



REPORT ON LEGAL COMMUNITY CONSULTATION

ALBERTA RULES OF COURT PROJECT

September 2002

ALRI claims copyright © in this work. ALRI encourages the availability, dissemination and exchange of public information. You may copy, distribute, display, download and otherwise freely deal with this work on the following conditions:

- (1) You must acknowledge the source of this work,
- (2) You may not modify this work, and
- (3) You must not make commercial use of this work without the prior written permission of ALRI.

Report on Legal Community Consultation

1. INTRODUCTION

The Alberta Rules of Court Project (the Rules Project) is undertaking a major review of the Rules of Court with a view to producing recommendations for a new set of rules by mid-2004. As informed users of the civil justice system and as representatives for members of the public, lawyers play an essential role in reform of the system. In conducting the Rules Project, the Alberta Law Reform Institute (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 CBA sections in Edmonton and 17 meetings with law firms and CBA sections in Calgary. In addition, there were meetings with three judicial groups. (See Attachment A for a list of consultations). An Issues Paper describing the Rules Project and seeking input on a range of issues was widely distributed in paper form and has also been available on the ALRI website and through a link on the Law Society of Alberta website. In addition to the input received through consultations with local bar associations, firms and CBA sections, ALRI has 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, has been 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. This Report is a summary of the comments in the database up to September 23, 2002.

2. GENERAL COMMENTS

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.

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.

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 lawyer mobility rules.

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.

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.

3. RULE-MAKING PROCESS AND PRACTICE NOTES GENERALLY

There were many comments and criticisms about the current rule-making process and the practice notes. The themes arising from these comments are set out below.

Themes – Rule-making process

- Does the process work? Can it be improved?
- Length and complexity of the rules
- Wider consultation about rules changes
- More notice about proposed changes
- Judicial education about new rules
- Review on a set schedule, not constant change
- Poor quality of index

Themes – Practice notes

- Authority to make practice notes
- Clear mandate about how practice notes are created and how they are to be used
- Volume of practice notes
- Relationship with rules/incorporate much of content of practice notes into rules
- Predictability as to when practice notes will be issued
- Wider consultation about new practice notes/changes to existing notes
- Review on a set schedule, not constant change
- Notification of and lead time to prepare for new practice notes/changes to existing notes
- Overly complicated, detailed
- Discrepancies in application by judges
- Index/Organization

4. ALTERNATIVE DISPUTE RESOLUTION (ADR)

Should there be mechanisms to encourage or to require ADR?

Among those who responded to this issue, there was broad agreement that ADR should be encouraged. Some suggested that it be supported by sanctions and incentives, while others commented that the costs, difficulty and mystery surrounding litigation are constant incentives for litigants to resolve their disputes.

The majority of those who responded were not in favour of mandatory ADR. It was widely thought that ADR will only be effective when consensually undertaken – the parties must enter mediation with a view to settling. As well, there are some cases where it is clear from the outset that a settlement is unlikely. The more general point was raised that the courts exist to resolve disputes and should be available to anyone. Further, unless a person is able to access the court system, there is no reasonable assurance that she or he will get justice in a mediation – the prospect of a trial and having to accept its outcome is often the main motivation for settlement. The comment was also made that most lawyers manage their cases responsibly and should be able to settle many matters themselves without the need for ADR.

Those in favour of mandatory ADR thought it would provide quicker justice and should be imposed for uncomplicated claims, wrongful dismissal claims, and claims under a certain dollar amount.

At what point in the proceedings should ADR take place?

There was widespread agreement among those who responded to this issue that if ADR is held too early on in the process, it is a waste of time and resources. Many commented that it should take place after the discovery process has been substantially completed. Some respondents were in favour of ADR at an earlier stage.

Who should perform ADR - judges (JDR) or specialist ADR practitioners?

A frequently raised point was that the system should not encourage or require ADR at all unless there are mediators with skill, experience and knowledge of the subject area of law – high standards and good training are required for those who perform ADR. Another frequent comment was that too often settlement is encouraged without a real assessment of the facts and law and good advice as to the merits of the claim.

Many who commented on this issue thought that judges should have a role in ADR given their ability to analyze and interpret legal issues and given that the weight a judge carries can be useful in convincing a reluctant plaintiff or defendant about the merits of the case. On the other hand, it was pointed out that most cases do not require a judge and are better served by someone with more expertise in the relevant field (e.g., personal injury). Many respondents commented that ADR should be left to trained mediators as not all judges have expertise in mediation or accept the value of professionalism in ADR. As well, there is an issue in regional areas with the availability of judges to perform this role.

How are clients discouraged from using ADR?

Factors that discourage clients from using ADR include cost, uncertainty over the finality of any outcome, the limited authority of the other party to make a settlement, and, particularly, when the process is abused to run up costs or to discover more about the other side's weaknesses, with no real desire to settle or to settle at less than a fair amount.

Successful/unsuccessful examples from other courts/jurisdictions?

Some respondents commented that the Provincial Court pilot project for small claims works well, but the point was also made that this model may not translate successfully to Court of Queen's Bench actions, as they are usually more complex.

There were comments on both sides regarding the experience in Saskatchewan with mandatory pre-trial settlement conferencing: some said that it has been a success; others felt that the settlement conference happens too early in the process, that those who run it are not properly trained, and that counsel sometimes just show up to get their "certificate" so they can continue with the case. There were also comments that the experience with mandatory mediation in Ontario has not been a success. Some were in favour of the British Columbia approach of mandatory mediation where one party requests it.

