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Civil Justice System and the Public Update

Alberta Field Research Underway

In May and June 2002 the research team for the Civil Justice System and the Public project commenced field research in Alberta. As well as conducting interviews in Edmonton the team has visited Calgary, Peace River and High Level. We have received strong support and enthusiastic participation from members of the judiciary, court administrators, lawyers and many other justice system workers. It has proven somewhat more challenging, especially in the larger centres, to identify and include members of the public who have been involved in a civil court case. However, we continue to add to the range of public participation. To date we have completed 75 interviews, 17 of these with members of the public. The data from the interviews is supplemented by field observation notes and meetings with key contacts. During the summer we will be analysing these data.

Two members of our Research Team, Amritha Bakshi-Fernandes and Cam Schwartz, in the Peace River Court House inviting participation of the public.

The Alberta interviews are rich with first hand experience that we are convinced will help us meet our project goal of identifying communication practices that bring about positive change within the system. Many thanks to all those who have supported and participated in the research.

The Alberta data and field experience will also greatly assist us in preparing for the national phase of the research. We will now be turning to our national partners for input and on-the-ground help in organizing our field visits. In particular we will be looking for ways to effectively identify and involve members of the public who have experience in a civil court case.

For more details about the research project we invite you to contact our Research Coordinator, Mary Stratton, by e-mail at mstratto@law.ualberta.ca or by telephone at (780) 492-9426.

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CLE on Technology in the Courts

At about the time that this newsletter is being mailed out, we will be on our way to the CBA Annual Conference in London, Ontario. We have organized a Continuing Legal Education Program entitled "Technology in the Courts" which will examine new technologies that are being developed in some Canadian courts. The program is on Tuesday August 13, 2002 at 1:30 pm and our panel of expert speakers consists of:

> **Peter Baran**, CEO of Juricert and from the Law Society of British Columbia, who will speak about digitally secure identification and how it can be used to file electronic documents in court and in other legal registries. He will demonstrate "Juricert" which is a project of the Law Society of BC and other Law Societies.
>
> **Cynthia Tape**, a lawyer at Torys LLP in Toronto, will speak about Document Organization Software, and how it can assist in managing a file, preparing for court and in producing effective and efficient courtroom presentations. She will provide a demonstration of this technology. She will also speak about electronic discovery and electronic disclosure.
>
> **Nils Jensen**, Director of Municipal Court Reform with Court Services and the Crown's office in BC, will speak about the experience of setting up video conferencing capability in courts across BC, and will demonstrate video-conferencing by appearing via video conference from BC. Thanks to ACCA for making this demonstration possible.
>
> **Andy Sims**, QC, will "speak" in an electronic presentation about the electronic appeals pilot project at the Alberta Court of Appeal. There will be a demonstration of an electronic factum, showing that all of the appeal documents (trial transcripts, exhibits, authorities) are included on CD-Rom and hyper-linked to one another, allowing for easy reference from one to another.
>
> **Barbara Kincaid**, General Counsel for the Supreme Court of Canada will wrap up by speaking about some of the lessons learned and the broader policy issues she has researched in the context of the Court's e-filing pilot project.

The program will be of interest to lawyers, judges, court administrators and technology enthusiasts. If you are unable to participate in the CLE, you may be interested in obtaining copies of the papers which are available through the CBA National office, by contacting Monique Cassidy at 1-800-267-8860 or by E-mail nickiec@cba.org

Publications

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Courtroom Technology SCAN - Electronic filing

Andrew C.L. Sims, QC

Electronic filing seems like an idea whose time has come. Most of us are used to e-mail and those who are, often know how to attach documents to them. So why are we still sending runners to the Courthouse? Would it not save money to switch to electronic filing right away? There are of course barriers and challenges to such a switch.

Electronic document filing without an "electronic filing cabinet" for those documents is little more than a cost transfer from law firms to government. The technological problem is not in getting documents from the lawyer's office over to the Courthouse, although that does pose some challenges. There are several aspects to the challenges of implementing electronic filing, from the practical to the policy oriented to the technological. The real issue is how to organize paper-based courthouses so they will be able to work with electronic documents once they arrive. It makes little or no sense to have a court clerk sitting at a computer terminal printing up copies of all the documents just "electronically filed".

What courts need to make electronic filing a reality is a computerized case management system to accept and keep track of all these electronic documents. The system must record not only where they come from and what they are about, but the steps they mandate or prevent. Most documents filed in court are designed to make something happen; get an application struck, get a date set, comply with an order. A case management system must, at least, track all these events. It must also make the documents available when needed, for example in court, or when a schedule is being prepared.

It is often the case management system that is the prerequisite, and thus the barrier, to electronic filing. You cannot readily buy such systems off the shelf, at least not to meet sophisticated court needs. Even if you could, much work has to be done to switch the court's processes from a paper-oriented system to one that uses electronic transactions and reports wherever possible instead of traditional documents.

Discussions about electronic filing very quickly get tied up in the related but not inseparable discussion about electronic access. As a society we are responding to the increased access to information that technology allows, with a series of laws designed to protect our privacy. If allowing electronic filing includes allowing electronic access to the court's records we need to address these privacy issues.

Open courts with open files have been our norm. However, the inconvenience factor has meant that court files present little threat to interests of privacy except in high profile cases. Electronic access to court documents could allow search engine indexing and free access to everything from anywhere. Courts unwilling to see open access have to decide on policies to restrict access. Should access be restricted to litigants alone, selected subscribers, access to the docket only or some half-way point? The technical work becomes more complex and the security issues more challenging depending on the policy choices made.

This brings in the next rung of the debate - Who should run the electronic filing portal? Electronic filing

has the potential to become big business. The per-transaction fees may be low, but the potential for volume is high. The large electronic publishers are anxious to get into the business. It gives one more service to attract people to their web site or electronic database. Firms that provide litigation support software or document warehousing for law firms are also candidates. This sparks other policy debates - Should e-filing be run by a single service provider for the courts, or should any firm be allowed to be an "electronic court runner"? If there is any monopoly element, how much should be charged for access to the "electronic toll road"?

A more mundane question about electronic filing is file formats. Paper documents follow layout standards that are imposed by the Court Rules and photocopiers produce relatively uniform copies. Electronic file formats are not totally compatible with each other, and there are a variety of formats currently in use. How does one design an electronic filing system that allows uniform electronic documents to arrive at the courthouse knowing that lawyers and other users use a wide variety of software, versions and file types? The solution in the past has been to go to a lowest common denominator, using Plain Jane, ASCII or the slightly more upscale .rtf (rich text format). However, neither of these is fully satisfactory, particularly given the font differences between market leader Microsoft Word and the darling of legal secretaries, WordPerfect.

A newer solution is to convert whatever file is used at the user end into a standard file format that will look and print the same on any computer. The most popular format for this is Adobe Acrobat. Some electronic filing involves sending the file via a service provider that, for a transaction fee, will convert whatever file format is used at the point of origin into Acrobat .pdf (portable document format) for sending to the courthouse. This preserves the style, font and pagination aspects of the original. It allows the court and individual users like judges to print only what they need, keeping what they do not need in hard copy solely in electronic form.

Transmitting or "electronically filing" documents is not however, just sending an electronic copy of a paper document. A document has two aspects to it. It has content, but it also has a description. The description of the document includes its source (the law firm identity), its action number, its date, its style of cause and so on. In electronic file lingo this is all "Meta Data". In order for a case management system to accept an electronically filed document it needs this meta data. This is what tells it, automatically, where to put the document, what to do with it and what to do as a result of it.

Electronic filing systems are now developing using newer XML technology that will accept an electronic document and "wrap it up" in a meta data envelope. Basically, using your web browser, you fill in a form describing the document (that is entering the meta data) and then attach a document file. Your browser takes this and wraps it all together into one file. This transmission file includes the meta data in a form the court's database can read, and the enclosed file for filing, perhaps after automatic conversion into a common file format. The document itself is inelegantly called a "BLOb" for "binary large object". An important advantage of this system is that it can accommodate various types of files or BLObs, including audio files, video files and so on. This capacity will be important as the type of items involved in court filing grow to accommodate things like scanned documents, presentations, video evidence and so on.

This brief summary is meant to describe some of the challenges involved in electronic filing and to show why it is more than just an e-mail attachment away. However, it is not meant to discourage its development. It is working well in many jurisdictions, providing convenience and cost savings to courts and litigants alike. For some examples check out the links at these two web sites: www.ncsc.dni.us/NCSC/TIS/TIS99/ELECTR99/Efilinglinks.htm and www.wendytech.com/efilingprojects.htm#selectedwebsites. We survived the loss of red ribbons on barrister's briefs and we will survive and prosper in the new age of paperless court proceedings. E-file and prosper.

Andrew Sims is a lawyer practicing in Edmonton and principal of the Sims Group, a consulting practice providing advice to courts and tribunals. He will write "Court Technology Scan" as a regular column for our newsletter.

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With Gratitude We Say Farewell to Outgoing Board Members

Since the creation of the Forum, we have been served by Board and Advisory Board Members from across Canada who are leading members of the Bar, the judiciary, academia, government and the public.

Included among these are Heather Cooper, Chantal Corriveau and Andy Watt who have all served on the Board from the inception of the Forum until recently. Their contributions have been significant and we wish to recognize and thank them. We are very pleased to have Andy Watt continue his involvement with the Forum in his new capacity as an Advisory Board Member. We wish Heather Cooper and Chantal Corriveau the very best in their future endeavours.

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Update on Dispute Resolution in Yukon

In Issue #4 – Spring 2002, in the "Cross Country Snapshot of Dispute Resolution" it was reported that one Yukon Supreme Court Justice has mediation training. In fact, both justices of the Yukon Supreme Court have training in mediation, and both have mediated resolutions to some of the civil matters that have come before them. For more information please contact:

Catherine Simpson, Manager, Court Administration
Tel (867) 667-5089 Fax (867) 393-6212
E-mail: catherine.simpson@gov.yk.ca

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Cross Country Snapshot of Rules and Rules Committees

The Supreme Court of Canada

The *Rules of the Supreme Court of Canada* are enacted pursuant to section 97 of the *Supreme Court Act*. Amendments to the Rules must be signed by five judges of the Supreme Court of Canada and marked with the stamp of approval, issued pursuant to the *Statutory Instruments Act*, by the Regulations Section of the Department of Justice. The amendments must then be registered by the Clerk of the Privy Council before they are published in Part II of the *Canada Gazette*.

Before the final approval is given, proposed amendments are discussed by the Supreme Court of Canada Rules Committee, which meets regularly around specific issues and is comprised of three Supreme Court of Canada Judges who are invited to sit on the committee by the Chief Justice. Although many of the ideas for proposed changes originate within the committee, suggestions are brought to the Committee by other members of the Court, the Registrar and Court staff or by counsel who appear before the Court.

The careful consideration of proposed changes is always done in consultation with the Canadian Bar Association/Supreme Court of Canada (CBA/SCC) Liaison Committee and the Court Ottawa Agents Practice and Procedures Committee (COAPP). This latter committee, which is comprised of Court legal staff, Ottawa agents and a representative from the Federal Department of Justice, was first established in 1977 to study the Rules of the Supreme Court of Canada and serves as a forum for discussion about any problems that a practicing lawyer might have with procedures in the Court.

Newly Revised Rules of Practice

The Supreme Court of Canada has just enacted new Rules of Practice. This has been the first major revision in almost 20 years. The Rules of the Supreme Court of Canada were registered as SOR/2002-156, were published in Part II of the *Canada Gazette* on April 24, 2002, and came into force on June 28, 2002.

The main objectives in rewriting the Rules were to simplify the process, to reflect current practices of the Court, to make case management more efficient and to make the rules easier to understand and to follow. Following detailed instructions from the Court, the Department of Justice prepared drafts of the revised Rules. These were sent to the members of COAPP and the CBA/SCC Liaison Committee for clause by clause study and discussed at regular COAPP meetings and at the annual meeting of the CBA/SCC Liaison Committee, which has the same membership from the Court as on the SCC Rules

Committee.

The new Rules, forms and a guide to major changes are available on the Court's Web site at www.scc-csc.gc.ca or at the Registry Office in print.

For further information, please contact the Registrar, Anne Roland at rolanda@scc-csc.gc.ca or the Director of the Registry, Nadia Loreti at loretin@scc-csc.gc.ca

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Federal Court of Canada

Federal Court of Canada Rules Committee

The Federal Court of Canada Rules Committee is a statutory committee established under section 45.1 of the *Federal Court Act*. The committee is composed of the Chief Justice who presides over the committee, the Associate Chief Justice, seven other judges of the Court, a representative of the Attorney General of Canada, and five members of the Bar of any province designated by the Attorney General of Canada, after consultation with the Chief Justice. The members of the Bar are proposed by the Chief Justice upon receiving recommendations from the Canadian Bar Association. They are representative of the different regions of Canada and of the various areas of practice within the jurisdiction of the Court.

Bill C-30, cited as the *Courts Administration Service Act*, received Royal Assent on March 27, 2002 and will change the composition of the rules committee. It will be composed of the Chief Justice of the Federal Court of Appeal who will preside over the committee, the Chief Justice of the Federal Court, three judges of the Federal Court of Appeal, five judges of the Federal Court, the Chief Administrator of the Courts Administration Service and five members of the Bar of any province designated by the Attorney General of Canada, after consultation with the Chief Justice of the Federal Court of Appeal and the Chief Justice of the Federal Court. Parliament has not yet proclaimed a date for the coming into force of Bill C-30.

