

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

Rules of Court Project

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ABOUT THE ALBERTA LAW REFORM INSTITUTE

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

The current members of ALRI's Board are The Honourable Justice N.C. Wittmann, ACJ (Chairman); C.G. Amrhein; N.D. Bankes; A.S. de Villars, Q.C.; The Honourable Judge N.A. Flatters; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C.; P.J.M. Lown, Q.C. (Director); The Honourable Justice A.D. Macleod; J.S. Peacock, Q.C.; The Honourable Justice B.L. Rawlins; W.N. Renke; N.D. Steed, Q.C. and D.R. Stollery, Q.C.

ALRI's legal staff consists of P.J.M. Lown, Q.C. (Director); S. Petersson (Research Manager); D.W. Hathaway; C. Hunter Loewen; J.D. Larkam; M.E. Lavelle (on leave); A.L. Lis and G. Tremblay-McCaig. W.H. Hurlburt, Q.C. is an ALRI consultant.

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This and other Institute reports are available to view or download at the ALRI website: <<http://www.law.ualberta.ca/alri/>>.

ACKNOWLEDGMENTS

In a project as large as this one, every contribution is crucial. Every element is essential to the completion of the overall project, and we thank each person who has contributed to the project's success, either as a member of a working committee, stakeholder group or as a consultee.

The completion of a large project inevitably falls on the staff of the project manager, namely ALRI. All of the membership of the various groups and committees are set out in Appendix A, but it is appropriate to list those staff members and virtual staff members whose skill and stamina have brought the project to a conclusion (see below). It is also appropriate to acknowledge the leadership of the Chair of the ALRI Board and of the Steering Committee, Associate Chief Justice Neil Wittmann who has kept us all on task to completion, and always sees the bigger picture.

It is also appropriate to single out two people, Bill Hurlburt and David Elliott, who, each in their own way and area, have gone above and beyond the call of duty in their commitment to this project.

Finally, a special mention must be made of ALRI's support staff. The support role and the logistics for such a large project are enormous and they have taken on and carried out this task with dedication and efficiency. The details of meeting organization, document production and handling and report production have been attended to assiduously, and the final product is only achievable because of their work and dedication.

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SUMMARY

ALRI is very pleased to publish proposals for the revision of the current Alberta Rules of Court. The proposals will bring the Alberta Rules of Court into the modern age of civil rules, civil justice purposes and modern drafting.

The proposed rules are the result of the most comprehensive review of civil procedure by the largest group of participants and volunteers in the most open and consultative manner ever carried out in this Province.

Organization of the Report

This report sets out the process by which ALRI has proposed rules for the revision of the Alberta Rules of Court.

The rules themselves are contained in the accompanying CD which also contains proposed court forms and a guide to the proposed rules.

The appendices contain: list of committees and members, list of respondents to our consultation papers, list of publications, instructions to working committees, drafting protocol, draft Alberta Rules of Court Act, and a table of rules.

All background papers are available and downloadable in PDF format from the ALRI website, <<http://www.law.ualberta.ca/alri/>>.

Overview

There will always be procedural details on which there is a justified and healthy difference of opinion, which provides a basis for ongoing monitoring. That difference of opinion does not detract from the substantial consensus on which these proposals are based, nor from the integrity of a cohesive and integrated code of civil procedure.

The proposed rules represent a marked change and improvement from the format of the current rules. They are written in plain English – they say what they mean, and mean what they say. They are arranged in a logical, chronological order that reflects the progress of a lawsuit – fundamental premises are at the beginning and technical rules at the end. Individual rules are numbered, and rules within each part numbered, for example Part 1, Rule 5 is known as Rule 1.5; Part 5, Rule 27, Sub-rule 1 is known as Rule 5.27(1).

Reviewers have commented that the proposed rules are shorter, clearer, and are expressed in active voice sentences. The headings are informative, visuals and tables illustrate more complex processes, and the organization and layout is clear and intuitive.

The proposed rules include introductions to each part, information notes to assist the reader and cross-references to related topics. In the electronic version, the cross-references are hyper-linked. Defined terms are identified in the text and collected in an easily findable appendix. The proposed rules are printed on 8.5 x 11 page size and include an appropriate balance of text and whitespace. The drafting style and format both have received positive comment in Alberta and internationally.

The regulating power for rule-making is currently spread over a number of statutes and shared by a number of entities. The responsibility for maintenance and revision is not clear, and there is not sufficient resourcing for any body which undertakes that task, nor is there any clear timetable, schedule or process for proposed revisions. A clear and workable legislative framework would address these issues in a direct and effective way.

ALRI recommends to the Minister of Justice that the Lieutenant Governor in Council:

- (i) enact the proposed legislative framework for the creation, validation and maintenance of the Rules (see Appendix F).
- (ii) enact the proposed rules in their entirety in the format in which they appear on the attached CD.

LIST OF RECOMMENDATIONS

RECOMMENDATION No. 1

Enact the proposed legislative framework for the creation, validation, and maintenance of the Rules.

RECOMMENDATION No. 2

Enact the proposed rules in their entirety and in the format in which they appear on the attached CD.

REPORT

A. The Project Beginning

[1] The Rules of Court Project began as a result of a request to ALRI from the Rules of Court Committee [RCC] to review the Alberta Rules of Court. The RCC is a body constituted under the *Court of Queen's Bench Act* to consider and make recommendations to the Minister of Justice about the Rules of Court.

[2] When ALRI received this request, it was not ALRI's first venture into the subject area of civil procedure or civil justice. ALRI had already issued publications including:

- Validity of the Alberta Rules of Court (1974)
- Resolution of Disputes: Landlord and Tenant (Advisory) Boards (1975)
- Family Law Administration: Court Services (1978)
- Administration of Family Law: The Unified Family Court: Constitutional Opinions (1978)
- Service of Documents During Postal Interruptions (1979)
- Judicial Review of Administrative Action: Application for Judicial Review (1984)
- Proposals for a New Alberta Arbitration Act (1988)
- Report on Referees (1990)
- Dispute Resolution: A Directory of Methods, Projects and Resources (1990)
- Judicial Mini-trial (1993)
- Court-Connected Family Mediation Programs in Canada (1994)
- Revision of the Surrogate Rules (1996)
- Pilot Project on Caseflow Management Procedures (unpublished)
- Class Actions (2000)

[3] It was recognized, however, that a comprehensive review of the Rules of Court would be far greater in scope and challenge than any of the previous projects.

[4] That the Rules of Court were in need of review was not in doubt. The RCC looked to ALRI to take on the project, it being beyond the resources and personnel on the RCC to undertake a task of this size.

[5] The existing rules were enacted in 1968. They were heavily based on previous versions and many rules are directly traceable to 1914. Much has changed since 1968. Alberta has an entirely new court structure. The Court of Queen's Bench, Court of Appeal and the Provincial Court were created after the 1968 rules came into force. New concepts and initiatives have grown up and the volume and culture of litigation have changed immensely over 40 years. In ALRI's view, the project could only be taken on if it was adequately financed, managed and the scope defined.

[6] As a result, a preliminary project proposal was presented to funders and approvals were given. Initial estimates called for a \$2.6 million project over several years with the Alberta Law Foundation contributing \$950,000, the Department of Justice \$500,000, ALRI \$1.3 million, and the Law Society of Alberta \$25,000. Additional funding was also provided by the Department of Justice for extra components of the project. The Alberta courts, the Law Society of Alberta and some individual law firms also provided funding in kind through access to their videoconferencing facilities.

[7] The project was also designed as a typical law reform project – open, transparent, consultative and inclusive of all interested and willing stakeholders. A number of bodies played an oversight and coordinating role. Coordination among ALRI counsel and special counsel was initially provided by the Director, Peter Lown, and our Lead Counsel, Professor June Ross (as she then was). When Professor Ross was appointed to the Court of Queen's Bench, her role was assumed by three Board members, Bill Hurlburt, Lyndon Irwin and Peter Lown. Later, much of the coordinating role, especially at the drafting and checking stage, was assumed by our Counsel and Research Manager, Sandra Petersson.