Judicial dispute resolution (JDR) - general comments

A frequent comment was that the Alberta JDR system is working well and that JDR should continue to take place on a voluntary basis. One respondent felt that JDR

should be mandatory in all cases over a certain dollar amount and should take place on an annual basis during the progress of the litigation, forcing review and clean-up of the case. Mini-trials are thought to be useful, often leading to settlement. It was suggested that costs might be ordered if the judge's recommendations were not followed.

Some of the issues/concerns with JDR that were identified included:

- Booking delays
- Cost – usually briefs and expert reports are filed
- Not knowing what you are getting – you may have requested a mini-trial but the judge or the other party may prefer and get something else
- Trials being delayed because judicial time and resources are taken up by JDR activities

Some respondents commented that JDRs are most effective when the judge gives a view of how the claim would be assessed at trial; to the extent that they carry on a mediation the JDR session is not as effective and the parties would be better off with a fully trained mediator. In this vein, the idea was put forward that there should be a requirement that the parties let the judge know whether they are looking for a “decision” in the matter or a mediation. Another suggestion was that there should be a provision that would make a JDR decision binding, if this was elected by the parties beforehand.

There was widespread agreement among those who commented on this issue that it is a good idea to continue the practice of being able to choose which judge you get for JDR based on a judge's particular area of knowledge.

5. COMMENCEMENT AND SERVICE

Should there be a uniform procedure for commencing proceedings? Prescribed forms? Plain English?

The majority of those who responded to this issue felt that there should be a uniform procedure for commencing proceedings, adaptable to accommodate matters that are currently determined summarily by originating notice. Some respondents commented that there should be prescribed forms (with some flexibility as not all situations will fit a standard form) and that these forms should be written in plain English. A caution was raised that using plain English may have the effect of making forms longer and causing information to be lost in the translation – legal words often being shorthand for longer concepts. Other respondents did not want forms imposed.

Place of commencement

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. It was pointed out that the taxing officers are not allowing extra costs for attendance at the out of town location and this is punishing 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:

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

Service outside of Alberta

The majority of those who commented on this issue felt that service outside of Alberta should be permitted without a court order. Some respondents disagreed, commenting that particularly in contract cases, there are many times when a party makes an application for service ex juris despite the fact that the contract contains attornment clauses to other jurisdictions.

Many pointed out that the practice in other provinces is not to require a court order authorizing service ex juris. It was suggested that it would be much simpler to have a rule stating that if a party is served elsewhere in Canada that they have 30 days to respond, rather than the usual 15, and if they are served outside of Canada that they have 90 days to respond.

6. PARTIES AND JOINDER

The frequent comment regarding this part of the rules was that the rules need to address class actions in detail, whether there is legislation in this area or not. Respondents commented that if there is legislation the rules need to be in harmony with it, if not, the rules need to set out the procedure. It was felt that there is a vacuum in the rules at present and class actions are totally left to the discretion of the court, which makes it very hard to advise clients. Respondents also commented more generally that this part would be improved with the use of plain language, the elimination of duplication and better organization.

7. PLEADINGS

Do the cost and delay associated with pleadings outweigh their value? Should pleadings be abolished and replaced by a less formal narrative of fact and law?

The majority of those who responded to this issue felt that formal pleadings were valuable enough to outweigh the associated cost and delay and should be retained in favour of a less formal narrative. Formal pleadings were thought to help keep the parties on track and prevent them from reinventing their case. Some respondents commented that a more informal approach would likely result in more time and money being spent trying to get the facts and issues of the case defined. Some thought that a more narrative form of pleadings would widen the scope of discovery.

Some respondents thought it a good idea to consider having the parties certify, to some degree, that there is merit in the pleadings. It was pointed out that under the U.S. Federal Rules of Court the attorney must acknowledge in writing as part of their

pleadings that the action is not frivolous or without merit. The comment was made that the use of this requirement together with costs sanctions imposed upon lawyers who are bringing baseless actions would be a welcome addition to the Alberta Rules.

It was suggested by some that the issues should have to be more clearly defined in the pleadings. It was also suggested that a set form requiring the use of plain language would improve the problem of poorly written pleadings and would make the process clearer for clients.

Particulars

Respondents commented that if better particulars were given in the first instance, discoveries and document production would be more efficient. It was suggested that if the pleadings are not clear, there should either be an automatic right of receiving further and better particulars, or the ability to serve a request to provide further and better particulars, without the need for a court order. It was also suggested that a general “reasonable requirement” statement in the rules on the need for and the right to demand particulars would be helpful. It was pointed out that an amendment to the rules providing for particulars of bad faith in defamation actions would also be helpful.

Time period for filing statement of defence

The theme of many of the comments on this issue was that the time period for filing the statement of defence should be extended. Respondents commented that 15 days is not a practical time within which to prepare a defence and no one appears to follow or enforce this rule in any event. On the other hand, some respondents suggested that the 15 day time period is not unrealistic for many types of actions and extending the deadline would slow down those actions that are often undefended, such as foreclosures. It was pointed out that in some jurisdictions there is a document called a Notice of Intention to Defend, which allows some time to sort out the issues.

8. CASE MANAGEMENT

Is case management effective?

