law. Jurisdiction may also be based on consent or submission.
2. Service provides affected persons with notice of proceedings and an opportunity to be heard.

In a series of decisions dealing with conflict of laws issues, the Supreme Court of Canada has ruled that there is a constitutional limit on the territorial jurisdiction that may be granted pursuant to provincial legislative authority: there must be a “real and substantial connection” between the territory and the litigation.

The rules require personal service of documents by which a proceeding is commenced. Alternative methods of personal service are provided, and non-personal methods of service for documents not required to be served personally. Substitutional service may be ordered when prompt personal service is impractical. Technically defective service may be “deemed good and sufficient” when this is appropriate.

The Committee proposes providing for an alternative form of personal service on individuals by leaving a document with an adult person residing at the individual’s place of residence, and mailing another copy to the individual at that address. This form of service could save significant expense by eliminating the need for substitutional service orders in these circumstances.

The Committee proposes that the provision for service by “double registered mail” be eliminated. “Double registered mail” is no longer provided by Canada Post. While it is still possible to obtain a receipt signed by the recipient of mail, this is a more involved process, and it is a frequent occurrence that plaintiffs who serve in this fashion do not obtain such a receipt, so that their “service” is ineffective. This creates administrative problems for the court and wasted time and expense for plaintiffs. In addition, there are reasons to believe that this form of service is not particularly effective in providing affected persons with notice of proceedings and an opportunity to be heard. The Committee’s view is that the alternative form for serving individuals by leaving documents with an adult at their residence and mailing the documents to them at that address would be a more effective form of service, and a suitable substitute for service by “double registered mail”.

The Committee proposes retaining the substitutional service rule, with minor changes, and adding a rule regarding applications to deem service good and sufficient, to reflect the actual practice.

The Committee does not propose a special provision for service by e-mail. Such service can be effected under current rules provided it is accepted. Solicitors can accept service in any form.

#### **D. Service Outside Alberta**

The constitutional limit on the territorial jurisdiction that requires a “real and substantial connection” between the territory and the litigation is a particular concern regarding grounds for service *ex juris*.

As pointed out in a number of comments from the bar, Alberta’s rules stand out from those of most provinces by requiring a court order prior to serving outside the province. Most commentators felt that such service should be permitted without a court order.

The Committee proposes that a court order should no longer be required for service outside the province in specified circumstances similar to those now listed in Rule 30. This is the dominant approach in Canadian rules. The specified circumstances make a presumptive case for a real and substantial connection between Alberta and the litigation. Removing the requirement for a court order will save time and expense. The Committee also proposes that the rules should provide for court authority to authorize service out of Alberta in other, unspecified, circumstances. This, too, reflects the dominant Canadian approach.

As to time for responding, the Committee proposes that 30 days be permitted for service within Canada, 45 days for service in the United States and 60 days for service elsewhere.

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# CHAPTER 1. COMMENCEMENT DOCUMENTS

## A. Introduction

### ISSUE No. 1

#### How many commencement documents should there be?

[1] There are two basic types of court proceedings in the Court of Queen’s Bench: actions and applications. This is express in the commencement provisions of some rules,<sup>2</sup> and implicit in Alberta.<sup>3</sup> Most stages of an action, including pleadings, discovery and trial, do not apply to an application, which is typically dealt with in a summary proceeding based on affidavit evidence.

[2] Rule 6 provides for three types of commencement documents: Statements of Claim, Originating Notices and Petitions. There is also a special application procedure in Rules 394-395 for commencing proceedings without the issuance of a commencement document.

[3] The two types of proceedings, actions and applications, are commonly recognized and reflected in Canadian, English and Australian rules which consistently provide different commencement documents for the two forms.<sup>4</sup> Of course, a blurring of the lines may occur: a trial of questions arising on an application may be ordered, and an action may be disposed of by means of various forms of motions. The recent addition of summary trial procedure arguably makes the distinction between actions and applications less significant, by providing broader access to a summary process for actions. But the two forms remain distinct in that applications typically (although

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<sup>2</sup> Ontario, *Rules of Civil Procedure* [hereinafter “Ontario”], r. 14.02, 14.03 and 14.05.

<sup>3</sup> Alberta, *Rules of Court* [hereinafter “Alberta”], r. 261(1) (“any fact required to be proved at the trial of an action by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court”) and (3) (“in any case or matter begun by originating notice or petition and upon any application or motion evidence may be given by affidavit. . .”).

<sup>4</sup> For the Canadian rules, see Chart A.

not necessarily) bypass pleadings and discovery, while summary processes applied to actions typically (although not necessarily) follow pleadings and discovery.

[4] The distinction between actions and applications has been maintained in recently revised rules. The civil procedure reforms in England sought to create one commencement document in order to simplify procedure.<sup>5</sup> It was proposed that all proceedings be begun by means of a “claim”. As this recommendation was developed in the new Civil Procedure Rules,<sup>6</sup> however, two claim forms were adopted: the general form under Part 7 of the new rules and an additional form under Part 8. Part 8 claims are used in circumstances similar to Alberta’s originating notice.

[5] There were not a large number of comments from the legal community on this issue. Of those who responded, the majority felt that there should be a uniform procedure for commencing proceedings, but noted that it would have to be adaptable to accommodate matters that are currently determined summarily by originating notice.

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[6] The Committee was of the view that the distinction between actions and applications is a valid one. In Alberta and many other jurisdictions a civil action involves three relatively distinct phases, the pleadings stage during which the issues in controversy between the parties are identified, the discovery stage during which each party is able to learn about the opponent’s case, and the trial stage in which legal and factual issues are adjudicated, and which typically involves oral evidence in open court before a judge or judge and jury. These phases of an action, and the complex rules relating to them, have developed over many years in response to fundamental issues of justice and fairness. While they are in an ongoing state of evolution, and may be subject to reforms during the course of the Rules Project, the Committee considers that all three stages of an action are fundamental parts of the civil justice system and must be available in appropriate cases. At the same time, the complexity of the resulting process can involve delay and expense that is unwarranted in some

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<sup>5</sup> *Woolf Report*, *supra* note 1, c. 12.

<sup>6</sup> United Kingdom, *Civil Procedure Rules (1999)* [hereinafter “United Kingdom”].

circumstances. For example, where there are no substantial factual disputes (see section E.3 below), discovery is unnecessary and adjudication may be based on affidavit rather than oral evidence. Additionally, legislation may contemplate a summary process to facilitate the expeditious determination of particular matters (see section E.5).

[7] The Committee concluded that it is important that actions be commenced by a pleading that contemplates the receipt of a pleading in response, to be followed by the other aspects of pleadings, discovery and trial processes. At the same time, it is efficient to commence proceedings that are unlikely to require pleadings, discovery and trial, and that will likely be determined by a summary process, with a specialized commencement document that is typically accompanied by one or more affidavits. The Committee therefore favours having two ways to commence proceedings: one for actions and one for applications. The Committee also favours retaining the familiar terms “statement of claim” for actions and “originating notice” for applications.

**CHART A**  
**COMMENCEMENT DOCUMENTS**  
**COMPARISON OF RULES IN OTHER JURISDICTIONS**

<b>Jurisdiction</b>	<b>Statement of Claim</b>	<b>Writ of Summons</b>	<b>Notice of Action</b>	<b>Originating Notice</b>	<b>Originating Application</b>	<b>Notice of Application</b>	<b>Petition</b>
British Columbia		R.8(1)			R.10(1)		
Alberta	R.6(1)		R.6(1)	R.6(2)			R.6(3)
Saskatchewan	R.13(1)			R.451			
Manitoba	R.14.03					R.14.05	
Ontario	R.14.03 (Originating Process)		R.14.03(2)			R.14.05	
New Brunswick	R.16.03		R.16.03			R.16.04	
Newfoundland	R.5.01				R.5.02		
Nova Scotia				R.9.01(action or application)			R.9.03
Prince Edward Island	R.14.01 (Originating Process)		R.14.03(2)			R.14.05	R.14.03(1)(i)
Northwest Territories	R.8(1)			R.8(2)			R.8(3)
Federal	R.63(1)(a)					R.63(1)(d)	

## **B. Statement of Claim**

### **ISSUE No. 2**

#### **What document should be used to commence an action?**

[8] The statement of claim is the default form of originating document to commence an action. Rule 6 provides that “every proceeding” shall commence by statement of claim with specified exceptions for applications.

[9] Alberta’s statement of claim contains the full pleading of the claim. It does not permit the possibility of commencing action by a formal writ or notice and taking additional time to file a more detailed pleading of the claim. In British Columbia<sup>7</sup> action is commenced by writ of summons which may be endorsed “either with a statement of claim or with a concise statement of the nature of the claim made and the relief required in the action” (Rule 8(2)). If the statement of claim is not filed and delivered with the writ, this must be done within 21 days after appearance (Rule 20). In Ontario actions may be commenced by statement of claim or, “where there is insufficient time to prepare a statement of claim,” by a notice of action that includes a “short statement of the nature of the claim”. In the latter case the statement of claim is to be filed within 30 days, and the notice of action and statement of claim served together (Rule 14.03). The Ontario notice of action was adopted in response to concerns of the Bar about the abandonment of the writ.<sup>8</sup>

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[10] The Alberta practice is of longstanding duration.<sup>9</sup> Although Canadian practice in this context is far from uniform, the Alberta approach is fairly common.<sup>10</sup> It has the advantage of the simplicity of just one commencement document, and in this sense is consistent with the objectives of the Rules Project. It is familiar to the Bar and was not

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<sup>7</sup> British Columbia, *Supreme Court Rules* [hereinafter “British Columbia”].

<sup>8</sup> Ontario, Civil Procedure Revision Committee, *Civil Procedure Revision Committee: [draft]* (Toronto : Ministry of the Attorney General, 1980).

<sup>9</sup> Alberta, *Rules of Court, 1914*, r. 119.

<sup>10</sup> See Chart A.

the subject of negative commentary. The Committee accordingly proposes that the statement of claim should be retained as the single document for the commencement of an action. No special provision should be made for circumstances in which there is limited time to prepare a statement of claim.

## C. The Petition

### ISSUE No. 3

#### Should the petition be retained?

[11] Alberta employs petitions under Rule 6(3) where this is permitted by statute, where there is no person against whom relief is sought or the person against whom relief is sought is unknown or unascertained, or where there are no issues of fact. References to petitions in other court rules are relatively rare. Only the Northwest Territories and Nova Scotia employ petitions in similar circumstances to Rule 6(3).<sup>11</sup> Case law on commencement by petition under Rule 6(3) is very sparse, indicating a general lack of reliance on Rule 6(3) in favour of the more common originating notice.

#### 1. Grounds for petition: “permitted by statute”

[12] Modern Alberta statutes employ the originating notice as the preferred method of commencement of summary proceedings. There seem to be very limited situations in which a petition is still used in Alberta, and even fewer in which an originating notice would not be an option. For example, while a petition may be used to obtain approval for the sale of property belonging to an infant under the *Minors’ Property Act*, or to obtain approval of a plan of arrangement under the *Canada Business Corporations Act*, neither of these statutes specifically requires the use of a petition.<sup>12</sup> However, the

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<sup>11</sup> Northwest Territories, *Rules of the Supreme Court* [hereinafter “Northwest Territories”], r. 8(3) provides for petitions where required by statute. Nova Scotia, *Civil Procedure Rules* [hereinafter “Nova Scotia”], employs a petition for particular statutory proceedings (r. 9.03: winding up of a company and proceedings under the *Controverted Elections Act*, R.S.N.S. 1980, c. 96 and *Dominion Controverted Elections Act*).

<sup>12</sup> The *Minors’ Property Act*, R.S.A. 2000, c. M-17 does not explicitly refer to a petition, but indicates procedure on applications is governed by the Rules of Court. Section 248 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 provides that applications under that Act may be made summarily

*Land Titles Act* does explicitly provide that an appeal of an action of the Registrar is to be brought by petition.<sup>13</sup>

## **2. Grounds: “no person against whom relief is sought” or the person is “unknown or unascertained”**

[13] The only real issue regarding petitions under Rule 6(3) seems to be whether a good policy rationale exists to use a separate commencement method where “there is no person against whom relief is sought” or the person is “unknown or unascertained”. While specific reference to these circumstances may be useful, the need for a separate commencement method is not apparent. When other jurisdictions address these circumstances specifically they do so by including a provision within their general application procedure.<sup>14</sup>

## **3. Grounds: “no issues of fact”**

[14] Despite the wording of the rule, the lack of factual issues alone has not been relied upon to justify the use of a petition.<sup>15</sup>

## **POSITION OF THE GENERAL REWRITE COMMITTEE**

[15] The Committee considers that the petition is archaic and should not be retained. Where a statute refers to a petition, or where there is no person against whom relief is sought or the person is unknown or unascertained, applications should be commenced by originating notice.

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<sup>12</sup> (...continued)

by petition, originating notice of motion or otherwise as court rules provide.

<sup>13</sup> R.S.A. 2000, c. L-4, s.184.

<sup>14</sup> See British Columbia, *supra* note 7, r.10(1)(c); Northwest Territories, *supra* note 11, r. 22(m) and (n) use language similar to r. 6(3). Ontario and Nova Scotia expressly contemplate the use of a notice of application without a named respondent (Ontario, *supra* note 2, r. 14.06(3); Nova Scotia, *supra* note 11, r. 9.02).