[8] The other coordinating role was provided by the Steering Committee and the ALRI Board. Initially, the Steering Committee reviewed all the work of the working committees and, if necessary, joint meetings with the working committees

were held. Before the publication of a consultation memorandum, a joint meeting might review difficult areas of policy or ensure consistency where there was overlap between different working committees. For example, alternative dispute resolution requirements straddled the Early Dispute Resolution Working Committee and the Management of Litigation Working Committee. And the rule setting out when cases should be dismissed for long delay spanned the General Rewrite and Management of Litigation Working Committees. The heavy lifting role moved from the Steering Committee to the Board once the preparation of the composite draft commenced.

B. Creating Project Objectives

[9] Consistent with the practices of a modern comprehensive law reform agency, the objectives of the project were clearly established at the beginning by the Steering Committee. The objectives were:

Objective # 1: Maximize the Rules' Clarity

Results will include:

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

Objective # 2: Maximize the Rules' Useability

Results will include:

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

Objective # 3: Maximize the Rules' Effectiveness

Results will include:

- updating the rules to reflect modern practices
- pragmatic reforms to enhance the courts' process of justice delivery

- designing the rules so they facilitate the courts' present and future responsiveness to ongoing technological change, foreseeable systems change and user needs

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

Objectives

Results will include:

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

C. The Climate for Review

[10] What was the climate in which ALRI took on the project? What was the problem to be addressed? In many minds the challenge was clear:

1. The public perception of the court system was that it takes too much time and money and it is too difficult to use the system.

Our Response: The proposed rules describe a clear, step-by-step process of dispute resolution with progress milestones set by the parties. The goals of the process are to minimize the dollar and time costs and maximize procedural transparency.

2. Users told us: The rules are long, disorganized and not consistently applied or enforced. This confusion impedes access to justice and frustrates efforts to run an efficient, effective justice system.

Our Response: The proposed rules are short, logical, well arranged and written in plain English. It will now be easy to find and follow the right rules.

3. Users and the public said: The rules are out of date and no longer reflect modern practice.

Our Response: The proposed rules blend core principles of procedural justice with the best contemporary legal and administrative practices into a single, comprehensive and consistent procedural code.

D. Background Research

[11] Rules have traditionally been written in a closed environment, relying primarily on individual expertise and experience. They are often restated rather than rethought. To meet the four objectives required a thorough review and research of civil procedure and civil justice initiatives from around the common law world. In other jurisdictions, review was often mandated by systemic problems. This was not so in Alberta in that the review could take place without the element of crisis management.

[12] The initial research sought to map out developments in civil procedure around the world. What were the rules and state of play in every other jurisdiction in Canada? Why was the Federal Court system so different from the others? What were the recommendations in the United Kingdom where the Wolff report had performed such a comprehensive review? What were the provisions in Australian states and in the United States? What initiatives had been introduced throughout the common-law world? This research would guide the creation of working committees and shape their mandate, guide their objectives and inform the research and issues of more than 20 consultation memoranda. It would allow each working committee to start from an informed background.

[13] Only with the appropriate level of research and analysis could we approach the task of creating a set of rules that are clear, useful and effective tools for accessing a fair, timely and cost efficient civil justice system. This was the goal – a mere restatement or re-wording of existing rules would be inadequate; an audit of the proposed rules by reference only to the old would be entirely inappropriate.

[14] The acid test will be whether the proposed rules meet the fundamental purpose set out in proposed r. 1.2(1):

The purpose of these Rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

E. Preliminary Consultation

1. Legal Community

[15] Consultation with the legal community commenced in the fall of 2001 with a series of presentations to the bench and bar. The process continued through the winter with law firm meetings in Edmonton and Calgary. An issues paper described the Rules Project, raised a number of issues, and sought input from the legal community.¹ That input, whether in the form of letters, e-mail, or notes from meetings, was categorized and entered into a database. Information from the database was provided to working committees by ALRI counsel. In addition, a summary report was prepared for working committees.²

2. Public

[16] Direct consultation with the public was an essential element of project definition. They are the ultimate users of the system and their experience is a valuable component of any revision. Their feedback also allowed us to verify the information received indirectly on their behalf from other users of the system.

[17] A consultation paper and questionnaire for the public was prepared, and made available electronically and in print format.³ Extensive circulation of the questionnaire was arranged: at courthouse counters, MLA offices, Legal Aid and Law Society offices; by mail to advocacy interest groups with an interest in civil litigation; on the ALRI website; and by publication in *Law Now*.⁴ The return rate was sufficient, but disappointing. Ninety-eight questionnaires were received by the cutoff date. A report describing the responses was prepared.⁵ Some of the respondents indicated a willingness to participate in focus groups about rules

¹ Alberta Law Reform Institute, *Issues Paper for the Legal Community – Alberta Rules of Court Project* (2001), online: <<http://www.law.ualberta.ca/alri/docs/arcissue.pdf>>.

² Alberta Law Reform Institute; *Report on Legal Community Consultation – Alberta Rules of Court Project* (2002), online: <http://www.law.ualberta.ca/alri/docs/db_report.pdf>.

³ Alberta Law Reform Institute, *Public Consultation Paper and Questionnaire – Alberta Rules of Court Project* (2002), online: <http://www.law.ualberta.ca/alri/docs/Public_Consultation.pdf>.

⁴ “Alberta Rules of Court Project” (2002) 26 *Law Now* 20.

⁵ Alberta Law Reform Institute, *Public Consultation Report – Alberta Rules of Court Project* (2002), online: <<http://www.law.ualberta.ca/alri/docs/Banister2Finalrptl.pdf>>.

reform. In the fall of 2002, focus groups were conducted in Edmonton and Calgary. A report on the focus groups was then prepared.⁶

F. Role of the Working Groups

[18] The preliminary research was vital for two reasons – first, to inform a meaningful and rational assignment of responsibilities among the working committees; second, to ensure that each working committee had available to it a complete dossier of information on its subject matter areas. The working committees were created to reflect relatively homogeneous collections of subject matter, rules initiatives and civil justice reforms.

[19] Some topics were quite predictable, such as costs or enforcement of judgments. Others concentrated on topic areas which had been identified as areas of concern, such as discovery or self-represented litigants. Others represented emerging over-arching themes that required broader approaches to the issues.

[20] For example, the Management of Litigation Working Committee examined a number of issues from a “big picture” perspective. That group reviewed existing rules in respect of pretrial conferences, mode of trial, entry for trial and streamlined procedure, practice notes relating to case management, civil juries, setting down for trial and very long trials. Other topics, such as caseflow management, tracking systems, trial standards and topics from recommendations of the Canadian Bar Association Task Force and the Ontario final report were relevant to this area.⁷

[21] Similarly, under the rubric of early dispute resolution, another working committee examined conventional rules relating to compromise using the court process and pretrial conference rules. Added to that list were systems of court connected alternative dispute resolution and judicial dispute resolution.

⁶ Alberta Law Reform Institute, *Focus Group Edmonton & Calgary Venues Final Report – Rules of Court Project* (2003), online: <<http://www.law.ualberta.ca/alri/docs/PublicConsultfinalreport.pdf>>.

⁷ Canadian Bar Association, Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association, 1996); Ontario Civil Justice Review, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, 1996).

[22] Any topic not assigned to a topic-specific working committee, fell to the General Rewrite Committee – this group took on a mammoth task and displayed remarkable stamina. Their mandate included: all elements of commencement, parties, pleadings, motions and applications, masters, time, non-compliance, service, summary disposition, exhibits and reciprocal enforcement. Practice notes issued by the Court were also assigned to the General Rewrite Committee, including those about applications without personal appearance, special chambers applications and summary trials.