The majority of those who commented on this issue were of the opinion that case management is effective. It was felt that bringing the lawyers together face to face with a judge present encouraged them to abandon their combative positions. Similarly, it was pointed out that just knowing that you have to attend a meeting and report to a judge on your progress is likely to make some progress happen.

A frequent comment in this area was that the effectiveness of case management depends on the judge and not all of the judges are willing to make orders and keep things moving. Another frequently identified concern was that of ambush – judges appear to entertain motions at the case management meetings without notice or evidentiary rules being applied.

Some felt that the current pretrial conference system works effectively, many others commented that it was a waste of time and increased costs to the client.

Some of the other problems that were identified included:

- Counsel may rely too much on case management, and look to the courts to do the counsel's job.
- Case management may increase costs and delay if steps are required that normally wouldn't have to be taken.
- Setting meeting dates - trying to coordinate the schedules of counsel and the judge means that there are often long delays to get a case management date.
- The current system is a hybrid and actually slows down litigation – a full case flow management system with a more rigid set of time deadlines would be better than the hybrid in place now of loose deadlines and judges being “hands on” and making additional deadlines.
- Case management is placing too many demands on judicial resources.
- The current rule allowing counsel to make proposals regarding schedules is good, but hardly ever used.

Should case management be mandatory or at the election of the parties?

The majority of those who responded to this issue took the position that case management should be at the election of the parties in most cases. It was felt that most of the time counsel can work things out between themselves and having a mandatory meeting with a judicial officer would simply increase delay and cost. There was agreement that case management should be easy to access when necessary. The point was also raised that there should be an option to apply to take matters out of case management.

When is case management appropriate?

The theme of the comments on this issue was that there should be lawyer control wherever appropriate. Some respondents recommended that case management be reserved for certain types of cases: very long trials; litigation involving self-represented litigants, numerous parties or numerous related actions; cases where one of the lawyers is not managing the litigation properly. Some thought that case management should be available upon the request of any lawyer. The suggestion was made that it should be easier to obtain “case flow management” in order to obtain time lines for taking certain steps.

What is the most appropriate model?

On this issue, there was widespread support among commentators in favour of an informal, flexible and less paper intensive model of case management, with room for counsel to agree on matters such as scheduling. Several supported the idea of having an assigned judge take a case through all procedural matters before trial. This system was considered more efficient than bringing each judge hearing an interlocutory matter up to speed. It was also thought that it would help stop abuse as it would become clear whether one of the lawyers or clients was causing undue delay and/or was acting unreasonably.

Some respondents suggested that every case should go before a judicial officer after pleadings and before disclosure to create a framework for the action, including a trial date to work towards. There was a suggestion that the Masters could play a larger role

in this process than they do presently. Some recommended that there should be a way of making steps happen, such as some form of a “Notice to Take the Next Step”, outlining the step to be taken and a reasonable time within which to do it.

There were several comments to the effect that the new Federal Court Rules are not working well. The system is considered too inflexible with too little discretion left to counsel. Some respondents suggested that the pretrial process in the Federal Court is an advancement on the Alberta process and should be looked to as a model.

Scheduling and time lines

There was a lot of commentary about scheduling and time lines. The majority of commentators thought that time lines should not be imposed, they should be set by the lawyers. It was thought that automatic deadlines tend to advantage the more affluent litigant who can afford to “throw” more lawyers at procedural or logistical bottlenecks. As well, it is not possible to set time lines which are appropriate for each case, although it was pointed out that too many different processes for different types of cases should be avoided. Another line of thought was that mandatory time lines result in counsel becoming obsessed with completing the next step and not taking time to reflect on the action and explore options for settlement.

Some respondents commented that deadlines would be useful as long as they are clear, concise and not arbitrary. A suggested option was that there should be a schedule of events that predicts when and what steps will happen, with discretion to vary the steps or opt out of them and a means to enforce the time lines if necessary. There was disagreement about whether the court should have the discretion to vary or opt out – some thought this was a good idea, others felt that whether or not the time lines will be relaxed will then depend on which judge you get.

One respondent discussed the CBA Task Force recommendations in this area, which include the early settings of a fixed trial date, the setting of time lines for the overall determination of civil cases with enforcement of those time lines and the automatic dismissal of cases (or defences) which have not been determined within specified times.

Should case managers be judges or other officials?

The theme running through the responses in this area was that unless the case manager has some authority (to order costs, etc), the process will be ineffective. Some thought that case managers should be judges because their advice is most persuasive. Others expressed concern about the impact on judicial resources. Some thought that this task should be performed by Masters.

It was pointed out that case managers, who are required to render judicial and quasi-judicial decisions throughout the progress of a case, must be distinguished from case flow officers, whose tasks are of a more administrative nature and who need not be a judge or a lawyer.

Litigation tracks

A common theme in this area was that there should be at least three tracks. One of the suggested options was that there should be expedited, ordinary and complex tracks, differentiated by steps which are to be taken, nature and length of discovery, time limits and a varying costs schedule, with flexibility to vary procedures and time lines if necessary.

Some thought that the choice of track should be left to the discretion of the judge while others felt the lawyers should make this choice. One suggested option was that the pleadings be framed in a way that will permit the parties to signal the particular track that will most meet their needs.

Many expressed the opinion that it is not only the value of the claim but also the complexity and impact of the result that should be considered in choosing the track. There should be some flexibility to move from one track to another, as it is often difficult to know at the commencement of the case whether it is going to be complicated or simple – unforeseen issues may arise, or what appear to be complicated issues may be resolved.