The principal mandate of the Rules Committee is to make rules for regulating the practice and procedure in the Trial Division and in the Court of Appeal. Where the Rules Committee proposes to amend, vary, revoke or make any rule, the Committee is statutorily required to give notice of the proposal by publishing it in Part 1 of the *Canada Gazette* and inviting any interested person to make representations to the Committee in writing within sixty days after the day of publication. After the expiration of the sixty days, and subject to the approval of the Governor-in-Council, the Rules Committee may implement the proposal either as originally published or as revised, in such manner as the Committee deems advisable having regard to any representation so made to it. A copy of each rule, amendment, variation or revocation of a rule is then laid before each House of Parliament on any of the first fifteen days (on which that House is sitting) after the approval of the Governor-in-Council of the making thereof.

On December 8, 2001, a proposed rule on class proceedings in the Federal Court was published in Part 1 of the *Canada Gazette*, Volume 135, No. 49 and comments were invited. All submissions received were considered and the Rules Committee will seek to obtain Governor-in-Council approval of this rule in the fall 2002.

Should you require additional information, please communicate with Nancy B¹langer, Secretary of the Rules Committee, at nancy.belanger@fct-cf.gc.ca

Tax Court of Canada

The existence, composition and powers of the Rules Committee of the Tax Court of Canada are statutorily defined in the *Tax Court of Canada Act* (the "*Act*"). Subsection 22(1) of the *Act* dictates the composition of the Committee: the Chief Judge and Associate Chief Judge of the Tax Court of Canada, two judges of the Tax Court (designated by the Chief Judge), one representative of the Attorney General of Canada, and two lawyers (who represent non-government interests) designated by the Attorney General of Canada.

Section 20 of the *Act* grants the Rules Committee the broad power to make rules for regulating the pleadings, practice and procedure in the Court, subject to the approval of the Governor-in-Council.

Before the approval of the Governor-in-Council is obtained, any proposed amendment or addition to the rules must first be published in the *Canada Gazette* Part I, with an invitation to any interested person to make representations in writing within 60 days from the date of publication. After the expiration of the 60 days, the Committee may implement the proposed rules as originally published or as revised, in light of the representations received. However, the Rules only have effect once they have been published in the *Canada Gazette* Part II. The Rules must also be laid before either House of Parliament (that is sitting) on any of the first fifteen days after the making thereof.

The *Courts Administration Service Act* ("*CASA*"), which has received Royal Assent but has not yet come in force will have a significant effect on the Tax Court of Canada. By virtue of *CASA*, the administrative services of the Court will be merged with those of the Federal Court of Appeal, the Federal Court, and the Court Martial Appeal Court. The Tax Court of Canada will also be granted the status of superior court of record. *CASA* will change the composition of the Committee, although it will not change any of the powers of the Rules Committee. The new composition will mean that in addition to its current members, the Committee will consist of an additional Judge of the Tax Court as well as the new Chief Administrator of the Courts Administration Service. The rules of Court will need to be amended upon the coming into force of *CASA*. Amendments reflecting these changes as well as other matters are currently being drafted.

The Rules of the Tax Court of Canada are published in English and French, and are printed in the *Canada Gazette*. An unofficial version of the Rules is also available on the Tax Court of Canada's Website at www.tcc-cci.gc.ca Any inquiries relating to the rules of the Tax Court of Canada or the Rules Committee should be directed to J. David Power, Legal Counsel and Administrative Officer, Tax Court of Canada, 200 rue Kent Street, Ottawa, ON, K1A 0M1
Tel (613) 947-0322 Fax (613) 941-4915
E-mail david.power@tcc-cci.gc.ca

British Columbia

The *Court Rules Act*, R.S.B.C. 1996, c. 80 provides that the Lieutenant Governor in Council has the power to make rules governing the conduct of proceedings in all levels of court in the

province. The Lieutenant Governor makes rules on the recommendation of the Attorney General, after the Attorney General has consulted with the Chief Justice of British Columbia.

British Columbia Attorney General Supreme Court Rules Revision Committee

The Rules Revision Committee (the "Committee") assists the Attorney General in making recommendations for rule changes to the Lieutenant Governor in Council. The Attorney General appoints the members of the Committee by ministerial order, usually after consultation with the Chief Justice and the Chair. The Committee includes judges, masters, representatives of court services, legislative drafting counsel and members of the private bar. The members of the private bar are chosen for their expertise in civil or family litigation and also broadly represent larger and smaller communities. The composition of the Committee, together with a policy of expansive consultation, ensures that proposed amendments to the Rules are evaluated in the broadest context.

The Committee meets regularly to discuss rule changes proposed by the judiciary, the profession, and the Attorney General's Department.

Once the Committee makes recommendations to the Attorney General, the Attorney General consults with the Chief Justice regarding the proposed changes before presenting them to Cabinet. With the exception of some stand-alone amendments, proposed rule amendments are presented to Cabinet each spring for enactment on July 1st. Upon Cabinet approval, the amendments are enacted by Order in Council.

Copies of the Orders in Council giving effect to the amendments as well as the full text of the Rules are available on the Superior Courts' website at www.courts.gov.bc.ca where there is also a link for our Rules Committee, with a statement of the Committee's mandate. In addition, invitations for comments on proposed rule changes are often posted on the website. We encourage members of the bar and the public to regularly check the website for information on rule amendments and welcome comments, suggestions and even criticism. Please send your comments to Mr. Justice Macaulay, Chair, Rules Revision Committee, The Law Courts, 850 Burdett Avenue, Victoria, BC, V8W 1B4.

British Columbia Court of Appeal Rules Committee

The Chief Justice of British Columbia has established the Court of Appeal Rules Committee, composed of five justices of the Court, the Registrar and the Law Officer. The Chief Justice appoints committee members who serve a five-year term. The Committee meets regularly throughout the year to discuss issues raised by the judiciary, the profession and the Attorney General's Department. Proposed amendments to the rules are circulated to members of the Court, the profession and may also be discussed with a representative from the Legislative Counsel's Office. Once this consultation process is concluded, the Chief Justice forwards the proposed amendments to the Attorney General for presentation to the Cabinet.

Amendments to the Court of Appeal Rules are usually sporadic. However, a completely new set of Rules came into effect in March, 2002. These rules can be found on the court's website at www.courts.gov.bc.ca

The Committee welcomes comments and suggestions from the Court, members of the profession and the public. Comments may be forwarded to Jennifer Jordan, Registrar, Court of Appeal, Law Courts, 800 Smithe Street, Vancouver, BC, V6E 2Z1.

Ad Hoc Provincial Court Rules Committees

There is no statutory provision for a standing Rules Committee in Provincial Court, however, the Chief Judge has struck rules committees on an ad hoc basis to develop rules for specific divisions of the court. Appointment to the committees has been made by the Chief Judge either on recommendation or based on expertise or area of practice.

While these have been judicial committees, membership has not necessarily been restricted to judges and has also included representatives of the professions and the Ministry of the Attorney General. The

committees have also invited the submissions and expertise of other justice system participants where this was deemed appropriate. None of the committees have invited direct public participation in rules development but comments and criticism about existing rules from any source are forwarded to the relevant committee to consider with respect to proposed amendments.

The Civil Rules Committee was instrumental in drafting and then amending the Small Claims Court Rules, enacted pursuant to the *Small Claims Court Act*. The Family Rules Committee reviewed and assisted in drafting new rules under the *Family Relations Act*, the *Child, Family and Community Service Act*, and the *Adult Guardianship Act*. In recent years practice has extended the mandate of rules committees from rules development to review of the implementation and performance of the Rules.

The Provincial Court is committed to the use of plain-language, and to simplified and flexible rules. Since the rules are regulations, they are gazetted and available from the Queen's Printer. They are also available on provincial government internet sites such as www.qp.gov.bc.ca/statreg/ The only rules available on the Provincial Court website are the rules made federally, as these are more difficult for the public to access www.provincialcourt.bc.ca/ Comments, suggestions and criticisms are received by Chief Judge Baird Ellan or by her Associate Chief Judges Anthony Spence and Ellen Burdett. Chief Judge Baird Ellan can be contacted at, The Office of the Chief Judge, P.O. Box 10287, Pacific Centre, Vancouver, BC, V7Y 1E8.
Tel (604) 660-2864

ALBERTA

The Alberta Rules of Court are prescribed by the Lieutenant Governor in Council on the recommendation of the Alberta Rules of Court Committee. The Rules of Court Committee is established under s.25 of the *Court of Queen's Bench Act* which provides that the Committee is to consist of one designate of each of the following: Court of Appeal, Court of Queen's Bench, Provincial Court and Alberta Minister of Justice. In addition, the Minister is to appoint 2 lawyers to the Committee based on recommendations from the Law Society of Alberta. The current members of the Committee are Justice J.E. CĠ¹, (Court of Appeal) - Chair, Justice J. Rooke (Court of Queen's Bench), Judge K. Hope (Provincial Court), Rod Wacowich, QC (Alberta Justice), Juliana Topolniski, QC (Law Society), Everett Bunnell, QC (Law Society). In addition, Geoffrey Ho, QC, of Alberta Justice, acts as Secretary for the Committee.

The Committee normally meets 2-3 times a year to consider the Rules of Court and make recommendations to the Minister of Justice. These Rules include the Rules of the Court of Appeal, the Rules of the Court of Queen's Bench and the Surrogate Rules. In the case of the Surrogate Rules, the recommendations of the Rules of Court Committee are based on advice provided to it by the Surrogate Rules Committee.

The authority for the Rules is primarily found in the *Court of Appeal Act*, the *Court of Queen's Bench Act*, the *Judicature Act*, the *Divorce Act*, the *Civil Enforcement Act*, and the *Dependent Adults Act*. However, rules are also made under various other statutes, such as the *Winding-Up Act* (Can.) and the *Local Authorities Election Act*.

The *Provincial Court Act* authorizes the Lieutenant Governor in Council to make rules governing the practice and procedure of the Provincial Court, and provides that the Court may make recommendations to the Minister respecting any rules. There has not been extensive use of this authority as the Provincial Court instead relies on s.8 of the *Provincial Court Act* which enables the

Court, in the absence of a specific procedure under the *Act* to ensure an expeditious and inexpensive resolution, to apply the Rules of Court or to modify them as needed.

In considering changes to the Rules of Court, the Rules of Court Committee takes into account comments from the judiciary, the legal profession, the general public, and court staff. When significant changes are being proposed, the Committee consults with stakeholders as necessary.

The Rules are published by the Queen's Printer in looseleaf form, and are available through the Queen's Printer website: www.qp.gov.ab.ca/display_rules.cfm

A major revision of the Rules has not occurred since 1968. The Alberta Law Reform Institute has undertaken a project to re-write the Rules, in conjunction with the judiciary, the Law Society of Alberta, Alberta Justice and funded by the Alberta Law Foundation. This project is scheduled for completion in 2004.

The contact for the Rules of Court Committee is Geoffrey Ho, QC, at Alberta Justice, Court Services, 3rd Floor, Bowker Building, 9833 - 109 Street Edmonton, AB, T5K 2E8.
Tel (780) 427-4992
Fax (780) 422-6613

SASKATCHEWAN

Court of Queen's Bench

The rule making authority for the Court of Queen's Bench is section 28 of *The Queen's Bench Act, 1998*.

The Queen's Bench Rules Committee is composed of the Chief Justice, several Queen's Bench justices and the Registrar. The process for proposing amendments to the Rules Committee is very informal. Lawyers or court staff may give their suggestions to either the Chief Justice or the Registrar who will add those suggestions to an agenda of the Committee. In addition, any judge may simply send a memo to the Rules Committee suggesting a change. Proposed amendments are first discussed and approved by the Rules Committee. Once amendments are passed by the Rules Committee they are sent to a joint committee of the Law Society of Saskatchewan and the Saskatchewan Branch of the Canadian Bar Association, for review and comment. Representatives to that committee are appointed by the respective organizations. On occasions, when proposed amendments affect an entire section of the rules, such as the complete revision of the family law rules, consultation will occur more broadly with lawyers who practise in that particular area. When the consultation is complete, the proposed amendments are presented to all the judges of the court at their *en banc* meeting for approval. Adoption of the amendments requires a majority vote by the judges.

The last comprehensive revision of the Rules of Court was completed in 1983. Since then, amendments have been made to specific parts or individual rules. Recent major amendments were made to Part 11 - Class Actions; and to Part 48 - Family Law Proceedings which came into effect on January 1, 2001. Currently there is a project examining the rules relating to service and costs. It is anticipated that those amendments will be considered by the Queen's Bench judges at their en banc meeting in August 2002.

For further information about the Queen's Bench Rules Commitee contact Jan L. Kernaghan, QC at (306) 787-0472.

Court of Appeal

Section 22 of *The Court of Appeal Act, 2000* provides the rule making authority for the Court of Appeal.

There is no formal Rules Committee for the Court of Appeal. Minor revisions or amendments to the Court of Appeal Rules are accomplished by a majority of Court of Appeal Justices voting in favour of the suggested amendment. The suggestion to amend could come from a number of sources including the Court of Appeal Justices, the Registrar, the Law Society and individual members of the Saskatchewan Bar.

Major revisions would result in extensive discussions with the Law Society and the appropriate section of the Saskatchewan Branch of the Canadian Bar Association. Ultimately, adoption of the amendments would require a majority vote of the Court of Appeal Justices.

The last major revision to the Court of Appeal Rules took place in 1997.

For further information about Court of Appeal Rules contact Maurice Herauf at (306) 787-5382.