[23] Each working committee was comprised of a cross-section of members having experience and expertise in the subject matter. The members were drawn from across the province. Usually, the committee was chaired by one or more of the judges sitting on the committee. Each committee was supported by ALRI counsel and co-counsel. Counsel took the responsibility for preparing background research material and writing issues documents. Core support staff members handled all the logistics necessary for working committee meetings, minutes and the follow-up. Counsel also played three other pivotal roles – first, to translate the working committee discussion and recommendations into a comprehensive consultation memorandum; second, to handle and analyze all feedback on the consultation memorandum and assist the working committee in coming to final policy positions; and finally, to convert the final policy positions into drafting instructions for the project drafter.

[24] In all, the working committees have produced 21 consultation memoranda on discrete topics, as listed in Appendix C, which should provide a rich research base for any future studies.

[25] The purpose of the working committees was to establish drafting instructions based on a clearly articulated and informed policy base. General consultation preceded the work of the working committees.

[26] Working committees were encouraged, even strongly advised, to avoid developing policy by drafts. The intention was to keep the discussion as open as possible to all views and input. Each working committee was provided with a recommended workplan which covered the following elements: review of mandate

and project objectives; identification of issues and research plan; initial research and policy formulation; detailed research and policy formulation; issue of consultative document; review of feedback, further research and refinement of issues.

[27] After all this work, basic policy was set. One of the major reasons for confining working committee activity to policy was to allow the development of a policy position in the most direct and efficient way and to provide a solid policy base from which drafting was to proceed. The policy and drafting functions are quite distinct and the project would mix them at its peril. That also explains why the various functions were clearly described in the initial documents provided to each working committee.

G. Drafting Process – Roles and Basic Functions

1. The Working Committees

[28] Each working committee of the Rules Project was responsible for formulating the policy recommendations for its area. Once those policy recommendations were approved by the Steering Committee and ALRI Board, drafting instructions were given to the drafter by the working committee's instructing officer.

2. The Instructing Officers

[29] Each working committee had one ALRI counsel who acted as the instructing officer for that committee. The instructing officer's functions were:

- to instruct the drafter on the policy decisions made by the committee
- to review the initial drafts produced by the drafter
- to liaise between the drafter and the committee on all matters

3. The Drafter

[30] The drafter's functions were:

- to receive the drafting instructions from the instructing officers
- to prepare the draft legislation

[31] It was not the drafter's role to formulate policy. The drafter's area of expertise was how to write legislation. Therefore, on substantive issues of policy,

the working committees' decisions and instructions prevailed. On stylistic issues of legislative drafting, the drafter's opinion prevailed.

H. Drafting and Review

[32] The link between policy and drafting is a key and often underappreciated role. Preparation of drafting instructions commenced with a narrative of four elements:

- the nature of the policy decisions
- the purpose of the policy decisions
- the desired results that the policy decisions should produce
- the details of how the policy should work in practice

[33] The instructing officer on our project then played the liaison role between the drafter and the working committee.

[34] Once the drafting instructions were approved by the working committee, the focus shifted to the drafter and Drafting Committee, unless the drafting process revealed policy areas on which the instructions were silent or incomplete. In that case, the working committee was reconvened to deal with those issues.

[35] A further reason for reconvening the working committee stemmed from the necessity to combine the instructions from 11 working committees into one composite draft. Despite the best efforts of the Steering Committee and ALRI Board to ensure consistency between the working committees, it was inevitable that the composite draft would reveal areas where the drafting instructions were either inconsistent or problematic. Those issues were dealt with on a graduated scale – could instructing counsel clarify the intent; could the ALRI Board or Steering Committee easily resolve the matter; could the working committee be asked to clarify, with or without further research.

[36] It was also inevitable that some issues would have to be left until late in the day for final determination, mainly because of their interdependence with other areas (e.g., a number of forms, the details of the timelines in Part 4 and the list of definitions in the Appendix).

[37] ALRI was fortunate to engage the services of an extremely capable drafter, David Elliott. His previous experience in large challenging projects like this one and his thorough knowledge of modern drafting techniques and styles has added immeasurably to the finished product. So too has his ability to respond to the comments and reviews of the Drafting Committee consisting of Bill Hurlburt, Lyndon Irwin, Peter Lown and Sandra Petersson. The drafting process consumed seven versions and four composite versions.

[38] Test Draft 3 was distributed to all working committees and to the profession as a whole in March of 2007. It remained open for feedback and comment until spring 2008, and was the subject of a number of presentations and descriptions to the profession:

- Canadian Bar Association – 5 section presentations and a panel at the 2008 Alberta Law Conference
- University of Alberta, Faculty of Law – presentation to the Civil Procedure class in April 2007
- Alberta Civil Trial Lawyers’ Association – a teleconference in June 2007 and presentations in Calgary and Edmonton in March 2008
- Canadian Centre for Professional Legal Education/Legal Education Society of Alberta – presentation in February 2008

[39] Since March 2007, the draft has been subjected to significant review by the Steering Committee, ALRI Board, Drafting Committee and other stakeholders such as court clerks. All of that feedback has been integrated into the draft and significant improvements have been made. Throughout that time, ongoing discussions with the RCC took place and amendments to the draft were made as a result.

I. Review by the Rules of Court Committee

[40] Rules of Court are passed by Order-in-Council. Under s. 25 of the *Court of Queen’s Bench Act*, the RCC may make recommendations respecting the rules. Given the mandate of the RCC, ALRI provided draft versions of the proposed rules to RCC for review. The process commenced in early 2006 and has progressed until June 2008.

[41] The review has been detailed and voluminous. The RCC researcher has had access to all ALRI material and has sat in on drafting meetings. After exchanges of correspondence and discussions, RCC produced a series of lists of issues, varying in importance from “monitor” to “cannot recommend”. The latter became the focus of significant further research and review by the ALRI Board, Steering Committee, and Drafting Committee.

[42] In early May 2008, ALRI provided a draft document responding to and accommodating all but a few of the suggestions and issues raised by RCC. There are a few issues where ALRI considered that further change would not be consistent with either the project objectives or the overall spirit and tenor of the proposed rules. In ALRI’s opinion the two remaining issues should be reduced to “will monitor” status. Those issues concern master’s appeals and review of retainer agreements.

J. The Finished Product

[43] The purpose of the project was to produce clearer, more useable and effective rules. Those results can be seen in summary form in the Guide to the Proposed Rules found on the attached CD.

[44] Meeting those objectives meant that consultation activities took place at every stage of the project. In the first phase, ideas from over 40 open meetings with legal committees, two public forums, and the more than 800 responses to a rule reform paper were used to set the project’s scope and process.

[45] In the rule development stage, the knowledge and experience of the legal community powered the rule creation effort. More than 85 members of Alberta’s bench and bar generously gave over 30,000 hours of time and talent in the 11 working committees to produce 21 consultation memoranda and consider approximately 300 sets of response comments. These consultations resulted in 9 draft rule documents, including the publicly released Test Draft 3 version, and 25 sets of comments on Test Draft 3.

[46] The final stage of the project included more than a dozen detailed discussions with the RCC, as well as voluminous correspondence, over a period of

20 months. This extensive process, supported by thousands of hours of legal research, has shaped the rules into an efficient, modern, comprehensive procedural code that reflects the best of Alberta's civil litigation practices and traditions.

[47] ALRI confidently asserts that the proposed rules meet the project objectives that ALRI set out to achieve and recommends their adoption. Once adopted, they should be monitored and adjusted as necessary. Their content is clear and their organization logical. When viewed as operating principles for the conduct of a court system for the resolution of disputes, they represent a fair, modern and clear system and will stand the test of time.

