ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Summary Disposition of Actions

- **Striking Out Pleadings**
- **Trial of an Issue and Special Case**
- **Summary Judgment**
- **Summary Trial Procedure**
- **Streamlined Procedure**
- **Combining Summary Disposition Procedures**
- **Default Procedures**

Consultation Memorandum No. 12.12

August 2004

Deadline for Comments: October 31, 2004

ALBERTA RULES OF COURT PROJECT

The Alberta Rules of Court Project is a 3-year project which has undertaken a major review of the *Alberta Rules of Court* [The Rules] with a view to producing recommendations for a new set of rules by 2004. The Project is funded by the Alberta Law Reform Institute (ALRI), the Alberta Department of Justice, the Law Society of Alberta and the Alberta Law Foundation, and is managed by ALRI.

This Consultation Memorandum is issued as part of the Project. It has been prepared with the assistance of the members of the Rules Project General Rewrite Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the committee are:

The Hon. Justice Brian R. Burrows (Co-Chair), Court of Queen's Bench of Alberta
The Hon. Justice Terrence F. McMahon (Co-Chair), Court of Queen's Bench of Alberta
The Hon. Judge Allan A. Fradsham, Provincial Court of Alberta
The Hon. Justice Eric F. Macklin, Court of Queen's Bench of Alberta
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Chapters 1 to 6 of the Consultation Memorandum were written by Doris Wilson, Q.C. Chapter 7 was written by Sheryl Pearson. Both are counsel to ALRI.

A reader who wishes to have more information about the Alberta Rules of Court Project may consult the background material included in each of the Consultation Memoranda 12.1 to 12.9. More complete information, including reports about the

Project and particulars of previous Consultation Memoranda, may also be found at, and downloaded from, the ALRI website:

http://www.law.ualberta.ca/alri

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THE RULES PROJECT CONSULTATION MEMORANDA

No.	Title	Date of Issue	Date for Comments
12.1	Commencement of Proceedings in Queen's Bench	October 2002	January 31, 2003
12.2	Document Discovery and Examination for Discovery	October 2002	January 31, 2003
12.3	Expert Evidence and "Independent" Medical Examinations	February 2003	May 16, 2003
12.4	Parties	February 2003	June 2, 2003
12.5	Management of Litigation	March 2003	June 30, 2003
12.6	Promoting Early Resolution of Disputes by Settlement	July 2003	November 14, 2003
12.7	Discovery and Evidence Issues: Commission Evidence, Admissions, Pierrringer Agreements and Innovative Procedures	July 2003	November 14, 2003
12.8	Pleadings	October 2003	January 31, 2004
12.9	Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions	February 2004	April 30, 2004
12.10	Motions and Orders	July 2004	September 30, 2004
12.11	Enforcement of Judgments and Orders	August 2004	October 31, 2004
12.12	Summary Disposition of Actions	August 2004	October 31, 2004

Available to view or download at the ALRI website: *http://www.law.ualberta.ca/alri/*

ALBERTA LAW REFORM INSTITUTE

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

The members of the Institute's Board are A. de Villars, Q.C.; A.D. Fielding, Q.C.; The Hon. Judge N.A. Flatters; P.M. Hartman, Q.C.; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C.; P.J.M. Lown, Q.C. (Director); A.D. Macleod, Q.C.; The Hon. Madam Justice B.L. Rawlins; W.N. Renke; D.R. Stollery, Q.C.; The Hon. Mr. Justice N.C. Wittmann (Chairman) and K.D. Yamauchi.

The Institute's legal staff consists of P.J.M. Lown, Q.C. (Director); D.W. Hathaway; C.L. Martens; S. Pearson; S. Petersson; M.A. Shone, Q.C. and H.L. Stout. C.R.B. Dunlop; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C. and D.I. Wilson, Q.C. are consultants to the Institute.

PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute by October 31, 2004 .

This consultation memorandum addresses procedures under which an action can be disposed of summarily and issues arising from those procedures. The procedures include striking out pleadings, trial of issues and special case, summary judgment, summary trial procedure, streamlined procedure, and default judgment and noting in default.

Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the General Rewrite Committee has identified a number of issues arising from these procedures and has made preliminary proposals. These proposals are not final recommendations, but proposals which are being put to the legal community for further comment. These proposals will be reviewed once comments on the issues raised in the consultation memorandum are received, and may be revised accordingly. While this consultation memorandum attempts to include a comprehensive list of issues in the areas covered, there may be other issues which have not been, but should be, addressed. Please feel free to provide comments regarding other issues which should be addressed.

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

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Website: http://www.law.ualberta.ca./alri/

The process of law reform is essentially public. Even so, you may provide anonymous written comments, if you prefer. Or you may identify yourself, but request that your comments be treated confidentially (i.e., your name will not be publicly linked to your comments). Unless you choose anonymity, or request confidentiality by indicating this in your response, ALRI assumes that all ***written comments are not confidential***, in which case ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although usually we will discuss comments generally and without specific attributions.

Table of Contents

EXECUTIVE SUMMARY

A. Introduction

This Consultation Memorandum covers an important aspect of legal practice and procedure, that being the ability to have a matter disposed of in a summary way where that is a reasonable way of dealing with the action. This increases access to justice, in that it frees up trial time for other matters requiring a full hearing. It is also likely to cost the litigants less money, and certainly uses up less of their time. Because such summary disposition often takes place near the beginning of an action, the problems associated with delay may also be ameliorated.

In successive chapters, we discuss the topics of Striking Out Pleadings; Trial of an Issue and Special Case Rules; Summary Judgment; Summary Trial Procedure; the Streamlined Procedure; the possibility of combining Summary Disposition Procedures; and Default Procedures. The discussion in this paper is organized around the issues that arose as the Committee considered each topic, and reflects research and consultation, as well as the experience and views of the General Rewrite Committee.

The Consultation Memorandum sets out the initial views of the General Rewrite Committee, but it does so for the purpose of inviting comment and discussion, which will be considered and taken into account before final recommendations are formulated and put into the form of a set of draft Rules of Court.

B. Summary Disposition of Claims

The general rule is that all issues raised in an action will be disposed of at a single trial, even though it may be months or even years after the action is commenced. However, there are several methods in The Rules for having a matter dealt with in alternative ways, in order to reach a resolution more quickly. The courts have been careful to distinguish which cases are suitable for summary disposition, to ensure that justice is done between the parties while attempting to shorten the time elapsed and, if possible, conduct the action in a more economical way, thus allowing greater access to justice for more parties. The main rules offering alternative, usually earlier, disposition are as follows:

- Striking Out Pleadings (Rule 129);
- Trial of an Issue (Rules 220-224);
- Special Case (Rule 232);
- Summary Judgment (Rule 159-164);
- Summary Trial Procedure (Rules 158.1-158.7); and,
- Streamlined Procedure (Rules 659-672).

In reviewing the various rules, the Committee considered whether the current rules are serving a useful purpose, whether they could be combined, and whether they could be improved.

C. Striking Out Pleadings - Rule 129

Rule 129 should be retained, even though there is a heavy onus on the applicant to make out its case under this rule, and the decision is discretionary. The rule provides a useful procedure for ensuring that litigants are not put to the time, expense and consequences of further litigation, unless it is warranted.

However, the Committee felt that changes should be made to the rule and that it should be rewritten along the lines of Ontario, *Rules of Civil Procedure* [Ontario Rules], Rule 21.01. An addition should be made to the rule enabling a party to move to strike or stay an action or amend a pleading on the grounds that the pleading discloses no cause of action; that the court has no jurisdiction; or, that the pleading is frivolous, scandalous, or vexatious or otherwise constitutes an abuse of process. Subsection (c) of Rule 129 should be removed.