<sup>15</sup> *Re San Juan Holdings Ltd.* (1987), 51 Alta. L.R. (2d) 211 (Q.B.) (a petition is inappropriate where interested parties exist and relief sought is clearly against them).

## D. Special Application to the Court

### ISSUE No. 4

#### Should the special application procedure be retained?

[16] Alberta allows for an application *ex parte* to a judge on an affidavit of the facts without filing a commencement document where a statute or regulation gives court authority to issue a certificate or make any direction or order (otherwise than in any action) and where no procedure is provided. The judge may then determine the matter *ex parte*, or may give directions to proceed by originating notice (Rules 394, 395).<sup>16</sup>

[17] Stevenson & Côté, *Alberta Civil Procedure Handbook 2002* comments:<sup>17</sup>

Statutes often allow the court or a judge to give an order or a certificate for some statutory purpose. . . . Such legislation almost never indicates what procedure should be followed. If no notice is called for, the theory of civil procedure would suggest that a petition must be issued. If notice may be called for, then maybe a statement of claim should issue. These two Rules are designed to negate that suggestion, provide a simple procedure, and to some extent legitimate a practice which had grown up before these Rules.

[18] Of other Canadian jurisdictions, only the Northwest Territories makes specific reference to the circumstances addressed by Rule 394. It allows applications by originating notice in these circumstances.<sup>18</sup> Other provinces tend to describe legislative references authorizing applications in relatively broad terms, and to include all such applications within the ordinary application procedure.<sup>19</sup>

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<sup>16</sup> *Switzer v. Gruenewald* (1997), 55 Alta. L.R. (3d) 117 (Q.B.): an *ex parte* restraining order was held to have been appropriately issued under r.395(1)(a). Such use of part 30 is now specifically contemplated by Alberta, *supra* 3, r. 440.1. Alternatively, an emergency protection order could be sought pursuant to the *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27. These matters will be dealt with by the Family Law Committee of the Rules Project.

<sup>17</sup> Stevenson & Côté, *Alberta Civil Procedure Handbook 2002* [hereinafter *Civil Procedure Handbook*] at p. 295.

<sup>18</sup> Northwest Territories, *supra* note 11, r. 22(k).

<sup>19</sup> For example, Manitoba provides for applications where a statute “authorizes an application, appeal or motion to the court and does not require the commencement of an action” and Nova Scotia refers to enactments which permit commencement by “originating application, originating motion, originating summons, petition, or otherwise.”

## **POSITION OF THE GENERAL REWRITE COMMITTEE**

[19] There is arguably a degree of simplicity obtained by not having to file an originating document. However, if notice to an opposing party is required, an originating notice will eventually need to be filed, and the two-stage process (of seeking court direction and then proceeding by originating notice) makes the procedure more complex than simply proceeding by originating notice. It is also not clear why there would be a particular need for court directions in this context. The Committee is of the view that the special application procedure should not be retained. An application under a statute or regulation that authorizes the court to issue a certificate or make any direction or order (otherwise than in an action) and does not provide a procedure for the application, should be commenced by originating notice.

### **E. Originating Notice**

#### **1. General interpretive approach**

## **ISSUE No. 5**

### **Should the Rules take a liberal or restrictive approach to application procedure?**

[20] In all Canadian jurisdictions other than Alberta and Saskatchewan, the rules contain a general principle to the effect that the rules are to be interpreted liberally “so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits”. (As noted above, the Rules Project Steering Committee is proposing that such a provision be included in the new rules.) This interpretive principle has been employed by courts considering appropriate circumstances for proceeding by application.<sup>20</sup> Ontario courts have also relied on the 1985 expansion to the Ontario rule, in justifying a liberal approach to the availability of applications.<sup>21</sup>

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<sup>20</sup> *Blair Athol Farms Ltd. v. Black*, [1996] 8 W.W.R. 1 (Q.B.), aff’d on other grounds (1997), 115 Man. R. (2d) 208 (C.A.), allowed an application to proceed so that the matter would be adjudicated “in the most expeditious and efficient way possible”. *Halifax (City) v. Nova Scotia A.G.* (1996), 149 N.S.R. (2d) 390 (S.C.) held that conversion of an action to an application would “accomplish a just, speedier and far less expensive determination” (para. 29).

<sup>21</sup> *McKay Estate v. Love* (1991), 6 O.R. (3d) 511 (Gen. Div.); aff’d (1991), 6 O.R. (3d) 519 (C.A.), additional reasons at (1991), 14 C.P.C. (3d) 371 (Ont. C.A.).

The Ontario approach was recently described and approved as follows by the Manitoba Court of Appeal:

It would also appear that, in Ontario at least, the courts are extending the availability of proceedings by way of application given that such matters are typically quicker and less expensive than the alternative of an action, leaving it to the discretion of the motions court judge whether evidentiary disputes based on credibility or other circumstances, render it more appropriate to direct a trial of an issue.<sup>22</sup>

Such a liberal approach does not appear to have been adopted in Alberta. For example, Alberta courts have held on a number of occasions that Rule 410(e) is a discretionary rule which should be used with restraint.<sup>23</sup>

## **POSITION OF THE GENERAL REWRITE COMMITTEE**

[21] The Committee was of the view that it would be consistent with the objectives of the Rules Project and the proposed purpose clause to take a liberal approach to the availability of proceedings by way of application.

## **2. Mandatory or permissive**

### **ISSUE No. 6**

#### **Should proceeding by application be mandatory or permissive?**

[22] Rule 6(2) provides that proceedings *may* be commenced by originating notice where permitted by statute or the rules. Similarly, Rule 410 provides that proceedings *may* be commenced by originating notice in the specified circumstances. This is consistent with most Canadian rules, in which the direction to proceed by application, rather than action, is permissive.<sup>24</sup>

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<sup>22</sup> *Hughes Land Co. v. Manitoba*, [1999] 3 W.W.R. 483; 167 D.L.R. (4th) 652 (Man. C.A.).

<sup>23</sup> The case law is reviewed in *Edmonton Telephone Corp. v. Stephenson* (1994), 160 A.R. 352, 24 Alta. L.R. (3d) 96 (Q.B.); aff'd (1994), 162 A.R. 139, 26 Alta. L.R. (3d) 33 (C.A.), leave to appeal dismissed (1995), 26 Alta. L.R. (3d) 1 (S.C.C.).

<sup>24</sup> Nova Scotia is an exception. Nova Scotia, *supra* note 11, r 9.01-9.02 states that proceedings “shall” go by originating notice (application) in the specified circumstances.

## **POSITION OF THE GENERAL REWRITE COMMITTEE**

[23] The Committee recognizes that not only the claimant, but also responding parties and the court itself have an interest in the efficient disposition of matters, which would support a mandatory provision rather than leaving the election of action or application to the claimant. However, it is expected that in most cases a claimant will choose the more efficient procedure. Retaining the flexibility of a permissive procedure may accommodate special circumstances, such as where there may be disputed facts or where it may be convenient to combine relief that could be claimed in an application with related claims in an action. Thus, the Committee favours a permissive rule.

### **3. Categories of applications: no factual dispute**

#### **ISSUE No. 7**

#### **Should a broad functional provision permit applications where there is no factual dispute?**

[24] A common theme across jurisdictions is that applications are appropriately used where factual disputes are unlikely. Alberta, British Columbia and Saskatchewan are the only jurisdictions that do not have broad statements that “any matter” without facts in dispute may proceed as an application. Manitoba, the Northwest Territories, Ontario, New Brunswick, Nova Scotia and Prince Edward Island all provide for applications where material/substantial factual disputes are unlikely, as do the new English rules.<sup>25</sup> Holmested and Watson describe this as a change from a “pigeon-hole approach” to a functional test.<sup>26</sup>

[25] Alberta Rule 410(e) permits applications where there are “no material facts in dispute,” provided two additional criteria are satisfied. The parties’ rights must depend on the interpretation of a written instrument or legislation, and the court must be able to give a declaration, which is the only form of relief permitted.

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<sup>25</sup> United Kingdom, *supra* note 6, r. 8.1(2)

<sup>26</sup> G.S. Holmested et al., *Holmested and Watson Ontario Civil Procedure*, looseleaf (Toronto: Carswell, 1984) at 14-16.

[26] Whether factual disputes will preclude an originating notice application depends on whether the issues “may as a matter of expediency be tried and adjudged on affidavit evidence” or “whether there is a sufficient likelihood of relevant evidence being admitted at trial which will significantly assist the Court . . . to warrant the expense and delay of a full trial process”.<sup>27</sup> The test is functional, in that it is associated with functional differences between proceeding by action and proceeding by application.

[27] But this is only one of three criteria under Rule 410(e). Limiting these applications to declaratory remedies raises a number of additional issues, which are not related to functional differences in the forms of procedure.<sup>28</sup> Further complications can arise from the requirement of Rule 410(e) that the parties’ rights turn on the interpretation of a written instrument or statute, order-in-council or regulation.<sup>29</sup>

[28] Rule 410(e) is very restrictive as compared with the rules of other Canadian jurisdictions. As noted above, Alberta, British Columbia and Saskatchewan are the only jurisdictions that do not have broad statements that any matter without facts in dispute may go by way of application. Saskatchewan and British Columbia require that the sole or principal question at issue be the interpretation of a document, but do not refer to the other criteria.<sup>30</sup> Remedial limits are not common in other rules. Some jurisdictions expressly permit injunctions, mandatory orders, declarations, receiverships and other remedies as ancillary relief in applications.<sup>31</sup>

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<sup>27</sup> *Harvie v. Calgary (City) Regional Planning Commission* (1978), 12 A.R. 505, 94 D.L.R. (3d) 49, 8 Alta. L.R. (2d) 166 (S.C.A.D.) and *Edmonton Telephone Corp. v. Stephenson*, *supra* note 23, respectively. See also *Gainers Inc. v. Alberta (Pork Producers’ Marketing Board)* (1985), 59 A.R. 35 (Q.B.).

<sup>28</sup> *Edmonton Telephone Corp. v. Stephenson*, *supra* note 23: the question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; and the person raising the questions must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

<sup>29</sup> This includes a by-law (*Barke v. Calgary (City)* (1993), 7 Alta. L.R. (3d) 396, 139 A.R. 15 (Q.B.)) or resolution (*Edmonton Telephones Corp. v. Stephenson*, *supra* note 23).

<sup>30</sup> Saskatchewan, *Queen’s Bench Rules* [hereinafter “Saskatchewan”], r. 452(a) and British Columbia, *supra* note 7, r. 10(1)(b).

<sup>31</sup> Ontario, *supra* note 2, r.14.05(3)(g); New Brunswick, *Rules of Court* [hereinafter “New Brunswick”], r.16.04(i); Prince Edward Island, *Rules of Civil Procedure* [hereinafter “Prince Edward Island”],

## **POSITION OF THE GENERAL REWRITE COMMITTEE**

[29] The Committee believes that we should adopt the approach now used in most provinces, allowing applications where no significant factual disputes exist, without limiting the circumstances to the interpretation of documents or declaratory relief. In other words, the rules should adopt a functional approach to when an application is available. This is in line with a liberal approach to the availability of applications, and consistent with the Rules Project objective of promoting proceedings that are accessible, timely and cost effective, as well as fair. It also simplifies and shortens the rule, by replacing a large number of “pigeon-hole” categories with one functional test.

## **ISSUE No. 8**

### **What functional test should be used to determine the absence of a factual dispute?**

[30] The tests employed in the Canadian rules that employ a functional approach are set out in Chart B.<sup>32</sup> The Committee considered whether it should attempt to devise a new and broader test, permitting the use of applications where there may be factual disputes, but the matter could nonetheless fairly be resolved by application. But there was concern about the uncertainty that would accompany the adoption of a new test. There is a substantial body of case law regarding the current tests.

[31] One broader test considered by the Committee is that contained in the new summary trial rules. Summary trial procedure is available where a court is able “to find the facts necessary to decide the issues of fact and law” and where it would not be “unjust to decide the issues on a summary trial”.<sup>33</sup> However, summary trials usually occur after pleadings and discovery. Thus they will be suitable for a broader range of cases than originating notice applications, which do not provide the same opportunity for defining issues and developing facts.

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<sup>31</sup> (...continued)

r.14.05(3)(g); Manitoba, *Court of Queen's Bench Rules* [hereinafter “Manitoba”], r.14.05(3).

<sup>32</sup> Holmsted & Watson, *supra* note 26 at 14-16, suggest that the two tests are likely equivalent.

<sup>33</sup> Alberta, *supra* note 3, r. 158.6.

**CHART B**  
**COMMENCING BY APPLICATION WHEN SUBSTANTIAL/  
 MATERIAL FACTS DISPUTES ARE UNLIKELY**  
**COMPARISON OF RULES IN OTHER JURISDICTIONS**

<b>Jurisdiction</b>	<b>Unlikely there will be any material facts in dispute</b>	<b>Unlikely there will be a substantial dispute of fact</b>
British Columbia		
Alberta		
Saskatchewan		
Manitoba	r.14.05(2)(d)	
Ontario	r.14.05(3)(h)	
New Brunswick		r.16.04(j)
Newfoundland		r.5.02(b)
Nova Scotia		r.9.02(b)
Prince Edward Island	r.14.05(3)(h)	
Northwest Territories		r.22(o)
Federal		

**POSITION OF THE GENERAL REWRITE COMMITTEE**

[32] The Committee agreed that the summary trial approach to factual disputes does not provide an appropriate test to determine the availability of proceeding by originating notice. The Committee proposes to employ one of the traditional tests, and favours the relatively plain language 'unlikely to involve a substantial dispute of fact'.