K. Other Related Activity

1. Legislative Authority

[48] ALRI has also proposed a legislative framework for the promulgation of the proposed rules (see Appendix F). The framework is clear and direct legislation authorising the creation of rules of civil procedure and validating any necessary overlap into substantive law. The authority and responsibility for the rules is clearly assigned and resourced. The framework will establish a clear basis for the enactment, implementation and ongoing maintenance of the rules. It is formatted as amending legislation that would consolidate provisions governing the creation of rules within the *Judicature Act*.

2. Consequential Amendments

[49] A large number of consequential legislative amendments will be necessary as a result of the adoption of the proposed rules. A report to the Department of Justice will identify all of the necessary changes, propose a composite protocol for dealing with them, and propose detailed changes where the protocol is inappropriate.

3. Civil Appeals

[50] The processing of feedback on the consultation memorandum on appeals rules and the settling of final policy was completed in late spring of 2008. The consultative feedback included the comments of a specific committee of the Court of Appeal established for the purpose of providing input on ALRI's consultation

memorandum. ALRI will complete its proposed draft of rules for the Court of Appeal towards the end of 2008.

4. Surrogate Rules

[51] The current Surrogate Rules will be added after minor changes for timing and nomenclature.

5. Family Law

[52] The Department of Justice will develop any necessary special provisions to apply to the practice of family law and to complement the *Family Law Act*.

6. Criminal Rules

[53] Criminal rules follow an entirely different process for enactment, requiring federal approval and regulation. As such, our working committee's proposals, for selected areas, will follow that process.

L. Conclusion

[54] This concludes one of ALRI's largest, most complex projects. Each person who has contributed should take pride in the overall product. We now look forward to the educational phase and the implementation of the proposed rules.

HON. N.C. WITTMANN, ACJ, Chairman

C.G. AMRHEIN

N.D. BANKES

A.S. de VILLARS, Q.C.

HON. N.A. FLATTERS

W.H. HURLBURT, Q.C.

H.J.L. IRWIN, Q.C.

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HON. A.D. MACLEOD

J.S. PEACOCK, Q.C.

HON. B.L. RAWLINS

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CHAIRMAN

DIRECTOR

APPENDIX A – COMMITTEES

Rules of Court Project Steering Committee

The Hon. Justice Neil C. Wittmann, ACJ (Chair)

The Hon. Judge Allan A. Fradsham

Mr. Peter J.M. Lown, Q.C.

The Hon. Justice Alan D. Macleod

The Hon. Justice June M. Ross

The Hon. Justice Joanne B. Veit

The Hon. Judge Geoff Ho (*observer*)

The Hon. Justice Eric F. Macklin

Mr. Robert Maybank, Q.C. (*observer*)

Ms. Phyllis A. Smith, Q.C.

Alberta Law Reform Institute Board

The Hon. Justice Neil C. Wittmann, ACJ (Chair)

Dr. Carl G. Amrhein

Ms. Anne de Villars, Q.C.

Mr. Alan D. Fielding, Q.C.

Ms. Peggy M. Hartman, Q.C.

Mr. William H. Hurlburt, Q.C.

Mr. Peter J.M. Lown Q.C.

The Hon. Justice Sheilah L. Martin

Mr. James S. Peacock, Q.C.

Professor and Vice-Dean Wayne N. Renke

Mr. Doug R. Stollery, Q.C.

Mr. Clark Dalton, Q.C.

Ms. Jeanette W. Fedorak

The Hon. Judge Nancy A. Flatters

Dr. Patricia Hughes

Mr. H.J. Lyndon Irwin, Q.C.

The Hon. Justice Alan D. Macleod

Dr. Doug R. Owsram

The Hon. Justice Bonnie L. Rawlins

Mr. Nolan D. Steed, Q.C.

The Hon. Justice Keith D. Yamauchi

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Appeals

The Hon. Justice Carole M. Conrad

Ms. Ritu Khullar

Mr. Havelock B. Madill, Q.C.

Ms. Sandra Petersson

Mr. H. Martin Kay, Q.C.

Mr. Peter J.M. Lown, Q.C.

The Hon. Justice Sheilah L. Martin

Costs

The Hon. Justice Myra B. Bielby

Mr. James A.B. Christensen

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The Hon. Justice Patricia A. Rowbotham

Mr. Gary W. Wanless

Prof. Barbara A. Billingsley

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Ms. Virginia M. May, Q.C.

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Criminal Rules

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 The Hon. Justice Ronald L. Berger
 The Hon. Justice Elizabeth A. Hughes
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Enforcement of Judgments

The Hon. Justice John A. Agrios
 Mr. C.R.B. (Dick) Dunlop
 Ms. Debra Hathaway
 Master Keith R. Laycock
 Mr. Calvin C. Robb
 The Hon. Justice Barbara E.C. Romaine

Mr. Françoise H. Belzil
 Mr. Max Gold
 Mr. H.J. Lyndon Irwin, Q.C.
 Ms. Cynthia L. Martens
 Ms. Susan L. Robinson Burns, Q.C.
 Mr. Raymond (Bud) W. Steen

Foreclosure

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Mr. Francis C.R. Price, Q.C.

Forms

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Mr. David C. Elliott
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 Ms. Debra Hathaway
 The Hon. Justice Eric F. Macklin
 The Hon. Justice Terrence F. McMahon
 The Hon. Justice June M. Ross

Mr. James T. Eamon
 The Hon. Judge Allan A. Fradsham
 Mr. William H. Hurlburt, Q.C.
 The Hon. Justice Alan D. Macleod
 Ms. Sheryl Pearson
 Mr. Wayne Samis

Judicial Review

Mr. Tom Archibald
 Mr. Tim Hurlburt, Q.C.
 Mr. David N. Jardine
 Ms. Peggy Kobly
 Prof. Alastair R. Lucas, Q.C.
 Ms. Margaret A. Shone, Q.C.

The Hon. Justice Gerard C. Hawco
 Mr. H.J. Lyndon Irwin, Q.C.
 Mr. David P. Jones, Q.C.
 Ms. Jo-Ann R. Kolmes
 Mr. Thomas W.R. Ross
 The Hon. Justice Frans F. Slatter

Management of Litigation

Mr. Kenneth F. Bailey, Q.C.
 Mr. Anthony L. Friend, Q.C.
 The Hon. Justice C. Adele Kent
 Ms. Cynthia L. Martens
 The Hon. Justice Doreen A. Sulyma

Mr. P. Jonathan Faulds, Q.C.
 The Hon. Judge Elizabeth A. Johnson
 Mr. Peter J.M. Lown, Q.C.
 Mr. Gerald F. Scott, Q.C.
 Ms. Doris I. Wilson, Q.C.

Promoting Early Resolution of Disputes

Mr. Patrick M. Bishop
 The Hon. Judge Nancy A. Flatters
 Mr. J. Royal Nickerson, Q.C.
 The Hon. Justice Bonnie L. Rawlins
 Ms. Karen M. Trace
 Ms. Camilla Witt, Q.C.

The Hon. Justice Peter T. Costigan
 Mr. William H. Hurlburt, Q.C.
 Ms. Sandra Petersson
 Ms. Margaret A. Shone, Q.C.
 Mr. Kenneth J. Warren, Q.C.

APPENDIX B – RESPONDENTS

We also thank everyone who took the time and effort to comment on our many consultation memoranda and issues papers, as well as Test Draft 3 of the proposed rules. Your comments provided extremely important information for the project.

The Hon. Justice John A. Agrios

Ms. Camille Audain

Mr. Michael J. Bailey

Ms. Elaine Balestra

Ms. Françoise H. Belzil

The Hon. Justice Myra B. Bielby

Mr. Douglas A. Bodner

Ms. Lyn Bromilow

The Hon. Justice Brian R. Burrows

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Mr. James A. Christensen

Mr. William E. Code Q.C.

The Hon. Justice Peter T. Costigan

The Hon. Judge S. R. Creagh

Mr. Ronald G. Cummings Q.C.