Amendments to the Queen's Bench Rules and Court of Appeal Rules are first published, in French and English, in the *Saskatchewan Gazette*. Usually this publication occurs prior to the effective date of the amendments. Thereafter, the rules are available in The Rules of Court produced the by the Queen's Printer of Saskatchewan. These are available at no cost at www.qp.gov.sk.ca The Law Society of Saskatchewan produces an Annotated Rules of Court which is available on the Law Society Web Page to subscribers.

MANITOBA

Of the three courts in Manitoba, Provincial Court, Court of Queen's Bench and Court of Appeal, the most formalized rules process is found in the Court of Queen's Bench.

Court of Queen's Bench

Under *The Court of Queen's Bench Act*, a rules committee of the court - the "Statutory Rules Committee" - is established and is comprised of eleven voting members: the Chief Justice of the court or his designate; five judges of the court; two persons appointed by the provincial Minister of Justice; and three lawyers appointed by The Law Society of Manitoba. The Chief Justice or designate is the presiding member of the committee; currently the designate is Mr. Justice Gerald O. Jewers. The Statutory Rules Committee also has active but non-voting members: the Executive Director of Winnipeg Courts; the Registrar of the court; a Master of the court; and a judge of the Manitoba Court of Appeal.

The Court of Queen's Bench Act states that rules respecting the practice and procedure of the court may be made upon consultation with the provincial Minister of Justice, whether or not they alter substantive law. The Committee meets once every two months and recommendations for rule amendments can be proposed by any member of the committee, ensuring input from the judiciary, court staff, the Ministry and the legal profession. The Committee also receives recommendations for rules amendments from other committees of the court, such as the Civil Practice Committee and the Surrogate Court Committee.

Mr. Justice Gerald O. Jewers can be contacted at Manitoba Court of Queen's Bench, Room 226, The Law Courts, 408 York Avenue, Winnipeg, MB, R3C 0P9.
Tel (204) 945-2050
Fax (204) 945-8858

Court of Appeal

The Court of Appeal Act (the "*Act*") states that the practice of the Court of Queen's Bench is to apply where a procedure is not provided for in the *Act* or in the Rules of the Court of Appeal. The *Act* provides that a majority of the judges of that court may make rules of practice and procedure for the court. Currently the Court of Appeal is undertaking a comprehensive review of its civil Rules. Its Rules Committee is comprised of two judges of the court and includes the Registrar of the Court. There is an advisory committee comprised of representatives from the Manitoba Bar Association, Legal Aid Manitoba, Manitoba Justice, and other stakeholders, who provide comments and suggestions on proposed rule changes.

Provincial Court

The Provincial Court Act also provides that a majority of the judges of the Provincial Court may make rules respecting the practice and procedure in the Family Division of that court. The Provincial Court is primarily a court of criminal jurisdiction and the Court is currently developing criminal rules of procedure.

The civil rules of the courts in Manitoba are enacted and promulgated as regulations that are published in the *Manitoba Gazette* in both official languages. The Rules of Court are also available electronically on the web site of the courts at www.manitobacourts.mb.ca Printed copies of the Rules of Court can be purchased from Manitoba's Statutory Publications, 200 Vaughan Street, Winnipeg, MB, R3C 1T5.

For more information contact Karen Fulham, Executive Assistant to the Chief Justices and Chief Judge, Judicial Services, 2nd Floor - 408 York Avenue, Winnipeg, MB, R3C 0P9.
Tel (204) 945-2050
Fax (204) 945-8858
Email kfulham@gov.mb.ca

ONTARIO

Ontario has both a Civil Rules Committee and a Family Rules Committee created by the *Courts of Justice Act* ("*CJA*"), R.S.O. 1990, c. C.43, ss. 65(1) & 67(1) respectively. The Civil Rules Committee has an Estates Rules Subcommittee and a Small Claims Court Rules Subcommittee.

The Chief Justice of Ontario, or designate, Chairs the Civil and Family Rules Committees. In practice, the Chief Justice has designated the Associate Chief Justice of Ontario as Chair of the Civil Rules Committee and the Senior Justice of the Family Court as Chair of the Family Rules Committee. Categories of representation for rules committees are defined in the *CJA* (ss. 65(2), 67(2)). Some members are there by virtue of their office (i.e. senior judiciary, Attorney General), while others are appointed by various authorities (including the Chief Justice of Ontario, the Chief Justice of the Superior Court, the Attorney General and the Law Society) for renewable 3-year terms.

The Rules of Civil Procedure, (O. Reg. 194/90) apply to all civil and family proceedings in the Superior

Court of Justice and the Court of Appeal. The Family Law Rules, (O. Reg. 114/99) apply to all cases in the Family Court (a branch of the Superior Court of Justice, previously called the Unified Family Court) and family cases in the Ontario Court of Justice. The Rules of the Small Claims Court, (O. Reg. 258/98) apply to Small Claims Court.

Civil Rules Committee

The Civil Rules Committee has broad general authority to make rules for the Court of Appeal and the Superior Court of Justice in relation to the practice and procedure of those courts in all civil proceedings, including family law proceedings, subject to the approval of the Lieutenant Governor in Council. This authority persists regardless of whether the rules alter or conform to the substantive law in the matters enumerated in s. 66(2) of the *CJA*.

The Civil Rules Committee is composed of 29 members: 16 judges, 11 lawyers (including 2 Ministry of the Attorney General lawyers), and 2 court administrators. It meets two or three times a year. The Chair appoints a Secretariat to review all matters considered by the Committee, to conduct research and consultation, and to prepare a memo with recommendations for each agenda item. The Secretariat's memorandum is sent to the chairs of four standing committees. Each standing committee is responsible for a portion of the Rules of Civil Procedure. The chair of each standing committee prepares a report in response to the memo and both documents are tabled for consideration by the Committee. Informal ad hoc committees are also used to develop specific procedures (e.g. mandatory mediation, simplified procedure, case management, electronic filing, costs grid).

Suggestions for rule changes may come from a variety of sources, including the judiciary, the bar, the public and the government. The civil rules are amended regularly (about twice a year), although many of the changes are minor. The latest amendments to the Rules of Civil Procedure came into force on January 1, 2002. The latest amendments to the Rules of the Small Claims Court came into force on December 10, 2001.

Family Rules Committee

The Family Rules Committee is authorized to make rules for the Court of Appeal, the Superior Court of Justice (including the Family Court) and the Ontario Court of Justice in relation to the practice and procedure of those courts, in proceedings under statutory provisions related to family law (ss.68(1), & 28.1 *CJA*), subject to the approval of the Lieutenant Governor in Council.

The Family Rules Committee is composed of 27 members: 13 judges, the Attorney General or his/her designate, 11 lawyers (including 1 Ministry of the Attorney General lawyer), and 2 court administrators. It meets monthly, except in July and August. The Chair of the Committee sets the agenda based on issues of importance raised by the judiciary, bar and government. In the past the Committee has used a Secretariat similar to the Civil Rules Secretariat, although more informal. Currently, the Committee is using a Working Group format, where specific issues are assigned to a working group comprised of Committee members and outside experts as required.

The Family Law Rules are a new set of rules that were introduced in 1999. Work is ongoing to fine-tune the Rules. Amendments are made once or twice a year. The most recent amendments became effective July 30, 2001.

Approval & Publication

Legislative counsel drafts all amendments. After a rules committee approves a rule, it is reviewed and passed by Cabinet, like any other regulation. When rules are approved by the Committee and passed by Cabinet, they are published in the *Ontario Gazette*. Notices of rules changes are published in the weekly Ontario Reports, which every member of the Law Society receives.

The Rules of Civil Procedure, the Rules of the Small Claims Court and the Family Law Rules (and associated forms) are made in both English and French, and the Family Law Rules were designed to be plain language.

All Ontario legislation and regulations are available on the government's e-laws website. The following is a link to all regulations made under the *Courts of Justice Act*, including all sets of rules: www.e-laws.gov.on.ca/
The Family Law Rules (including forms) are also available on the Ontario Courts website: www.ontariocourts.on.ca/family_court/index.htm Private publishers also produce annotated consolidations of the rules.

QUEBEC

Unlike other Canadian provinces, Quebec does not have a Rules Committee. Further, in Quebec it is important to distinguish "civil procedure" from "rules of practice" since jurisdiction over rule making on these matters belongs to different authorities.

Civil Procedure

Only the Quebec legislature is empowered to legislate with respect to "civil procedure", and these rules are found in the *Code of Civil Procedure*, R.S.Q., c. C-25. When amendments are necessary, the Ministre de la Justice [Minister] will adopt a bill to modify the *Code*. Usually, when such a bill is introduced, interested parties will have an opportunity to make representations before the parliamentary committee in charge of studying the bill.

In June of 2002 *An Act to Reform the Code of Civil Procedure* (S.Q. 2002, c. 7) was passed by the Quebec legislature. This law reforms the rules governing such matters as the institution of proceedings, proceedings in appeal, the recovery of small claims and class action suits. Since this law only represents the first phase of the revision of the civil procedure, other bills are expected to continue the work presently in progress.

The *Code of Civil Procedure* is published in the revised statutes. The different bills that modify the *Code* are published in the *Gazette officielle du Qu¹bec* (Part 2), available in English and French. The laws of Quebec can be accessed on the site of Publications du Qu¹bec, whose Web address is: http://publicationsduquebec.gouv.qc.ca/en/frame/index.html

Rules of Practice

The judges and the courts of each jurisdiction are responsible for establishing the "rules of practice" in civil and family matters. The process that must be followed is detailed in s. 47 of the *Code of Civil Procedure* ("*CCP*") and in s. 146 of the *Courts of Justice Act* ("*CJA*"). Section 47 of the *CCP* stipulates that the Chief Justice may convene a meeting or hold a consultation by mail, of a majority of the judges of each court and may then make rules of practice for one or more judicial districts, as they deem necessary for the proper carrying out of the *CCP*. Also, the majority of the judges of the Superior Court for the District of Montreal or for the District of Quebec may replace, amend or complete special rules applicable only in their respective districts.

Although the Ministre de la Justice [Ministry] and the Bar are usually consulted, there is no formal consultation process mandated. The rules of practice for the Court of Appeal and the Superior Court are not subject to approval by the government, however, under the *CJA* those of the Court of Quebec are.

The Court of Quebec is currently revising all of its rules of practice.

Under s. 48 of the *CCP* the rules of practice for the Superior Court and the Court of Appeal are published in the Gazette officielle du Qu¹bec, and come into force 10 days after their publication. Under s. 147 of the *CJA* the rules of practice for the Court of Quebec are published in the Gazette officielle du Qu¹bec, and come into force 15 days after their publication. Furthermore, immediately after they are published, the rules of the various jurisdictions must be copied into the registers kept for the purpose by the clerks, and notice thereof must be posted in the office of the court in each of the districts where they apply.

The rules of practice for all of the different courts and jurisdictions can be found at the web address mentioned earlier including: the Court of Appeal, the Superior Court of Quebec in civil and family matters, the Superior Court of the District of Montreal in civil and family matters, the Superior Court of the District of Quebec in civil matters, and the Court of Quebec.

For more information contact Me Lorraine Lapierre, Directrice Direction de la recherche et de la l¹gislation minist¹rielle, Ministre de la Justice 1200, route de l'ايlise, 4e ¹tage, Sainte-Foy (Qu¹bec), G1V 4M1.

NEW BRUNSWICK

Rules of Court Review underway in New Brunswick

The New Brunswick Rules of Court underwent a complete revision and were proclaimed as a regulation under the *Judicature Act* and the *Provincial Offences Procedure Act* of New Brunswick in 1982. Since that time, there have been a number of amendments to the Rules, but they have not been the subject of an in-depth review until now. In 2001, the governing council of the Law Society of New Brunswick elected to strike a committee - the Rules of Court Review Committee ("RRC") – chaired by Charles A. LeBlond, QC. The mandate of the RRC is to take a fresh look at the Rules of Court to determine whether any substantive modifications might be in order. The RRC is composed of leading practioners in various fields of law as well as a member of the judiciary from each of the levels of court to which the Rules of Court apply - the Court of Appeal, the Court of Queen's Bench, Trial Division and the Court of Queen's Bench, Family Division. In addition, the Department of Justice for the province of New Brunswick has a representative on the RRC to deal with issues related to the administration of justice.

The Law Society has always had a Rules of Court Standing Committee to deal with recommendations for amendments to the Rules as they arise from time to time. However, the newly constituted RRC was given the broader mandate to "streamline" the Rules of Court and consider the introduction of new rules to deal with practical realities as they have evolved in the last 20 years. The Standing Committee is not involved with the current review, but will continue its work with respect to ad hoc amendments as they arise.

The process for amendments is the same whether from the Standing Committee or the RRC. The Department of Justice legislative drafting branch has the exclusive authority to draft Rules of Court, which must be done in both official languages, for eventual proclamation in the Legislative Assembly.

At this point the RRC is fully engaged in its work. Individual members of the Committee have been assigned to review groups of rules based on each member's specific expertise. Each of these members is scheduled to report to the full RRC for discussion and debate on proposed amendments as well as introduction of new rules to deal with concepts that did not exist 20 years ago. The process is largely

informal in that each member of the RRC is free to consult with any and all stakeholders who might be affected by a particular rule prior to reporting to the Committee. The RRC will be consulting with Professor Gary Watson, a leading authority in rules of procedure, in order to get his perspective on the latest trends around the world. His contribution will be extremely valuable in arriving at the final product. Ultimately, the RRC will submit a report dealing with policy considerations and proposed amendments to the legislative drafting branch.

The RRC hopes to complete its work by late 2002 or early 2003 and will then submit its report to the Department of Justice in order for the official drafting of amendments and new rules to begin. The proposed re-drafted rules are expected to be submitted to the RRC for its further comments prior to being finalized for proclamation.