**4. Other categories of applications**

**ISSUE No. 9**

**Should other categories of applications be available despite factual disputes?**

[33] In those jurisdictions which provide that any matter where there are no factual disputes may proceed by application, this provision is read disjunctively from provisions creating other categories of applications. *McKay Estate v. Love*<sup>34</sup> rejected the argument “that the power given under all of the paragraphs in Rule 14.05(3) should not be exercised where there were material facts in dispute”:

[T]hat would impose para. (h) as a condition to hear any matter under the preceding paragraphs. This would be clearly contrary to the disjunctive wording of subs. (3). I believe that the court has power to hear an application under paras. (a) to (g) inclusive, even if there are material facts in dispute. This does not mean that in an appropriate case the court may [not] decide to direct the trial of an issue, or otherwise deal with the application.

[34] The situation regarding disputed facts under subparagraph (e) and other parts of Rule 410 was distinguished in *Harvie v. Calgary (City) Regional Planning Commission*.<sup>35</sup>

The Rules of Court provide for procedures by which civil causes of action may be brought to Court and judgment. Of these, the statement of claim is, generally speaking, all-inclusive with the full panoply of pleadings, discovery and the like. The originating notice of motion, sanctioned by Rule 410, is limited to causes in which, *prima facie*, the issue may as a matter of expediency be tried and adjudged on affidavit evidence; but, with one exception, provision is made for cases in which, on the application, it is apparent to the Judge that the issues must be specifically defined and contentious facts material to those issues tried on *viva voce* evidence. The exception is Rule 410(e) which is limited in scope and is not available if material facts are in dispute.

[35] *Nordstrom v. Baumann*<sup>36</sup> indicates that the proposition that serious issues of fact or law should not be dealt with on originating application is a rule of practice only, not of jurisdiction. This British Columbia case dealt with a rule allowing an application for the determination of a question affecting the rights or interests of a person claiming an interest in estate or trust property. It was held that while the application procedure was not “primarily designed for the purpose of having seriously contested

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<sup>34</sup> *Supra* note 21 at 514. See, to the same effect, *Blair Athol Farms Ltd. v. Black*, *supra* note 20 and *Hughes Land Co. v. Manitoba*, *supra* note 22.

<sup>35</sup> *Supra* note 27.

<sup>36</sup> [1962] S.C.R. 147.

questions of fact determined,” the judge would nevertheless have jurisdiction to determine a contested question of fact when so raised.

[36] The existence of facts in issue will, however, be the dominant factor governing the court’s discretion to direct the trial of a question arising in an application under Rule 409. Stevenson & Côté note that:

The procedure to follow then is not well known. The court should either define the precise questions to be tried, or direct the exchange of pleadings. And it should direct who has the onus of proof. If the court directs pleadings, then the party who has the onus of proof should file a document called "Statement of the Plaintiff’s Claim". This is *not* a statement of claim, and does not start a new proceeding, and uses the action number of the existing suit (originating notice) and there is no fee for filing it. It has no notice to defendant on the back, but otherwise alleges facts much the way that a statement of claim would. Its prayer for relief may be somewhat different. And at the end it would not say that it was issued, and the Clerk would not sign or seal it.<sup>37</sup>

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[37] The Committee proposes that other categories of applications should continue to be available despite factual issues. The existence of facts in issue may, however, cause the court to exercise its discretion to direct the trial of a question arising in an application. It may be appropriate to make explicit provision in the rules for the procedure then to be followed.

#### **5. Other categories: where provided by statute**

### **ISSUE No. 10**

#### **What types of statutory references should be included?**

[38] Rules 6(2) and 410(d) indicate that proceedings may be commenced by originating notice where this is provided by statute or in the Rules. In addition, Rule 6(3) provides for proceedings by the issuance of a petition where permitted by statute and Rules 394-394 set out a special application procedure for use “where by statute or regulation the court or a judge is designated as having authority to issue any certificate

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<sup>37</sup> *Alberta Civil Procedure Handbook 2002*, *supra* note 17. The use of this procedure was directed in *Trebell v. Hartwig* [2000] A.J. No. 1325.

or make any direction or order (otherwise than in any action), and no procedure for an application . . . is provided”. In the discussion above (Issues Nos. 3 and 4) the Committee proposed dispensing with the latter two forms of commencement and providing for the use of an originating notice where statutes refer to a petition or, more commonly, where no procedure for an application is provided by statute.

[39] There are a number of forms of statutory references in other rules.<sup>38</sup>

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[40] The Committee proposes that an originating notice should be employed where a statute or rule explicitly or implicitly authorizes this. The statutory reference should be sufficiently broad to ensure that it covers matters now dealt with by the petition or special application procedures.

### **6. Other categories: proceedings with no respondent**

#### **ISSUE No. 11**

#### **Should there be reference to proceedings where there is no person against whom relief is sought or the person is unknown or unascertained?**

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[41] In the discussion of Issue No. 3, the Committee proposed dispensing with the petition and ensuring that matters formerly commenced by petition may be commenced by originating notice. Accordingly, there should be a category of application that would reflect this.

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<sup>38</sup> British Columbia, *supra* note 7, r. 10(1)(a): where “an application is authorized to be made to the court”. Ontario, *supra* note 2, r. 14.05(2): proceed by application “if a statute so authorizes”. Manitoba, *supra* note 31, r. 14.05(2)(b): “where a statute authorizes an application, appeal or motion to the court and does not require the commencement of an action”. Nova Scotia, *supra* note 11, r. 9.02(c): originating notice employed for proceedings which “may be commenced by an originating application, originating motion, originating summons, petition, or otherwise under an enactment”.

## 7. Other categories: construction of documents

### ISSUE No. 12

#### Should there be a specific category for proceedings regarding the construction of documents?

[42] In addition to making provision for applications where there is no factual dispute, Ontario, New Brunswick, Prince Edward Island and Manitoba permit applications where “the determination of rights depends on the interpretation” of listed documents.<sup>39</sup> Nova Scotia also makes provision for circumstances where there is no factual dispute, and those where the “sole” or “principal” question is a question of law or construction. Is this a useful additional category? This depends on whether questions of construction may be determined by application when facts are in dispute. If not, these applications will be included in the general functional provision.

[43] Nova Scotia and Ontario courts have held that questions of construction should not be determined by application where there are substantial factual disputes.<sup>40</sup> This has been the case in Alberta, as well, due to the provisions of Rule 410(e).

#### POSITION OF THE GENERAL REWRITE COMMITTEE

[44] The Committee proposes that there be no special provision for proceedings regarding the construction of documents. Rather, these applications would be included in the general functional approach, provided no significant factual dispute is involved.

## 8. Other categories: proceedings related to land

### ISSUE No. 13

#### Should there be a category or categories for proceedings related to land?

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<sup>39</sup> See for example Ontario, *supra* note 2, r. 14.05(d).

<sup>40</sup> *Chisholm v. Equisure Financial Network Inc.* (1998), 167 N.S.R. (2d) 134 at paras. 13-14 (N.S. S.C.); *Dorey v. HongKong Bank of Canada* (1991), 107 N.S.R. (2d) 29 at para. 18 (N.S. S.C. (T.D.)); *Baker v. Chrysler Canada Ltd.* (1996), 6 C.P.C. (4th) 346 (Ont. Gen. Div.) (although *McKay Estates v. Love*, *supra* note 21, was not mentioned, it was thus effectively distinguished).

[45] Alberta provides for commencement by originating notice under Rule 410 for proceedings:

- (a) to recover possession of land;
- (c) relating to land, including declarations of interests, charges or priorities and cancellation of certificates of title;
- (i) to compel partition of land.

[46] The Northwest Territories has the same list.<sup>41</sup> British Columbia, Ontario, Manitoba, New Brunswick, and Prince Edward Island have shorter lists.<sup>42</sup> Nova Scotia and Saskatchewan do not refer to proceedings related to land.

[47] Many of these cases will also invoke statutory provisions. For example, the *Land Titles Act*, s. 190 refers to proceedings regarding land and the power of a judge by order to “cancel, correct, substitute or issue a certificate of title or make any memorandum or entry on it”.<sup>43</sup>

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[48] The Committee proposes that there be no special provision for proceedings related to land. These applications would be brought under the statutory reference in some circumstances. As well, they would be included in the general functional approach where there is no significant factual dispute. As discussed under Issue No. 7, the Committee suggests the use of a functional approach. Consistent with this is the use of a small number of broader categories, rather than a large number of “pigeon-hole” categories.

### **9. Other categories: proceedings related to trusts and trustees**

#### **ISSUE No. 14**

#### **Should there be a category or categories for proceedings related to trusts and trustees?**

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<sup>41</sup> Northwest Territories, *supra* note 11, r. 22(a), (d) and (j).

<sup>42</sup> See for example British Columbia, *supra* note 7, r. 10(1)(g) and Ontario, *supra* note 2, r. 14.05(3)(e).

<sup>43</sup> *Supra* note 13. See also s.184 noted under Issue No. 3.

[49] Alberta provides for commencement by originating notice under Rule 410 for proceedings:

- (b) for the appointment of a trustee;
- (f) for advice or directions pursuant to *The Trustee Act*;
- (g) to fix the compensation of a trustee;
- (h) to approve an arrangement for the variation of a trust.

[50] The Northwest Territories has a virtually identical list.<sup>44</sup> Other provinces have varied lists.<sup>45</sup> Nova Scotia does not specifically mention proceedings related to trusts and trustees.

[51] The *Trustee Act* has numerous provisions that refer to applications to or orders of the Court of Queen's Bench that would appear to cover all of the areas referred to in Rule 410, as well as other matters.<sup>46</sup>

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[52] In common with its approach to Issue No. 13, the Committee proposes that there be no special provision for proceedings related to trusts and trustees. These applications would be brought under the statutory reference in most circumstances. As well, they would be included in the general functional approach where there is no significant factual dispute.

#### **10. Other categories: proceedings under the *Arbitration Act***

### **ISSUE No. 15**

#### **Should there be a category or categories for proceedings under the *Arbitration Act*?**

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<sup>44</sup> Northwest Territories, *supra* note 11, r. 22(b), (c), (h) and (i).

<sup>45</sup> For example see Saskatchewan, *supra* note 30, r. 452(b), (c) and (d) and British Columbia, *supra* note 7, r. 10(1)(d).

<sup>46</sup> R.S.A. 2000, c. T-8. See, e.g., ss. 14 (substitute trustee), 15 (application for discharge), 16 (order appointing new trustee), 21 (purchase and sale powers conferred by court), 40 (payment into court), 42 (variation of trusts), 43 (application to court for advice) and 44 (allowances).

[53] Including a subsection for proceedings that may be brought to court under the *Arbitration Act* is a practice unique to Alberta (Rule 410(i.1)).

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[54] In common with its approach to Issues Nos. 13 and 14, the Committee proposes that there be no special provision for proceedings under the *Arbitration Act*. These applications would be brought under the statutory reference.

### **11. Other categories: miscellaneous**

#### **ISSUE No. 16**

##### **Are there other categories that should be specified?**

[55] Ontario provides for an application "for a remedy under the *Charter of Rights and Freedoms*" (Rule 14.05(3)(g.1)). British Columbia provides for an application for court relief, advice or direction to determine claims of solicitor and client privilege (Rule 10(1)(h)).

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[56] The Committee did not think that specific provision need be made for applications relating to the *Charter* or to solicitor and client privilege. They should be dealt with like other applications, without special mention. A specific provision would be contrary to the functional approach that the Committee proposes.<sup>47</sup>

### **F. Summary**

[57] The General Rewrite Committee is of the view that the distinction between actions and applications should be retained, as there are situations in which it is useful to commence a proceeding as an application. The Committee favours having two ways to commence proceedings: one for actions and one for applications. The familiar terms, "statement of claim" and "originating notice," should be retained.

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<sup>47</sup> Alberta, *supra* note 3, r. 410(j) (estate proceedings) will be addressed at a later date by a specialized committee.

[58] The Committee proposes to discard the archaic petition, and provide that in circumstances previously calling for the use of a petition, applications should be commenced by originating notice. Similarly, the special procedure in Rules 394-395 should be dispensed with, and applications formerly brought under this procedure should be commenced by originating notice.

[59] The Committee proposes that there should be three stated situations in which an application may be commenced by originating notice:

- (1) where a statute or rule explicitly or implicitly authorizes this;<sup>48</sup>
- (2) where there is unlikely to be a substantial dispute of fact;
- (3) where there is no one to serve as respondent.

These are alternative categories. Originating notices can be used in categories (1) and (3) even if there are facts in dispute. However, the existence of facts in issue may cause the court to exercise its discretion to direct the trial of a question arising in an application.

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<sup>48</sup> The Committee is not proposing that this precise language be employed in the rule. This is offered simply as a short description of the intended effect of the proposed rule. Current rules to similar effect are referred to in section E.5 above.