Mr. Robert M. Curtis Q.C.

Ms. Kathleen Dimsdale

Mr. Michael G. Doerksen

Mr. William A. Dushenski

Mr. Ron J. Everard Q.C.

Mr. Martin Felsky

Ms. J. Kate Foster

Mr. Mark C. Freeman

Mr. Rick Garvin

Mr. Richard J. Gilborn Q.C.

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Mr. Gregory J. Alexander

Mr. Larry D. Ayers

Mr. Sarbjit S. Bains

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Professor Barbara A. Billingsley

Mr. Douglas J. Boyer

Ms. Cara L. Brown

Ms. Shannon C. Butcher

Mr. Joseph A. Caruk

The Hon. Justice C. Philip Clarke

Mr. Brian W. Conway

The Hon. Justice Jean E.L. Côté

The Hon. Justice Michelle Crighton

Mr. Sean Curran

Ms. Jeanette Dechant

Mr. Leonard M. Dolgoy Q.C.

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Mr. Max Gold

Mr. Timothy C. Hagg

Mr. Robert J. Hall Q.C.
Mr. Harris Hanson
Mr. Glen M. Hickerson
Ms. Jocelyn L. Hill
The Hon. Judge Geoff Ho
Mr. Patrick Horner
Mr. Alan D. Hunter Q.C.
Mr. William H. Hurlburt Q.C.
The Hon. Justice Gerald O. Jewers
Ms. C. Anne Kaplan
Mr. Bryan J. Kickham
Mr. Stephen Kit
Mr. John P. Kudrinko
Ms. Beverley Larbalestier Q.C.
Mr. Robert P. Lee
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Ms. Diana J. Lowe Q.C.
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The Hon. Justice Eric F. Macklin
Mr. James I. MacSween Q.C.
Mr. Richard J. Mallett
Mr. Michael A. Marion
Mr. Douglas H. McCallum
Mr. Shawn W. McLeod

Ms. Linda McKay-Panos
Ms. Averie McNary
Mr. Ken B. Mills
Mr. John Garry Moore Q.C.
Ms. Anita M. Myers
Ms. Colleen Nicholls
Mr. Robert T. O'Neill
Mr. Murray K. Olsen
Mr. Alan Pearse

Mr. Brent L. Handel
Mr. Martin J. Hattersley Q.C.
Mr. Richard C. Hilborn Q.C.
Mr. Leroy N. Hiller
The Hon. Judge John D. Holmes
Mr. David A. Huculak
Mr. Tim Hurlburt Q.C.
Mr. Carsten Jensen Q.C.
Mr. David P. Jones Q.C.
The Hon. Justice C. Adele Kent
Mr. Philip G. Kirman
Mr. Walter W. Kubitz
The Hon. Judge Hugh F. Landerkin
Master Keith R. Laycock
Mr. Ken H. Lewis Q.C.
Mrs. Michael A. Loberg
Mr. Richard A. Low
The Hon. Justice Arthur M. Lutz
Mr. Perry R. Mack Q.C.
Mr. Cameron D. MacLennan
The Hon. Justice Brian E. Mahoney
Mr. Lenard G.L. Mar
Ms. Gillian D. Marriott
Mr. K. Mark McCourt
The Hon. Justice Terrence F. McMahan
Mr. Bob McNally
Mr. Peter Michalyshyn
The Hon. Justice Andrea Moen
Ms. Christine Mowat
The Hon. Justice Rosemary E. Nation
Mr. J. Royal Nickerson Q.C.
Professor Shannon K. O'Byrne
The Hon. Justice Vital O. Ouellette
Mr. Constantine Pefanis

Mr. Daniel D. Peterson Q.C.
Mr. Robert S. Pollick
Mr. F. Murray Pritchard
Mr. Michael J. Pucylo
Mr. Robert Reynolds
Mr. Andrew R. Robertson
The Hon. Justice John D. Rooke
Mr. Leslie S. Scholly
Mr. Gerald F. Scott Q.C.
Mr. Steven L. Shavers
Mr. Gregory P. Shewchuk
Mr. Robert M. Simpson
Mr. C. Michael Smith
Mr. Grant D. Sprague
Mr. Craig R. Steele
Ms. Laura K. Stevens Q.C.
Ms. L. Deborah Sword
Mr. Jeffrey N. Thom Q.C.
The Hon. Justice Marguerite J.
Trussler
Ms. Margaret Unsworth Q.C.
The Hon. Justice Joanne B. Veit
Mr. Aran Veylan
Ms. Kim D. Wakefield Q.C.
The Hon. Justice Jack Watson
Ms. Analea Wayne
Mr. Philip N. Williams
Mr. Eric D. Young Q.C.

Mr. John P. Poirier
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Mr. John T. Prowse Q.C.
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Mr. James A. Robertson
Mr. Wayne Samis
Mr. W. Scott Schlosser
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Mr. Howie Sniderman
Mr. Grant N. Stapon
Mr. Raymond (Bud) W. Steen
Mr. Brian S. Sussman Q.C.
Mr. E. David D. Tavender Q.C.
Ms. Karen M. Trace
Ms. Susan E.A. Trylinski

Mr. J. Todd Van Vliet
The Hon. Justice Gerald Verville
Chief Justice Allan H.J. Wachowich
Mr. Lewis Wasel
Mr. G. Scott Watson
Mr. Neil S. Wiberg
Mr. Arthur A.E. Wilson Q.C.
Mr. Barry Zalmanowitz Q.C.

APPENDIX C – PUBLICATIONS

CONSULTATION MEMORANDA

- 12.1** Commencement of Proceedings in Queen’s Bench (October 2002)
- 12.2** Document Discovery and Examination for Discovery (October 2002)
- 12.3** Expert Evidence and “Independent” Medical Examinations (February 2003)
- 12.4** Parties (March 2003)
- 12.5** Management of Litigation (March 2003)
- 12.6** Promoting Early Resolution of Disputes by Settlement (July 2003)
- 12.7** Discovery and Evidence Issues: Commission Evidence, Admissions, Pierringer Agreements and Innovative Procedures (July 2003)
- 12.8** Pleadings (October 2003)
- 12.9** Joining Claims and Parties, Including Third Party Claims, Counterclaims, and Representative Actions (February 2004)
- 12.10** Motions and Orders (July 2004)
- 12.11** Enforcement of Judgments and Orders (August 2004)
- 12.12** Summary Disposition of Actions (August 2004)
- 12.13** Judicial Review (August 2004)
- 12.14** Miscellaneous Issues (October 2004)
- 12.15** Non-Disclosure Order Application Procedures in Criminal Cases (November 2004)
- 12.16** Trial and Evidence Rules – Parts 25 and 26 (November 2004)
- 12.17** Costs and Sanctions (February 2005)
- 12.18** Self-Represented Litigants (March 2005)
- 12.19** Charter Applications in Criminal Cases (June 2006)
- 12.20** Criminal Jury Trials: Challenge for Cause Procedures (April 2007)
- 12.21** Civil Appeals (April 2007)

OTHER REPORTS AVAILABLE ON OUR WEBSITE

Issues Paper for the Legal Community (October 2001)

Public Consultation Paper and Questionnaire (January 2002)

Public Consultation Report (September 2002)

Report on Legal Community Consultation (September 2002)

Family Law Issues Paper (October 2002)

Judicial Review and Administrative Law – Identified Issues (March 2003)

Focus Group Report (April 2003)

Interim Report (March 2004)

Non-Disclosure Order Application Procedures in Criminal Cases – Report on Consultation Memorandum 12.15 (September 2005)

Charter Applications in Criminal Cases – Report on Consultation Memorandum 12.19 (February 2007)

APPENDIX D – INSTRUCTIONS TO WORKING GROUPS

(Excerpt from instructions to all Working Committees.)