9. DISCOVERY

Should there be discovery in all cases?

There was a range of responses on this issue. Some thought that discovery should be limited in certain cases. Some commented that there are cases where document discovery should not be mandatory as it is not necessary, whereas others recommended that it be mandatory for all lawsuits, large and small, and that it not be narrowed in any way. One respondent expressed that access to justice requires fuller disclosure than we have now. One concern was that limiting discovery would create more interlocutory applications to force the production of relevant documents.

One suggested option was that for smaller claims, there be document discovery only with examination for discovery upon order of the court. Others disagreed with limiting examination for discovery based upon the amount of the claim. It was suggested that there should be examination for discovery in all cases, but there should be limits on length. Some respondents thought that examination for discovery was abused; one suggestion was that the rule be amended to provide that each party can be discovered for one day plus a half day on undertakings, unless leave of the court or agreement of the parties is obtained. Others felt the process was rarely abused and that there were adequate safeguards allowing the court to limit examination if it is being abused. Another suggestion was that the lawyers should decide if examination for discovery is necessary.

Definition of record

Some respondents voiced concerns over the definition of “record” given the current state of computer technology. It was pointed out that the definition is quite broad and covers all the information stored in the computer’s hard drive, including information

about modifications to the document, deleted documents and e-mails, etc. Similar concerns were raised about archived and backup records. The comment was made that this is an area that will likely be the subject of litigation in the future and some clarification may be useful, including not only what is expected to be produced but how the information should be produced.

Relevant and material

The theme of many of the comments in this area was that the “relevant and material” standard is not appropriate. Many thought that the standard is too subjective and allows for too much discretion, which often means that documents that fall into the “grey” area are not produced. You don’t know what the other side is withholding, and if you want to find out you must cross-examine on the affidavit or find out in discovery, which causes delay and is expensive.

A related concern is that this standard has created the need to file lengthier and more detailed statements of claim, for fear that something will be missed and there will be no discovery of documents on that issue. Some thought that the old test which allowed broader document discovery was preferable.

Describing records/Privilege claims

A frequent comment in this area was that the rules need to provide better guidance on the description of documents in the affidavit of records, including guidance on describing privileged documents.

One suggestion was that the description should include what the document is, a date, and if it is correspondence, to and from whom. Many thought that the “bundling” of documents was useless. It was thought that this is particularly true for privileged records because bundling gives no idea of the grounds upon which the privilege is being claimed.

It was suggested that a clear statement in the rules defining the various grounds of privilege would be useful, as the various heads of privilege are sometimes misunderstood or misapplied. It was suggested that if the “basket” description of privilege continues, there should be a procedure to have documents put before some form of referee to decide on privilege.

Affidavit of records

A common theme in the comments on this issue was that parties should not be forced to file an affidavit of records if there is no need. Many thought that it should be left to the lawyers’ discretion.

Several respondents expressed concerns about the mandatory 90 day time period for filing the affidavit of records. Many thought it was too inflexible. Several respondents commented that it should not be necessary to get an order extending this time period – counsel should be able to agree in writing between themselves as to scheduling. Some suggested that there was nothing wrong with the Notice to Produce, which required a party to file and serve the affidavit within 10 days. It was thought that this method was

preferable to the automatic 90 days which takes away flexibility when dealing with complicated lawsuits, or in some cases allows too much time and slows the case down when there are few documents. A frequent comment was that the 90 day rule was either completely ignored or used as a “sword”. The comment was made that often people file a minimal affidavit of records to comply with the time limit, and then follow up with several supplemental affidavits, which is confusing and inefficient.

On the issue of whether the affidavit should be replaced by a form, the frequent response was that there is value in having an affidavit. Some of the identified benefits included that an affidavit:

- Emphasizes the importance of full disclosure
- Allows for cross-examination on documents
- Stops the other side from producing other (new) documents at a late stage in the action
- Means that officers can more readily get assistance from others in the company because they can say they have to swear the document under oath

Some respondents felt differently and suggested that the affidavit form be rethought and possibly replaced with a form or list with a solicitor’s signature to the effect that all records had been listed. One comment was that it is counsel who reviews the materials and decides what goes into the affidavit and often the client really has no idea what he or she is swearing to. Another comment was that the affidavit requirement essentially creates mandatory perjury, because in almost every case there are more documents which come out at discovery. One suggestion was that it would be useful if someone else could swear the affidavit, because sometimes it is hard to find the actual party.

Who can be discovered

The majority of those who commented on this issue felt that it is useful to allow discovery of both officers and employees. Others thought that discovery should be limited to one officer except in exceptional circumstances, so long as a higher onus was put on the corporate officer to be informed. It was pointed out that it should not be mandatory to examine an officer who is not sufficiently familiar with the facts. A party should have to produce the best informed person. The majority of respondents agreed that the officer’s duty to inform him or herself should be codified and subject to sanctions to minimize situations where the officer gives numerous undertakings, and as such it is really counsel giving evidence in response to the undertakings.

The suggestion was made that there needs to be a balance between examination of employees which never ends and allowing examination of key employees. Some thought it might be useful to impose limits on the number of employees who may be discovered without leave of the court. Some suggested that the abuse of discovery by examining too many employees was not a prevalent concern.

Corporate evidence

Some thought that there should be a prescribed method in the rules for having a corporate officer adopt the evidence of an employee as evidence of the company. Others suggested that the procedure of having the officer adopt an employee’s

information should be abolished and the evidence of the employee should be treated as what it is, which is evidence.