For more information contact Charles A. LeBlond QC, Chair, Rules Revision Committee, Law Society New Brunswick. E-mail cleblond@smss.com

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NOVA SCOTIA

There are two levels of court in Nova Scotia that have Civil Procedure Rules - the Supreme Court and the Nova Scotia Court of Appeal. There are also rules specific to the Family Division of the Supreme Court.

The jurisdiction to make civil procedure rules is found in sections 46-51 of the *Judicature Act*: the judges of the Court of Appeal may make rules of court in respect of the Court of Appeal, and the judges of the Supreme Court may make rules of court in respect of the Supreme Court.

The **Supreme Court Bench Rules Committee** is made up of 10 judges, 9 of whom are appointed at the annual Supreme Court judges meeting, including the Associate Chief Justice who chairs the Committee, and the Chief Justice. One member of the Court of Appeal also sits on the Committee. The Prothonotary provides support to the Bench Rules Committee as well as to its working groups.

The Committee sets up working groups on an ad hoc basis to deal with specific rule amendments, and there is a permanent sub-committee responsible for the Family Division Rules. The working groups and sub-committees are not decision-making bodies, but report to the Bench Rules Committee, which meets monthly. Pursuant to s. 47 of the *Judicature Act*, the recommendations of the Bench Rules Committee are presented to the full meeting of the Supreme Court for adoption. The full court may accept, reject or return the recommendations to the Committee. All amendments approved by the full court are then sent to the *Royal Gazette*, and come into effect on the date of publication. Section 51 of the *Judicature Act* requires that all Rules be laid before the House of Assembly within twenty days.

There is also a **Bench-Bar Rules Committee**, with the same compliment of Judges as the Bench Rules Committee, and approximately 5 lawyers chosen by the Barrister's Society, including the Executive Director. The Prothonotary also provides support to this Committee. The Bench-Bar Committee is not a decision making body, but is the venue through which the bar may offer suggestions, raise concerns or seek input into the Civil Procedure Rules. It meets twice annually and all recommendations of this Committee go forward to the Bench Rules Committee.

The **Court of Appeal** has not established a Rules Committee. All judges of the Court of Appeal will consider civil procedure rule amendments relevant to the Court of Appeal at their regular meetings

and changes are approved at a meeting of these judges.

Amendments to the Rules are made on a regular basis, the most recent being published in the *Royal Gazette* on June 12, 2002. Members of the Bench and the Bar would welcome an opportunity to re-write the entire Civil Procedure Rules, including a plain language rewrite. The Rules are published by Butterworths, and our Department of Justice - Regulations Section forwards a copy to Carswell. The amendments are on our court website at www.courts.ns.ca and on the Barristers' Society website at www.nsbs.ns.ca as well as in publications distributed to members of the Bar.

For more information contact Annette M. Boucher, Prothonotary of the Supreme Court, and Registrar of the Court of Appeal, Halifax, NS.
Tel (902) 424-6187 E-mail boucheam@gov.ns.ca

PRINCE EDWARD ISLAND

Prince Edward Island has two levels of court, the Provincial Court and the Supreme Court. Provincial Court has jurisdiction in criminal matters and initial jurisdiction under the *Young Offenders Act*. Supreme Court has two divisions, trial and appeal. The only rules of procedure provided for in the province are those adopted for proceedings in both divisions of the Supreme Court. These Rules establish the procedures to be followed in all civil and criminal matters coming before both divisions of the Court.

There is a Rules Committee established under the authority of s. 24 of the *Supreme Court Act* R.S.P.E.I. 1988 Cap. S-10 (the "*Act*"). Subject to the approval of the Lieutenant Governor in Council, the Committee has broad jurisdiction pursuant to s. 25 of the *Act* to make rules of court in relation to the practice and procedure of the Court.

In accordance with s. 24 of the *Act* the Rules Committee is composed of: the Chief Justice of Prince Edward Island, the Chief Justice of the Trial Division, two justices appointed by the Chief Justice of PEI, the Attorney-General or a designate, two members of the Law Society appointed by the Law Society, and the Prothonotary of the Supreme Court. In addition to the membership prescribed by the *Act* two additional members of the PEI Law Society, appointed by the Society, sit on the Committee as non-voting members. The Chief Justice of PEI acts as Chair and has the authority to appoint a secretary. Members of the Committee hold office for a period of three years and may be reappointed. Meetings may be held on the direction of the Chair; however the practice is to hold meetings three times in each calendar year.

The most recent complete rewrite of the Rules occurred in 1987 when the Court essentially adopted the Ontario Rules of Procedure with some modifications. The Rules are regularly reviewed by the members of the Committee, as are the amendments adopted each year to the Ontario Rules. After this review the Committee decides on whether to make amendments. Input is also received from time to time from lawyers, judges, and members of the public as to changes that should be made to the Rules.

In July of each year the amendments recommended by the Committee are submitted to the Lieutenant Governor in Council for approval. Those approved become effective September 1st each year. The amendments are circulated to the members of the Bar and other subscribers.

The Rules and the forms they prescribe, are published both electronically and on paper. Electronic

publication is on the court website: www.gov.pe.ca/courts/ . The rules are also annotated and the annotations are published with the rules in both written and electronic formats.

Mr. Justice John McQuaid, Secretary, The Rules Committee Supreme Court of PEI - Appeal Division
P.O. Box 2000, Charlottetown, PEI, C1A 7N8.
Tel (902) 368-6024 Fax (902) 368-6774
E-mail jmcquaid @judicom.gc.ca

NEWFOUNDLAND AND LABRADOR

In the Province of Newfoundland and Labrador, the *Judicature Act*, which is an Act respecting the Supreme Court and procedure in that Court, provides for a Rules Committee of the Court of Appeal and a Rules Committee of the Trial Division. **The Rules Committee of the Court of Appeal** consists of the Chief Justice of Newfoundland and Labrador who is the Chairperson, the other Judges of the Court of Appeal, the nominee of the Chief Justice of the Trial Division from among the Judges of the Trial Division, the Registrar, two members of the Law Society of Newfoundland appointed by Benchers, and the nominee of the Minister of Justice. **The Rules Committee of the Trial Division** consists of the Chief Justice of the Trial Division who is the Chairperson, the nominee of the Chief Justice of Newfoundland from among the Judges of the Court of Appeal, four Judges of the Trial Division designated by the Chief Justice of the Trial Division, the Registrar, two members of the Law Society of Newfoundland appointed by Benchers, and the nominee of the Minister of Justice. Each Rules Committee shall meet at least once yearly at the call of the Chairperson and at other times upon request. Each Rules Committee may make rules governing the pleading, practice and procedure generally of the Court of Appeal or the Trial Division.

The *Unified Family Court Act* provides that the Rules Committee of the Trial Division may make rules of court regulating matters in relation to the practice and procedure of the Unified Family Court. A presiding Judge of the Unified Family Court shall be a member of the Rules Committee of the Trial Division for this purpose. Divorce Rules are made by the Rules Committee of the Trial Division pursuant to the *Divorce Act* (Canada). Provincial Court Family Rules are made by the Lieutenant Governor in Counsel under the authority of the *Provincial Court Act, 1991*. Under the *Small Claims Act*, a Rules Committee consisting of two Judges of the Provincial Court, one of whom is the Chief Judge, a member of The Law Society of Newfoundland designated by Benchers and one person designated by the Attorney General may make rules in relation to the practice, procedure and costs of the Provincial Court. Other rules, such as the Criminal Appeal Rules, are made pursuant to the *Criminal Code of Canada*.

The process for rule making is quite formal, however, considerable input is sought from members of the legal profession and other interested parties. As well, the Rules Committees receive suggestions from time to time and deal with all concerns raised. In addition to the statutory requirement, the Rules Committees meet more frequently to deal with specific issues.

Rules made under the *Judicature Act* are subordinate legislation and are published in *The Newfoundland and Labrador Gazette*. The Office of the Legislative Counsel maintains an unofficial consolidation of the *Rules of the Supreme Court, 1986*, which may be accessed at www.gov.nf.ca/hoa/regulations/Rc86rules.htm The rules are available in English and consideration currently is being given to having the rules rewritten in plain language.

For more information contact Barry R. Sparkes, BCL, Registrar of the Supreme Court The Court House, Duckworth Street, P.O. Box 937 St. John's, Newfoundland and Labrador, A1C 5M3. Tel (709)729-6995 Fax (709)729-6644
E-Mail barrysparkes@gov.nf.ca

NUNAVUT

Review, Revision & Creation of Rules

The Nunavut Rules of Court Committee is tasked with the largest rules revision project in Canada. As Canada's only single level trial court, the Nunavut Court of Justice has the authority to hear all matters normally placed before both a superior and a territorial court.

The Committee's mandate is broad: the rules of the Supreme Court of the Northwest Territories were adapted for Nunavut upon the creation of the new territory. New rules and procedures are being created for those matters usually heard by a territorial court and therefore not included in the existing rules. All of the rules must be made relevant and applicable to both a single trial level court system and the unique linguistic and cultural heritage of Nunavut. In short, the Nunavut Rules of Court Committee is tasked with the review, revision and, where necessary, creation of rules governing all civil and criminal proceedings in the jurisdiction.

Authority for making civil procedure rules derives from s.59 of the *Consolidation of the Judicature Act (Nunavut)*, R.S.N.W.T. 1998, c.34, and the authority for making criminal rules is s.482(1) of the *Criminal Code of Canada*.

There is, however, no statutory authority for the creation of a rules committee and the current project is an initiative of the Nunavut Court of Justice.

The Committee is comprised of the judges of the Nunavut Court of Justice, a full-time counsel and volunteer representatives from the Federal and Territorial Departments of Justice, the Legal Aid Society of Nunavut and the Law Society of Nunavut.

Rules and procedures are developed in the order of caseload volume. Work on the criminal procedure rules is completed and the Committee's consideration of small claim matters is well underway. The civil rules, when approved, will be published in Inuktitut, Inuinaqtun, English and French and made available on the Nunavut Court of Justice Library website: www.nunavutcourtofjustice.ca and the *Nunavut Gazette*.

Further information about the Nunavut Rules of Court Committee and the work they are doing may be obtained by contacting Barbara Winters, Counsel, Rules of Court Project, Nunavut Court of Justice, PO Box 297, Iqaluit, Nunavut, X0A 0H0.
Tel (867) 975-6166 E-mail bwinters@gov.nu.ca.

NORTHWEST TERRITORIES

In the Northwest Territories, the authority for making Rules of Court is found in statutory provisions relevant to each level of court.

Supreme Court and Court of Appeal

The authority for making rules in the Supreme Court and the Court of Appeal is found in the *Judicature Act*, R.S.N.W.T. 1988, c.J-120.

Under s. 60 of the *Judicature Act* the judges may, with the approval of the Commissioner, add to, delete from, or substitute new rules for previously existing rules (S.N.W.T 1995, c.6, s.4.). The three Justices of the Supreme Court of the Northwest Territories are the Rules Committee. They are in constant communication with the Bar through the Bench and Bar Committee. The Rules of the Supreme Court were extensively revised in 1996 after far-reaching consultation and discussion.

Under s. 20 of the *Judicature Act* the judges of the Court of Appeal have exclusive authority to make rules regulating the practice and procedure on appeals under any statute or Act.

The Rules made by the Supreme Court of the Northwest Territories and the Court of Appeal for the Northwest Territories can be found at www.lex-nt.ca/statutes_en.html

Territorial Court

The Commissioner may establish a Rules Committee for the Territorial Court, composed of the Chief Judge, who shall be the chairperson, and such other persons as the Commissioner may appoint. Generally s. 29 of the *Territorial Court Act*, R.S.N.W.T. 1988,c.T-2 prescribes that Territorial Court actions shall proceed according to the same rules as an action in the Supreme Court. However, the Rules Committee has general power to make rules regulating the practice and procedure in the Territorial Court in civil actions. In addition to a number of areas of specific authority the Rules Committee may modify provisions regarding practice and procedure that are found in other Acts "to any extent necessary for the equitable dispatch of business of the Territorial Court unless that power is expressly excluded in the Act." (s. 29 (6)).

Rules made by the Rules Committee come into force once the Commissioner has approved them by notice published in the *Northwest Territories Gazette*.

In 1992 the Territorial Court Rules Committee established rules for small claims, known as the Territorial Court Civil Claims Rules that can be found at www.lex-nt.ca/reg/index.html The Committee is currently inactive.

For more information contact Bruce Errol McKay, Director of Court Services, Justice NWT, P.O. Box 1320,
Yellowknife, NT, X1A 2L9.
Tel (867) 873-7488 Fax (867) 873-0562
E-mail bruce_mckay@gov.nt.ca

YUKON TERRITORY

The Rules of the Supreme Court of the Yukon Territory are dealt with under s. 37 of the *Judicature Act*, R.S.Y. 1986, c.96, as follows:

> Subject to this and any other Act, the Rules of the Supreme Court of British Columbia in force from time to time shall, *mutatis mutandis*, be followed in all causes, matters and proceedings, but the judges of the Court may make rules of practice and procedure, including, adding to or deleting from those rules, or substituting other rules in their stead.

If any variation is decided upon by the judges of the Court, they take the form of a Practice Directive, which are on file with the officers of the Court and are circulated to the profession resident in the Yukon.

There is an ad-hoc Rules Committee that sits when requested by the Senior Judge. At present there are no matters under consideration by this Committee.

At this time the Yukon Court of Appeal Rules, which were pronounced in 1974, are currently the subject of discussion.

There are also special Divorce Rules, 1986, and Rules with respect to family law proceedings in the Yukon. The Family Law Rules are also under consideration at this time.