Project Objectives

While they are subject to an ongoing process of amendment, the Rules have not been comprehensively revised since 1968. There is a need for rewriting that has arisen over the course of this lengthy period. Further, since 1968, and particularly in the last decade, concerns have been raised as to the timeliness, affordability and understandability of civil court proceedings. Reforms have been adopted to address these issues, some as amendments to the Rules, others by other means.

The Alberta situation is best understood if looked at in the larger context of rules revision and civil justice reform. ALRI research commenced by identifying projects in other jurisdictions involving rules or civil justice reform and gathering information about the content of and process employed in those projects. The information gathered is summarized in the Reference Binder: Rules Reform - Other Jurisdictions, copies of which will be provided to all Working Committee members.

The binder contains information on the state of rules revision in other Canadian jurisdictions (summary at Tab 1.2, details at Tabs 2.1 through 2.13). A comprehensive revision was completed in British Columbia in 1977 and in Ontario in 1985. The most recent comprehensive revision was to the Federal Court rules in 1998.

In recent years there have been a number of civil justice reform projects, also reviewed in the binder: Ontario's *Civil Justice Review: First Report 1995* and *Supplemental and Final Report, 1996* (Tab 2.9); Lord Woolf's report on the English system: *Access to Justice: Interim Report, 1995* and *Final Report, 1996* (Tab 4.1); the Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System, 1999* (Tab 5.7); and the Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system, 2000* (Tab 5.2). Reference may also be had to the Canadian Bar Association's *Report of the Task Force on Systems of Civil Justice, 1996*. These are civil justice reform projects, and do not necessarily include comprehensive Rules revision.

The reform projects focus on the issues of delay, cost and lack of public understanding of civil justice systems, with the attendant issues of inaccessibility and mistrust of the systems. The proposals designed to address these problems

include the promotion of early settlement, notably through the incorporation of ADR techniques, employment of different “tracks” for litigation together with caseflow management, and judicial case management of complex cases. They therefore tend to focus on certain aspects of procedure and the Rules of Court that are identified with the issues of cost and delay (notably discovery and expert evidence) and on those associated with proposed resolutions to these problems. These same reform areas are reflected in recent Alberta rules changes (e.g., changes to discovery rules and Streamlined Procedure) and practice notes.

The Steering Committee has approved Project Objectives that address both the need for rewriting of the Rules and reform issues. The objectives of maximizing the Rules’ clarity and useability, and to some extent the objective of maximizing the Rules’ effectiveness, are goals associated with the “rewriting” of Rules. Such objectives formed a significant part of the impetus for this project. Our consultations with the bar to date support the view that these are essential and central, although not exclusive, goals. Objective #4, maximizing the Rules’ advancement of justice system objectives, as well as some aspects of objective #3, maximizing the Rules’ effectiveness, relate more to “reforming,” or at least “rethinking” the Rules. These goals are consistent with the recent civil justice reform studies. Consultations with the legal community to date indicate acceptance that these goals as well, with their focus on promoting access to justice, are appropriately included in the Rules Project.

Objectives of the Rules of Court

In addition to Project Objectives, the Steering Committee has approved on a working basis the inclusion of an interpretive or purpose provision in the new Rules to the same effect as provisions now found in most Canadian rules.

Ontario Rule 1.04(1) provides, under the heading “general interpretation principle”:

These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

(See also Manitoba Rule 1.04(1), New Brunswick Rules 1.03(2) and Prince Edward Island Rules 1.04(1)).

British Columbia Rule 1(5) provides:

The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding.

(See also Northwest Territories Rule 3 and Nova Scotia Rule 1.03).

Rule 3 of the Federal Court Rules provides:

These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

Alberta, Saskatchewan and Newfoundland do not have such a provision.

The effect of the Ontario rule is summarized in Holmsted and Watson, *Ontario Civil Procedure*, p. 1-25 as follows: “it embodies the philosophy of modern procedure that procedure is not an end in itself but merely a means of obtaining a just disposition on the merits, speedily, expeditiously and least expensively.”

The principle is not new and it is not thought that its adoption would cause a significant change in practice. Stevenson & Côté, *Civil Procedure Guide 1996*, at 3-5, cite case law adopting similar interpretive principles, such as, that the rules are “servants,” not “masters,” are not “an end in themselves,” and “should serve to secure justice between the parties.” But an express statement of this type would bring Alberta Rules into line with most other Canadian rules, and would create a lasting connection between important Project Objectives and the Rules. Therefore the Steering Committee has approved the inclusion of a similar clause in the new Rules. The precise language of the provision will be addressed at a later date.

Such a clause can serve as a guide, not only to the eventual interpretation and application of the Rules, but also to the adoption of changes to the Rules. Justice J. W. Morden, commenting on the Ontario rule in the context of the 1985 revision of the Ontario Rules of Court indicated that this principle underlay changes to the Ontario Rules which “compromise[d] between, on the one hand, providing effective mechanisms for ascertaining the truth and, on the other, not making litigation too cumbersome or expensive” (“An Overview of the Rules of Civil Procedure,” in *Materials for a 1984 Continuing Legal Education Program on Ontario’s “New Rules of Civil Procedure”*).

Drafting Guidelines

In an effort to secure similar approaches to the process of redrafting by the various committees that will be involved in the Rules Project, the Steering Committee has adopted a set of Guidelines for Redrafting and Guidelines on the Drafting Process. These guidelines go some way towards operationalizing the project’s “rewrite” objectives of maximizing the clarity and useability of the Rules. They also emphasize the importance, at the initial stages of the project, of making policy decisions rather than draft rules. Finally, they indicate the contexts in which

it is very important that working committees liaise with each other and with the Steering Committee.

Project Organization

The Steering Committee has adopted a structure that reflects the “rewriting” and “reforming” or “rethinking” objectives, and that makes provision for the inclusion of persons with a diversity of experience and perspectives. Further, as a comprehensive review of the Rules includes a number of highly specialized topics, the structure includes committees, to be composed of persons with relevant experience, to review the Rules in these areas. [Each committee was given a mandate.] Many of the committees will become active at a later stage in the project. In January 2002, the first four Working Committees were created.

Reform topics have been separated from the overall revision of the Rules of Court. The “Rethink” Committees will address those areas in which reform issues have been at the forefront. Where reforms have already been adopted, these will be reviewed and evaluated. Reforms not yet adopted in Alberta can also be considered for inclusion in the Rules.

The General Rewrite Committee will deal with topics in which, it is thought, the primary focus will be rewriting. The inclusion of a topic in the rewrite category **does not** preclude review of policy and practice issues related to that topic, it simply indicates an educated guess as to the likely need for a substantial rethinking of policy and practice issues. The General Rewrite Committee also ensures that there will be a comprehensive review of the Rules, as it will have the responsibility of dealing with all Rules not assigned to a specialized committee.

Consultation Process

1. Consultation with the Legal Community

Consultation with the legal community commenced in the fall of 2001, with a series of presentations to the bench and bar. The process continued through the winter with law firm meetings in Edmonton and Calgary. An Issues Paper for the Legal Community described the Rules Project, raised a number of issues, and sought input. That input, whether in the form of letters, e-mail, or notes from meetings, was categorized and entered into a database. Information from the database is provided to working committees by ALRI counsel. In addition, a summary Report on the Legal Community Consultation has been prepared.

2. Consultation with the Public

Consultation with the public employed a model similar to that employed by the Alberta Government for the Unified Family Court Task Force.

A “Public Consultation Paper and Questionnaire” was prepared, and made available electronically and in print format. Extensive circulation of the questionnaire was arranged: at courthouse counters, MLA offices, Legal Aid and Law Society offices; by mail to advocacy interest groups with an interest in civil litigation; on the ALRI website; and by publication in *Law Now*. However, the return rate was disappointing. 98 questionnaires were received by the cutoff date of June 30, 2002. A Public Consultation Report has been prepared.