Examination of witnesses

The majority of those who commented on this issue took the position that discovery of other witnesses should be permitted. Sometimes the best informed person is not an officer, employee or former employee. It was generally agreed that there should be limits on such discovery: requiring leave of the court and limiting the number of people who could be examined were among the options suggested.

Undertakings

A frequent suggestion in this area was that the rules should set out procedures for dealing with undertakings. It was thought that the rules should specify a reasonable time for delivery of undertakings, after which there must be either consent or leave of the court for an extension.

Interrogatories

Several respondents who commented on this issue thought that written interrogatories were effective and should be allowed as an alternative to oral discovery in many cases, perhaps with oral discovery available if credibility is in issue. Interrogatories were seen as especially useful in multi-jurisdictional cases, as they would save on travel costs. Others thought that they may not be useful in the majority of cases because counsel for the party being examined “sanitizes” the responses. Some recommended the UK approach of having answers given by the officer in their original form.

Will-say statements

Some respondents were in favour of will-say statements. It was suggested that these statements might facilitate early disclosure and earlier resolution, and would help to limit surprise at trial. Others felt that it was expensive to get these statements and often you don't know at an early stage whether you will need a particular witness. Some were concerned about the impact of lawyers vetting these statements and the possibility of abuse through inaccurate disclosure of evidence or a failure to disclose evidence.

One respondent noted that the CBA Task Force recommended a pilot project to help evaluate whether will-say statements have the potential for improving the justice system and, if so, with what sort of controls and sanctions.

Examination of experts

There was a difference of opinion on examining experts. Some felt that it would be useful in narrowing the issues and, if you could avoid calling the expert, potentially shortening the trial. Others had concerns about how allowing either discovery of or examination and cross examination of experts would affect litigation privilege. Another concern was that it may just lead to further delay and expense.

10. SUMMARY JUDGMENT AND SUMMARY TRIAL

Generally

A frequent comment was that both summary trials and summary judgment are potentially valuable tools, but are not particularly well utilized. It was thought that there should be more freedom to use summary processes and that the court should rethink its generally reluctant attitude about disposing of matters summarily. One suggestion was to include a statement of principle in the rules as to the purpose of summary trials.

Summary trial

The majority of those who commented on the summary trial rules were of the opinion that summary trials are potentially very effective where counsel and the judge are committed to the process. Some of the criticisms of the process included:

- Judges seem to be applying a summary judgment standard
- Rules concerning the evidence needed for summary trials in different types of cases need to be developed
- Judges need to be more open in terms of making findings when there are conflicting affidavits
- Procedures need fine-tuning (e.g., for filing, and two-step procedure is cumbersome)
- Time limits are impractical

Summary judgment

The widespread consensus among respondents in this area was that the summary judgment threshold is too high in many cases. The perception is that there is a general reluctance to deprive a litigant of an action or defence.

11. COMPROMISE USING COURT PROCESS

The theme of the comments in this area was that there is a lack of clarity regarding the use of these rules: there are difficulties in wording the offer, it is unclear whether third parties and other parties can use the rules, it is unclear whether an offer can be withdrawn less than 45 days after it was made, and there is a problem in terms of offers to settlement that are made “all inclusive”— it is difficult to calculate whether you have exceeded the offer the way that the rule is worded right now.

Concerns were also expressed about the operation of the double costs rules. It was pointed out that double costs against a plaintiff who has a legitimate claim can cause bankruptcy. Some matters ought to be adjudicated, and just because someone loses does not mean that there was not a legitimate issue. One respondent suggested that there should be a greater element of discretion with respect to the doubling of costs. Another commented that the provision for double costs should apply equally to both plaintiffs and defendants, and should also apply to all judgments, including summary judgments.

12. MEDICAL EXAMINATION

A frequent comment in this area was that the exam should be videotaped, which would be more cost effective and practical than having an observer present. It was also suggested that the defendant should have to pay for the observer. Another frequent comment was that Rule 217 causes unfairness by requiring the plaintiff to provide all of his/her medical reports simply because the defendant has asked for an examination.

Several respondents agreed that there should be strong safeguards on the examination – right now, there are very few controls on what can be asked or required of the plaintiff, including questions about matters unrelated to the action. It was pointed out that the examination under Rule 217 is the defendant’s medical examination of the plaintiff, not an independent examination. Some respondents felt that there should be an independent examination available to the court.

It was suggested that the rule needed clarification in order that its interpretation be made more consistent with its intended purposes and existing case law. It was recommended that it be codified that the court shall order an examination where the defendant demonstrates that its theories require the examination and touch upon one or more of the matters in issue and the examination could place before the court expert testimony dealing with those issues. The suggestion was also made that there be clarification of whether the rule applies to other types of actions, such as disability or medical malpractice claims. There was a comment that the rule is outdated in referring only to “medical practitioner”. It was recommended that the rule state that the defendant may choose what expert the plaintiff should be required to attend.

13. EXPERTS

It was suggested that Rule 218.1 should set out clear, unequivocal criteria for expert reports. The criteria should be a statement of qualifications, symptoms addressed, tests performed, results, comparison to norms, and whether the condition is permanent. It was also suggested that clarification was needed of whether reports must be exchanged consecutively or concurrently, with one respondent recommending simultaneous production of expert reports and one rebuttal by each side. Some respondents commented that parties should be required to seek leave of the court to call an expert. It was also suggested that limits be put on the number of experts. A concern was identified that Rule 218.12(1) (rebuttal evidence) is being used to “handcuff” the defence long in advance of the trial date.