D. Trial of an Issue and Special Case

Trial of an issue (Rules 220-224) and special case (Rule 232) are both methods under which a law suit can be split into two (or more) parts for separate determination.

The Committee recognized that the main competing goals being served with these rules are the saving of time and money in a lawsuit, as against ensuring that justice is done between the parties. The test in Alberta of an “exceptional case” has been strictly applied in applications to sever issues for trial purposes. The Committee found these rules to be useful as they provide an expeditious resolution in appropriate

cases, and the strictness of the test ensures that only those issues suitable for pre-trial resolution are heard in this manner.

Both rules could be combined into a re-written Rule 221, which would always require leave of the court and directions for the hearing to the parties. Some additional changes should be made to specific wording in the rule. After reviewing similar rules in other Canadian jurisdictions, the Committee thought that *Federal Court Rules, 1998* [Federal Rules], Rule 220 would serve as an appropriate model.

E. Summary Judgment

The provisions in The Rules relating to summary judgment are widely used and broadly seen by the legal community to be very useful in ensuring that cases are dealt with at the appropriate point in litigation, whether by dismissal or allowing the case to be continued. The Committee's consideration revolved around several issues, including whether the test for use of the rule should be mandatory or discretionary; whether the current test is adequate; and what type of evidence should be required in support of such an application.

The Committee's position is that the test should remain subject to court discretion; that the current wording of the test should be retained; and that certain specific improvements should be made to the wording of the rule.

There are several other rules related to the operation of Rule 159, namely Rules 160 through 164. The Committee decided to retain Rules 160 and 161, but delete Rule 163.

F. Summary Trial Procedure

Currently counsel (or the litigant) must choose between a one-stage and a two-stage application for use of the summary trial procedure. ALRI consultations with the legal profession indicated that the two-stage process is considered to be onerous because counsel must provide to the judge at the first stage the same information that must be provided to the judge at the second stage. The Committee's position is that there should be a one-stage procedure which could be rebutted on application by a respondent who thinks it is inappropriate under the circumstances.

The Committee then reviewed the tests which have been applied in determining whether a matter is suitable for disposition by way of summary trial. The Committee decided that the test in the rule should be a general statement such as that set out in Rule 158.4(1)(b); the test should be stated positively but remain discretionary (using the word "may" rather than "shall"). The Committee's position is that evidentiary requirements should not be set out in the rule.

The Committee's discussions and review of case law identified a conflict between Rule 158.3 and the provisions of the *Jury Act*. Bill 10 was passed by the Alberta Legislature on March 10, 2004, amending section 17 of the *Jury Act*, allowing a judge to direct that a proceeding be tried pursuant to the summary trial procedure in The Rules even if there has been an order for a jury trial. This amendment has removed the conflict.

G. Streamlined Procedure

The basic issue considered by the Committee was whether it was worthwhile having a separate streamlined procedure for claims under a certain dollar amount, when we have several other methods of achieving an expeditious resolution available in The Rules. Since the Management of Litigation Committee has recommended that there be separate "tracks" for different types of cases, this Committee felt that the Simple Track under that recommendation should replace the streamlined procedure.

Given this major decision to eliminate the streamlined procedure, the other issues that the Committee proposed considering did not have to be addressed.

H. Combining Summary Disposition Procedures

Since there are overlaps between the purpose and requirements of various summary disposition procedures, the Committee considered whether it would be useful to combine some of them in order to shorten legal proceedings.

Would it be easier for the court to grant judgment on part of a claim if Rules 129 and 159 were amalgamated? Since the tests under Rule 129 for striking out an action and under Rule 159 for dismissal of an action are so strict, some legal commentators had indicated in the ALRI consultation that a combined rule might make sense.

However, after due consideration of this issue, the Committee's position is that the two rules should remain separate. In Alberta we have maintained the distinction between applications merely considering the sufficiency of the pleadings under Rule 129, and applications for dismissal on the merits under Rule 159. The Committee felt this should continue.

Similarly, while there are some reasons why it might make sense to combine Rule 159 with the summary trial procedure under Rules 158.1-158.7, the Committee decided that the functions of the two rules are too different to amalgamate them.

Likewise, the Committee's position is that Rule 129 should be kept separate from Rules 220-224 (which will be re-written as a new Rule 221). Rule 129 is usually used at or near the beginning of an action to test the sufficiency of pleadings, while Rules 220-224 can be used at any time in an action to determine a point of law.

Finally, the Committee considered whether Rules 158.1-158.7 and the new Rule 221 could be conveniently joined in one rule, as the test for both rules is the substantially the same. However, as the need for trial of an issue still arises in some cases where the matter cannot be disposed of using written material, the Committee felt that the two rules should probably be kept separate.

The Committee's position is that all of these various rules relating to early disposition without trial should be placed as closely together in the new rules as possible, to ensure that all options for shortening legal proceedings, improving access to justice and making legal proceedings more economical and efficient are considered. The exception is Rule 129, which should remain in the Pleadings section of The Rules.

I. Default Procedures

Default procedures can be broken down to three major phases:

1. Time to Respond

After the statement of claim has been served, the defendant must respond to the claim within the specified period of time by filing and serving a statement of defence or

demand of notice. The defendant currently has 15 days within which to file and serve a response, unless otherwise specified in an order for service *ex juris* or a substitutional order. The 15 day time limit can also be extended by agreement.

2. Failure to Respond

In the absence of the defendant's response to the statement of claim within the prescribed time, the plaintiff, at their leisure, chooses one of the following options:

- file a noting in default;
- enter a default judgment;
- apply *ex parte* for final judgment;
- serve the defendant with notice of an assessment hearing; or
- do nothing at all.

The option chosen by the plaintiff will be dependant, in part, on whether the claim is for a debt/liquidated demand, or for unliquidated damages. However, up to the point in time that the plaintiff takes an active step, and regardless of the amount of time that passes, the defendant continues to have the ability to file a statement of defence or demand of notice.

3. Setting Aside

If a judgment is obtained against a non-defending defendant, there are remedies available to the defendant to set aside or vary the judgment depending on the circumstances under which it was obtained. For judgments obtained administratively or without notice to the defendant (i.e. default judgment), the remedy is an application to vary or set aside under Rules 157 or 158. Where the judgment is obtained on notice to the defendant, there may be a remedy available to set aside under Rule 257, or the defendant may simply have to appeal the judgment.

This first section in this chapter deals with the procedure for responding to a statement of claim. The Committee considers what is the appropriate amount of time for responding to a statement of claim and whether an intermediate pleading should be adopted to extend the time to defend. Given the significant implications that would arise from extending the time to defend, particularly for those actions which typically go undefended, the General Rewrite Committee prefers to canvas the legal community

for its input on three possible options. Also in the first section, the Committee considers the issue of whether there should be a cap on agreements to extend time to defend and, after canvassing the problems with the Ontario model, suggests that no cap be adopted.

In the next section, the Committee reviews the purpose and utility of the demand of notice. The Committee considers whether it should be retained as a pleading and, if so, whether it should be combined with an intermediate pleading that would also function to extend the time to defend. The Committee supports the continued use of the demand of notice in its current form and prefers that it be retained, regardless of whether an intermediate pleading is adopted for the purpose of extending time to defend. The Committee also suggests that a provision be added to make explicit the requirement that a defendant must seek leave of the court to file a statement of defence after having first filed a demand of notice.

The Committee then considered several issues related to the actual commencement of default procedures. First, it looked at Rule 142 which requires a defendant to file *and* serve a statement of defence/demand of notice to avoid being noted in default. The Committee decided that, although service should continue to be a necessary step, a filed but not served response from the defendant should not enable a plaintiff to commence default proceedings. Instead, the Committee thought that the defendant should be subject to a costs consequence if the plaintiff has to do a court search in order to determine whether the defendant has responded to the claim.