The Yukon Summary Conviction Appeal Rules, 1978, and the Yukon Criminal Pre-trial Conference Rules, 1988, were made pursuant to s. 438 of the *Criminal Code*.

For more information contact Annette Bertrand, Supreme Court Judges Chambers, Supreme Court of Yukon, Law Courts, 2134 2nd Ave. - 4th Floor Judges Chambers,
Whitehorse, YK, Y1A 5H6.
Tel (867) 667-3524 Fax (867) 667-3079
E-mail abertrand@judicom.gc.ca

Publications

News and Views Issue 5: Fall 2002

Why are There Rules of Court?

Gordon Turriff *

Lawyers who are also baseball fans love a short article called "The Common Law Origins of the Infield Fly Rule" [1]. It examined the development of a rule which stops the fielding team from using its own intentional error to make a double play. This rule was needed "to preserve the spirit of the game" where "moral force" alone would not ensure that teams played fairly.

We have rules of court for the same reason. They "regulate and prescribe the practice and procedure" [2] of courts because without rules people in court proceedings would not necessarily treat each other properly. This is human nature. Litigation is adversarial and litigants are opponents, not partners, in the search for truth. Individual senses of injustice, or the desire to win would, in many cases, outstrip altruism. With no rules, fair play would lose out. So, like the rules of baseball that describe, for example, when a player can be added to a team's line-up or what happens if a pitcher throws intentionally at a batter's head, procedural rules have been devised to instruct litigants about how to conduct themselves in a fair manner.

To that end, literally hundreds and hundreds of rules of court have been developed in order to secure the fundamental premise that parties in litigation must treat their opponents fairly. At first courts produced rules to control their own proceedings. Later, beginning in England in the 1830's, legislatures helped out. Rules now govern every step in litigation and every manner of litigation behaviour. How could it be otherwise? Courts must preserve their integrity, even more so than baseball. This has to be, because courts dispense justice. They must not permit anyone to act unfairly. And they have to be able to stop people from using court processes abusively.

Rules of court, especially rules fixed by legislatures, who have to allow courts their independence, are not a complete code for litigation conduct [3]. But no matter who makes them, rules do govern court proceedings, always with fairness as the ultimate end. Rules produce order so that steps in the litigation process occur logically. Rules permit courts to condemn and to punish oppressive conduct. One useful tool for which there are many little rules is the power of courts to order that costs be paid or to order that they cannot be recovered. Costs are a contribution towards litigation expense. Most people will act fairly if they know their pocket books will be affected if they do otherwise.

1. (1975) 123 U. of Penn. L. Rev. 1474, at 1476.
Return to Article

2. I.H. Jacob, "The Inherent Jurisdiction of the Court" [1970] 23 Current Legal Prob. 23, at 34. Return to Article

3. *Ibid.*, at 34. See also *Baart* v. *Kumar* (1985) 66 B.C.L.R. 61 (C.A.). Cf. *Brown* v. *Lowe* (2002) 97 B.C.L.R. (3d) 246 (C.A.). Return to Article

** Mr. Turriff is counsel with Stikeman Elliott in Vancouver. He is a Bencher of The Law Society of British Columbia, a founding member and director of the British Columbia Law Institute and has been, for 15 years, one of three co-editors of the British Columbia Annual Practice.*

Publications

News and Views Issue 5: Fall 2002

Revising Civil Procedure in Quebec: A Necessary Process

Me Anthony Russell, Direction de la recherche et de la législation ministérielle, Ministère de la Justice du Québec

According to the preamble of Louis XIV's Edict on Civil Procedure of April 1667, justice is the most solid foundation ensuring the continuation of the State. However, it is not an unchangeable institution. Under the impulse of various social forces, civil procedure is redefined, reoriented, modernized. Civil Procedure in Quebec is undergoing its third revision since its first codification in 1866 [1], with new codes having been adopted in 1897 [2] and in 1965 [3]. Like the revision undertaken in 1897, the present revision attempts to simplify access to justice and reduce delays [4], but it also aims to establish justice in a more efficient and less expensive way, to improve access to justice and to increase trust in the justice system for the people appearing before the court.

The Need to Revise Civil Procedure

The *Code of Civil Procedure* currently in force in Quebec was adopted in 1965. Over the years, it has been amended many times. A number of new procedures have been added without always being completely integrated. We may consider, for example, Book VIII on the Recovery of Small Claims in 1971, Book IX on Class Action in 1978 [5], Title IV of Book V on Proceedings in Family Cases in 1982, Book VII on Arbitrations in 1986, various amendments concerning appeals in 1995, and the fast-track procedure included in the *Code* in 1996, to name a few.

To carry out the necessary revision of the *Code*, the Minister of Justice established the Civil Procedure Review Committee in June 1998. As the Committee noted, [Translation] "these amendments and additions, often intended to remedy the shortcomings resulting from often excessively complex formal procedures and often imperfectly integrated into the existing rules, have led to major changes in procedures and resulted in inconsistencies in the *Code* [6]. In addition, they do not facilitate the task of legal practioners, or the neophyte wishing to represent himself.

Thus, [Translation] "whereas in 1965, when the *Code* was adopted, the legislator retained the statement attached to the brief as a preferred model of procedures for bringing action, an increasing number of actions are now being introduced by motions involving the application of many different rules [7]. In addition, [Translation] "this multiplicity of procedures for bringing claims and rules has contributed to increasing the complexity of the civil process [which] in itself constitutes a dissuasive factor that can explain, at least in part, the reduction in the number of cases heard by the courts [8]. Finally, this multiplicity of procedures [Translation] "often gives rise to legal arguments where questions of form prevail over content, leading to delays and additional costs for those before the court [9]. Indeed, among the delays that may be the result of procedural rules, those taken to prepare the case - that is, the period during which the parties or their attorneys exchange procedural documents and communicate information to prepare, notably the hearing of the case - generally depend on their desire and ability to act expeditiously.

Further, the introduction of the Charters [10], [Translation] "the reform of the *Civil Code*, the spin-offs from information technologies, the globalization of law [11] and the profound changes in traditional social values continue to require new legislative action [12]. This shows the importance of revising the *Code* in order to renew its rules within a better-integrated whole with easier access.

The Civil Procedure Review Committee

The Committee's work began on August 27, 1998 and lasted a little more than three years. In addition to its president, Professor Denis Ferland of Université Laval, the Committee was made up of members of the judiciary, the Barreau du Québec and representatives of the Ministère de la Justice.

The Committee's mandate was to review the rules of procedure in order to limit their number, simplify and facilitate procedures and take into account alternative dispute resolution, in order, among other things, to [Translation] "[...] ensure a better balance between the parties and the court and to take into account the expectations and needs of judges, lawyers, parties and the other stakeholders in the justice system [13].

[Translation] "The Committee, taking into consideration the objectives mentioned by the Minister in his mandate to them, began its work by identifying the issues involved in the task facing it, to ensure accessibility to civil justice, an expeditious process, the balancing of rights and liability among all stakeholders, and respect for public order and social peace, in order to offer a quality public service, while respecting the rights and freedoms of the individual. Taking into account these issues, its own findings and the contemporary trends seen in other jurisdictions that it has studied, the Committee has identified the major components of a new "vision" of civil procedure [14]. Thus, the orientations developed by the Committee in its report, that is, its recommendations, all relate to five major themes: respect of persons, accountability of the parties, increased intervention of the judge, proportionality of the procedure, and openness to information technologies.

In addition, the Committee was concerned with placing the citizen at the heart of the revision. It is important to point out that the Committee's mandate was to review the civil procedure and not carry out a reform of civil justice as a whole.

The work of the Committee

As part of its work, the Committee had 112 sittings. In order to ascertain the social relevance of the review and be better informed about the social context in which the review of the *Code* is taking place, the Committee met with sociologists and a legal historian. In pursuit of the same objective, the Committee was able to take advantage of a study aiming to [Translation] "enunciate and establish a case for the principles that would clarify the general concept of the civil justice system and the place of the judicial courts within this system [15].

The Committee was also anxious to verify the legal relevance of the review. [Translation] "To sustain its reflection and its discussions in this respect, the Committee benefited from the contribution of a team of jurists from the Ministère de la Justice assigned to work with the Committee, which in particular prepared many orientation documents and provided texts for the drafting of the Consultation Document and the Final Report. These texts were based on reports of difficulties arising from the *Code*, a comparative analysis of applicable rules relating to procedure in other Canadian provinces and in certain foreign countries such as the United States, France, England, Australia and Switzerland [16]. This analysis also took into account recent reports on civil justice including the *Report of the Canadian Bar Association Task Force on Systems of Civil Justice*, [17] the reports of the Ontario *Civil Justice Review* team or Blair Report [18], the Woolf Report (*Access to Justice*) [19] and the *Report of the Task Force on Access to Justice* or Macdonald Report [20].

At the same time, the Committee formed fourteen discussion groups on specific themes in which more than 150 jurists chosen from among the traditional judicial stakeholders participated. Each group was chaired by a member of the Review Committee.

These actions, together with the analysis of certain statistical data prepared from computerized court offices, allowed the Committee to write a Consultation Document [21] that was submitted to the Minister of Justice on February 24, 2000 and on the basis of which further consultations have been held.

Since citizens were to be at the heart of the review, the Committee, in carrying out its work, had to obtain their points of view in addition to those of the judicial stakeholders. To do so, in addition to meetings with the fourteen discussion groups, the Committee consulted with representatives of social groups interested in civil justice such as consumer associations, human rights or court support groups, unions, judges, lawyers and justice officials, notaries and bailiffs, and representatives of other groups and stakeholders in the justice system, such as mediators, social workers, psychologists and stenographers. These consultations, held mainly in June, September and November 2000, made it possible to collect comments from 60 persons or agencies.

The Committee's Final Report

Following these various consultations, the Committee submitted its final report to the Minister of Justice on August 28, 2001. This report contains some 327 recommendations and states the Committee's analyses and reflections. The report is divided into three main sections: 1) findings, 2) a new vision of civil procedure and 3) principal orientations.

This report lists the Committee's findings on the decrease in the number of proceedings brought before the courts, the costs of justice as an obstacle to accessibility, the complexity of the law as a dissuasive factor, delays in justice and certain difficulties related to the respect of persons, to the accountability of the parties and the administration of justice. It presents a new vision of civil procedure considering the increased intervention of the judge, the proportionality of the procedure and openness to information technologies. It also indicates the objectives of the review, namely, humanizing the justice system, expediting the process and reducing the costs of justice.

The Committee's guidelines fall under seven main headings:

1. The values of justice: the guidelines and the general rules (24 recommendations);
2. The jurisdiction and the organization of the courts (57 recommendations);
3. Institution and course of proceedings (47 recommendations);
4. Production of evidence (24 recommendations);
5. Judgment, costs and the means to contest a judgment (20 recommendations);
6. Particular matters: non-contentious matters, family matters, boundaries of land, arbitration, recovery of small claims, class actions, provisional measures and private international law (98 recommendations);
7. Execution of judgments (57 recommendations).

It recommends a complete review of civil procedure and hopes that the review of the *Code of Civil Procedure* will allow the development of a new judicial culture whose primary beneficiaries will be the citizens.

Bill 54

Following the submission of the Committee's final report, Bill 54, entitled *An Act to reform the Code of Civil Procedure* was presented to the National Assembly on November 13, 2001. It was adopted on June 6 and sanctioned on June 8, 2002.

The *Act to reform the Code of Civil Procedure* [22] (the "*Act*") enacts most of the recommendations contained in the Committee's Final Report. However, considering the scope of the project, it constitutes the first phase in the review of civil procedure in Quebec.

The *Act* will come into effect on January 1, 2003, except for the provisions increasing the monetary limit of the jurisdiction of the Court of Quebec from $30,000 to $70,000, and the threshold of monetary

jurisdiction of the small claims division, which rises from $3000 to $7000, which came into effect on the date of the sanction of the *Act*, June 8, 2002.

The law makes some substantial changes to the present civil procedure and the philosophy behind the *Code* – the single mode introduced for the institution of any type of action or application, namely the "motion to institute proceedings" constituts the cornerstone of the future code. Thus, beginning on January 1, 2003, almost all court actions will be introduced by motion and will be presented at a preliminary stage in court. However, actions for contempt of court, *habeas corpus*, non-contentious matters and small claims will continue to follow their own rules. In addition, all court actions should be inscribed within a peremptory time limit of 180 days after service of the motion. However, when the complexity of the case or special circumstances warrant it or, if the party demonstrates that it has been, in fact, impossible to act, the time limit may be extended by the court.

The law also gives precedence to oral arguments. It increases the court's powers at the time of presentation of the motion, in order to ensure the smooth conduct of the trial. Thus, the court may hold a special case management conference, establish a deadline schedule, order the parties to come to an agreement, either by a settlement conference or by mediation, proceed at once to the hearing of preliminary exceptions, and finally, determine the length and the number of examinations for discovery.

In line with the *Déclareation de principe concernant les témoins* [witnesses policy statement] and in order to ensure respect of people called on to testify in Court, the law contains the obligation, for the party who calls a witness, to offer him, for the first day he is present in Court, an indemnity for the loss of time and allowances for transportation, meal and lodging expenses. In addition, considering the high costs and often useless delays generated by examinations for discovery, the law abolishes them in cases where the amount claimed or the value of the property claimed is less than $25,000. In other cases, the court may limit their length and number if they are abused.

Still for the purpose of limiting costs and avoiding useless delays, when expert testimony is produced, the court may order the experts to meet, even before the date for proof and hearing has been set, in order to reconcile their opinions. Otherwise, the court may decrease the costs if it considers that an expertise was useless or the expenses unreasonable.