Another respondent commented that there should be very short examination-in-chief of experts provided that the expert report is done fully and is provided to the court for review prior to the hearing. It was recommended that there should either be rules allowing full cross-examination of the expert on income, testifying history, and lack of objectivity, or the system should move to court-appointed experts.

14. ENTRY FOR TRIAL

Several respondents in this area were of the opinion that certificates of readiness were not useful and caused delay. One respondent felt that certification for trial and the pre-trial process often result in settlement.

Some thought that conditional certificates were more appropriate, given the delay between the filing of the certificate and the actual trial. Others felt that conditional certificates did not work very well because time lines are seldom met, and usually the trial has to be adjourned. One respondent commented that, given the problems with conditional trial scheduling, the only safe system is to require a certificate of readiness before a trial date can be procured. It was suggested that if conditional certification is granted, there should be cost penalties associated with failure to meet the conditions. The comment was also made that judges will not entertain the idea of a conditional certificate until discoveries have been completed, and yet it should be possible to book a trial date earlier, during discoveries.

15. DELAY IN PROSECUTION OF ACTION

The majority of respondents in this area thought that a five year delay should result in mandatory dismissal. Many were also of the opinion that five years is too long to wait – some commented that, absent an agreement, two or three years is a more appropriate time line. Another suggestion was that the old rule which required leave to be obtained to take the next step in an action after a one year delay be reinstated, although it was pointed out that the downside may be that forcing a matter on to trial will result in a case moving forward when it would otherwise die. There was a comment that it should be made clear that an action can still be struck before five years in appropriate circumstances (i.e. if there is delay causing prejudice), and that Rule 244.1 (application re delay) should be used more.

It was recommended that there be discretion in a judge to account for the normal healing and assessment process. Putting arbitrary limits on the process, it was suggested, can result in injustice by forcing a plaintiff to quantify their claim when they may have not been able to determine their future prognosis with any reasonable degree of probability.

Some respondents commented that Rule 243.2 (proposal as to timing) is useful and should be expanded to apply to other matters, such as discovery. Others were of the opinion that this rule is clumsy in its operation and is ineffective because the judges do not enforce it.

16. EVIDENCE

It was suggested by some respondents that the absolute right to cross-examine on an affidavit be curtailed, as it is often used as a delay tactic. Some respondents also commented that the language in this section of the rules is outdated.

Rule 84(1) of the Federal Court Rules was suggested as a model – it imposes on a party seeking to cross-examine an opposing party a requirement that all evidence that they intend to rely on by way of affidavits is before the courts before cross-examinations are conducted.

17. MOTIONS AND APPLICATIONS

Some respondents requested that it be made clearer when a master vs. a judge can hear a motion. It was suggested that access would be improved if Provincial Court judges could act as masters in chambers, particularly in smaller centres.

It was pointed out that in practice the court permits parties in the same city to make applications by phone and it was suggested that applications without personal appearance be permitted where all parties consent, or where there is an emergency. The suggestion was made that the rule about telephone conferences be expanded to include video conferences.

Some respondents identified that for in-person applications, there is a real need to control adjournments as substantial travel may be involved. There is a need to ensure early notice of adjournment applications. The suggestion was made that telephone adjournment applications would be best.

The concern was raised that interlocutory procedures longer than 20 minutes are not being dealt with efficiently if they are always sent to a special application with the necessity of filing briefs and authorities. The point was made that the 20 minute rule is hard to apply as the time depends on the speed of the judge. Self-represented litigants slow the process too. Respondents suggested that the 20 minute time limit for morning chambers be reconsidered.

Some respondents recommended that counsel should have to provide motion books or some sort of list of all materials to be relied upon in an application. The British Columbia and Saskatchewan practices were suggested as models. With regard to Alberta practice regarding written briefs, both the specific timelines and their enforcement were criticized.

Respondents also recommended that the rules provide more guidance for ex parte applications, such as what information must be put before the judge.

18. STREAMLINED PROCEDURE

While some thought that the procedure worked well, the theme underlying many of the comments was that these rules have not been particularly well-received by the profession. Some respondents commented that the idea is a good one but the procedure as it is just being ignored. Pleadings may claim in excess of \$75,000 in order to avoid streamlined procedure. Some suggested that the procedure is overly complex, requiring too many steps and too much written material. It was pointed out that counsel are constantly going back to court to obtain orders for steps that would not require orders without this procedure. Concerns were also raised about the lack of clarity in the procedure and the differing interpretations of these rules by masters.

Some respondents suggested that it would be better to have a shortened form of procedure available for use in any action. The point was made that the amount of money in an action does not necessarily determine its complexity. Some “small” claims may be sufficiently complex to warrant all the steps of a full action. As well, it is difficult to know at the outset whether a claim falls into the procedure – there may be special or aggravated damages to be proven at trial, or, more generally, you may not know what a claim is worth until years after the event. One respondent suggested that special procedures should be provided for builders’ liens and simple debt claims.

Another problem identified by respondents was that the rules don’t move the action along after the affidavits of records are filed. It was suggested that there should be time lines for discovery and other steps to keep the action moving. One proposal was that a conditional certificate of readiness should be required early in the process with time lines for completing steps and a trial date to work towards. It was recommended that there be consequences for failing to follow the rules.