## CHAPTER 2. PLACE OF COMMENCEMENT

### A. Introduction

[60] Rules governing the place of commencement of an action within a jurisdiction determine one aspect of civil venue. Canadian rules regarding civil venue are “far from uniform”.<sup>49</sup> Limits on the place of trial are more common than limits on the place of commencement of proceedings.<sup>50</sup> All provinces provide for court discretion to change venue. In Alberta, this discretion is exercised when the balance of convenience indicates that a change would be appropriate.<sup>51</sup>

[61] Venue rules determine the presumptive venue by relying on grounds such as where the subject of an action is situate, where the parties reside or carry on business or where the cause of action arose.

[62] A consideration of venue rules thus entails a determination of what aspects of venue, such as place of commencement or place of trial, should be regulated, and on what grounds.

### B. Alberta Venue Rules

[63] Alberta venue rules distinguish between the place of commencement and the place of trial (respectively, Rules 6.1 and 237). Other than trial, the venue for commencement governs “all proceedings in a cause or matter” (Rule 716). However, as noted in *Stevenson & Côté, Alberta Civil Procedure Handbook 2002*, this is mitigated by a number of rules that provide for communication by mail, fax or telephone.<sup>52</sup>

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<sup>49</sup> J. Twohig & J. Pawson, “Civil Venue in Ontario” (1997) 19 *Advoc. Q.* 129.

<sup>50</sup> Ontario is the only province with separate rules for the place of hearing of motions. They provide, in general, that a contested motion should be brought in the location of the respondent’s solicitor: Ontario, *supra* note 2, r. 37.03.

<sup>51</sup> *R.F.B. v. T.L.B.* (1990), 105 A.R. 67 at 69-70.

<sup>52</sup> *Supra* note 17 at 21.

[64] Venue for commencement is the judicial centre closest to the residences or places of business of the parties (if the party is a business with more than one location, the one where the dealings in question took place is the relevant one). If a judicial centre cannot be thus determined, the plaintiff has a choice of judicial centre. These general rules are subject to change by court order or agreement of the parties (Rules 6.1(3) and 12).

[65] The place of trial is that proposed by the plaintiff. However, where the cause of action arose and the parties reside in the same judicial district, the named place of trial shall be in that judicial district. Also, the named place of trial for claims of possession of land will be where the land is situated. Again the court can order otherwise (Rule 237(d)).

[66] Alberta Rule 6.1 followed extensive consideration by the Alberta Rules of Court Committee over a number of years. The issue was opened in the 1980's by a number of lawyers and bar associations in Medicine Hat, Grande Prairie, Drumheller and Fort McMurray arguing that Rule 237 was not a sufficient restriction on the venue for foreclosure (and other) actions, as it addressed place of trial only, so that actions could be commenced, and often resolved as a result of chambers motions, in Edmonton and Calgary. It was argued that this caused hardship to rural defendants, as well as loss of business for the rural Bar.

[67] The matter was on the agenda of the Rules of Court Committee for a number of years. The Committee chose to deal with the issue broadly, as applied to all actions, rather than just foreclosures. The Committee considered whether venue for commencement should be subject to the provisions of Rule 237. The basic approach of Rule 237 was followed in certain respects, in that venue was limited by a *prima facie* rule subject to variation by agreement or court order. However the grounds for the *prima facie* rule were varied, to refer to the mutual residence of the parties, but not to the place where the cause of action arose or where land is situated. This reflects the balance of convenience test for determining venue, which focuses on the location of parties and witnesses. As noted in the *Alberta Civil Procedure Handbook 2002*

annotation to Rule 237, “no case acts on where the cause of action arose, still less on where property is: those are pointless formalisms”.<sup>53</sup>

[68] In 1996 an article in the *Benchers’ Advisory* described the proposed Rule 6.1. In response, a number of letters were sent to the Rules of Court Committee and the Law Society, objecting to the change. Institutional lenders and lawyers acting for them argued that the cost of litigation would be increased if they were unable to centralize their litigation, and that these increased costs would be passed on to debtors. On the other hand, members of the rural Bar expressed their concern to see the change implemented. Rule 6.1 came into effect that year.

[69] During the Rules Project consultation we heard continued concern from the rural bar that actions relating to persons and business dealings in their areas continue to be commenced in Edmonton and Calgary, rather than locally. It was pointed out that this raises access to justice concerns for both unrepresented and represented litigants. It was suggested that Rule 6.1 has not made the needed change. An excerpt from the Report on the Legal Community Consultation follows:

The concern raised here was the ability of plaintiffs to commence actions in whichever jurisdiction is most convenient to them regardless of the impact upon other parties and lack of connection with the lawsuit. Respondents commented that you don’t get costs even when the venue rule is clearly violated and lawyers who do comply with the rule are punished because the case doesn’t proceed as quickly and it is more costly to the clients. . . Respondents commented that consideration must be given to requiring actions to be commenced in the jurisdiction having the most connection with the action:

1. Foreclosures- where the land is located or the debtor resides
2. Collections - where the debt arose or where the debtor resides
3. Other actions - where the subject matter of the dispute is located

### **C. Other Canadian Jurisdictions**

[70] Canadian rules vary in the type of limits placed, whether relating to the parties’ residence or where the cause of action arose, and sometimes dependant on the type of action involved. Generally, however, “all provinces give discretion to the court to

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<sup>53</sup> *Supra* note 17 at 196.

change venue if circumstances seem to require it.”<sup>54</sup> Limits on the place of trial are more common than limits on the place of commencement of proceedings. In the latter category, Manitoba and Saskatchewan both restrict actions to the judicial centre nearest where the cause of action arose or where the defendant(s) reside or carry on business.<sup>55</sup>

[71] While Ontario does not restrict the place of commencement of an action, the matter has been under consideration by their Civil Rules Committee.<sup>56</sup>

## D. Restricting the Plaintiff’s Choice

### ISSUE No. 17

#### **Should the rules continue to limit the plaintiff’s choice as to the place of commencement of actions?**

[72] It has been argued that allowing plaintiffs to choose venue may lead to abuse of the judicial system, as plaintiffs may “commence actions in places that have no connection to the parties or to the dispute to inconvenience defendants and to increase

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<sup>54</sup> J. Twohig & J. Pawson, *supra* note 49 at 145.

<sup>55</sup> Saskatchewan: *Queen’s Bench Act, 1998*, SS. 1998, ch. Q-1.01, ss. 22-24. Manitoba, *supra* note 31, r. 14.08. Both jurisdictions provide that an action commenced elsewhere will be transferred upon request by the defendant.

<sup>56</sup> Ontario Civil Rules Committee *Consultation Paper - Venue*, online: <<http://www.ontariocourts.on.ca/notices/venue.htm>> (last accessed: 19 July 2002) [hereinafter *Venue*], describes current Ontario rules and proposals for change.

The reform of venue rules has been before the Ontario Civil Rules Committee for some time. Materials provided to ALRI by the Ontario Rules Secretariat describe a debate similar to that before the Alberta Rules of Court Committee, with the additional element that the courts themselves have sought changes to venue rules in order to rationalize the demands placed on particular courts. A decade ago, the primary concern came from Toronto courts regarding overuse for cases not connected with Toronto. In more recent years, due to significant delays in Toronto courts, it is argued that there is overuse of courts in regions adjacent to Toronto.

The issue of venue was referred to the Ontario Committee in 1990. It was featured in the *Ontario Civil Justice Review, 1996*, *supra* note 1. The issue has returned to prominence recently. At the opening of the courts in 2001, Chief Justice Lesage C.J. called for reform of venue rules. This was followed by the Committee’s *Consultation Paper*, recommending that certain actions (debt, recovery of land or personal property, foreclosure) be commenced where a defendant resides. The Committee has not yet concluded its consideration of venue.

the likelihood of default judgments.”<sup>57</sup> While improper motives have not been suggested in the Alberta context, the increased cost to rural defendants in foreclosure and debt actions has been raised, and has the potential to cause such an effect.

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[73] There are solid policy reasons for restricting the plaintiff’s choice of venue, and ensuring that the venue of a proceeding takes into account the defendant’s convenience and other concerns. These policy reasons have led most jurisdictions to restrict venue, at least with respect to trial, and a number of jurisdictions to restrict venue with respect to the commencement of proceedings and interlocutory motions.

[74] Of course, lawyers are not disinterested in this issue, and it is recognized that the personal interests of members of the Bar may influence their views. But venue concerns go beyond the Bar, and directly affect parties and their ability to pursue or defend proceedings at a reasonable cost.

[75] Rule 6.1 was added recently after a long process before the Rules of Court Committee. It was in response to long-standing complaints from the rural Bar that raised legitimate concerns about access to justice for rural defendants. Those complaints and concerns have currency today. The Committee is of the view that the basic policy decision that there should be some limit on the plaintiff’s choice of venue is well-founded and should not be revisited.

#### **ISSUE No. 18**

**Should the rules continue to provide a *prima facie* place of commencement in certain circumstances, and allow for changes by agreement or court order?**

[76] This issue relates to how the limitation is to be imposed. Rule 6.1 imposes a *prima facie* rule subject to variation by agreement or court order.

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<sup>57</sup> *Venue, ibid.*

**POSITION OF THE GENERAL REWRITE COMMITTEE**

[77] This is consistent with the familiar approach of Rule 237 and was not the subject of negative commentary. There does not seem to be any reason to change this approach.

**E. Factors Governing Place of Commencement and Trial****ISSUE No. 19**

**What factors should govern the *prima facie* place of commencement?**

**ISSUE No. 20**

**Should there be a different rule for the place of trial, or should it be governed by the place of commencement rule?**

[78] The various policy considerations surrounding venue suggest that certain grounds for the determination of venue are more appropriate than others. For example, it has been suggested that the location of property that is the subject of an action *is* an appropriate ground for venue, because courts can supervise the attachment and delivery of the property; it also allows for taking a view during trial. Where the defendant resides or has a place of business is a sound consideration because it curbs a plaintiff's potential to abuse the suit and it serves the convenience of the defendant and witnesses. Considering the plaintiff's residence is also appropriate as it may be convenient for the plaintiff's witnesses. Conversely, it is argued that the ground of "where the cause of action arose" should not be employed as it gives rise to many difficulties in interpretation, and is unrelated to the convenience of parties or witnesses.<sup>58</sup>

[79] Rule 6.1 provides the approach that only dual residence overcomes the plaintiff's choice as a basis for venue. Rule 237 provides that either dual residence (combined with the place the cause of action arose), *or* the place where land is located, overcome the plaintiff's choice.

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<sup>58</sup> J. Twohig & J. Pawson, *supra* note 49 at 140.

[80] Most jurisdictions in Canada do not place *prima facie* limits on the place of commencement of an action. However, in Saskatchewan and Manitoba actions are to be commenced where the cause of action arose or where a defendant resides or carries on business. The Ontario *Consultation Paper* suggested this approach for debt actions, foreclosure actions, and actions for the recovery of land or personal property.

[81] The limit imposed by Rule 6.1 prevents a plaintiff from selecting a location with no connection with the lawsuit, rather than a location where both parties reside or carry on business. However, where there are competing connections, as where the parties reside in different locations, the plaintiff's choice prevails (unless set aside by the court on a particularized consideration of the balance of convenience). This contrasts with the situation in Saskatchewan and Manitoba, where the defendant's convenience prevails. But to reverse the presumption from plaintiff's convenience to defendant's convenience would not always advance access to justice concerns. In consumer actions, it might have a negative effect. In commercial actions, it would simply change the current default rule without any clear policy justification. This would not be the case if the rule were limited to debt and foreclosure actions, as in the Ontario proposal, but that approach gives rise to potential complexity in the need to categorize actions.

[82] Although Alberta has different rules as to place of trial and place of commencement it may be that this is more a reflection of historical accident than policy considerations. When the court considers the circumstances of a particular case, it may conclude that different venues are appropriate for different stages of the action.<sup>59</sup> But, as a general rule, there is nothing to suggest that there should be different *prima facie* rules to determine the place where an action is commenced, where applications are heard, and where the trial is held. Academic literature on venue

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<sup>59</sup> In *Fountain Tire (Valleyview) Ltd. v. Elm Oilpatch Rentals Ltd.* (1998), 221 A.R. 55 at para. 23 (Q.B.), it was held that "the proper test to apply is that of the balance of convenience, but such a test is applied separately to the proceedings as distinct from the trial proper". In *Blue River Heavy Hauling Ltd. v. Cal-Van Auctioneering Ltd.* (1987), 87 A.R. 67 (Q.B.) and *Van Horn v. Coal Valley Systems Ltd.* (1987), 78 A.R. 203 (Q.B.), the balance of convenience test was considered in relation to the relevant aspect of an action, whether examination for discovery, interlocutory applications, or trial.

suggests that commencement of proceedings and venue should be considered together; that there is “little point in splitting the rules” in this regard.<sup>60</sup>

[83] The primary difference between the grounds for selection of venue in Rule 6.1 and Rule 237 is that only the latter refers to the place where land is situated, in actions where possession of the land is claimed. Is there a good reason for the resulting distinction between the place of trial and the place for applications or motions? It would seem not. Considerations regarding the attachment and supervision of property suggest that local treatment is preferable, and commonly arise in applications and motions, as well as trial.<sup>61</sup>

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[84] The Committee noted that it seems the rural bar is not satisfied that Rule 6.1 is accomplishing what it was supposed to. There are two problems: the rule is not enforced and the rule is not defendant-friendly. There was debate as to whether venue remains the problem it was twenty years ago, given that one can now file by fax and make telephone applications. But it seems that venue for interlocutory matters is still problematic.