Even though the law does not modify the general appeal procedure, it contains some innovations aimed at facilitating and accelerating the progress of the case on appeal, and also to improve access to justice. It raises the threshold for an appeal as of right from $20,000 to $50,000 and introduces the possibility of holding case management conferences and settlement conferences.

Another major aspect of the revision concerns small claims.
The main problems found by the Civil Procedure Review Committee members during consultations related to the limits of applicability of this particular procedural system, the absence of a mediation service and action by the clerk to ensure the execution of judgments, and, finally, the complexity of the system and the lack of information given to the parties. To correct these problems, the *Act* in particular increases from $3,000 to $7,000 the maximum admissible amount for a claim.

In addition, the *Act* introduces a free and voluntary mediation service, provided by private sector lawyers accredited by their professional order, the *Barreau du Québec* or the *Chambre des notaires du Québec*, as appropriate. The Act, and this was one of the main demands of consumer associations, introduced the possibility of obtaining assistance from clerks in executing judgments. It also introduces the possibility of obtaining their assistance at any stage of the proceeding, including the preparation of the statement of claim and defence, but they may not of course give the parties any legal advice. In particular, when the creditor of the judgment is a natural person, he may address the clerk of the court to have it executed.

Finally, the law makes changes relating to class actions.
In order to counter a practice that had developed and that was giving rise to multiple examinations at the certification stage of a class action, the law now imposes oral argumentation at this stage in the procedures. Besides, in order to facilitate access to justice and to meet certain demands, the law

allows legal entities with 50 or fewer employees to join a group bringing a class action. However, they may not obtain financial assistance from the *Fonds d'aide aux recours collectifs* [class actions fund], which remains accessible to natural persons and certain legal entities, such as cooperatives, associations of employees and non-profit legal entities. The law also simplifies the rules regarding notices, which may henceforth be distributed, notably on the Internet.

Subsequent Stages

The reforms undertaken by the *Act to reform the Code of Civil Procedure* constitute a first stage that must be completed. The second stage in the review of the *Code* consists in particular in rewriting the first two books, the first on General Provisions and the other on the ordinary trial procedure, by inserting, in particular, the newly adopted rules. A consultation document entitled *Mesures visant à instituer un nouveau Code de procédure civile et comportant une proposition quant aux deux premiers livres de ce Code* [Measures to institute a new Code of Civil Procedure, including a proposal regarding the first two books of this Code] was submitted to the National Assembly on June 13, 2002, for general consultation.

A third stage is planned, which would deal in particular with special provisions relating to certain actions, such as those in family matters, non-contentious matters, private international matters or class actions. It would also deal with the review of rules relating to appeals and the execution of judgments. These rules will have to be adapted to the new rules that will have been adopted during the first two stages.

Then, the new *Code*, based on a new philosophy and written in more accessible language, will constitute a coherent, modern whole, adapted to the practical realities of the 21st century, and that should contribute meaningfully to facilitating access to justice while reducing the associated costs and delays.

June 26, 2002

Endnotes

1. *Act respecting the Code of Civil Procedure of Lower Canada*, RSLC. 1866, c. 25. Return to Article

2. *Code of Civil Procedure of the Province of Quebec Act*, S.Q. 1897, c. 48. Return to Article

3. *Code of Civil Procedure*, S.Q. 1965, c. 80. Return to Article

4. Débates de l'Assemblée législative, 8th legislature, 4th session, 1895 (text established by Jean Boucher, Quebec, 1980) at 102. Return to Article

5. At the time, the legislator was breaking new ground since Quebec was the first Canadian province to adopt "modern" rules on this subject. Other provinces have since followed, Ontario in 1992, British Columbia in 1995, Saskatchewan and Newfoundland in 2001. In Manitoba, a bill on class actions was introduced on May 14, 2002, and is currently undergoing second reading: online: (date accessed: 19 June 2001). Return to Article

6. *Rapport du Comité de révision de la procédure civil: Une Nouvelle Culture Judiciaire*, (Ministère de la Justice: Québec, 2001) at 1. [hereinafter *Une Nouvelle Culture Judiciaire*] [A New Judicial Culture]. The report is also available online: (date accessed: 18 June 2002). An English language summary *Report of the Civil Procedure Review Committee: A New Judicial Culture* is also available on the Department's Internet site and may be consulted at the following address: (date accessed: 18 June 2002). Return to Article

7. *Ibid.* at 1 and 2. Return to Article

8. *Ibid.* at 109. Return to Article

9. *Ibid.* Return to Article

10. *Charter of Human Rights and Freedoms, R.S.Q.*, c. C-12; *Canadian Charter of Rights and Freedoms*, Part I of the *Canada Constitution Act of 1982* [Appendix B of the *1982 Canada Act* (1982, UK, c. 11)] Return to Article

11. C. L'Heureux-Dubé, "Les défis de la magistrature ?ére de la Charte" [Challenges facing the judiciary in the era of the Charter], (Address to the plenary session of the Barreau du Québec Conference, Mont-Tremblant, 1 June 2000). See also the speech given by L. Goupil (Address on the occasion of the Joint Session on Continuing Education of the Bar of Maine, the Barreau du Québec and the Canadian Bar, Beaupré, 16 February 2001) online (date accessed: 18 June 2002). Return to Article

12. *Une Nouvelle Culture Judiciaire, supra* note 6 at 2. Return to Article

13. *Devis de projet de la révision de la procédure civile* [Specifications of the draft revision of civil procedure] (Ministère de la Justice: St. Foy, 1998). In particular, in terms of substantive law, this includes revising the leading principles of the *Code of Civil Procedure*, the jurisdiction of the courts, the roles of the various actors and stakeholders in the justice system, assessing and revising the procedures for bringing action, including fast-track procedures and petitions, revising the special rules set out in the Code, among others, those for small claims, considering the integration of alternative dispute resolution, improving the communication of evidence, trial management, renewing the rules for executing judgments, extraordinary remedies and the rules governing class actions. Return to Article

14. *Une Nouvelle Culture Judiciaire, supra* note 6 at 31. Return to Article

15. This text, prepared by professor Jean-Guy Belley, was reissued by the author in the McGill University Law Journal: (2001) 46 *McGill L.J.* 317. Return to Article

16. *Une Nouvelle Culture Judiciaire, supra* note 6 at 5. Return to Article

17. *Report of the Canadian Bar Association Task Force on Systems of Civil Justice* (Canadian Bar Association: Ottawa, 1996). Return to Article

18. *Report on the Revision of Civil Justice*, also called *Blair Report* (Ministry of the Attorney General: Toronto, 1996); *Report on the Revision of Civil Justice*, also called *Blair Report* (Ministry of the Attorney General: Toronto, 1995). Return to Article

19. *Access to Justice – Final Report*, also called the Woolf Report (Lord Chancellor's Department: London, 1996) online (date accessed: 18 June 2002). Return to Article

20. *Rapport du Groupe de travail sur l'accessibilité à la Justice* [Report of the Access to Justice Task Force], also called *Macdonald Report* (Ministère de la Justice: Québec, 1991). Return to Article

21. Online (date accessed: 18 June 2002). Return to Article

22. L.Q. 2002, C. 7. The law is also available, in its electronic version, under "Laws and Regulations" on the *Publications du Québec* website, in the section of Bills of the 2nd session of the 36th legislature: (date accessed: 26 June 2002). Return to Article

Publications

News and Views Issue 5: Fall 2002

Membership

Thank you to so many of you who have recently renewed or taken out a new membership in the Forum. Your interest in civil justice reform and support for the Forum allows us to expand the work we do through our web-based Civil Justice Clearinghouse, conference and education activities, the publication of "News & Views on Civil Justice Reform" and research. All members receive "News & Views on Civil Justice Reform", and we plan to provide additional membership benefits in the future.

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Publications

News and Views Issue 5: Fall 2002

Managing Litigation in Canada

Doris I. Wilson, QC, Special Counsel to the Alberta Law Reform Institute's Rules of Court Project*

In the Canadian civil justice system, litigants or their counsel have traditionally controlled the pace of litigation, only involving the court when they perceive a problem with the progress of their case. From the time a Statement of Claim is filed in the justice system, litigants work through the steps of the litigation process - from pleadings, to disclosure, to examination for discovery, through to the trial itself - at their own pace. While all cases make use of some of the court's services and resources, there is no attempt by the justice system to manage the progress of cases. [1] That has begun to change over the last twenty years, and in 1996 when the CBA Systems of Civil Justice Task Force studied the systemic problems of cost, delay and complexity the issue was considered at the national level. The *Report of the Canadian Bar Association Task Force on Systems of Civil Justice* ("*CBA Report*") [2] made a series of recommendations for "Court Supervision of the Progress of Cases [3] that have strongly influenced the exploration of case management options in Canadian jurisdictions.

The traditional approach provides flexibility to the litigants. However, the traditional system is also subject to criticisms, including several set out below.

- All cases are treated as if they are going to trial. The courts, in effect, "reserve" the use of resources that may never be needed.
- There is no identification of cases that would benefit from early judicial attention and no incentive to pursue early disposition.
- Counsel determine when activities, events and disposition will occur and the court only obtains information on case status when a case is ready to be set for trial. In some jurisdictions, there is no concluding document filed unless the matter goes to judgment and thus the courts cannot confirm whether a matter is concluded.
- There is no systematic control or record of the stage reached by each individual case within that system and thus no information about what resources may be required by each case or when. Most traditional systems do require that the court be notified when the matter is ready to be heard, and then there is often a substantial waiting period until the matter can be heard.

These major criticisms of the traditional approach relate to its perceived connection with delay in access to justice. Delay is attributed to slow moving lawyers, a lack of system resources, as well as increased demand for services of the justice system. [4] Specifically, the traditional approach is associated with delay arising from resolving interlocutory disputes, discovery of documents and examinations for discovery, booking trial dates or other court steps, scheduling conflicts, and adjournments that are too easily obtained.

In response to such criticisms, some jurisdictions have moved away from the traditional model in which the pace of litigation is controlled by litigants and their lawyers, toward one in which that control rests with the court. These changes may be seen to occur along a continuum. Different jurisdictions will operate at different places along such a continuum, with the traditional approach at one end, the implementation of a variety of case management tools falling in between, and full caseflow management systems at the other end.

Traditional Approach > *(Controlled by litigants)*	Case Management tools >	Caseflow Management System *(Controlled by Courts)*

In his *Report of the Ontario Courts Inquiry* [5] Justice Zuber used the term "case management" in reference to a focus on managing the pace of litigation by an individual judge in an individual case, as distinct from "caseflow management" which referred to systemic management processes. The terms are used in a similar manner here. It must be noted however, that the distinction is often blurred both in the literature and in practice. In practice the two terms are closely linked and are sometimes used interchangeably [6].

Case Management

Many of the "tools" of case management have been incorporated into traditional models over the last 20 years. Thus, lawyers continue to have the primary control over the progress of cases, but they do so within a model that provides both litigants and courts with tools to better manage cases through the litigation process. It is often difficult to distinguish between processes that use tools to provide some court management and processes that are systemic and thus manage cases from beginning to end. Some of the tools that are indicative of some measure of court control include:

- case management conferences (pretrial, settlement and duration conferences);
- applications to court;
- deadlines for exchange of documents;
- time limits for completion of other steps;
- dismissal or other sanctions for delay;
- status review;
- pretrial hearings;
- dispute resolution mechanisms and minitrials;
- trial booking procedures, including certificates of readiness; and
- "tracks" or "streams" for different types of litigation (which may indicate a systemic approach).

All Canadian jurisdictions use some of these mechanisms, although they may be used somewhat differently in each jurisdiction [7].

Caseflow Management

Under a caseflow management system where there is a systemic approach to managing cases, the court monitors progress throughout the process and deadlines are imposed for completion of procedures, such as motions, discoveries and settlement conferences.

There are two key features of a caseflow management system - time standards and status review. Time standards are applicable throughout the process of a case, and status review involves a continuous review of the age and status of pending caseload by the courts, with those cases that are not moving forward being subject to dismissal. The *CBA Report* recommended that [8]:

> ...every court set timelines for the overall determination of civil cases and develop suitable means by which to enforce such timelines. [and]
> ...every jurisdiction provide by its rules of procedure for the automatic dismissal of cases where they have not been determined within a specified period, subject to the discretion of the court to order otherwise in compelling circumstances.

Further, the Report recommended that model time guidelines be adopted for Canadian courts and the legal profession, being [9]:

> ...90 per cent of all cases should be settled, tried or otherwise concluded within 6 months of filing of readiness and within 12 months of the date of the case filing; 98 per cent within 9 months of filing of readiness and within 18 months of such filing; and the remainder within 12 months of filing of readiness and within 24 months of case filing; [with an allowance for] ... exceptional circumstances... [and] ...summary hearing procedures ... should be concluded within 90 days of filing.

In some jurisdictions, overall case completion dates have been adopted, indicating that cases are to be disposed of within a specified time limit [10]. The court, through a judge or judicial officer, monitors compliance and imposes sanctions for failure to meet deadlines. As the court knows what stage each case has reached, court dates can be booked well in advance.

There are benefits attributed to caseflow management, applicable regardless of the way in which the system is designed. For instance, caseflow management demands early court and counsel attention to each case, the belief being that early triage ensures the most appropriate treatment. One option that can then be selected is early mediation, a common feature available in many caseflow management systems, which is thought to make expeditious and interest based resolution much more accessible. There are of course, also concerns, for instance the concerns expressed by legal counsel related to their loss of control over the progress of cases.