Many raised the point that some form of notice should be required if a matter is going to be under the streamlined procedure – perhaps a paragraph in the pleadings or a stamp on the front of the statement of claim.

19. COSTS

Schedule C

While some respondents felt that the costs in Schedule C were either appropriate or not high enough, the large majority of those who commented on this issue were of the opinion that these costs were too high. A prevalent comment was that the schedule has “closed doors” to meritorious claims because people cannot afford to take the risk of litigation. One respondent pointed out that the training of junior lawyers is being affected – fewer senior counsel will let a junior counsel run a trial because of the costs at stake. One suggestion was that the old “limiting rule” be reinstated, where costs are limited to a certain percentage of the claim in certain cases (e.g., smaller actions, appeals from small claims matters).

Some of the other identified concerns included that Schedule C favours firms with large claims because there is often the same amount of work involved in a large claim as with a smaller claim, but the schedule does not reflect this. As well, the concern was raised that Schedule C puts too much of an emphasis on trial costs and not enough on costs for preparation for discovery. Raising costs for discovery would encourage early settlement.

Costs sanctions against counsel

Some respondents thought that counsel should have to pay costs personally if they are responsible for delay. One suggestion was that in order to avoid a personal costs order, counsel would need to stipulate that the delay in question was caused by the client or some factor beyond the control of counsel. Other respondents cautioned that it should be a very exceptional case where counsel should be held personally responsible.

Costs payable forthwith

The concern expressed by some respondents in this area was that too few judges are ordering costs payable forthwith in interlocutory matters. It was suggested that the risk of having to pay costs forthwith would force parties to be more reasonable. It was pointed out that the Ontario Commercial Division has for some time now been awarding reasonably substantial costs payable immediately and in any event of the cause against the unsuccessful party in an interlocutory application.

Another point of view raised was that the requirement that interlocutory costs be paid forthwith is a hardship for some clients. Wealthier clients and corporations can raise the money immediately to pay costs, so are able to push their actions ahead even if they lose an interlocutory application. For some individual litigants, it means the end of the action. It was suggested that guidelines be put in place regarding the circumstances where it is appropriate to order costs payable forthwith in any event of the cause. It was also suggested that any requirement to pay costs forthwith should not apply to ex parte orders.

Contingency fee agreements

Some respondents expressed that contingency agreements should be retained because they are often the only way that the average person can afford to retain a lawyer. The requirements for contingency fee agreements set out in Rule 616 were the subject of criticism - it was stated that the imposition of these requirements on no other legal fee arrangements except contingency agreements is arbitrary and unfair and implies to potential clients that the lawyer is not to be trusted.

Taxation

The frequently expressed concern in this area was that the taxing officer should have no discretion to vary the costs in Schedule C. It was felt that there needed to be more consistency in the way the schedule is applied. There was also perceived to be a lack of consistency in what will be allowed for type and amount of disbursements.

20. APPEALS

Some respondents raised the issue of whether appeals from masters should be *de novo*. It was suggested that parties should not be able to file new evidence for the appeal. It was also suggested that for certain matters there should be a procedure for skipping over Queen's Bench and going straight to the Court of Appeal (e.g., foreclosure matters).

There was a difference of opinion regarding limits on appeals of interlocutory matters. Some thought that there should be limits; others thought that the right to appeal should remain, subject to a requirement of leave. Another suggestion to limit abuse of these appeals was to require that they be disposed of in writing, without appeal books or oral argument.

One respondent suggested adopting the practice, followed by the Divisional Court of Ontario, of an intermediary court of review. Every two months, the Chief Justice could assign three ordinary judges to constitute a panel of appeal from interlocutory orders. All appeals from interlocutory orders would go to this divisional panel, from which there would be an appeal to the Court of Appeal only with leave from a member of the Court of Appeal. All appeals filed within the 60 days prior to the divisional panel sitting would be heard by the panel sitting in continuous session from 9:00 a.m. Adjournments would not be permitted except upon special grounds advanced to the panel itself.

Some respondents voiced support for the use of electronic appeal books, as long as the technology requirements are appropriate for the lawyers and the court. The concern was raised that while electronic appeal books are attractive from a bulk viewpoint, a paper copy is often far more accessible and usable.

Many were of the opinion that oral argument was not necessary in every appeal. The suggestion was made that the Court of Appeal could review the materials and determine whether oral argument was necessary. Some thought that the Court of Appeal should summarily dismiss appeals with no significant prospect of success, or that costs sanctions should be imposed for bringing weak appeals. Restrictions on the length of factums received some support.

One respondent discussed the initiatives under consideration by the Court of Appeal, including the court's plan to establish an enhanced leave to appeal process in order to restrict volume. As well, on leave applications, only written arguments would be accepted by the court. The court would also apply rigid time lines and impose sanctions on both counsel and the appeal for missed deadlines. Counsel would also be restricted to 45 minutes oral argument. Some respondents think that these reforms go too far and are too harsh. A concern was also raised about the impact of the suggested reforms on self-represented litigants. The filing cost to commence an appeal was seen as too high and a barrier to access to justice.

A frequent comment in this area was that the Court of Appeal practice notes are overly complicated and specific.