[85] The Committee reached consensus that one of the categories to determine place of commencement should be the location of land for which possession is disputed. Rule 237 has such a category for determining the place of trial. The Committee noted that, if actions were required to be commenced in the judicial centre nearest the land, this would resolve the problems raised by the rural bar for foreclosure actions (although not for debt actions). Further, this would have the advantage of reconciling the different approaches under Rule 6.1 and Rule 237. It was agreed that it makes no sense to dictate the place of trial for foreclosure actions but not the place of commencement or applications, because foreclosure matters typically do not end up in trial.

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<sup>60</sup> J. Twohig & J. Pawson, *supra* note 49 at 155.

<sup>61</sup> *Ibid.*

[86] The Committee proposes that Rule 6.1 and Rule 237 be rolled into a single provision that would contain a reference to the location of land as currently found in Rule 237. The place of commencement should govern applications and trial. This would not result in any venue rule changes for debt actions and the Committee agrees with that outcome.

## **F. Consequences of Noncompliance**

### **ISSUE No. 21**

#### **How should non-compliance with the rule as to place of commencement be dealt with?**

[87] If an action is commenced in violation of Rule 6.1, the commencement is not invalid (Rule 6.1(4)). The court can give directions and order costs as it considers appropriate (Rule 6.1(5)).

[88] The comments from the Bar suggest that this is not an effective method of dealing with non-compliance, that costs or other sanctions are not imposed, and that it is unduly onerous for impecunious defendants to have to seek a court order to transfer proceedings.

[89] Another model is that used in Saskatchewan and Manitoba and proposed in the Ontario *Consultation Paper*, in which a defendant may, by filing a notice or requisition, require the Registrar to transfer the action.

### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[90] The Committee considered the model of simply filing a notice to require the Registrar to transfer an action. There were concerns expressed about whether it would be apparent (apart from actions concerning land) that an action has been commenced in the wrong place. Thus it was thought that this would be better handled by the objecting party going to court and getting an order for costs. Although it has been suggested that costs are not consistently awarded, the Committee noted that with the new Schedule C changes, it is up to the Bar to understand that costs are now worth pursuing vigorously. The availability of a significant costs award should resolve this

problem. The Committee therefore proposes that the current method of handling noncompliance need not be changed.

## **G. Transfer Applications**

### **ISSUE No. 22**

#### **What provision should be made for court authority to determine venue?**

[91] It seems clear that there is a need to provide for court discretion to control the venue of an action, or a particular aspect of an action, based on the balance of convenience. This authority is now reflected in three separate rules: Rules 6.1(3), 12 and 237(d).

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[92] The Committee proposes that the court should have the authority to change venue (either because rules were not complied with or overriding the rules on the basis of balance of convenience). There should be just one provision in the rules regarding this authority.

## **H. Summary**

[93] The Committee proposes that Rule 6.1 and Rule 237 be rolled into a single provision that would contain reference to the dual residence of parties as currently found in Rule 6.1 and to the location of land as found in Rule 237. The place of commencement should govern applications and trial. The court should continue to have overriding jurisdiction to alter venue in appropriate circumstances.

## CHAPTER 3. SERVICE WITHIN ALBERTA

### A. Introduction

[94] Service of process has traditionally performed two functions, both of which should be taken into consideration when reflecting on the adequacy of service rules:

1. The court acquires territorial jurisdiction over persons at common law by serving them in accordance with its procedural law. Jurisdiction may also be based on consent or submission.
2. Service provides affected persons with notice of proceedings and an opportunity to be heard.

[95] In a series of decisions dealing with conflict of laws issues, the Supreme Court of Canada has ruled that there is a constitutional limit on the territorial jurisdiction that may be granted pursuant to provincial legislative authority: there must be a “real and substantial connection” between the territory and the litigation.<sup>62</sup> Reflecting these developments, the Uniform Law Conference of Canada has proposed in the *Uniform Court Jurisdiction and Proceedings Transfer Act* that territorial jurisdiction be determined by the presence of: consent or submission, ordinary residence of the defendant, or a real and substantial connection with the subject matter of the litigation.<sup>63</sup>

### B. Personal Service

[96] Alberta Rule 14 prescribes personal service for documents “by which an action or other proceeding is commenced” (Rule 14). Service will only need to be proved if the plaintiff proceeds by default (Part 10). Where an action is defended, this is a submission to the jurisdiction of the court rendering proof of service unnecessary. Specific methods of personal service are prescribed for individuals, corporations and partnerships in Rule 15. Subsequent rules (Rules 16, 20, 21 and 22) provide

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<sup>62</sup> *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc.*, [(1993)4 S.C.R. 289, 109 D.L.R. (4th) 16; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, S.C.J. No. 110, 120 D.L.R. (4th) 289; *Amchem Products Inc. v. British Columbia (W.C.B.)*, [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96 [hereinafter *Amchem*].

<sup>63</sup> Uniform Law Conference of Canada, *Proceedings of the Seventy-Sixth Annual Meeting* held at Charlottetown, Prince Edward Island, August 1994 at 48 [hereinafter *Uniform Act*]. The Act has been adopted in Saskatchewan (S.S. 1997, c. C-41.1) and in the Yukon (S.Y. 2000, C-7).

alternative methods of personal service (on solicitors or agents, pursuant to agreement or by mail).

## **1. On individuals**

### **a. Leaving a true copy**

## **ISSUE No. 23**

### **Should the rules require that service on an individual in the jurisdiction be restricted to individuals ordinarily resident in the jurisdiction?**

[97] Personal service on an individual is effected by leaving a true copy of the document with the individual (Rule 15(1)). The same description is found in other Canadian rules. This form of personal service is “best” as it ensures that notice of the proceeding has been provided.<sup>64</sup>

[98] The rules do not stipulate that an individual must be resident (or domiciled) here. Service on a person who is a mere visitor to Alberta would likely not constitute a real and substantial connection between this jurisdiction and the litigation, with the result that it would be defective as a means of asserting territorial jurisdiction. Nonetheless, no Canadian rules limit service within the jurisdiction to residents, although this is the approach taken in the *Uniform Act*.<sup>65</sup>

## **POSITION OF THE GENERAL REWRITE COMMITTEE**

[99] The Committee discussed this issue at some length and reached a consensus. It was noted that, should the *Uniform Act* be adopted in Alberta, the service rules will need to be reviewed. In the meantime, concerns arising from private international law and constitutional law should continue to be dealt with by the courts as issues arise, rather than being dealt with in the rules. To attempt to codify this law within the rules would unduly expand the rules and this project. Further, the introduction of the concept of ordinary residence into the rules would encourage more applications about

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<sup>64</sup> Holmsted & Watson, *supra* note 26 at 16-16.

<sup>65</sup> *Supra* note 56.

service, which could increase delay and expense. Therefore, the Committee does not propose that service on an individual in Alberta be restricted to persons resident here.

***b. At the residence***

**ISSUE No. 24**

**Should service of an individual by serving any adult person at their residence and also mailing to the residence be incorporated in the rules?**

[100] Personal service can be “cumbersome, time-consuming and expensive”.<sup>66</sup> Thus alternative forms of service are useful, provided they meet the objective of ensuring that the defendant knows, or reasonably should know, about the proceedings.<sup>67</sup>

[101] A number of Canadian jurisdictions make provision for a form of personal service on individuals “by leaving the document with an adult person residing at the individual’s place of residence, and mailing a copy of the document to the individual at that address”.<sup>68</sup>

[102] Service on an individual’s residence can be ordered under Alberta Rule 23. But a rule similar to that described above would eliminate the requirement to obtain a court order and reduce the need for multiple attempts at service. Other jurisdictions have implicitly accepted that this form of service meets the objective of ensuring that the defendant knows, or reasonably should know, about the proceedings. There is also a similar form of service (without the mailing requirement) in the *Provincial Court Act*, which provides for service to be made “either personally or by leaving a copy of the

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Orazio v. Ciulla* (1966), 57 W.W.R. 641 (B.C.S.C.) and other cases cited in A.A. Fradsham, *Alberta Rules of Court Annotated 2002* (Toronto : Carswell, 2001) at 28-29 deal with the objective of service.

<sup>68</sup> *Federal Court Rules* [hereinafter “Federal”], r. 128(1)(b). See also Ontario, *supra* note 2 r. 16.03 and British Columbia, *supra* note 7, r. 12(4) and (5). These rules make specific provision for the time when such service becomes effective. The time for service by mail in Alberta is governed by the *Interpretation Act*, R.S.A. 2000, c. I-8, s. 23, which provides that service is presumed to be effected 7 days from the date of mailing to an address in Alberta (14 days to an address in Canada), unless the document is returned to the sender or was not received by the addressee, the proof of which lies on the addressee.

document for the person at his most usual place of abode with some resident of the abode apparently 16 years of age or older ”.<sup>69</sup>

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[103] The Committee was of the view that this form of service could save parties significant expense. There is no indication that the similar provision in the *Provincial Court Act* has caused problems. The Committee proposes to adopt such a form of service, including the requirement to mail a copy of the document to the residence. Proper proof of service, including the identity of the adult who was served and confirmation of the residence address, will be explicitly addressed either in the rules or in a prescribed form.

#### **2. On corporations**

#### **ISSUE No. 25**

#### **Should any changes be made to the rules for personal service on corporations?**

[104] Rule 15(2) provides for personal service on a corporation by the statutory procedure (mail service) or the rules procedure (leaving with corporate officers or managers).

[105] The statutory procedure requires either delivery or registered mail to the registered office or post office box designated as the address for service by mail.<sup>70</sup> Service is effective at the time it would be delivered in the ordinary course of mail, unless there are reasonable grounds for believing the corporation did not receive the document then or at all.<sup>71</sup>

[106] The rules procedure requires leaving a true copy with the head officer or a manager of the corporation. Although not explicit in the rules, there may be a

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<sup>69</sup> R.S.A. 2000, c. P-31, s. 29(1).

<sup>70</sup> *Business Corporations Act*, R.S.A. 2000, c. B-9, ss. 256 and 288.

<sup>71</sup> See also the *Interpretation Act*, *supra* note 68, s. 23.

requirement that the corporation be carrying on business in the jurisdiction, and that service on an official who is incidentally in the jurisdiction would not be sufficient.<sup>72</sup> Procedures under other Canadian rules are largely the same.<sup>73</sup>

### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[107] Consistent with its approach regarding individuals, the Committee would not introduce a requirement that a corporation be carrying on business (or resident) in the province. Other than updating the rules language describing corporate officers, the Committee saw no need for change.

### **3. On partnerships**

#### **ISSUE No. 26**

#### **Should any changes be made to the rules for personal service on partnerships?**

[108] Where an action is brought against a firm in the firm name, Rule 15(3) provides that service can be effected on “one or more of the partners” or on “any person at the principal place of business of the firm within the jurisdiction who appears to have management or control of the partnership business there”.<sup>74</sup>

[109] Rules from other jurisdictions are similar. However, the Federal Court Rule 131 specifies that for limited partnerships, service must be on a general partner. This is consistent with the *Partnership Act*, s. 77, which provides that a limited partner is not a proper party to an action brought against the limited partnership.<sup>75</sup>

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<sup>72</sup> See the cases in W.A. Stevenson & J.E. Côté, *Civil Procedure Guide 1996* (Edmonton, Alberta : Juriliber, 1996) at 154-55.

<sup>73</sup> Mail service in Ontario is more limited. The provisions for service on corporate officers or managers in British Columbia and Ontario refer to a place of business in the province. Ontario, *supra* note 2, r. 16.02(1)(c); British Columbia, *supra* note 7, r. 11(2)(b).

<sup>74</sup> Alberta, *supra* note 3, r. 80 provides that partners “carrying on business within the jurisdiction may sue or be sued” in the partnership name. This rule will be addressed in a future Consultation Memorandum.

<sup>75</sup> R.S.A. 2000, c. P-3 (unless the proceeding is to enforce the limited partner’s right against or liability to the limited partnership).

[110] The *Partnership Act* contains provisions for service of LLPs (limited liability partnerships) similar to those for service of corporations.<sup>76</sup> There are no similar provisions for other types of partnerships.

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[111] Consistent with its approach regarding individuals and corporations, the Committee would not include in the rules a requirement that a partnership be carrying on business (or resident) in the province.

[112] It was felt that the lead of the Federal Court should be followed with respect to limited partnerships. Service on limited partnerships should be on the general partner. Limited partners, who may be mere investors, and are not normally proper parties to an action, should not be subject to being served.

[113] As a matter of drafting, a consistent approach should be taken regarding specific incorporation of statutory procedures for service of corporations and partnerships.