Approaches to Caseflow Management

Caseflow management ("CFM") focuses on the movement of cases through the legal system. Notably CFM uses key tools in a manner that provides a complete system for controlling the pace of litigation. Flexibility in the system, such as extension of timelines, is generally at the discretion of the court and not of litigants. Different jurisdictions can, and do, develop unique systems to suit their needs.

Commentators have described CFM systems in varied ways, [11] usually as appropriate to the system in operation in their jurisdiction. For the purposes of the general discussion here, it is useful to identify three distinct approaches, or methods, for implementing a CFM system. However, in practice there is a great deal of overlap and blending of these approaches and no pure system exists. All of the approaches described here have aspects that may be incorporated into the others, and the benefits and concerns often coincide. The first approach described here - Differentiated "tracks", or Differential Caseflow Management ("DCM") - is essentially a method for determining what time standards should be applied to different types of cases. The second - Individual Case Management ("ICM") - and third - Master List, or Administrative Monitoring - are descriptions of approaches to status review, or methods that are used to monitor compliance with time standards.

1. Differentiated "tracks" or Differential Caseflow Management (DCM)

DCM is a way of implementing specific time lines. It uses pre-established deadlines for different types of cases, that are designed to move cases of varying complexity through the court process within time frames appropriate to their complexity. Deadlines are set for major case events, and there is close court supervision (sometimes by court staff) until disposition. Jurisdictions that follow this approach attempt to define the specific features of cases that distinguish the level of case management required. Most DCM systems have a minimum of three tracks: complex, simple and standard. Some jurisdictions add a category for "holding" cases, which are not moving forward due to events such as settlement negotiations. There may also be separate tracks for specialized matters, such as family law or commercial litigation.

The benefits of DCM include that: event and time standards for tracks are created to fit case requirements; tailoring of the court system to the particular case or kind of case is more appropriate than treating all cases as if they were the same; judicial intervention can occur as needed, reserving judicial supervision for the more complex cases; dispute resolution is encouraged at the earliest possible time; and, the number of interlocutory motions is usually reduced, allowing trial dates to be

more certain.

Concerns about DCM include questions about how cases should be assigned to a track; whether it is necessary to have specific deadlines for each type of case; and how much judicial involvement is necessary at the early stage. Some DCM systems have been criticized for being "lockstep" and inflexible [12] .

2. Individual Case Management (ICM)
The ICM approach is known by various names: "Judicial Monitoring", "Individual List", "Single Judge", "Single Docket" or "Individual Docket". ICM involves continuous control by a judge, who personally monitors each case on an *ad hoc* basis and ensures that the case moves at an appropriate pace. Support for this approach is found in research that indicates that early judicial involvement in a case will increase the likelihood of settlement.

Positive features of this approach to caseflow management include familiarity of the assigned judge with individual cases, earlier settlements, and less delay overall. Commentators have followed the results of the introduction of caseflow management in jurisdictions such as Australia and found the ICM approach to have significant benefits including [13]:

- saving of time, money and courtroom space;
- earlier resolution of disputes;
- producing just results promptly in a memory-dependant system;
- increasing accessibility to the court system;
- producing reliable and certain trial dates, with few adjournments; and
- more effective use of judicial resources.

Concerns include whether or not there are adequate judicial resources to carry out the monitoring (for instance, because ICM is expensive it should be reserved for complex cases) and how to ensure the availability of the assigned judge when the case needs attention.

ICM is the dominant American approach to caseflow management, and has been extensively reviewed in that context. Some of the observations and criticisms of Judith Resnik, a noted American scholar, include the following [14]:

- to be effective, caseflow management must be compulsory;
- judicial case management is a reorientation of the judicial role, and the skill of judges in the management role has been questioned by some;
- pretrial conferences as a venue for settlement, without sworn evidence, are criticized by some;
- judicial promotion of settlement at pretrial conferences is controversial (particularly where the pretrial judge may also be the trial judge);
- "big" (protracted, complex) cases have produced the necessity for management and set the agenda for the entire universe of cases, including control by the judiciary, definition of issues, time-tabling, forecasting trial time, and use of expert evidence;
- individual judges' experiences and preferences have made their way into custom, rules and statutes;
- the informality of the proceedings (closed-door, in many instances) leave some lawyers or litigants out of the process;
- responsibility for raising settlement moves from lawyers to judges; and
- judicial case management saves court time but at the expense of extra lawyer work hours (and thus increased cost to the client).

3. Master List, or Administrative Monitoring (usually called Master List)
With Master List, deadlines are monitored by court staff and a file is referred to a judge only if a problem arises. Master List tends to require fewer judicial resources, as a judge only becomes involved if a case does not meet established timelines. Monitoring is achieved by requiring the parties to report to the court (often a Master or Registrar) at fixed milestones, enabling the court to exercise

routine and structured control over timelines. All cases are controlled by the court registry and are assigned to different judges or judicial officers at different times for different purposes. When an event relating to a case has been dealt with, it is returned to the pool of cases to await the next event and to be assigned again, not usually to the same judge or judicial officer.

The advantages of Master List are that judicial resources are reserved to judicial functions, with court staff carrying out monitoring functions. The litigants and lawyers maintain a great deal of responsibility for the progress of cases, while the justice system has an "overall picture" of what is in the system and what cases are likely to require court resources in the near future. Positive comments by practising lawyers include that this approach allows qualified and committed court staff or Masters to become familiar with particular cases, and that it leads from commencement to trial expeditiously and inexpensively [15]. Other advantages include fixed trial dates, case conferences, and the ability to set timetables for all steps in the proceeding.

Concerns about Master List include the availability of court resources for monitoring, unfamiliarity of different judges with steps previously taken on the file, delay due to lack of judicial resources when a case needs attention, and the complexity of administering the system. Some legal practitioners have argued that: it would be more useful to have one judge familiar with an action from beginning to end; judges are converted from adjudicators into referees; the onus is put on the system instead of on lawyers to manage their practices; cases are dealt with piecemeal and only in reaction to foul-ups or contentious matters; and, judges have too many cases and not enough case responsibility [16].

The Canadian Landscape

Several Canadian court systems have reviewed options for managing the flow of cases through the justice system; some have implemented caseflow systems, and most continue to study the issue. Ontario studied case and caseflow management in detail [17]. *The Civil Justice Review, First Report* recommended that the "modern civil justice system should operate under the rubric of an overall caseflow management system [18].

Several key concepts emerged from the Ontario Report:

- caseflow management (CFM) entails a significant shift in the cultural mind set of judges, lawyers, and court staff;
- the traditional method of proceeding with a lawsuit has become ineffective in delivering civil justice, given rising costs and unacceptable delays;
- CFM involves the transfer of principal responsibility for the management of the pace of litigation to the courts; and
- CFM involves the establishment of reasonable, but firm, time limits and the adherence to them.

Similarly, the *CBA Report* was a major impetus for reform in Canada. The purpose of the Task Force was to enquire into the state of the civil justice systems across Canada and to develop strategies and mechanisms to meet the major concerns about lack of accessibility to the legal system, perceived by "many Canadians [who] feel that they cannot exercise their rights effectively because using the civil justice s ystem takes too long, is too expensive, or is too difficult to understand. [19]" The *CBA Report* recommended that all Canadian courts

> ... have a caseflow management system to provide for early court intervention in the definition of issues and for the supervision of the progress of cases. [... that each court design its own system, and]
> ... at a minimum, systems should provide for (a) early court intervention by designated and trained individuals in all cases; (b) the establishment, monitoring and enforcement of timelines; (c) the screening of cases for appropriate use of non-binding dispute resolution processes; and (d) reliable and realistic fixed trial dates [20].

Three jurisdictions have adopted formal caseflow management systems: Ontario, Nova Scotia and the

Federal Court of Canada. Ontario has continued to modify its systems as results from pilot projects become available. Nova Scotia has retreated from the broad-based system that was implemented in their pilot project but has retained several aspects of CFM. Quebec has introduced reforms, coming into force in January 2003, that will implement a caseflow management system. All other Canadian jurisdictions use several of the case management tools outlined above, but have not adopted full caseflow management systems. Please refer to the table that follows for more detail.

Considerations in Choosing a Case Management Approach

What is obvious in looking at the rules across Canada, is that each jurisdiction will fashion mechanisms or approaches to fit its unique needs, and will no doubt continue to explore options for managing litigation. The collection of empirical data that assesses the impact of various options will go a long way in making this exploration more fruitful. Guidance can also be obtained from a seminal paper delivered by The Honourable N. Douglas Coo, now Justice Supernumerary, Superior Court of Justice in Ontario, a pioneering expert in the application of CFM principles. The seven factors to consider, as set out below, are based on that article [21] :

1. A jurisdiction should first gather statistical information to assess whether or not there is a problem with delay or access to justice. Each jurisdiction must review its own system to decide whether CFM would be beneficial, or whether additional case management "tools" can or should be introduced into an existing system.

2. Both the judiciary and the Bar should be involved in considering the proposed changes and indicate support for the type of case management chosen before it will be effective. CFM does entail a change of culture, and cannot be imposed without Bench and Bar leadership. Changes or additions to existing case management techniques and tools should also be introduced through local bar associations and in continuing legal education programs for lawyers and judges.

3. Administrative support must be available in order to support the case management system chosen.

4. Government participation is necessary to ensure that judicial resources and other resources, including technology, are made available.

5. Each case management system must be designed for a particular jurisdiction, taking into account local needs. Research and materials should be reviewed to help assess which type of case management will be effective in that jurisdiction.

6. Once a system is settled on, there is a need to consult widely within the jurisdiction to be sure that the solution will work. Most jurisdictions use pilot projects in limited areas as testing grounds before introducing system-wide changes.

7. The final step is implementation of the changes, including necessary amendments to Rules, practice directions and forms.

Comparison of Caseflow Management Systems and Case Management Rules in Canadian Jurisdictions [22]

JURISDICTION	CASE FLOW MANAGEMENT		
Federal Court*	Pre-Trial Conference	-requisition may be served by either party when ready for trial	R 258-268
	Status Review	-mandatory status review for all cases	R 380-382

	Specially Managed Proceedings	-may appoint case management judge for specially managed cases	R 383-385
	Simplified Action	-by agreement, order of the court, or for a claim not exceeding $50,000	R 292-299
	Dispute Resolution	-the court may refer any issue or proceeding to dispute resolution	R 386-391
	Trial Management Conference	-may be held before or during a trial by the trial judge or prothonotary	R 270
Ontario*	Case Management	-applies to proceedings in Ottawa and Toronto (also in Windsor as of 12/30/02) -the plaintiff shall choose either the fast or standard track unless the court orders otherwise	R 77
	- Case Conference	-may be initiated by either party or the court at any time in the case	
	- Trial Management Conference	-may be initiated by either party or the court, in any proceeding	
	- Settlement Conference	-mandatory, scheduled by registrar on 45 days' notice - to be held 150 days after first defence for fast track; 240 days after first defence for standard track	
	Pre-Trial Conference	-for cases not subject to R 77; may be initiated by either party or the court, in any proceeding	R 50
	Simplified Procedure	-mandatory in actions not exceeding $50,000; does not apply to R 77 cases, class proceedings or construction lien cases -at the plaintiff's option in all other cases, provided defendant does not object	R 76
	Mediation	-mandatory for R 77 case managed actions (not applications) in Ottawa and Toronto (also in Windsor as of (12/30/02), and for R 76 cases in Ottawa	R 24.1
	Family Court Case	-applies to proceedings	R 39-40

	Management	governed by the Family Law Rules -also in Toronto and Windsor under specialized rules	(Family Court Rules) Toronto/Essex Case Management Rules
Nova Scotia*	Halifax Case Management	-applies to proceedings commenced on or after 04/01/00	R 68 / Practice Memorandum 27
	- Fast Process	-may be selected by the plaintiff with approval of the court on appearance day	
	- Complex Cases	-the court may order complex proceedings to management by a judge	
	- Settlement Conference	-may be offered if requested by a party and other parties consent	
	Notice to Proceed / General List	-an action on the General List for more than 3 years will be dismissed unless the parties indicate an intention to proceed	R 28
	Pre-Trial Conference	-may be initiated by either party or the court, in any proceeding	R 26
Quebec*	Case Management	- the parties must negotiate an agreement as to the conduct of the proceeding - the agreement is binding on the parties and may be modified insofar as it does not contravene the 180-day peremptory time limit for inscription of a case for proof and hearing	Art. 151.1 - 151.3 (An Act to reform the Code of civil procedure, R.S.Q. 2002, c. 7 - [ARCCP])
	Special Case Management	- the chief justice or judge may order special case management in complex proceedings or where the 180-day	Art. 151.11 - 151.13 (*ARCCP*)

	peremptory time limit is extended	
Case Management - district of Quebec	- a judge becomes responsible for all lengthy cases (5 or more days)	R 10, 13 & 14 (Superior Court Rules - district of Quebec)
	-if a case is inactive for a long time, a judge may confer with the parties	
Settlement Conference	- may be initiated by either party or the court, in any proceeding	Art. 151.14 - 151.23 (*ARCCP*)
Pre-Trial Conference	- a judge will determine which cases require a pre-trial conference	R 20 (Superior Court Rules)
	- a judge may transform a settlement conference into a pre-trial conference	Art. 151.23 (*ARCCP*)
	- may be initiated by either party or a judge	Art. 279 (*Code of Civil Procedure*)Art. 151.13 (ARCCP)
Accelerated Procedure	- either party to the action may apply to the court for accelerated procedure	R 27a. (Court of Appeal Rules)
Practice Division	- the chief justice will distribute cases within the sections of the Practice Division	R 15 (Superior Court Rules - district of Montreal) / R 36 (Court of Quebec Rules)
Mediation	- the court may recommend mediation	Art. 151.6 (*ARCCP*)
	- in actions involving small claims less than $7000, the clerk will inform the parties that they may submit their dispute to mediation	Art. 973 (*ARCCP*)
	- the parties in dispute regarding certain interests of their children must	Art. 814.2 - 813-14 (*Code of Civil Procedure*)

		attend a mediation information session before their application is heard by the court	