The Committee also considered whether the process of noting in default should be replaced by a "pleadings closed" rule, which would be triggered by the passing of time, rather than the filing of a document. In concluding that the noting in default should be retained, the Committee considered the philosophical question of whether the commencement of default procedures should remain plaintiff driven or whether it should become time driven. The Committee is of the opinion that default proceedings should continue to be initiated at the leisure of the plaintiff, but prior to the plaintiff entering judgment or noting in default, the defendant will continue to have the ability to respond to the claim.

In the next section, the Committee considered the separate procedures currently in place for liquidated and unliquidated demands vis-a-vis default procedures. Generally speaking, undefended claims for debt or liquidated demands are administratively entered without notice to the defendant, whereas undefended claims for unliquidated demands require judicial approval on notice to the defendant. The Committee considered whether the existing procedural distinction should be maintained, or whether the process for all undefended claims (liquidated or unliquidated) should be made uniform. The Committee concluded that liquidated claims will continue to be administratively entered and judicial approval will continue to be required for unliquidated claims.

The Committee next reviewed the two existing options for a plaintiff to obtain judgment for undefended unliquidated claims. Although both require judicial approval, some applications for judgment may proceed *ex parte*, while other claims proceed by way of an assessment hearing on notice to the defendant. The Committee is of the view that the two options currently available to the plaintiff should be reduced to a single option so there is a standard approach to all applications for judgment involving unliquidated claims. There is no significant policy reason to justify notice all of the time or even most of the time and the purpose of notice in the first place is obscure. As such, the Committee suggests that all applications for final judgment involving claims for unliquidated damages be commenced on an *ex parte* basis. A standard approach will eliminate the confusion of choosing one process over the other. It will also eliminate the risk that an application will unnecessarily proceed by way of assessment.

The rule should enumerate the following options available to the judge at the *ex parte* hearing:

- give final judgment;
- direct an accounting of damages;
- adjourn the application and order additional evidence (affidavit or *viva voce*);
- dismiss the action;
- order that the action proceed to trial and that notice be given to the defendant; or
- make such further order as may be just.

This proposal replaces the term "assessment hearing" with the word "trial" to make explicit the fact that *viva voce* evidence would be permissible in that context.

The Committee also debated the continued use in the rules of the terms "liquidated" and "unliquidated." The committee noted that these terms are not descriptive and, therefore, not intuitive. Other jurisdictions in Canada and throughout the world were canvassed and, although the terms "liquidated" and "unliquidated" are consistently used in all jurisdictions across Canada, many jurisdictions outside of Canada have departed from the use of those terms in favour of plainer language. The Committee seeks input from the profession on whether the Alberta rules should retain the current terminology or whether more plain language terms should be adopted and, if so, what the preferred terms would be.

The Committee also considered whether Rules 5(1)(i) and 148, which pertain to liquidated demands, need to be revised to take into consideration the statutory right to claim interest under the *Judgment Interest Act*. The Committee is of the view that the substance of Rule 148 is accurate and need not be revised. The Committee recommends, however, that the rule be redrafted so that it clearly reflects the intent of the *Judgment Interest Act*, namely, that where the calculation of interest is based on a set rate it can form part of the default judgment, but where the calculation of interest requires the exercise of discretion, interest should not form part of a default judgment. The Committee is also of the view that the definition of "liquidated demand" in Rule 5 should state clearly that interest claimed at a fixed rate pursuant to a contract or statute will form part of the sum capable of entry by default judgment.

The Committee does not take any position in this Consultation Memorandum in relation to Rules 157 and 158 which deal with the procedure for varying and setting aside of default judgments. Instead, these rules are addressed in Chapter 3 of Consultation Memorandum No. 12.10 which addresses the rules for varying and setting aside orders and judgments generally.

Lastly, the Committee considered several situation specific rules which require that leave of the court be obtained before default judgment can be entered. The rules considered were:

- Rule 16(2), which deals with the process for obtaining default judgment against a defendant when a solicitor fails to carry out his/her undertaking to file a statement of defence or demand of notice under Rule 16(1). The Committee thought this rule could be deleted;
- Rule 23(4), which requires the plaintiff to seek leave of the court in order to enter default judgment where the statement of claim has been served pursuant to an order for substitutional service under Rule 23(1). The Committee has previously suggested the deletion of the requirement to obtain leave from Rule 23(4);
- Rules 73, which applies when the defendant does not file a statement of defence or demand of notice, but nonetheless issues a third party notice, and Rule 74(1), which deals with the situation when the third party fails to defend and the plaintiff obtains a judgment against a defendant other than by default. Rule 73 stipulates that the defendant may, by leave of the court, have judgment against the third party to the extent claimed in the third party notice. Rule 74(1) gives the court authority to give judgment for the defendant against the third party as the case requires. The Committee suggests the deletion of Rule 73 and the maintenance of Rule 74(1); and
- Rule 143, which provides that judgment shall not be entered against an infant or person of unsound mind on default except by leave of the court. The Committee previously stated that leave should continue to be required in this situation.

LIST OF ISSUES

STRIKING OUT PLEADINGS

TRIAL OF AN ISSUE AND SPECIAL CASE

SUMMARY JUDGMENT

SUMMARY TRIAL PROCEDURE

STREAMLINED PROCEDURE

COMBINING SUMMARY DISPOSITION PROCEDURES

DEFAULT PROCEDURES

CHAPTER 1. STRIKING OUT PLEADINGS

ISSUE No. 1
Should Rule 129 be retained, since there is a school of thought which says that applications under it rarely, if ever, succeed?

ISSUE No. 2
Should the wording of Rule 129 be revised to reflect the reality of the way applications are made under the rule?

ISSUE No. 3
Should Rule 129(1)(b)(c) and (d) be re-written to refer more generally to abuse of process?

[1] Rule 129 does much more than just allow pleadings to be struck out:

- It also allows pleadings to be amended, or struck out in part only;
- Striking out of pleadings can have the effect of striking out an entire action or defence if successful;
- This rule also applies to strike out actions in hopeless-fact cases;[1]
- It is also used to strike out actions where the court has no jurisdiction, although that is not an enumerated ground in the rule;[2] and,
- It is used to stop abuse of the court's process.[3]

[2] This is an important rule in terms of the effect it can have: a party can lose its entire action or defence, and if outside the limitation period, the action may be truly lost. Given that the rule allows the application to be brought "at any stage of the proceedings," it is possible, though unlikely, that an action (or part of one) which had

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[1] *German v. Major* (1985), 20 D.L.R. (4th) 703 (C.A.) at 706. In at least one of the "hopeless-fact" cases referred to by Justice Kerans in the judgment on behalf of the Court of Appeal, evidence from Examinations for Discovery was introduced, although this was an application under r. 129(1)(a).

[2] *Allen v. Alberta* (2001), 286 A.R. 132, 2001 ABCA 171 [*Allen*], and *Young Estate v. Transalta-Utilities Corp.* (1997), 209 A.R. 89 (C.A.) [*Young Estate*], both establish that it is appropriate to apply under r. 129 where the jurisdiction of the court is challenged.

[3] *German v. Major*, *supra* note 1 at 706.

subsisted for some years could be dismissed as a result of an application under this rule. There is a perception in the legal community that applications to strike out pleadings under this rule rarely succeed, although applications to strike out paragraphs or to amend pleadings have a greater chance of success. This is because "rarely is there a fatal flaw which falls within Rule 129."[4] Nevertheless, the Committee was of the view that the rule provides a useful procedure to ensure that litigants are not put to the time and expense of unwarranted litigation, and it is also useful to strike out improper or unnecessary portions of pleadings.