Workplan for Working Committees

1. Organizational Meeting

At its first meeting, each working committee should address the following matters:

1. Review the committee’s mandate and then organize the mandate into topics. Develop a working understanding of the mandate and topics.
2. Review the various instructions provided by the Steering Committee identified above (Project Objectives, Objectives of the Rules of Court, Drafting Guidelines, Instruction on the Drafting Process).
3. Develop a preliminary agenda, including the priority for dealing with particular topics. In developing its agenda, the Committee should have regard to the process for developing policy recommendations and to the goals respecting timelines, both of which are described below.

2. Process for Developing Policy Recommendations

The major goal for Working Committees is the development of policy recommendations regarding each of the topics included in their mandates. These policy recommendations are to be written up in the form of Consultation Memoranda and distributed to the bar and bench for feedback. The committees will subsequently review the feedback, and approve drafting instructions and draft rules.

ALRI proposes a process in the following stages to develop policy recommendations. The process assigns research and writing tasks to counsel (who may be one or more members of the committee), with other committee members

involved in defining issues, assigning and reviewing research and making policy recommendations.

Stage 1: Identification of Issues and Research Plan

Counsel will start the process of identifying issues by providing a preliminary issues memorandum and background materials including a review of relevant Alberta Rules and comparable rules from other jurisdictions. The Committee will review this information and develop an issues list. The Committee will also construct a research plan for the issues, identifying issues requiring research, suggesting sources to be consulted, and assigning research tasks and priorities to counsel.

Stage 2: Initial Research and Policy Formulation

The Committee will review the initial research and discuss policy. The Committee will set policy on each identified issue, where this is possible. If the Committee considers that it is not in a position to make policy recommendations, it will plan and assign further detailed research or consultations.

Stage 3: Detailed Research and Policy Formulation

The Committee will review further research or consultations. It will review and approve policies set at Stage 2. It will, to the extent possible, adopt policy recommendations for all remaining issues. If the Committee feels that it still lacks sufficient information or is unable to agree on a policy recommendation at this stage, it should attempt to formulate possible alternative policies. The Committee will then instruct counsel regarding the drafting of a Consultation Memorandum, which will set out identified issues, provide policy recommendations (where possible) or alternatives (where the Committee has been unable to make a recommendation), and provide sufficient background to justify the policy recommendations or explain policy alternatives.

Subsequent Stages

The Committee will approve the Consultation Memorandum before it is circulated to the profession. The Committee will also develop a plan to review any feedback, finalize policy recommendations and approve drafting instructions and draft rules. ALRI will assist the Committees in developing these plans at the appropriate time.

3. Goals for Timelines

In developing its agenda and setting priorities for particular topics, Committees should have regard to the following goals:

1. The overall goal of the Rules Project is to complete a set of recommended new rules in 2004.
2. In order to allow time for circulation and feedback on consultation themes, followed by adequate time for review of feedback and preparation of draft rules, Consultation Memos should be completed within a maximum period of one year.

4. Reporting and Liaising

Working Committees report to the Steering Committee by means of minutes that provide a brief summary of committee discussions and that identify decisions taken and work assigned. The Steering Committee may provide directions or suggestions to working committees, or request that two or more working committees liaise in order to: resolve conflicts in the recommendations made by different committees, ensure proper coverage of all topics included within the Rules Project while avoiding overlap, and promote the achievement of Rules Project objectives.

APPENDIX E – DRAFTING PROTOCOL

GUIDELINES ON THE DRAFTING PROCESS

WHY ARE GUIDELINES NEEDED?

Drafting legislation is an extremely time- and labour-intensive process. It takes much more work than people generally anticipate. These guidelines outline standard drafting procedures that promote the best use of the drafter's time so that the drafter can produce the legislation as quickly and efficiently as possible. This is crucial in order to meet the timetable of the Rules Project. These drafting procedures are based on the use of clearly defined roles and functions.

THE ROLES AND BASIC FUNCTIONS

The Working Committees

Each Working Committee of the Rules Project is responsible for formulating the policy recommendations for its area. Once those policy recommendations are approved by the Steering Committee and ALRI Board, drafting instructions will be given to the drafter by the Working Committee's instructing officer.

There is no point in trying to prematurely instruct the drafter before the basic policy is set. Multiple changes of mind by the instructing body seriously waste the drafter's time.

The Instructing Officers

Each Working Committee will have one ALRI counsel who will act as the instructing officer for that committee. The instructing officer's functions are:

- to instruct the drafter on the policy decisions made by the committee
- to review the initial drafts produced by the drafter
- to liaise between the drafter and the committee on all matters

The Drafter

The drafter's functions are:

- to receive the drafting instructions from the instructing officers
- to prepare the draft legislation

It is not the drafter's role to formulate policy. On substantive issues of policy, the Working Committees' decisions and instructions should prevail. The drafter's area of expertise is how to write legislation. On stylistic issues of legislative drafting, the drafter's opinion should prevail.

THE DRAFTING PROCESS

How are drafting instructions formulated and given to the drafter?

The drafter is unlikely to attend any Working Committee's or other body's policy discussions because that is a poor use of the drafter's time. It is not the drafter's function to help formulate policy. Nor is it the drafter's function to discern the drafting instructions simply by being present at the policy discussions. That is an extremely inefficient way to give instructions. The drafter typically does not get involved in the process until formal drafting instructions are given by the instructing officer.

When the Working Committee's policy recommendations have been worked out and approved by the Steering Committee and ALRI Board, the instructing officer will prepare a written memorandum in narrative form to instruct the drafter concerning:

- the nature of the policy decisions
- the purpose of the policy decisions
- the desired results that the policy decisions should produce
- the details of how the policy should work in practice

Obviously the instructing officer must be sure to know and thoroughly understand the proposed policy in all its details in order to instruct the drafter effectively.

Neither the Working Committee nor the instructing officer should attempt to give instructions by writing a "first draft" of the legislation because, rather than helping, this in fact tremendously slows down the whole process. Trying to write the initial draft of legislation "by committee" causes people to get endlessly, time-consumingly mired in issues of language and style. They can also quickly get "married" to unfortunate terminology or poorly-worded draft provisions, which can jeopardize the drafter's ultimate ability to do the job well. It is much better and much faster simply to rely on the drafter's specialized expertise in writing legislation and let the drafter produce the first draft (and, of course, all subsequent drafts).

The liaison function of the instructing officer

The drafter will probably rarely, if ever, deal with any Working Committee itself. All decisions, instructions and comments from members of a Working Committee or other body should be channelled to the drafter through that committee's instructing officer. In order to produce draft legislation efficiently, the drafter needs to deal with as few people as possible. If the drafter is expected to take instructions from and respond to too many people, the process will become chaotic and impossible to manage.

It is the instructing officers who will deal with their Working Committees. If the drafter needs clarification or has questions or comments that require committee input, the instructing officer gets the necessary information from the committee and conveys it to the drafter. If the drafter needs research performed or precedents provided, the instructing officer arranges for it and conveys it to the drafter.

Reviewing the drafts

There will be multiple drafts of each area of the Rules before a final draft is achieved. Probably around 5 or 6 drafts will be required, on average. To make the most efficient use of the Working Committee's time and energy, the early drafts should be reviewed by the instructing officer alone. The instructing officer can work directly with the drafter to identify and resolve any obvious initial problems with the draft. Once a reasonably polished later draft is available (probably around draft # 4), the instructing officer should provide it to the Working Committee for its members' comments and input.

Each draft must be carefully reviewed to ensure that it accurately reflects the policy decisions made for each area. Does each provision, as drafted, achieve the legal and practical effect that it is supposed to? Often the drafter will put in written questions pointing out problems, gaps, unforeseen consequences or asking for further directions. These questions are much more common in the initial drafts, of course. Some of the questions may require the instructing officer to seek further policy decisions from the Working Committee in order to instruct the drafter.