#### **4. Other parties<sup>77</sup>**

##### **ISSUE No. 27**

##### **Should specific provisions for service on sole proprietorships, municipalities, the Crown, boards or commissions, or defendants in motor vehicle actions be adopted?**

[114] Rules from other provinces include provisions for service in a number of circumstances not covered by Alberta rules. Ontario Rule 16.02(n) covers a gap in our rules, by providing for service on sole proprietorships. Ontario Rule 16.02(d), referring to boards or commissions, might be a useful addition to our rules.<sup>78</sup> On the other hand,

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<sup>76</sup> *Ibid.*, ss. 92 and 100.

<sup>77</sup> Service on children and adults under a disability will be addressed at a later date, after the General Rewrite Committee concludes its review of Part 6: Parties Under Disability, Alberta, *supra* note 3.

<sup>78</sup> This issue will be dealt with at a later date in the context of a review of Part 56.1: Judicial Review in Civil Matters, Alberta, *supra* note 3.

rules pertaining to service on municipalities and the Crown would appear to be unnecessary, in view of statutory provisions.<sup>79</sup>

[115] One suggestion received during the Legal Community Consultation was that service on an “insurer of record” should be good service on a defendant in a motor vehicle action. Other Canadian rules do not make provision for this type of service.

### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[116] The Committee proposes that the rules provide for service on sole proprietorships, by means parallel to those for service on partnerships. It was not thought that rules for service on municipalities or the Crown need be adopted. As a matter of drafting, however, there should be a consistent approach to the specific incorporation of statutory procedures for service.

[117] After discussion, it was concluded that the rules should not provide for service on an “insurer of record” as this is an ambiguous concept.

## **C. Alternative Methods of Personal Service**

### **1. On a solicitor**

### **ISSUE No. 28**

#### **Should acceptance of service by a solicitor be sufficient for personal service?**

[118] Alberta Rule 16 provides that personal service is unnecessary if a solicitor for a defendant accepts service and undertakes to file a statement of defence or otherwise appear. Acceptance of service under this rule is not the same as admitting service, so use of the usual “service admitted” stamp is not effective.<sup>80</sup> In contrast, the Ontario

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<sup>79</sup> Service on municipalities is dealt with by the *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 607. Service on the Crown is provided for in the *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25, s. 13.

<sup>80</sup> Fradsham, *supra* note 67 at 32.

and Federal rules provide that acceptance of service alone (without an undertaking to appear) is sufficient.<sup>81</sup>

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[119] There was some debate about this. Some members of the Committee expressed concern that the provision in Rule 16 that the solicitor provide an undertaking brings home the significance of this particular acceptance of service. However, it was thought that this should be clear to solicitors in any event. Solicitors deal with service of statements of claim on their offices as registered office for corporate clients. It would be no more difficult to deal appropriately with statements of claim for which they had accepted service. The present rule means that a mere “acceptance of service” is meaningless, and this can result in errors, delay and expense. Therefore, the Committee proposes that acceptance of service alone should be sufficient.

#### **2. On an agent**

#### **ISSUE No. 29**

#### **Should the provision for service on an agent be changed?**

[120] Alberta Rule 20 provides that where a defendant is out of the jurisdiction, but carries on business in the jurisdiction by an agent, and where an action relates to that business, service effected on the agent “is good service on the defendant”. Other provinces have similar rules.<sup>82</sup>

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[121] The Committee proposes that this should be retained as a potentially useful alternative method of service that has not created difficulties for parties or the court.

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<sup>81</sup> Ontario, *supra* note 2, r. 16.03(2); Federal, *supra* note 68, r. 134.

<sup>82</sup> The Ontario, *supra* note 2, r. 16.02 does not stipulate that the action must relate to business carried on by the agent. The British Columbia, *supra* note 7, r. 11(4) requires court leave and notice by mail to the principal.

### 3. By contract

#### **ISSUE No. 30**

#### **Should the provision for service in accordance with contractual stipulations be changed?**

[122] Alberta Rule 21 provides that service per contractual stipulation as to service is sufficient, but does not exclude other acceptable methods of service. Such service also does not exempt parties from Rule 30 (service *ex juris*).

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[123] The Committee proposes that this method of service should be retained.

### 4. “Double registered” mail

#### **ISSUE No. 31**

#### **Should any changes be made with respect to service by mail, acknowledged by receipt?**

[124] Alberta Rule 22 provides for service by “double registered mail”. This is the equivalent of personal service providing there is a post office receipt “purporting to be signed” by the person intended to be served. The receipt has to be filed with proof of service in Form A to the Rules. Service is effective as of the date of the receipt. This form of service may not be used for infants or persons of unsound mind or in actions for divorce or nullity of marriage.

[125] Other jurisdictions have similar rules.<sup>83</sup>

[126] The *Interpretation Act*, s. 24, provides that a reference to “double registered mail, single registered mail, registered mail or certified mail includes any form of mail for which the addressee is required to acknowledge receipt of the mail by providing a signature”.

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<sup>83</sup> Federal, *supra* note 68, r. 128(1)(d) and (3); Ontario, *supra* note 2, r. 16.03(4) and British Columbia, *supra* note 7, r. 12(7) and (8).

## **POSITION OF THE GENERAL REWRITE COMMITTEE**

[127] It was brought to the attention of the Committee that this rule creates significant administrative problems within the court. These result from the fact that “double registered mail” is no longer provided by Canada Post. While it is still possible to obtain a receipt signed by the recipient of mail, this is a more involved process, and it is a frequent occurrence that plaintiffs who serve in this fashion do not obtain such a receipt, so that their “service” is ineffective. This involves significant clerks’ time in explaining the situation, and wasted time and expense for plaintiffs.

[128] It was also suggested that this service may not be as effective in communicating notice to defendants as it would appear on the surface. Signatures by anyone prepared to sign for the document are apparently commonly accepted, without a check as to the identity of the recipient. Further, where signatures are illegible, it is assumed that they “purport” to be signed by the intended recipient.

[129] The Committee noted that as it is proposing an alternative form for serving individuals by leaving documents with an adult at their residence and also sending the documents to them at that address by certified mail (no signature of the recipient being necessary for this), this might replace service under Rule 22 in many cases.

[130] The Committee accordingly reached a consensus that it would propose the elimination of Rule 22. It should be kept in mind that this is a proposal only. Feedback received will be very important to the Committee’s final recommendation.

## **D. Substitutional Service**

### **ISSUE No. 32**

#### **Should the substitutional service rule be changed?**

##### **1. Alberta Rule 23**

[131] Alberta Rule 23(1) provides that where prompt personal service is impractical for any reason, the court can order substituted service or can dispense with service. Subsection (2) sets out requirements of the supporting affidavit: it must show why personal service is impractical and offer an alternative mode which, *in the opinion of*

*the deponent*, is likely to be effective. Service in accordance with the substitutional service order is good personal service (3). Court leave is needed to obtain default judgment (4). There is no stipulation as to when leave may be obtained, and the practice is to obtain leave at the same time as the substitutional service order. Regarding missing persons, the Public Trustee must be served (5).

## 2. Other rules

[132] Ontario Rule 16.04 differs in the following respects. It provides that dispensing with service is done “where necessary in the interests of justice”. There are no stipulations as to the content of the affidavit. There is no requirement for leave to obtain default judgment. There is a provision requiring the court to specify when substitutional service is effective. This is consistent with Alberta practice.<sup>84</sup>

[133] Federal Rule 135 provides that the document served by substitutional service “shall make reference to the order that authorized” this. This is also consistent with Alberta practice. (See also British Columbia Rule 12(3).)

[134] British Columbia Rule 12(1) provides that the court may order substituted service “whether or not there is evidence that the document will probably reach the person,” but does not provide for dispensing with service.

## 3. Case law and commentary

[135] Stevenson & Côté note that:

Dispensing entirely with service of a statement of claim is unusual and should not be done unless the applicant has exhausted all reasonable efforts to locate the defendant, and there is little likelihood that the issues will be disputed. It should not be done if a method of substitutional service is available to the applicant. If such an order is granted, a default judgment may be more easily set aside.<sup>85</sup>

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<sup>84</sup> *Civil Procedure Handbook*, *supra* note 17 at p. 34.

<sup>85</sup> *Civil Procedure Handbook*, *ibid*. See *Gray v. Alberta (Administrator of the Motor Vehicle Accident Claims Act)*, [1986] A.J. No. 411, 71 A.R. 24 at 27, 45 Alta. L.R. (2d) 172 (C.A.) [hereinafter *Gray v. Alberta*]: “Dispensing with service of a statement of claim on a defendant against whom some relief is sought is, almost always, a questionable procedure”. Further, see *D.C.L. v. S.M.L.* [1990] A.J. No. 510, 108 A.R. 334 (Q.B.), approving *Lindgren* (1979), 10 R.F.L. (2d) 284 (Sask. Q.B.): “Dispensing with service on the respondent (of a divorce petition) is an unusual and extreme procedure. Even though the court has the power to do so [under the rules] it should not do so unless the applicant has exhausted all  
(continued...)

[136] The distinction between substitutional service and dispensing with service can be problematic. In *McGillis v. Hirtle* a substitutional service order stipulated publication in an Edmonton newspaper although the plaintiff had no idea as to the defendant's whereabouts. On the application of the Administrator of the *Motor Vehicle Accident Claims Act*,<sup>86</sup> the Master set aside this order on the ground that the plaintiff had not shown that the alternative mode of service was likely to be effective. The Master added:

I do not think that plaintiffs should necessarily be stymied in their action because the defendant has disappeared. However, the rule is still there. If there is a problem and it is with the rule, the remedy (if there is one) is not to ignore the requirements of the rule.<sup>87</sup>

[137] An approach like that in the British Columbia Rule 12, which eliminates the distinction between substituted service and dispensing with service, would ensure that orders and default proceedings are not set aside because of technical distinctions between substituted service and dispensing with service. However, orders could still be set aside if there was insufficient effort to locate or serve a defendant.<sup>88</sup>

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[138] The Committee first discussed the distinction between substituted service and dispensing with service. It was felt that this distinction should be maintained in the rule, to ensure that courts do address the issue of the effectiveness of substituted service and take the step of dispensing with service with a full understanding of its implications.

[139] The Committee then turned to the two requirements of the Alberta rule that are not found in other rules. The specification of the contents of the supporting affidavit in ss. (2), especially the requirement to state the opinion of the deponent as to the

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<sup>85</sup> (...continued)

reasonable efforts to locate the respondent; unless there is little likelihood that the issues will be disputed, and, even then, not where a method of substituted service may be effective and is within the means of the applicant".

<sup>86</sup> R.S.A. 2000, c. M-22.

<sup>87</sup> [1992] A.J. No. 73, 128 A.R. 83, 85 Alta. L.R. (2d) 393 (Q.B.).

<sup>88</sup> *Gray v. Alberta*, *supra* note 85.

likely effectiveness of an alternative mode of service, was seen as a technical requirement that does not offer any clear benefit. The question of whether an alternative form of service is likely to come to the attention of the person to be served is an issue for the court, but requiring the deponent to make a statement of opinion is likely to be of little or no assistance in determining the issue. The Committee proposes deleting the specification of the contents of the supporting affidavit.

[140] The requirement in ss. (4) regarding court leave to obtain default judgment is typically met by an additional paragraph in the substitutional service order, and therefore serves no real function. The Committee proposes that it be deleted from Alberta's rule.

[141] The Committee considered the two matters not included in Rule 23 but present in other rules. Indicating that the court should stipulate the effective date of service and requiring that the order be served with the document would ensure that these aspects of good practice are reflected in the rule. The Committee proposes their addition.

## **E. Court's Power to Deal with Defective Service**

### **ISSUE No. 33**

#### **Should the court's power to deem service good and sufficient be provided for explicitly?**

[142] The Alberta rules do not contain a specific provision to deal with technically defective service which has nonetheless come to the attention of the intended person. Rule 558 (non-compliance with the rules does not invalidate a proceeding) may apply.<sup>89</sup> Commonly, counsel will obtain an order deeming service good and sufficient or dispensing with the obligation to serve.<sup>90</sup>

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<sup>89</sup> *Fontaine v. Serben*, [1974] 5 W.W.R. 428 (Alta. D.C.).

<sup>90</sup> The practice and various bases for it are discussed in *Hvozdanski Estate v. Gasland Oil Ltd.* (1999), 258 A.R. 358 (Q.B. Master) at 360-361.

[143] Ontario Rule 16.08 provides that “where a document has been served in a manner other than one authorized” by the rules or a court order, the court can validate the service if it is satisfied that the document came to the notice of the person to be served, or would have come to that person’s notice, “except for the person’s own attempts to evade service”.

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[144] The Committee proposes adding a rule regarding applications to deem service good and sufficient, to reflect the actual practice.

#### **ISSUE No. 34**

#### **Should the court’s power to deal with service that does not come to the defendant’s attention in a timely way be provided for explicitly?**

[145] Grounds for setting aside late or ineffective service by mail are included in s. 23 of the *Interpretation Act* (presumption that service is effected set aside if the document is returned to the sender or was not received by the addressee) and ss. 256 and 288 of the *Business Corporations Act* (service is effective unless there are reasonable grounds for believing the corporation or attorney for service did not receive the document). These provisions are qualified by Rule 24(2) which provides that service by mail on an address for service (under Rule 24(1), Rule 26 or “pursuant to an enactment”) is not invalid where the addressee refuses or returns mail or has left the address without leaving a forwarding address.