A. Rule 129(1)(a) - No Cause of Action or Defence

[3] Rule 129(1)(a) allows, but does not require, a court to strike out a pleading, which can have the effect of striking out an action, if the pleading does not reveal a cause of action or a defence. Thus it is discretionary. The rationale for this part of the rule is as follows:

> If a plaintiff has not alleged facts capable of supporting a cause of action, then a defendant ought not be put to the time, expense and consequences of further litigation. Conversely, if it is not plain and obvious that no cause of action exists, an application to strike must fail.[5]

[4] This applies to defendants equally, in that if no defence is revealed then the statement of defence may be struck out and judgment entered, as well as to originating notices and third party pleadings.[6] The rule can be used to strike some claims or all of the claims or defences in a pleading.

[5] Rather than dismiss an action, the court often orders amendment. As Justice Berger stated in *Tottrup v. Lund*, an application based on Rule 129 is "an attack on the

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[4] See: The Honourable W.A. Stevenson & The Honourable J.E. Côté, *Alberta Civil Procedure Handbook 2004* (Edmonton, Alberta: Juriliber, 2004) at 103-109 [*Civil Procedure Handbook*]; Master Funduk in *Qualiglass Holdings Inc. v. Zurich Indemnity of Canada*, 2002 ABQB 740 at paras. 2, 3: "The current state of the law...means that a statement of claim drafted by an Alberta lawyer is bullet proof to such an application. Only statements of claim drafted by a non-lawyer plaintiff might be successfully challenged..."; and the legal community responses to the ALRI consultations.

[5] *Agrium Inc. v. Chubb Insurance Co. of Canada* (2002), 318 A.R. 355, 2002 ABQB 495 at para. 25 [*Agrium*], quoting from Conrad, J.A. for the Court of Appeal in *Tottrup v. Lund* (2000), 186 D.L.R. (4th) 226 at 234.

[6] R. 129(3) and *Agrium*, *ibid.* (striking Third Party Notice); and *Allen*, *supra* note 2 (striking Originating Notice).

sufficiency of pleadings."[7] However, one of the options is for the court to order that the pleading be amended: "If the pleading impugned will not hold water as it is, the court is not to discard it, if it can patch it up enough to hold some water."[8] Where the flaws in a pleading are capable of amendment, an action should not be struck out for want of a cause of action.[9]

[6] The Court of Appeal[10] recently confirmed that the correct procedure is to consider possible amendments first, then look at whether the amended statement of claim discloses a cause of action. Since an application to strike a statement of claim as disclosing no cause of action cannot be based upon evidence, it is only the amended claim that is then considered. Where the attack on the pleading amounts to matters of defence, difficult questions of law, criticisms that may be remedied by amendment, lack of precision in drafting, or looking at "facts" outside the face of the pleading, the application to strike out will be dismissed.[11]

B. Use of Evidence on the Application

[7] The rule is explicit and the law is well settled with respect to the first ground of attack under Rule 129(1)(a), striking a pleading on the ground that it discloses no cause of action or defence. In such applications Rule 129(2) applies, and the courts have disallowed the introduction of any evidence. As the Court of Appeal commented in one striking out case:

> It is important not to get sidetracked onto submissions by counsel, or affidavits, about what the "real facts" are. There is no motion for summary judgment here. Some of the evidence here is striking and

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[7] *Tottrup v. Lund*, *supra* note 5 at para. 43.

[8] *Civil Procedure Handbook*, *supra* note 4 at 104-105.

[9] *Fullowka v. Whitford (#2)*, [1997] N.W.T.R. 1 (C.A.), 147 D.L.R. (4th) 531 at 540, leave to appeal to S.C.C. refused, [1997] 2 S.C.R. xvi.

[10] *United Petroleum Distributors (Calgary) v. 548311 Alberta Ltd.* (1998), 216 A.R. 116, 1998 ABCA 121 [*United Petroleum*].

[11] *Ibid.* at para. 19, citing *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959 [*Hunt*] and *Cerny v. C.I.L.*, [1972] 6 W.W.R. 88 (Alta. C.A.) [*Cerny*]. An action which does not plead facts or establish a cause of action will be dismissed: see *Correia v. Jaycock*, 2001 ABQB 299 and the *Agrium*, *supra* note 5.

> beguiling, but we will resist any temptation to recite it or act upon it. It is trite law that we must assume the truth of the statement of claim.[12]

[8] However, although Rule 129(2) forbids the use of evidence in applications under Rule 129(1)(a), when the application is made on the basis of lack of jurisdiction, the courts have allowed evidence to be used in support of the application.[13] Issues regarding jurisdiction are difficult to resolve without having recourse to evidence of the facts surrounding the cause of action.[14]

[9] Evidence is allowed under the other branches of the rule.

C. Striking on the Basis of Failure to Disclose a Cause of Action

[10] As Madam Justice Conrad found in *Tottrup v. Lund*,[15] the "principles governing an application to strike a statement of claim for failure to disclose a cause of action are relatively settled."[16] On such an application, the judge hearing the matter must assume that all of the allegations of fact in the pleading are true and determine whether those allegations support a cause of action or a defence:

> The test set out by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, is whether it is "'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action." Caution is required before concluding that the plaintiff has no chance of success. The plaintiff is entitled to a broad reading of the pleadings.[17]

[11] Other cases have used a similar test, but phrased it as requiring that the court be satisfied that it is "beyond doubt" that there is no reasonable cause of action or

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[12] *United Petroleum*, *supra* note 10 at para. 6.

[13] *Allen*, *supra* note 2 and *Young Estate*, *supra* note 2. In Stevenson and Côté, *Civil Procedure Encylopedia* (Edmonton: Juriliber, 2003) vol. 2 at 26-1 [*Civil Procedure Encylopedia*], Stevenson and Côté remark that the Ontario rule which puts lack of a cause of action in one rule with preliminary questions of law and other grounds in another rule, "makes more sense analytically".

[14] *A-Channel Edmonton v. C.E.P., Local 1900* (2003), 342 A.R. 371, 2003 ABQB 841 at para. 12 [*A-Channel*], quoting from *Young Estate*, *supra* note 2 at para. 18.

[15] *Tottrup v. Lund*, *supra* note 5.

[16] *Ibid.* at para 8.

[17] *Ibid.*; *Hunt*, *supra* note 11 at 980.

reasonable defence to an action.[18] It is also clear from numerous cases that "a good defence constitutes neither want of a cause of action, nor ground to strike out...."[19]

[12] The Supreme Court of Canada urged caution in the leading case, *Hunt v. Carey Canada:*

> Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect...should the relevant portions of a plaintiff's statement of claim be struck....[20]

[13] A statement of claim should not be struck out simply because a new or unusual legal concept must be considered or a significant point of law must be decided through the action.[21] As Madam Justice Wilson stated in *Hunt v. Carey:*

> ...where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of

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[18] *Cerny*, *supra* note 11.

[19] See for example: *Fullowka v. Whitford* (#2), *supra* note 9 at para. 44; *Pasichnyk v. Pile Base Contractors (1987)* (1993), 145 A.R. 313 at 317 (C.A.).

[20] *Supra* note 11 at para. 33.