One of the most important things about reviewing drafts is the necessity for quick turnover. Because multiple drafts are required, time is of the absolute essence so that the final draft can be ready on schedule. When drafts arrive, the instructing officer needs to give them top priority. When the later drafts are given to the Working Committee, its response also needs to be prompt.

There are several ways to communicate to the drafter the results of the instructing officer's review. The drafter should be consulted about which method the drafter prefers, because some methods involve greater use of the drafter's time than others. Methods of communication can include:

- returning a copy of the draft with comments written on it in the margins
- written memorandum detailing the review's results
- meeting with the drafter to orally discuss the review's results
- telephoning the drafter to orally discuss the review's results (this is usually feasible only for the later drafts where comments are fewer)

When the Working Committee first reviews the later draft, the drafter may or may not attend the meeting to discuss or explain the draft. Again, it will depend

on the drafter's availability and preference. If the drafter does not attend, it is the function of the instructing officer to note all comments, questions and concerns and convey them to the drafter.

APPENDIX F – DRAFT ACT

JUDICATURE (ALBERTA RULES OF COURT) AMENDMENT ACT, 2009

Introductory explanatory note: This proposed amending Act would

- enact the new *Alberta Rules of Court*
- provide for future amendments to the new rules by incorporating in the *Judicature Act* what is currently section 20 of the *Court of Queen’s Bench Act* and section 16 of the *Court of Appeal Act*
- exempt the new rules from the *Regulations Act*, so permitting the improved format and style of the new rules to be retained in the official version
- state some specific responsibilities of the Rules of Court Committee with respect to the rules including authority to publish the rules and maintain an up-to-date consolidation of the new rules in electronic and looseleaf form.

JUDICATURE (ALBERTA RULES OF COURT) AMENDMENT ACT

- 1 The *Judicature Act* is amended by this Act.
- 2 Section 1 is amended by adding the following definitions:

Alberta Rules of Court means the *Alberta Rules of Court* enacted by section 22.1, as amended from time to time under this Act or by or under any other enactment of Alberta or Canada.

Explanatory note: This definition would require consequential amendments to sections 3(b), 7 and 62(2) of the *Judicature Act* to change the references “*Rules of Court*” to “*Alberta Rules of Court*”. Section 62(2) could be included in proposed new section 22.2(1). Section 63 would not apply to the new rules and so does not require amendment.

- 3 The following is added after Part 2:

Part 2.01
Alberta Rules of Court

Enactment of the *Alberta Rules of Court*

22.1 The Alberta Rules of Court published in Part 1 of the Alberta Gazette dated [200] are enacted.

Explanatory note: This section proposes that the new *Alberta Rules of Court* be enacted by this section after publication of the rules in Part 1 of the Alberta Gazette. This suggestion recognizes both the importance of the new rules as being worthy of enactment by the Legislature and ensures the validity of the new rules, avoiding the necessity of a validating section for the new rules like section 63 of the *Judicature Act*. Subsequent changes to the new rules would be made under proposed section 22.2.

Changes to the *Alberta Rules of Court*

22.2(1) The Lieutenant Governor in Council may make regulations respecting

- (a) the practice and procedure in the court by adding to, repealing or amending the *Alberta Rules of Court*;
- (b) judicial review in civil matters;
- (c) the duties of officers of the court;
- (d) costs in matters before the court;
- (e) the fees to be collected by officers of the court;
- (f) the rates of fees and expenses payable to persons under the *Alberta Rules of Court*.

(2) The rules made by the Lieutenant Governor in Council under subsection (1) in relation to the practice and procedure in the court may, subject to subsection (3), alter or conform to the substantive law.

(3) Subsection (2) does not authorize the making of rules that conflict with an Act of the Legislature or of the Parliament of Canada, or regulations made under those Acts, but the rules may supplement the provisions of an Act or regulation in respect of practice and procedure.

(4) Regulations made under this section must be published in Part 1 of the Alberta Gazette and come into force on publication or on a date or dates prescribed by the published regulation.

(5) The *Regulations Act* does not apply to regulations made under this section.

Explanatory note: This section, except for subsections (4) and (5) is a virtual copy of section 16 of the *Court of Queen's Bench Act* incorporating section 16 of the *Court of Appeal Act*. Reference to surrogate rules is omitted as necessary, the authority to make rules respecting surrogate matters being covered by subsection (1)(a), (c), (d) and (f).

Rules of Court Committee

22.3(1) The Rules of Court Committee previously established under the *Court of Queen's Bench Act* is continued consisting of the following members:

- (a) the Chief Justice of Alberta or a judge of the Court of Appeal designated by the Chief Justice;
 - (b) the Chief Justice of the Court of Queen's Bench or a judge of the Court of Queen's Bench designated by the Chief Justice;
 - (c) the chief judge of The Provincial Court of Alberta or a judge of the Provincial Court designated by the chief judge;
 - (d) 2 persons who are members of the Law Society of Alberta appointed by the Minister from among those recommended by the Benchers of the Law Society of Alberta;
 - (e) one person appointed by the Minister of Justice and Attorney General.
- (2)** The Committee must elect one of its members as chair.
- (3)** The Committee must meet as occasion requires to consider the *Alberta Rules of Court* and changes to them and may make recommendations respecting those rules of court to the Minister.
- (4)** The members of the Committee must serve without remuneration, but the Minister may pay the reasonable travel and living expenses incurred by the members in the performance of their duties under this section.
- (5)** The Minister of Justice and Attorney General must provide to the Committee
- (a) those secretarial and other services that the Minister considers appropriate, and
 - (b) resources or services required by the Committee to fulfill its responsibilities under this section, section 22.4, and the *Alberta Rules of Court*.

<p>Explanatory note: Clause (b) is new. The rest of this section is virtually a copy of s. 25 of the <i>Court of Queen's Bench Act</i>.</p>
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Responsibilities of the Rules of Court Committee

22.4 The Rules of Court Committee is responsible for

- (a) recommending new rules, amendments to rules or the repeal of rules in the *Alberta Rules of Court*;
- (b) publishing amendments to the *Alberta Rules of Court* in Part 1 of the Alberta Gazette as required under section 22.2(4);
- (c) maintaining an up-to-date consolidated version of the *Alberta Rules of Court* in looseleaf and in electronic form.

Explanatory note: This section is intended in part to replace the *Regulations Act* in terms of responsibility for publication of amendments to the *Alberta Rules of Court* and in part to describe the responsibility of the RCC with respect to the rules.

Consequential amendments

4(1) Section 16 of the *Court of Appeal Act* is repealed.

(2) The *Court of Queen’s Bench Act* is amended

- (a) by repealing section 20;
- (b) in section 24(1)(a)(i) by striking out “made under this Act” and substituting “made under the *Judicature Act*”;
- (c) by repealing section 25.

Notes: 1 There may need to be a transitional section to continue the appointments and designations under proposed section 22.3 and to deal with judicial districts.

2 It may be desirable to add regulation-making authority to amend regulations under any Act

- to deal with transitional or consequential issues arising as a result of the new rules
- to ensure consistency in terminology between regulations and the new rules (e.g. changing references from “motion” to “application”).

3 It may be desirable to consolidate section 55 and section 62 with proposed Part 2.01 [*Alberta Rules of Court*].

Repeal of former Rules of Court

5 The *Alberta Rules of Court*, Alberta Regulation A.R. 390/68, is repealed.

Note: The wording of this section is dependent on whether all existing rules can be repealed. Note also the following coming into force provision and the coming into force provision of the rules themselves in Part 14 – a choice of approach is needed.

Coming into force

6 This Act comes into force on a date to be fixed by Proclamation.

APPENDIX G – TABLE OF RULES

The following table tracks key ideas from the old rules to the proposed rules. However, it should not be viewed as a “concordance” as it is not possible to create a true concordance where entirely new legislation is enacted.