[146] Ontario Rule 16.07 provides that “on a motion to set aside the consequences of default, for an extension of time or in support of a request for an adjournment” a person may demonstrate that service, although done in accordance with the rules, did not come to his attention in a timely way. Similar considerations may be dealt with in applications to set aside default judgments or proceedings under Alberta Rule 158, although they are not detailed in the rule.<sup>91</sup>

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<sup>91</sup> *Civil Procedure Handbook*, *supra* note 17 at 114 notes that the court will inquire whether a defendant has some excuse for defaulting, and whether he moved promptly to set it aside after learning of it. The question of notice will be relevant to both of these inquiries.

## **POSITION OF THE GENERAL REWRITE COMMITTEE**

[147] The Committee proposes the addition of a rule similar to Ontario's as to the impact of technically correct service that does not come to the defendant's attention in a timely way.

## **F. Non-personal Service**

### **ISSUE No. 35**

#### **Should the methods of non-personal service be changed?**

##### **1. Delivery or mail to the address for service or solicitor**

[148] Alberta Rule 24 provides documents not required to be served personally may be served by delivery or mail to the address for service. The "address for service" is a residence or place of business within 30 kilometres of the office of the clerk where the action was commenced (Rule 5(1)(b)).

[149] Rule 26 provides that service on a party's solicitor (or solicitor's agent) is also sufficient for documents not requiring personal service. Rule 26(2) and (3) provide for service by means of a document exchange subscribed to by the solicitor or agent.

##### **2. Difficulties with service**

[150] Rule 24(2) provides that service by mail under Rule 24(1) or Rule 26 is not rendered invalid if the addressee refuses or returns the mail or has left without a forwarding address.

[151] If delivery is attempted to a solicitor's office or address for service and is "frustrated" because the office is closed or inaccessible during weekday office hours, service may be effected by mail with the effective date of service being the date of attendance (Rule 28).

##### **3. Telecopier to the address for service or solicitor**

[152] An alternative definition of "address for service" is a telecopier located in Alberta at which a document may be served under Rule 16.1. Rule 16.1 provides that documents not required to be served personally may be served on a telecopier in the

office of the solicitor or solicitor's agent, or on a telecopier situated "in a residence or place of business located in Alberta". A telecopier may be used if the telecopier number, with the word "fax" appears "in, or attached to, or on a letter enclosing" any pleading or notice from the party, solicitor or agent. To prove service by telecopier, one must prove that the receiving telecopier received the document. Because this may be difficult, Stevenson & Côté suggest that it may be dangerous to rely on telecopier service alone.<sup>92</sup>

#### **4. Change of address for service**

[153] The Rules do not provide for a notice of change of address for service.<sup>93</sup>

#### **5. Service by e-mail**

[154] Ontario allows for service by e-mail on a solicitor of record, if the solicitor "provides by e-mail an acceptance of service and the date of the acceptance" (Rule 16.05(1)(f) and (4)).

### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[155] The Committee does not propose any changes to the rules regarding non-personal service (other than drafting changes to organize and simplify the rules). E-mail service without acceptance of service would not be appropriate. With acceptance, it seems unnecessary as solicitors can accept service in any form. The Committee did view the lack of provision for a notice of change of address for service as a gap in the rules that should be remedied.

### **G. Summary**

[156] The Committee proposes providing for an alternative form of personal service on individuals by leaving a document with an adult person residing at the individual's place of residence, and mailing another copy to the individual at that address. This form of service could save significant expense by eliminating the need for substitutional service orders in these circumstances.

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<sup>92</sup> *Civil Procedure Handbook*, *supra* note 17 at 30.

<sup>93</sup> Except in the context of a change of solicitors, Alberta, *supra* note 3, r. 554.

[157] The Committee proposes that the provision for service by “double registered mail” be eliminated. “Double registered mail” is no longer provided by Canada Post. While it is still possible to obtain a receipt signed by the recipient of mail, this is a more involved process, and it is a frequent occurrence that plaintiffs who serve in this fashion do not obtain such a receipt, so that their “service” is ineffective. This creates administrative problems for the court and wasted time and expense for plaintiffs. In addition, there are reasons to believe that this form of service is not particularly effective in providing affected persons with notice of proceedings and an opportunity to be heard. The Committee’s view is that the alternative form for serving individuals by leaving documents with an adult at their residence and mailing the documents to them at that address would be a more effective form of service, and a suitable substitute for service by “double registered mail”.

[158] The Committee proposes retaining the substitutional service rule, with minor changes, and adding a rule regarding applications to deem service good and sufficient, to reflect the actual practice.

[159] The Committee does not propose a special provision for service by e-mail. Such service can be effected under current rules provided it is accepted. Solicitors can accept service in any form.



## CHAPTER 4. SERVICE OUTSIDE ALBERTA

### A. Introduction

[160] As noted in the introduction to “Service Within Alberta,” the Supreme Court of Canada has ruled that there is a constitutional limit on the territorial jurisdiction that may be granted pursuant to provincial legislative authority: there must be a “real and substantial connection” between the territory and the litigation.<sup>94</sup> This is a particular concern regarding grounds for service *ex juris*.

[161] There were a number of comments from the bar on this issue. Most commentators felt that service outside of Alberta should be permitted without a court order. Many pointed out that the practice in other provinces is not to require a court order authorizing service *ex juris*. On the other hand, some disagreed, commenting that in contract cases, there are many times when a party makes an application for service *ex juris* despite the fact that the contract contains an attornment to another jurisdiction.

### B. Requirement for Court Order: Service in Specified Circumstances

#### ISSUE No. 36

**Should the rules no longer require court leave to serve outside of Alberta in specified circumstances?**

##### 1. Requiring leave

[162] Alberta Rule 30 sets out the circumstances in which the court may allow service outside of Alberta of a document commencing a proceeding. Rule 31 specifies the contents of the affidavit that must be provided in support of an application for leave to serve out of Alberta.

[163] British Columbia Rule 13 provides for service outside of the province without leave in circumstances listed in subrule (1). Subrule (3) provides that the court may

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<sup>94</sup> *Tolofson v. Jenson*, *supra* note 62.

grant leave for service outside the province in any case not provided for in subrule (1). Ontario Rule 17.02 and 17.03 are to the same effect.

[164] In *Amchem Products Inc. v. British Columbia (W.C.B.)*,<sup>95</sup> the Supreme Court of Canada commented that “in most provinces in Canada, leave to serve *ex juris* is no longer required except in special circumstances and this trend is likely to spread to other provinces”. This prediction is borne out in our review. The British Columbia and Ontario approach is followed in Manitoba, New Brunswick, the Northwest Territories, Prince Edward Island and Saskatchewan. Nova Scotia does not specify any particular circumstances, but allows service anywhere in Canada or the United States without leave, and requires leave for service outside of Canada or the United States. Only Newfoundland takes the Alberta approach that court leave is required for all service out of the jurisdiction.

[165] As noted above, some respondents in the legal consultation advocated retaining the requirement for court leave. They commented that in contract cases, there are many times when a party makes an application for service *ex juris* despite the fact that the contract contains an attornment to another jurisdiction. For this to be prevented by requiring court leave, it would have to come to light in the *ex parte* application. Theoretically, this should happen. The existence of an attornment clause is a significant factor. The Alberta Court of Appeal held in *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.*,<sup>96</sup> that such clauses should be enforced unless the balance of convenience “massively favours an opposite conclusion”. When one considers the duty of disclosure that rests on counsel in *ex parte* applications it is clear that an attornment clause should be revealed in the application.<sup>97</sup> However, *ex parte* applications are frequently deficient.<sup>98</sup> Thus an attornment clause issue may not arise

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<sup>95</sup> [1993] 1 S.C.R. 897 at 920-1, [1993] 3 W.W.R. 441 at 457, 102 D.L.R. (4th) 96.

<sup>96</sup> (1985), 65 A.R. 271 at para. 6, [1986] 1 W.W.R. 380, 41 Alta. L.R. (2d) 5 (C.A.).

<sup>97</sup> See *Duke Energy Corp. v. Duke/Louis Dreyfuss Canada Corp.*, [1998] A.J. No. 671, 64 Alta. L.R. (3d) 91, 219 A.R. 38, 22 C.P.C. (4th) 154 (C.A.) (re material non-disclosure as a ground for setting aside service *ex juris*) and *Tait Distributors Ltd. v. McCulloch Corp.*, [1998] A.J. No. 878, 224 A.R. 194, 27 C.P.C. (4th) 261(Q.B.) (setting aside service *ex juris* for material non-disclosure relating to an attornment clause in a contract).

<sup>98</sup> *Patel v. Friesen*, [2002] A.J. No. 121 (Q.B.) (denying an *ex parte* service *ex juris* application in a

until an application to set aside service or to stay proceedings. But, certainly, the issue could be properly dealt with at that time. This is how attornment clause issues are dealt with under current Alberta rules regarding defendants served in the province. It is also the approach in other Canadian jurisdictions where service *ex juris* orders are not required.

## 2. Impact on burden of proof

[166] Removing the requirement for an order for service *ex juris* may have the effect of changing the burden of proof on *forum conveniens* disputes, although this is debatable.

[167] The Supreme Court of Canada commented on the burden of proof in *Amchem Products*:

. . . whether it is a case for service out of the jurisdiction or the defendant is served in the jurisdiction, the issue remains: is there a more appropriate jurisdiction based on the relevant factors. . . Whether the burden of proof should be on the plaintiff in *ex juris* cases will depend on the rule that permits service out of the jurisdiction. If it requires that service out of the jurisdiction be justified by the plaintiff, whether on an application for an order or in defending service *ex juris* where no order is required, then the rule must govern. The burden of proof should not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate decision on the basis of the material presented by the parties.<sup>99</sup>

[168] This is consistent with the Alberta Court of Appeal ruling in *United Oilseed Products Ltd. v. Royal Bank of Canada*,<sup>100</sup> where it was held that:

1. The test to be applied in all cases where there is an issue of determining the appropriate forum is that of *forum conveniens* . . .
2. Where a forum possesses jurisdiction over a defendant, as of right, the defendant must show that there is another available forum which is clearly or distinctly more suitable.
3. Where the jurisdiction does not exist as of right, the same burden rests on the party seeking to establish jurisdiction (typically service *ex juris*).

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<sup>98</sup> (...continued)

motor vehicle case because of insufficiency of the affidavit in support).

<sup>99</sup> *Amchem*, *supra* note 62 at 920-1.

<sup>100</sup> [1988] 5 W.W.R. 181 at 191 (Alta. C.A.).

[169] The Ontario Court of Appeal dealt with the burden of proof in *Frymer v. Brettschneider*.<sup>101</sup> The Court held two to one that the burden of proof in Ontario, notwithstanding the fact that its rules do not require court leave to serve *ex juris* in specified circumstances (Rule 17.02), is the same as that described in *United Oilseed*. The dissent would have reversed the burden of proof on the basis that Rule 17.02 does not require that service out of the jurisdiction be justified by the plaintiff (citing *Amchem*). The dissenting approach was followed in *Craig Broadcast Systems Inc. v. Frank N. Magid Associates Inc.*,<sup>102</sup> and thus represents the law in Manitoba.

[170] Even if the general burden of proof with respect to *forum conveniens* were altered by removing the requirement for court leave to serve *ex juris*, this should not have an impact on cases in which service contravenes a contractual choice of forum. The *Volkswagen Canada* case established a special burden of proof for these cases, and applied that burden in a stay application. The onus would normally be on the applicant for the stay (the defendant in the case), but instead a heavy onus was placed on the respondent (plaintiff) who had served Volkswagen within Alberta in contravention of the contractual provision.

### **3. Specifying circumstances**

[171] All of the provincial rules except Nova Scotia set out a list of circumstances in which service *ex juris* may be utilized. The Nova Scotia rules are unique. They do not specify any particular circumstances, but allow service anywhere in Canada or the United States without leave, and require leave for service outside of Canada or the United States.

[172] Despite circumstances coming within specified lists, the court may determine that there is not a real and substantial connection between the territory and the litigation in a particular case.<sup>103</sup>

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<sup>101</sup> (1994), 19 O.R. (3d) 60 (C.A.).

<sup>102</sup> [1998] M.J. No. 25, 4 W.W.R. 17, 155 D.L.R. (4th) 356, 15 C.P.C. (4th) 95 (C.A.).

<sup>103</sup> In addition, or alternatively, the court may decline to exercise jurisdiction on the basis of the *forum non conveniens* doctrine: *Amchem*, *supra* note 62.

[173] The *Uniform Court Jurisdiction and Proceedings Transfer Act*, s. 10, takes the approach of listing presumptive bases for a real and substantial connection. The commentary indicates that:

Instead of having to show in each case that a real and substantial connection exists, plaintiffs will be able, in the great majority of cases, to rely on one of the presumptions in section 10. These are based on the grounds for service *ex juris* in the rules of court of many provinces. If the defined connection with the enacting jurisdiction exists, it is presumed to be sufficient to establish territorial competence under paragraph 3(e). A defendant will still have the right to rebut the presumption by showing that, in the facts of the particular case, the defined connection is not real and substantial.

### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[174] The Committee reached a consensus that a court order should no longer be required for service outside the province in specified circumstances. This is the dominant approach in Canadian rules. The specified circumstances make a presumptive case for a real and substantial connection between the jurisdiction and the litigation. Removing the requirement for a court order will save time and expense. The Committee also noted that this approach was supported by most of those who commented on this topic in the Legal Community Consultation, and expressed the view that the concerns raised by some respondents can be otherwise resolved.