[21] It is worth noting that "some of the most important negligence cases of the last century have been determined in the context of applications to strike, including both *Donoghue v. Stevenson*, and *Anns v. London Borough Council of Merton* [cites removed]." *Tottrup v. Lund*, *supra* note 5 at para. 14. Another well known case which illustrates use of the similar Ontario Rules provisions is *Jane Doe v. Toronto (Metropolitan) Commissioners of Police* (1989), 58 D.L.R. (4th) 396 at para. 4 (Ont. H.C.J.). Mr. Justice Henry sets out the principles to be applied as follows:

> (a) All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proven;
> (b) The moving parties, in order to succeed, must show that it is plain, obvious and beyond doubt that the plaintiff could not succeed;
> (c) The novelty of the cause of action will not militate against the plaintiff; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Air India Flight 182 Disaster Claimants v. Air India et al.* (1987), 62 O.R. (2d) 130 (H.C.J.); *Johnson v. Adamson* (1981), 34 O.R. (2d) 236.
> (d) A further principle recently stated by the Supreme Court of Canada is that the court is obliged to read the statement of claim as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies. *Operation Dismantle* at page 451. Where the statement of claim presents difficulties to the defendant in pleading to it, the court will prefer to give leave to amend or will order particulars rather than strike out the whole of the plaintiff's pleading. *Steiner v. Lindzon* (1976), 14 O.R. (2d) 122 (H.C.J.).

> torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.[22]

[14] An application to strike on the basis of pleadings should be made very early on in the litigation process so that unnecessary expense can be avoided.

D. Striking on the Basis of Lack of Jurisdiction

[15] Ontario Rule 21.01(3)(a) specifically refers to situations where the court's jurisdiction has been ousted as one of the grounds for having an action stayed or dismissed, but the Alberta rule does not mention this. However, the courts in Alberta have determined applications under Rule 129 based upon lack of jurisdiction,[23] although the law is not as clearly developed in this respect. The Alberta Court of Appeal made the following comment in *Allen v. Alberta:*

> It appears settled by this Court that, although ARC 129 does not refer specifically to situations where it is alleged that the Court's jurisdiction has been ousted, it is appropriate to apply under ARC 129 where the jurisdiction of the Court is challenged on the ground that another forum has exclusive jurisdiction: *Young Estate et al v. TransAlta Utilities Corp. et al* (1997), 209 A.R. 89 (C.A.).[24]

[16] Even though the subrule under which the determination is being made forbids the introduction of evidence, both the *Allen* case and the *Young Estate* case it referred to allowed introduction of evidence such as a letter of intent, a Master Agreement, a collective agreement, and affidavits filed in the court, and this was deemed acceptable by the majority decision of the Court of Appeal in *Allen.* Other cases have also commented that evidence is required in order to determine a jurisdiction issue even though it is technically an application under 129(1)(a), as the "issue raised can only be determined by evidence of all the surrounding facts."[25]

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[22] *Supra* note 11 at 990.

[23] *Allen*, *supra* note 2. In *Horseman v. Horse Lake First Nation* (2002), 218 D.L.R. (4th) 523, 2002 ABQB 765, Mr. Justice Watson also cites *Young Estate*, *supra* note 2 at para. 14, as holding that jurisdiction claims can be resolved under r. 129.

[24] *Allen*, *supra* note 2 at para. 12.

[25] *A-Channel*, *supra* note 14 at para. 12, quoting from *Young Estate*, *supra* note 2.

[17] The test to be applied is affirmed in the *Allen* case:

> The test so clearly articulated in this and in other courts on a motion to strike pursuant to ARC 129 includes phrases such as "plain and obvious" and "certain to fail": (*Hunt v. T & N plc et al* [1990] 2 S.C.R. 959). That test is applicable to a jurisdictional dispute.[26]

[18] Typically applications to strike an action brought on this ground relate to matters in which it is alleged that another forum has jurisdiction, such as labour disputes or claims before tribunals such as the Workers' Compensation Board, or a different court (for example, a contest between Alberta Court of Queen's Bench and the Federal Court).

E. One Rule or More?

[19] The Committee considered whether Alberta should have two separate rules as in Ontario: one for striking or amending pleadings based on lack of a cause of action (without evidence), and another rule which deals with jurisdiction and abuse of process (with evidence).

[20] As well, the Committee reviewed whether it is necessary to maintain the wording "frivolous, vexatious, and scandalous" in the rule. It was noted that this language seems to be common amongst rules from most Canadian jurisdictions: British Columbia, *Supreme Court Rules* [British Columbia Rules], adds the word "unnecessary" and Federal Rules add the words "material or redundant." An option was considered whereby all of the grounds (including jurisdiction, lacks legal capacity, res judicata) would be listed and followed by a statement that says "or is otherwise an abuse of process."

F. Rule 129(1)(b),(c),(d) - Striking on the Basis of Abuse of Process

[21] As Justice Kerans stated for the Court of Appeal in the leading Alberta case, *German v. Major:*

> ...several rules of law have been developed in the exercise of the power under the rule. Some cases tie specific rules to specific adjectives found in the rule, as, for example, that duplicate suits are "vexatious". Others say that the colourful adjectives in the rule are merely illustrative of the basic rule that the court must stop abuse of its process. The important

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[26] *Allen*, *supra* note 2 at para. 23.

> point is that Rule 129 indeed incorporates several very specific rules. These include, for example, the rule against multiple prosecution, where a new suit is brought while another is pending; the rule against serial prosecution, where a new suit is brought which raises an issue already decided against the suitor; the rule of mootness, where the relief sought would, in the circumstances, be valueless; and the rule against suits which disclose no cause of action known to law. This last is probably the most common circumstance where Rule 129 applies.[27]

[22] A pleading cannot be an abuse of process of the court or frivolous and vexatious if it raises a serious point of law which is not clear.[28] Further, it is not an abuse of process to make a claim which may not succeed on meritorious grounds, although the courts have held that it is an abuse of process to make a claim "which is doomed beyond doubt to fail on the facts."[29]

[23] The Committee agreed that Rule 129(1)(c) is unnecessary, as it is subsumed within the definition of abuse of process.

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUES 1, 2 AND 3

[24] Although there is a heavy onus on an applicant applying to strike out pleadings or an action, and the court's decision to strike out is discretionary, this rule provides a useful procedure for ensuring that litigants are not put to the time, expense and consequences of unwarranted litigation. This procedure should remain available.

[25] The Committee proposes that one rule be maintained, and that it be rewritten along the lines of Ontario Rule 21.01, to enable a party to move to strike or stay an action or amend a pleading on the following grounds:

- the pleading discloses no reasonable cause of action or defence;
- the court has no jurisdiction;
- the pleading is frivolous, scandalous or vexatious or otherwise constitutes an abuse of process.

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[27] *Supra* note 1 at 706.

[28] *Cerny*, *supra* note 11 at 95.

[29] *Boudreault v. Barrett* (1995), 174 A.R. 71 at para. 25 (C.A.) [*Boudreault*].

[26] The Committee felt that the case law in Alberta is well-known and an understanding of how the rule is to be applied has developed. Significant changes are not necessary, except to remove Rule 129(1)(c).

CHAPTER 2. TRIAL OF AN ISSUE AND SPECIAL CASE (RULES 220-224 AND RULE 232)

ISSUE No. 4
Do Rules 220-224 and 232 serve a useful purpose?

ISSUE No. 5
Is it necessary to maintain separate Rules (220-224 and 232) or can they be combined?

ISSUE No. 6
Are there elements from rules of other jurisdictions that would be useful in the Alberta rules?

[27] Rules 220-224 and Rule 232 both allow a law suit to be split into two (or more) parts and the parts determined separately. Rule 220 allows a point that has been raised in the pleadings to be determined before trial upon application; Rule 222 enables the court to direct the parties to prepare issues if they are not clearly set out in the pleadings, or the court can settle issues and direct how they should be tried. Pursuant to Rule 221 the court can order an issue tried before, at, or after a trial and give directions for the hearing of the issue. Under Rule 223 discovery or inspection can be delayed until the determination of issues.

[28] Rule 232 is similar except that the parties must agree to state questions of law for the court to determine, and may agree that specific relief will be awarded.