21. SELF-REPRESENTED LITIGANTS

Concerns about self-represented litigants

A frequent comment in this area was that self-represented litigants should be bound by the rules. Many commented that there are essentially two sets of rules. The point was frequently made that judges bend over backwards to help the unrepresented litigant, which can be unfair to the client who has retained counsel. Some commented that judges give individuals the benefit of the doubt that counsel does not get. Another related problem that was identified was that individuals obtain legal advice on certain points, and may even consult several lawyers on a piecemeal basis. So in effect, they are represented but appear to be representing themselves, and judges give them extra help. A concern was raised about the high cost of having judges spend time assisting self-represented parties.

It was suggested that self-represented litigants should be treated fairly, but should not be given carte blanche to make claims with no reasonable cause of action, or to make inflammatory and irrelevant allegations. It was recommended that in some situations, self-represented litigants should have to apply for leave to commence an action.

Should court procedures be designed with self-represented litigants in mind?

What other methods may be used to assist self-represented litigants?

Opinions were mixed on this issue. It was pointed out that access to justice would be greatly improved with clear procedures, forms, and rules. One respondent recommended that the rules either be much simpler to follow or that they be more loosely interpreted for the self-represented litigant. Some respondents suggested that there should be some leeway for the judge to alter procedures where necessary. Another respondent thought that court procedures should be designed with self-represented litigants in mind, including the greater use of forms and a streamlining of pre-trial procedures.

One suggestion was that self-represented litigants should have to give the clerk notice and should be given advice and directions as to steps that must be taken and consequences for failure to take them. Another comment was that wherever possible, unrepresented litigants should use the law school assistance program to get help organizing and presenting their cases. It was pointed out that the *Vision 2000 Plus* Interim Report recommends a "Procedure Advisor" be appointed by the government for each of Edmonton and Calgary (with telephone access from other judicial centres).

Many respondents took the position that procedures should not be designed for self-represented litigants. It was suggested that self representation should be discouraged as the legal system is not designed for self-represented litigants. Access to justice should be dealt with in a different way, for example, by faster and easier access to legal aid, and by guaranteeing lawyers a basic number of legal aid hours to ensure that competent lawyers remain available to the legal aid system. Another respondent commented that a significant element of access to justice is not making it easier for people to represent themselves, but rather keeping the cost and risk of obtaining representation down.

22. TECHNOLOGY

One of the themes in this area was that the use of technology was a way of making the system more cost-efficient and of improving access to justice for communities outside the major centres. Some expressed a concern that Alberta is “behind” technologically.

Specific suggestions included recording the evidence of overseas witnesses; the greater use of videoconferencing, including the use of a “virtual” court; and the greater use of electronic documentation.

Concerns were expressed about the poor quality of computer equipment at the courts and more generally, about the government not meeting its commitments in the provision of computer hardware and software. The point was raised that greater use of video facilities should be encouraged but only provided that the available facilities have sufficient technology to provide for uninterrupted transmission. One respondent also expressed that there is a disadvantage with the use of a virtual court in not being able to see and hear effectively. Another pointed out that the cost of setting up a video conference can often be equal to or greater than the travel costs associated with getting a witness into the court room for direct testimony.

Many respondents were of the opinion that electronic filing should be available, but expressed concerns about the limited funds available to the courts and the need to ensure that stringent security controls are in place so that documents cannot be tampered with.

Alberta Rules of Court Project Consultations

Bar Associations

Calgary Bar
Central Bar – Red Deer
Edmonton Bar
Fort McMurray Bar
Grande Prairie Bar
Lethbridge Bar
Medicine Hat Bar
Northeast Bar – Lloydminster
West Yellowhead Bar

CBA

Civil Litigation Subsection, Calgary
Creditors' Rights, Edmonton
Insurance Subsection, Calgary and
Edmonton
Mid-Winter Meeting, Calgary

Courts

Court of Queen's Bench Education
Seminar, Edmonton
Court of Queen's Bench Masters,
Calgary
Provincial Judges' Conference, Canmore

Government

Justice Canada, Edmonton
Alberta Justice, Edmonton

Firms

Ackroyd, Piasta, Roth & Day LLP,
Edmonton
Bennett Jones LLP, Calgary and
Edmonton
Bishop & McKenzie LLP, Edmonton
Blake, Cassels & Graydon LLP, Calgary
Borden Ladner Gervais LLP, Calgary
Brownlee Fryett, Calgary
Bryan & Co., Edmonton
Burnett, Duckworth & Palmer LLP,
Calgary
Duncan & Craig LLP, Edmonton
Emery Jamieson LLP, Edmonton
Field Atkinson Perraton LLP, Edmonton
Fraser Milner Casgrain LLP, Calgary
Gowling Lafleur Henderson LLP, Calgary
Heenan Blaikie, Calgary
Macleod Dixon LLP, Calgary
May Jensen Shawa Solomon, Calgary
McCarthy Tetrault, Calgary
McCuaig Desrochers, Edmonton
McLennan Ross, Edmonton
Miller Thomson LLP, Calgary &
Edmonton
Parlee McLaws, Calgary & Edmonton
Scott Hall LLP, Calgary
Weir Bowen, Edmonton
Witten LLP, Edmonton

Significant support and financial contributions
to the Rules of Court Project were received from

**Alberta Justice
Alberta Law Foundation
Law Society of Alberta**

Alberta Law Reform Institute

402 Law Centre
University of Alberta
Edmonton, Alberta T6G 2H5
reform@alri.ualberta.ca
www.law.ualberta.ca/alri
t: (780) 492-5291
f: (780) 492-1790