** These jurisdictions have systematic approaches to caseflow management.*

JURISDICTION	CASE MANAGEMENT TOOLS	APPLICATION	RULE
Tax Court	Pre-Hearing Conference	-may be initiated by either party or the court, in any appeal set down for hearing	R 126
British Columbia	Case Management	-mandatory for civil trials 20 days or more (if less than 20 days, only available for actions showing a need for case management)	Practice Direction - 11/20/98
	Pre-Trial Conference	-mandatory for civil trials 4-19 days or jury/priority trial less than 20 days	R 35
	- Mini-trial / Settlement Conference	-by order of judge or master	R 35(5) / R 35(6)
	Fast Track Litigation	-complete trial in 2 days	R 66
	Pre-Hearing Conference	-may be used in any action in the Court of Appeal	B.C.C.A. - R 66
	Mediation	-once the Notice to Mediate process is initiated by a party, a mediation session is mandatory in most civil non-family actions in the Supreme Court	B.C. Reg. 152/99 B.C. Reg. 127/98
		-a court mediation program operates in four small claims registries	Small Claims Practice Directions
	Judicial Case Conference	-to be held before any notice of motion or affidavit in support of interlocutory action is delivered for all family matters in the Supreme Court	R 60E
	Settlement Conference	-mandatory for all cases in Small	R 7 (Small Claims Rules)

		Claims Court	
	Case Conference	-a judge may order a family case conference	R 7 (Family Court Rules)
	Trial Preparation Conference	-may be held if a trial is necessary; set by judge	R 8 (Family Court Rules)
Alberta	Case Management	-shall be used for a very long trial (25 or more days) -may be used in any action if it would promote efficient resolution	Practice Note 1 / R 219.1
	- Scheduling / Duration Conference	-shall be convened by the case management judge in a very long trial action	Practice Note 1 (s.41)
	- Judicial Dispute Resolution	-the case management judge may encourage a mini-trial in any action	Practice Note 1 (s.13)
	Pre-Trial Conference	-may be used in any action	Practice Note 3 / R 219.1
	Mediation	-the parties may request, or the court or a mediation co-ordinator may refer, to mediation	Mediation Rules
	Streamlined Procedure	-by agreement or order of the court for a claim not exceeding $75,000	R 659-673
Saskatchewan	Pre-Trial Conference	-mandatory before setting a proceeding down for trial -in a trial of one day or less it is not ordered unless the registrar feels there is a strong likelihood of settlement or that there is some other special reason	R 191-192/Practice Directive 4
	Simplified Procedure	-mandatory in actions not exceeding $50,000	R 477-489/Practice Directive 8

		-at the plaintiff's option in all other cases	
	Mediation	-mandatory after the close of pleadings in all non family law civil proceedings	s. 42-44 (*Queen's Bench Act*)
		-s. 42 only applies in Prince Albert, Regina, Saskatoon and Swift Current	s. 1,2 &5-7 (Queen's Bench Reg.)
Manitoba	Pre-Trial Conference	-will be required in all cases, unless otherwise ordered by a judge	R 48.01, 50
		-in family proceedings it may be initiated at any time by either party or the court	R 70.17
	Expedited Trial	-where summary judgment is dismissed, or on motion of either party, a judge may order an expedited trial	R 20
	Expedited Action	-mandatory for actions not exceeding $20,000, also by agreement or court order	R 20A
	Judicially Assisted Dispute Resolution	-judicially assisted dispute resolution may be held upon request of all parties	Notice to Profession - 01/98
	Case Management	-mandatory for Court of Appeal hearings of more than one day	Man.C.A. - R 36
New Brunswick	Pre-Trial Conference	-may be initiated by either party or the court, in any action ready for trial	R 50
	- Settlement Conference	-may be held at any time	
Prince Edward Island	Case Management	-a one track system has appeared to work well in Prince Edward Island	Practice Note 4-5
	Pre-Trial Conference	-may be initiated by	R 50

		either party or the court, in any proceeding	
	Simplified Procedure	-mandatory in actions under $25,000, at the plaintiff's option in other cases	R 75
	Mediation	-the court may appoint a mediator in any matter under the *Family Law Act*	s. 3 (*Family Law Act*)
	Streamlining - Commercial Dockets	-counsel are encouraged to streamline cases, wherever possible	Practice Note 32
Newfoundland	Pre-Trial/Pre-Hearing Conference	-may be initiated by either party or the court at any time	R 39
	- Mini-trial / Settlement Conference	-may be ordered in the pre-trial conference	
	Expedited Trial	-either party to the action may apply to the court for an expedited trial in a claim not exceeding $15,000 or where it would not cause injustice to the other party	R 17A
	Mediation	-the court may appoint a mediator in any matter under the *Family Law Act*	s. 4 (*Family Law Act*)
Nunavut	(Refer to NWT Rules of Court pending implementation of Nunavut rules, expected in 2002-2003)		
	Pre-Trial Conference	-will be required in all cases, once trial date is set & Counsel has been assigned	Practice Directive #6 - 12/13/01
	Settlement Conference	-counsel can initiate this if they feel it would be useful in resolving the case	
Northwest Territories	Case Management Conferences	-may be initiated by either party or the court, in any proceeding	R 281-292
	- Mini-trial	-may be directed by the case management judge	

Yukon	(Refer to British Columbia Rules of Court)

* Doris I. Wilson, QC, has practised law in Alberta for 22 years, and is currently Special Counsel to the Alberta Law Reform Institute's (ALRI) Rules of Court Project. She would like to thank: Jason Golbey, a student with ALRI, for his assistance with background research for this paper; Natalie Salvalaggio, a student with the Canadian Forum on Civil Justice, for her research and development of the accompanying table; and the editors of this Newsletter for their guidance and contributions to the development of this discussion.

The Alberta Law Reform Institute's ("ALRI") Rules of Court Project has been considering methods of managing litigation. As part of a consultative process, it has heard from lawyers, judges and members of the public about their experiences and concerns. ALRI invites comments about litigation management in your jurisdiction at: http://www.law.ualberta.ca/alri/feedback/pubcnslt_abrules.html

Endnotes

1. This paper is limited to a discussion of civil cases, and does not apply to criminal law. Return to Article

2. *Report of the Canadian Bar Association Task Force on Systems of Civil Justice* (Ottawa: The Canadian Bar Association, 1996) [hereinafter *CBA Report*]. The *CBA Report* was the first national survey of case management in Canada. It built on the work done in The Ontario Joint Committee on Court Reform's *Case Management and Case Flow (Ontario)* (Toronto: The Ontario Joint Committee on Court Reform, 1989), and the Ontario *Civil Justice Review, First Report, infra* note 18. Return to Article

3. *CBA Report, ibid.* recommendations 4-12 at 34-40. Return to Article

4. See G. Pohlkamp, *Caseflow Management: A Delay Reduction Tool: An Issue Paper Prepared for the CBA National Systems of Civil Justice Task Force* (Ottawa: Canadian Bar Association, 1996) at 2 [hereinafter *Caseflow Management*]. Return to Article

5. Ontario, Ministry of the Attorney General, Report of the Ontario Courts Inquiry. Commissioner: The Honourable Thomas G. Zuber (Toronto: Queen's Printer for Ontario, 1987). Return to Article

6. In Canada different jurisdictions use different terminology to refer to these concepts. This is especially true in French, which makes translation awkward. "Case management" may also be translated to "gestion de l'instance", "gestion judiciaire de l'instance" or even "gestion des dossiers judiciaires" (in use in NWT); and "caseflow management" may be translated to "gestion administrative des dossiers". Return to Article

7. For a review of the use of traditional case management procedures, see *Civil Justice Project: The Use of Time Limits and Notification in Civil Case Management* (Ottawa: Canadian Centre for Justice Statistics, 1999). Return to Article

8. *CBA Report, supra* note 2 recommendations 9-10 at 39. Return to Article

9. *Ibid.*, para. 3.4.2. Return to Article

10. For example, many jurisdictions in the United States have set such time lines. The Federal Court of Australia has a goal of disposing of 98% of cases within 18 months; See *Managing Justice: A Review of the Federal Civil Justice System: Report 89* (Sydney: The Australian Law Reform

Commission, 2000) online: (last modified: 2000) [hereinafter *Managing Justice*]. Return to Article

11. See H. Balke, & M. Solomon, "Case Differentiation: an approach to individualized case management" (1989) 73 Judicature 17 [hereinafter "Case Differentiation"]; *Caseflow Management, supra* note 4; *Managing Justice, ibid.* Return to Article

12. In the Alberta Law Reform Institute's Rules of Court Project legal consultation process there has been some criticism levelled at the Federal Court system for its "lockstep" nature and inflexibility, while other lawyers have referred to the Federal Court system as providing a useful structure. Please see the ALRI website at for additional detail. Return to Article

13. See *CBA Report, supra* note 2 at 6-7; *Managing Justice, supra* note 10 at para. 6.16: "Practitioners appearing in the Federal Court were emphatic that the advantage of IDS [Individual Docket System] was the continuing, informed oversight of the judge who was to determine the case. This was seen as a way to 'cut to the issues' and reduce inappropriate tactical play." Return to Article

14. J. Resnik, "Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging" (1997) 49 Ala. L. Rev. 133, online: Alabama Law Review website (last modified: 2001) Return to Article

15. See K. R. Aalto, "Case Management: The Way of the Future" (1999) 10:7 The Advocates' Brief 1; R. G. Slaght, "Case Management?" (1998) 10:3 *The Advocate's Brief* 1; S. Stanton & S. Wilson, "You Might Like to Know ..." (1997) 8:8 *The Advocates' Brief* 5; R. G. Slaght, "Comment on the Case Management System Proposal" (1996) 7:7 *The Advocates' Brief* 7; (*The Advocates' Brief* is a publication of The Advocates' Society of Ontario). See also B. Garland, "Changes and Challenges in the Case Management System" in *Civil Litigation* (Ottawa: County of Carleton Law Association, 1998); "Case Differentiation", *supra* note 11; *Managing Justice*, *supra* note 10. Return to Article

16. *Ibid.* Return to Article

17. See generally Ontario, Ministry of the Attorney General, *Fact Sheet: Civil Case Management: Rule 77* (Toronto: Queen's Printer for Ontario, 2001) online: Attorney General of Ontario website (last modified: 2 February 2001). Return to Article

18. Ontario, *Civil Justice Review, First Report* (Toronto: Ontario Civil Justice Review, 1995) c.13 at 169. Return to Article

19. *CBA Report, supra* note 2, at 11. Return to Article

20. *CBA Report, supra* note 2, recommendations 4-5 at 36. Return to Article

21. The Hon. N. D. Coo, "Practicalities of the Introduction of Case Management" in *Access to Justice: Questions of Access; Questions of Cost* (Toronto: Canadian Bar Association Convention, August 1994) [unpublished, archived at ALRI]. Return to Article

22. What is reported here is an account of the Rules in each jurisdiction. It may be the case that the way things work in practice or have developed by custom, may not be exactly as described in the Rules of Court or Practice Directions. Return to Article

Publications

News and Views Issue 5: Fall 2002

Apology to the Law Foundation of Saskatchewan

We would like to offer our apology to the Law Foundation of Saskatchewan for our omission in Issue #4 – Spring 2002. The Law Foundation of Saskatchewan has provided the Forum with project funding for our Civil Justice Clearinghouse project in Saskatchewan. We are very grateful to them for making it possible for us meet with key contacts and collect valuable materials from Saskatchewan which will be included in our Civil Justice Clearinghouse. We are looking forward to completing the main part of this project by the fall 2002.

Publications

News and Views Issue 5: Fall 2002

Saskatchewan and Québec Clearinghouse Projects

The "Civil Justice Clearinghouse" is a web-based database of information on civil justice systems and civil justice reform. The earliest information captured in the database was a bibliographic record of published materials, primarily from Canada but also including material from the United Kingdom, the United States and Australia. We have organized these materials according to our specialized subject headings, and searches can be conducted on our website using these subject headings, author and title. (At www.cfcj-fcjc.org click on "Civil Justice Clearinghouse".)

Our database is expanding to include materials which have been previously unpublished or not widely available, including draft rules and legislation, reports, commentary, articles, minutes, surveys and research papers on civil justice initiatives. These materials provide valuable background information for jurisdictions contemplating similar reform measures, and as we obtain copyright permissions, we are making them available full-text.

To learn about and obtain access to these previously unpublished materials, we are contacting organizations and individuals who have written or collected materials in their respective jurisdictions, including the Bar, the judiciary, rules committees, court administrators, legislators, academics, public legal educators, law reform institutes, legal aid societies, arbitrators, mediators and librarians. With the assistance of funding from Law Foundations and the CBA Law for the Future Fund we have travelled and met with key contacts in Alberta, British Columbia, Nova Scotia and the federal jurisdiction. We are about to travel to Saskatchewan and to Quebec, and will continue to expand the database with the addition of previously unpublished or not widely available material from these jurisdictions.

Don't feel you have to wait for us to contact you. We welcome your phone call or e-mail telling us about materials you have written or are familiar with, and allowing us to make them widely available on our website. You can reach us at (780) 492-2513 or by e-mail at cjforum@law.ualberta.ca.