[29] The general rule is that all issues will be disposed of at a single trial. The leading case in Alberta is *Esso Resources Canada v. Stearns Catalytic,*[30] which referred to the "extreme unwisdom – save in very exceptional cases – of adopting this procedure of preliminary issues....the shortest cut so attempted inevitably turns out to be the longest way round."[31] Although discretionary, the predominant view in the courts is that the

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[30] (1991), 114 A.R. 27 (C.A.) [*Esso Resources*].

[31] *Ibid.* at para. 9, quoting *Windsor Refrigerator Co v. Branch Nominees*, [1961] Ch. 375 at 396 (C.A.).

trying of preliminary issues "should be reserved for exceptional cases."[32] The reason that it is confined to exceptional cases is expressed in a recent case as:

> It is only in exceptional cases that litigants should be deprived of the normal procedural rights to have full production and discovery before trial and to have all issues in dispute determined at trial.[33]

[30] The main competing goals being served by these rules are the saving of time and money in a lawsuit, as against ensuring that justice is done between the parties. As stated by the court in *Baytex Energy v. Enron Canada*:

> [t]he rationale behind this factor [saving time and money] is very appealing in the current litigation climate in Alberta. Our courts have been emphasizing the desirability of streamlining litigation and of chambers judges deciding whenever possible all appropriate procedural and substantive issues in advance of trial.[34]

[31] However, the cases have almost uniformly found that if there is any possibility of an injustice to any party from the severance of issues, the application will be refused. In *Murphy Oil v. Predator*,[35] McMahon J. held that potential for "prejudice or injustice, if demonstrated even to a modest degree, should always outweigh considerations of expediency and convenience."

[32] While some Canadian jurisdictions[36] have adopted the British test of "just and convenient" to determine whether or not issues should be severed for trial purposes, the Court of Appeal of Alberta recently confirmed the "exceptional case" test in *Sware v. Welda Estate*. While acknowledging that it is "rare, if ever, that [trying a preliminary issue] can be guaranteed to produce a good result," the court stated that

> ...what one must do is see whether one is able to estimate the likely beneficial results and the likely detrimental results of either course of

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[32] *Esso Resources*, *supra* note 30 at para. 11. See also: *Sware v. Welda Estate* (1999), 244 A.R. 397, 1999 ABCA 308 [*Sware*]; *Baytex Energy Ltd. v. Enron Canada Ltd. Corp.* (2002), 329 A.R. 302, 2002 ABQB 1087 [*Baytex*]; *Murphy Oil Co. v. Predator Corp.* (2002), 319 A.R. 328 [*Murphy Oil*].

[33] *Baytex*, *ibid.* at paras. 19 and 57. See also: *Murphy Oil*, *ibid.*; *Tanguay*, *infra* note 38; *Lim Estate v. Home Insurance Co.* (1995), 168 A.R. 308.

[34] *Supra* note 32 at para. 32.

[35] *Murphy Oil*, *supra* note 32 at para. 46.

[36] See the comments in *Ratcliffe v. Nakonechny* (2003), 23 Alta. L.R. (4th) 21, 2003 ABQB 667 at paras. 13-17.

> action, and see if one can say anything about the odds. In many cases it is very difficult to see those things at all, and in other cases a comparison of the likely risks and benefits is not very encouraging. That is doubtless why the cases say that trying a preliminary issue requires an exceptional case.[37]

[33] Because they are unusual procedures, Rules 220-224 require leave of the court, and Rule 232 requires the agreement of the parties. The leading case on the considerations that go into making the discretionary decision as to whether an issue should be severed for hearing separate from the main trial, *Tanguay v. Vincent*,[38] lists the following factors:

- Will it end the suit, if decided one way?
- Will there be a saving in time or money spent on litigation, again at least if decided one way?
- Will it create an injustice?
- Are the issues complex or difficult?
- Will it result in a delay in the trial?
- Is the issue severable?

A. Rules 220-224 (Trial of an Issue)

1. Rule 220

[34] On an application to have a preliminary point of law determined under Rule 220, the court weighs the advantage to the trial judge of hearing all testimony at the same time as against the desirability of resolving a portion of the dispute in a more expeditious way. If the same witnesses are required for both parts of the "split" trial, there may be no advantage in hearing one portion of the trial separately. This is particularly so if there are issues of credibility in question. If the parties are agreed that a particular result in one portion of the trial will end the entire trial, then severance is more likely. But if a finding on the issue that is carved out for initial trial is not likely to shorten the balance of the trial, severance is less likely.

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[37] *Supra* note 32 at para. 2.

[38] *Tanguay v. Vincent* (1999), 75 Alta. L.R. (3d) 90, 1999 ABQB 814 at paras. 8 and 24 [*Tanguay*]; See also: *Bakker v. Van Santen* (2003), 342 A.R. 133, 2003 ABQB 706 and 2003 ABQB 804 (continuation of application); *Holowaychuk v. Hodges*, [2003] A.J. No. 287, 2003 ABQB 201 at paras. 12-13; *Baytex*, *supra* note 32 at para. 22; *Murphy Oil*, *supra* note 32; *Swamy v. Schell* (2000), 269 A.R. 66, 2000 ABQB 437 at paras. 27-28.

[35] Reducing time or money that would be spent on litigation is a goal of the process; if, however, there is likely to be duplication of evidence (either witnesses or documents) in the second portion of the trial, savings of time or money may not occur. As well, since in Alberta the judge is not seized with the entire matter if the trial is split, the second judge may be placed in the "awkward, unenviable and untenable position of potentially deciding differently on the same facts, or on expanded facts that were unavailable to the first trial judge."[39]

[36] Rule 220 currently requires "leave of the court" before a matter can be heard as a preliminary point of law. The Court of Appeal of Alberta has enforced this requirement, even when the parties have agreed to have an issue, or more than one, determined in this manner.[40] Leave to hear a preliminary point of law under Rule 220 can be refused on the basis of complexity of issues (such as Charter issues),[41] need for additional evidence, or if the hearing of a preliminary issue could delay the main trial.[42] Even if a matter has been heard as a preliminary point of law, it may be sent back for re-hearing in the context of a trial, if the Court of Appeal determines that findings of fact must be made, due to another ruling being successfully appealed.[43]

[37] Any decision to split a trial should not result in even the potential for prejudice or injustice.[44] Injustice can be caused by delay, including the potential for appealing the result of a split trial and awaiting the final result of that appeal.[45] The danger of actions being tried "piecemeal" has been pointed out in numerous decisions, one of which is the effect that a decision on a single point of law may have if there is later a full trial of all other aspects of an action. The chambers decision under Rule 220 is a

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[39] *Murphy Oil*, *supra* note 32 at para. 31.

[40] *Spruce Grove (Town) v. Yellowhead Regional Library Board* (1982), 44 A.R. 48 (C.A.).

[41] *Oil Sands Hotel (1975) Ltd. v. Alberta (Gaming and Liquor Commission)* (2002), 9 Alta. L.R. (4th) 318, 2002 ABQB 1028; *Armstrong v. McLaughlin Estate* (1995), 178 A.R. 125 (C.A.).

[42] *Cathcart v. Sun Life of Canada*, [2003] 2 W.W.R. 186, 2002 ABQB 827 [Cathcart].

[43] *Bank of Montreal v. Enchant Resources Ltd.* (1999), 255 A.R. 116, 1999 ABCA 363.

[44] As noted in *Murphy Oil, supra* note 32 at para. 46.