## **C. Service in Unspecified Circumstances**

### **ISSUE No. 37**

#### **Should the rules provide for court authority to authorize service outside of Alberta in unspecified circumstances?**

[175] Ontario, British Columbia and other jurisdictions not only simplify procedure, by not requiring court leave in listed circumstances, they also extend the availability of service *ex juris*, by providing for court leave in other circumstances.<sup>104</sup> This is also the approach of the *Uniform Act*. In contrast, the grounds for service *ex juris* listed in Alberta Rule 30 are exhaustive.

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<sup>104</sup> Ontario, *supra* note , r. 17.03, British Columbia, *supra* note 7, r. 13(3).

[176] The governing test for the granting of court leave in British Columbia and other jurisdictions is whether there is a real and substantial connection between the jurisdiction and the defendant or the subject of the litigation.<sup>105</sup>

[177] Ontario and British Columbia also provide for validation of service that was improperly effected without leave, but could properly have been effected with leave.<sup>106</sup>

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[178] The Committee proposes that the dominant Canadian approach be followed in this respect, as well. The rules should provide for court authority to authorize service out of Alberta in unspecified circumstances, and for court validation of service effected without leave.

### **D. The Grounds for Service *Ex Juris***

#### **ISSUE No. 38**

#### **Should any changes be made to the grounds for service outside of Alberta?**

[179] A comparison of grounds for service *ex juris* in Canadian rules and presumptive bases for a real and substantial connection in s. 10 of the *Uniform Court Jurisdiction and Proceedings Transfer Act*<sup>107</sup> reveals some differences, including the following:<sup>108</sup>

1. Ontario does not include the concept of domicile of an individual as a basis for asserting jurisdiction - only ordinary residence of the individual is relied upon (this is also the case in Manitoba, New Brunswick or Prince Edward Island). Alberta includes domicile as well as ordinary residence (as

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<sup>105</sup> *Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C.*, [1997] B.C.J. No. 428, 31 B.C.L.R. (3d) 24 (C.A.); leave to appeal to S.C.C. denied [1997] S.C.C.A. No. 218. *Strukoff v. Syncrude Canada Ltd.*, [2000] B.C.J. No. 2010 (C.A.).

<sup>106</sup> Ontario, *ibid.*, r. 17.06(3) and British Columbia, *ibid.*, r. 13(7).

<sup>107</sup> *Supra* note 56.

<sup>108</sup> Other differences, regarding the grounds for service *ex juris* in the context of enforcement of judgments and family law proceedings will be examined by other Working Committees.

do British Columbia, Newfoundland, the Northwest Territories and Saskatchewan). Ontario's approach is consistent with the *Uniform Act*.

2. Canadian rules include the making of a contract in a province as a ground for service *ex juris*. The *Uniform Act* does not, although it does refer to the solicitation of consumer contracts. In addition, the commentary to the Act notes that a plaintiff could argue, under the court's discretionary power, that place of contracting does constitute a real and substantial connection in the specific circumstances of a case.
3. Canadian rules permit service *ex juris* on necessary or proper parties to actions properly brought against persons served in the province. The *Uniform Act*, s. 10, does not contain such a provision. The commentary explains that such a rule would be out of place in provisions based on substantive connections. "Territorial competence over the second defendant will not be presumed merely on the ground that that person is a necessary or proper party to the proceeding against the first person." However, it is also noted that the Act contains a residual discretion in s. 4.1 under which a plaintiff could argue that there is no other forum in which s/he can reasonably be required to seek relief against the party concerned.

[180] The rationale for relying exclusively on ordinary residence and not domicile is that, because of the technical rules of domicile, domicile is not necessarily accompanied by actual physical presence in a jurisdiction:

At common law, the concept has had inordinate emphasis on the "intention" factor resulting in persons being found to be domiciled in areas where they have not resided for many years. . . In addition, the technical domiciles of origin or dependence have resulted in further distancing the domicile from what lengthy or established residence would suggest. . . The solutions are twofold. One is to remove domicile as a basis and to retain ordinary residence. . . The second is to redefine domicile. . .<sup>109</sup>

### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[181] The Committee proposes that residency, not domicile, should be the standard used in the rules. This is consistent with the approach in a number of Canadian

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<sup>109</sup> P. Lown, "Conflicts of Law," in D. Dunlop, *Creditor-Debtor Law in Canada*, 2d ed. (Scarborough, Ont.: Carswell, 1994).

jurisdictions, as well as the *Uniform Act*'s assessment of real and substantial connection. It also removes a from the rules a concept that can be difficult to describe and apply, and that does not fulfill a clear need.<sup>110</sup>

[182] On the other hand, the grounds for service *ex juris* based on the making of a contract in the province, or a necessary and proper party to an action brought against an Alberta defendant, should be retained. Here the approach consistently followed in Canadian rules differs from the *Uniform Act*. The Committee does not wish to make changes that are unprecedented in Canadian rules, based only on the *Uniform Act* provision. It is concerned that to do so might encourage motions about service, and increase delay and expense. Consistent with its recommendation on Issue #23, the Committee proposes that any such changes to the rules should come after, not before, Alberta adopts the *Uniform Act*.

## **E. Other Requirements**

### **ISSUE No. 39**

#### **Should any changes be made to the requirements of Rule 31?**

### **ISSUE No. 40**

#### **What provision should be made regarding time for defence?**

[183] Alberta Rule 31 contains a number of requirements respecting the affidavit and order in service *ex juris* applications. Under the approach proposed by the Committee, there would still be some, although more limited, circumstances in which court leave to serve outside of Alberta would be required. So a provision of this type remains relevant.

[184] Rule 31 provides that an application for leave to serve out of Alberta must be supported by affidavit or other evidence “stating that in the belief of the deponent the applicant has reasonable cause of action”, showing where the person is or probably may be found, and providing the grounds on which the application is made. Rules

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<sup>110</sup> There may be an argument, in the context of family law proceedings, for the retention of the concept. That issue is left to another Working Committee.

from Ontario and British Columbia are the same, except that they do not require the statement of the deponent's opinion.<sup>111</sup>

[185] Case law provides that the evidence must satisfy the court as to the existence of an arguable action with an appropriate connection to the jurisdiction. This requirement is derived from the need to prove the grounds of the application.<sup>112</sup>

[186] Ontario and British Columbia rules require that a service *ex juris* order and supporting affidavit be served with the originating document, and that where service out of the province is made without court leave the originating document should disclose the grounds or rule relied upon.<sup>113</sup> Alberta rules have no similar provision, but it is common for orders under Rule 30 to provide that the order is to be served with the statement of claim and notice to defendant.

[187] Alberta Rule 31 indicates that the order "shall limit the time within which the proceedings may be answered or opposed". Other provinces deal with the time for defence in separate rules which apply to all service out of the jurisdiction, whether with or without leave. British Columbia Rule 13(6) sets out limits of 21 days for service in Canada, 28 days in the United States and 42 days elsewhere. The limits may be shortened by court order (ss.6.1). Ontario Rule 18.01 provides for 20 days within Ontario, 40 days elsewhere in Canada or the United States, and 60 days elsewhere. There is no special rule to vary these periods, but Rule 3.02 provides generally for court extension or abridgement of times prescribed by the rules or an order.

[188] The Committee obtained from the Court of Queen's Bench information regarding service *ex juris* orders filed during 2001. For some of these orders, the length of time permitted for defence was recorded. In a smaller number of cases, the location of service as well as the permitted length of time was recorded. The average length of time for the first group of cases was 33.1 days. The average for service specified to be

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<sup>111</sup> Ontario, *supra* note 2, r. 17.03 and British Columbia, *supra* note 7, r. 13(4).

<sup>112</sup> *Talbot v. Pan Ocean Oil Corp.* (1977), 5 A.R. 361, 3 Alta. L.R. (2d) 354 (C.A.).

<sup>113</sup> Ontario, *supra* note 2 r. 17.04 and British Columbia, *supra* note 7, r. 13(2) and (5).

within Canada was 32.7 days, for service in the United States was 43.2 days, and for service in other countries was 52 days.<sup>114</sup>

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[189] The Committee first considered the requirement in Rule 31(a) for a statement of the deponent's belief that there is a reasonable cause of action. The Committee proposes to delete a similar requirement regarding the deponent's opinion under Rule 23(2), and proposes to take the same approach in this context. This is consistent with the approach in other jurisdictions and eliminates a technical requirement as to the wording of the affidavit. However, the Committee also suggests that the rule should clarify the reference to the "grounds" of an application, to make it clear that the affidavit should contain facts to support the cause of action and a real and substantial connection between Alberta and the action.

[190] With regard to the provision for service of a court order, affidavit, or other notice of the grounds for service *ex juris*, the Committee agreed that this information should be made available to a defendant who is served outside Alberta. However, it did not favour including the information in the statement of claim, as this might necessitate an amendment. Rather, the Committee proposes that a separate document setting out the grounds for service *ex juris*, endorsed by the solicitor of record (but not filed), accompany the statement of claim. Service of this document should be proved by the affidavit of service, with the document attached as an exhibit.

[191] As to the time to defend, having regard to the research regarding standard time frames in orders for service *ex juris*, the Committee proposes that 30 days be permitted to defend an action served within Canada, 45 days for service in the United States and 60 days for service elsewhere. The general rules provision for court extension or abridgement of time (Rule 548) should apply to these periods.

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<sup>114</sup> There were 479 cases in which the time was recorded, but no location was mentioned, 24 cases of service in Canada, 17 cases of service in the United States, and 5 cases of service in other countries. The particular countries and associated periods of time were as follows: Thailand (45 days); United Kingdom (2 orders, 60 days and 45 days); the Ukraine (60 days) and the Phillipines (50 days).

## F. Setting Aside Service *Ex Juris*

### ISSUE No. 41

#### Should any changes be made to the provision for applications to set aside service?

[192] Both Ontario and British Columbia rules contain express provision for setting aside service *ex juris*. Ontario Rule 17.06 specifies the grounds for such an application:

- service is not authorized by the rules;
- an order granting service should be set aside; or
- Ontario is not a convenient forum for the hearing of the proceedings.

[193] Alberta Rule 27 (from Part 3 of the rules) deals with these applications. The same grounds are relied on, although Rule 27 does not set them out.<sup>115</sup> British Columbia Rule 13(8) does not stipulate grounds.

[194] The burden of proof in applications to set aside service *ex juris* is discussed above.<sup>116</sup>

[195] Both Alberta Rule 27 and Ontario Rule 17.06 stipulate that applications to set aside service do not constitute a submission to the jurisdiction of the court.

[196] None of the rules attempt to codify the law with respect to *forum conveniens*. The *Uniform Court Jurisdiction and Proceedings Transfer Act* does so (s. 11).

### POSITION OF THE GENERAL REWRITE COMMITTEE

[197] The Committee discussed these issues at some length, and reached a consensus not to propose any change to Rule 27 (other than its location in the rules – it should follow service *ex juris* rules). Case law regarding *forum conveniens* is complex and case-specific. The Committee thought that it would not be appropriate to attempt to codify the law within the rules.

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<sup>115</sup> *Talbot*, *supra* note 112.

<sup>116</sup> Paragraphs [167] - [171].

## **G. Method of Service Outside Alberta**

### **ISSUE No. 42**

#### **Should any changes should be made to the provisions of Rule 31.1?**

[198] Alberta Rule 31.1 provides that where service outside Alberta is allowed, the document may be served pursuant to the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and if so, it may be served according to the domestic law of the receiving jurisdiction and a certificate of service issued by the central authority of the receiving jurisdiction is sufficient proof of service. The wording of this rule and the Convention indicate this is a permitted, not a required procedure (provided the other state does not object, Convention, Article 10). The implicit alternative is to serve in accordance with the procedural law of Alberta using private services. The latter procedure will also be used where the Convention does not apply (e.g., in other parts of Canada).

[199] Ontario Rule 17.05 makes explicit the alternative of using Ontario procedure (and limits this to non-objecting states). It adds another alternative, that service in a jurisdiction other than a contracting state can be made in the manner provided by the law of that jurisdiction provided it would reasonably be expected to come to the notice of the person served. British Columbia Rule 13(12) and Federal Court Rule 137 are to the same effect as the Ontario rule.

#### **POSITION OF THE GENERAL REWRITE COMMITTEE**

[200] The Committee proposes that the Alberta rule should clarify that if the *Hague Convention* does not apply, Alberta rules for service should be followed. It does not propose adding the alternative of using foreign service methods where the Convention does not apply.

## **H. Summary**

[201] The Committee proposes that a court order should no longer be required for service outside the province in specified circumstances similar to those now listed in Rule 30. This is the dominant approach in Canadian rules. The specified circumstances make a presumptive case for a real and substantial connection between

Alberta and the litigation. Removing the requirement for a court order will save time and expense. The Committee also proposes that the rules should provide for court authority to authorize service out of Alberta in other, unspecified, circumstances. This, too, reflects the dominant Canadian approach.

[202] As to the time for service, the Committee proposes that 30 days be permitted for service within Canada, 45 days for service in the United States and 60 days for service elsewhere.