[45] *Ratcliffe v. Nakonechny*, *supra* note 36 at para. 45.

final disposition of that aspect of an action, it is *res judicata*, and no further evidence may be adduced at a trial:

> The facts admitted on the submission of a point of law for determination under Rule 220 are deemed to be all of the facts relevant to the point of law as if they had been established in evidence on that issue at the trial had the issue proceeded to trial. The parties are bound by those facts on that point to the same extent that they would have been had the facts been found by the trial judge on evidence adduced before him.
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> A judicial determination on a point of law on the admitted facts has the same binding effect that it would have had if made at the conclusion of the trial. Once entered the decision operates as an estoppel by res judicata if the same point is sought to be re-litigated or re-argued by the same parties whether in the same action or another.[46]

2. Rules 221-224

[38] At first, these rules appear to simply provide more detail related to the hearing of a point of law under Rule 220. However, Rule 221 specifies that the court may order questions arising, "whether of fact or law or partly fact and partly law," to be tried "before, at or after a trial" and may give directions. This expands the availability of types of matters which can be heard, not being limited to points of law raised in the pleadings, as in Rule 220.

[39] Examples of issues which have been ordered to be tried separately in Alberta under Rule 221 include:[47] extent of insurance coverage; whether the Workers' Compensation Board or an injured worker should have carriage of an action; and, whether an individual was driving a vehicle with the owner's consent. A case which illustrates how the issues should be identified in order to be heard separately is *American Home Assurance Co. v. Canadian Pacific Railway Co.*:[48] the issues should be framed in a way that is not prejudicial to either side. The court is more likely to

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[46] *Guaranty Trust Co. of Canada v. Bailey* (1987), 77 A.R. 387 at paras. 17-18 (C.A.) [*Guaranty Trust*].

[47] *Brochu v. Vachon* (2003), 342 A.R. 181, 2003 ABQB 820; *Gutierrez v. Jeske* (2003), 341 A.R. 283, 2003 ABQB 647; *Austin v. Omand* (2002), 316 A.R. 252, 2002 ABQB 415.

[48] 2003 ABQB 324.

sever issues where a decision on one issue will result in one party being out of the lawsuit.[49]

[40] Rule 222 expands on directions of the court, and Rule 223 deals with delay of discovery or inspection until issues have been heard. Rule 224 allows the court to direct that different questions of fact in a proceeding be tried by different modes.

[41] The Committee discussed the test to be applied under Rules 220-224, coming to agreement that the test was appropriate, recognizing that it had been applied throughout Canada on a similar basis.

B. Rule 232 (Special Case)

[42] Rule 232 is based upon the concurrence of the parties to a proceeding. Rule 232(2) allows documents referred to in the special case to be read and inferences to be drawn "as at a trial." Leave is not specifically required to make an application under Rule 232.

[43] However, even if the parties agree to request the court to decide a question of law, the court should not do so unless there are enough facts to support the determination of the legal issue. Several Alberta cases illustrate this.[50]

[44] Rule 232 does not contain specific language as does Rule 222 about directions that the court can give for hearing of the issue, or Rule 223 dealing with delay of discovery or inspection until after the issues have been heard. Rule 232 refers only to questions of law but does allow the court to draw inferences of fact "as at trial" in order to determine the question of law.

[45] Some cases which have been heard by the courts under Rule 221 might also have been suitable for disposition under Rule 232, for example, where the parties agree to

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[49] *McCoy v. Manufacturers Life Insurance Co.*, [2002] 10 W.W.R. 688, 2002 ABQB 173.

[50] *Amiot v. Co-operators General Insurance Co.* (2001), 281 A.R. 170, 2001 ABCA 116; *Alberta v. Hansen* (2000), 255 A.R. 385, 2000 ABCA 334; *Stace (Estate) v. Larson* (2000), 25 A.R. 329, 2000 ABQB 19; *Gering v. Michel*, 1999 ABQB 1074.

have an issue of law heard and provide an agreed statement of facts, as was the case in *Brochu v. Vachon*.[51]

C. Differences Between Rules 220-224 and Rule 232

[46] While there are similarities between these rules, there are also significant differences. Rule 220 explicitly requires leave of the court; while Rule 232 does not refer to leave of the court, some of the case law indicates that if the court feels the case will not be resolved by such an application, it will be refused.[52] One party can apply to have a preliminary point of law heard under Rule 220, whereas the parties have to concur in seeking the court's opinion under Rule 232. In order to trigger the operation of Rule 220, the point of law must have been raised in the pleadings; this is not expressly required under Rule 232. Under Rule 222, if the pleadings do not sufficiently define the issues, the court may direct the parties to prepare issues, or may settle the issues to be tried.

[47] Some of the differences may be more a matter of drafting than substance: under Rule 221, the rule states that the question can be tried "before, at or after the trial"; Rule 232 is less specific in this regard. Rules 221 and 222 and 224 allow the court to give direction as to the manner in which the questions or issues are to be stated and how they are to be tried, including different modes of trial; under Rule 232 the parties concur in stating questions of law, but there are no specific directions about how the question is determined.

[48] Rule 221(2) sets out remedies available including dismissal of a proceeding or "such other order or ... judgment as [the court] considers proper" while Rule 232 states that the parties "may agree that, upon judgment of the court being given ... certain specific relief may be awarded." The wording in each of these rules has proven a trap for some counsel and even for the courts in some instances.[53] Case law indicates that a ruling under Rule 221 is a judgment of the court and appealable, even though

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[51] *Supra* note 47.

[52] See note 50.

[53] *Guaranty Trust*, *supra* note 46 at paras. 15-16.

the phrase in the rule is the parties "may agree...."[54] Likewise a determination under Rules 220-224 is a final judgment of the court (and appealable)[55] and renders an issue *res judicata* even though a trial may yet take place, and, given the intertwined nature of oral evidence, evidence may end up being introduced which may touch on the matter in question.

[49] Rules 220-224 do not refer to the type of evidence which can be introduced, although by specifying that trial may be by different modes, it may be implied that any evidence which would be admissible at trial can be adduced. Rule 232(2) specifies that the "entire contents" of documents referred to in evidence may be read by the judge. Rule 232(2) specifies that inferences can be drawn from facts and documents introduced in evidence "as at a trial"; Rules 220-224 do not mention inferences.

[50] Under Rule 232 the case is presented in written form, as a "special case" with the facts agreed upon by the parties; under Rules 220-224, it is contemplated that a separate trial of an issue could take place, although frequently the hearing is a chambers hearing based upon written documents.

[51] Practice Note 3 requires a Case Management Judge to consider and discuss with the parties the advisability of directing the trial of an issue, presumably pursuant to Rules 220-224; there is no mention in the Practice Note of obtaining an opinion pursuant to Rule 232.

D. Similarities Between Rules 220-224 and Rule 232

[52] There are some similarities in both the wording and the operation of these rules: both allow a judgment to be entered on a part of an action; each can be used to expedite an action, provided that safeguards are observed; and, each can result in the splitting of a trial.

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[54] *Muttart Industries Ltd. v. City of Edmonton* (1983), 119 A.R. 164 (C.A.).

[55] *Jen-Col Construction Ltd. v. Parkland (County No. 31)* (2000), 269 A.R. 352, 2000 ABQB 532; *Muttart*, *ibid*.

[53] The Committee considered whether these rules should be re-written as one rule[56] with different options, such as:

- trial of an issue of fact or mixed fact and law, including oral evidence (from Rule 220)
- hearing of an issue of law based on written materials submitted by each party (heard in chambers) (from Rule 220)
- hearing of a question of law based on agreed facts and documents submitted by both parties (heard in chambers) (from Rule 232)

and after discussion decided that this would be workable, with directions to be given for each type of hearing at the time the order was made.

[54] The Committee discussed whether the rule should specify that the issue would be heard "before, at, or after trial." Since the default position is that issues will be dealt with at trial, some Committee members thought the rule should be limited to applications before trial. However, in some cases an issue may be reserved to be determined after a trial, for example where there is a trial on liability, reserving the issue of quantum to be determined (perhaps based on written materials) "after a trial." Thus the rule is meant to recognize that all options exist and that lawyers and clients need to take whatever action is necessary based on the particular circumstances. The purpose of the rule is to save time and money by dealing with an issue outside of trial. It was recognized that the rule will generally be used before trial. That being said, parties should not be barred from dealing with something post-trial.

[55] The Committee did not see a need for specific reference to the judge's ability to draw inferences of fact in the rule.

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[56] This would be similar to the Federal rule which combines questions of law, questions of admissibility of evidence and questions stated by the parties in the form of a special case into one rule:

> Federal r. 220(1) Preliminary determination of question of law or admissibility – A party may bring a motion before trial to request that the Court determine
> (a) a question of law that may be relevant to an action
> (b) a question as to the admissibility of any document, exhibit or other evidence or
> (c) questions stated by the parties in the form of a special case before, or in lieu of, the trial of the action.

[56] The Committee then turned to whether the definition of the word "court" in Rule 221 includes Masters. The Alberta Court of Appeal[57] dealt with the issue of Masters' jurisdiction, concluding that a Master can determine a point of law, and can order a trial of an issue of fact, but cannot hear a trial of an issue of fact. Therefore, there may be a role for Masters under the new rule, so that "court" rather than "judge" is the appropriate terminology.

[57] Following a review of other Canadian rules, the Committee determined that some additions to the Alberta rule would be useful. The specific changes are set out in the proposal below.

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUES 4,5, AND 6

[58] On these issues:

- The Committee agreed that Rules 220-224 and Rule 232 are useful because they do provide an expeditious resolution in an appropriate case, while the strict tests applied in the courts make it is unlikely that injustice will be done. These rules serve a useful purpose and these options for resolving matters short of a full trial should be retained.
- The Committee agreed that Rules 220 and 232 should be deleted and the contents combined into a re-written Rule 221.
- The new rule should always require leave of the court (even if the parties consent to the issues being heard separately) and always provide directions for the hearing to the parties. Any necessary distinctions between a hearing on a point of law, an issue of fact or mixed fact and law, or a question of law based on agreement of fact, would be made in the directions.
- The Committee agreed that the court should be able to order an issue heard "before, at, or after a trial" and that this language should be used in the new rule.
- The Committee finds it unnecessary to state in the rule that inferences can be drawn "as at a trial" to determine a question of fact.
- The word "court" should be used in the rule.
- The Committee agreed to the following changes modelled on the rules of other provinces:

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[57] *S.B.I. Management Ltd. v. 109014 Holdings Ltd.* (1981), 32 A.R. 6 (C.A.).

- The revised rule should incorporate the test as set out in Ontario Rule 21.01(1)(a), that being “where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs”;
- Like Federal Rule 220(3), the rule should state that the determination of the question or issue is final, subject only to variation by appeal.

CHAPTER 3. SUMMARY JUDGMENT

ISSUE No. 7
Should the order under Rule 159 be discretionary or mandatory ("may" vs. "shall")?

ISSUE No. 8
What is the appropriate legal test for granting summary judgment, and how it should be expressed?

ISSUE No. 9
What provisions should the rules make regarding evidence on a summary judgment application?

[59] Access to the courts, traditionally, has meant that a litigant has a right to a full trial before a judge (or a judge and jury), after the completion of many interim steps including filing and defending the action, disclosure of documents relevant to the claim and examinations for discovery, exchange of undertakings and expert reports, and possibly, case management attendances and other interlocutory court applications. The purpose of having a matter heard more expeditiously if either the action or the defence to the action is clearly likely to fail was well expressed by Mr. Justice Watson in a recent case:

> It is not just in the interest of the Court, but of justice generally to ensure that invalid lawsuits are not allowed to be insinuated into the queue of litigation to the prejudice of valid ones. It should also be recalled that the other party in a lawsuit must necessarily undergo the costs and stresses related to litigation.[58]

[60] On the other hand, Mr. Justice Watson also noted the reason why summary judgment is only granted in the clearest of cases:

> ...it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having

[58] *Ghermezian v. Corey Developments Inc.* (2001), 302 A.R. 47, 2001 ABQB 914 at para. 73 [*Ghermezian*].

> considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.[59]

[61] What, exactly, is summary judgment? In Alberta, it is an application for final judgment without a trial, which, under The Rules, can be made by the plaintiff or the defendant. Although The Rules do not mention third and subsequent parties, case law has supported the extension of the rule to these and other parties by analogy.[60] The application is made in Chambers, before a Master or a Justice, and there are specific requirements which must be met before summary judgment can be granted:

- a statement of defence must have been filed;
- the application must be based upon an Affidavit swearing positively to facts and to the deponent's belief that there is no genuine issue to be tried (or the only issue is as to amount); and
- the fairly strict test of demonstrating no genuine issue to be tried must be met.

Since the rule states that the court "may" give summary judgment (upon being satisfied that there is no genuine issue for trial), it appears that there may be some discretion in Alberta even if the requirements are met. However, case law generally supports the principle that if all requirements are met, summary judgment will be granted in Alberta:

> It is inconceivable that in Alberta a chambers judge or a Master would, even if satisfied that there is not a genuine issue for trial, not give summary judgment as appropriate. The purpose of the Rule is to eliminate hopeless claims and hopeless defences.[61]

[62] The court is also empowered to impose terms on the parties if the matter is sent forward for trial or hearing, direct a reference or an accounting, direct determination of a question of law, or give judgment for part of the claim and send the rest to trial or assessment.

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[59] *Ibid.* at para. 63, quoting from *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[60] *Western Canadian Place Ltd. v. Con-Force Products Ltd.* (1997), 208 A.R. 179: r. 159 does not apply directly but does apply by analogy under r. 4.

[61] *Rabbitskin v. Greyhound Canada Transportation Corp.*, 2003 ABQB 94 at para. 23, Master Funduk [*Rabbitskin*].

[63] If the application is dismissed, the matter proceeds to a full trial, or to one of the hearings mentioned above; thus, the application is seen as an interlocutory one. If the application is granted, judgment is entered; thus the application is considered final, and rights of appeal arise.[62]

[64] The application for summary judgment will fail if the respondent, whether plaintiff or defendant, raises an arguable point or a triable issue.

A. History of the Rule in Alberta

[65] There has been some form of summary judgment rule in Alberta since 1914;[63] in earlier versions of the rule it was limited to "debt or liquidated demand"[64] or situations where the defence had been filed for delay. Changes were made to the Alberta rule in 1944, 1968 and 1986, the most important being the change in 1986 which allowed a defendant to move for summary judgment. Prior to that amendment, the plaintiff could move for summary judgment on the basis that there was no defence to a claim or that the defence had been filed for delay. However, the defendant could not apply for summary judgment in a case where the plaintiff's claim was untenable; the defendant had to proceed to a full trial and ask for a dismissal of the action at that time.

[66] In order to make the application in Alberta now, a defendant has to file a defence first, then apply for judgment based on an affidavit either sworn by the defendant or by some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it (Rule 159(2)).

[67] This is similar to, but not exactly the same as, what the plaintiff is required to file in support of an application for summary judgment: the affidavit must verify the

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[62] *Paragon Controls Ltd. v. Valtek International* (1998), 299 A.R. 373, 1998 ABCA 19; and Practice Note 8 [PN8].

[63] *Civil Procedure Handbook*, *supra* note 4 at 139, note 1.

[64] Which had its own extensive definition, see Alberta, r. 5(1)(i) and its predecessors. *Civil Procedure Encylopedia*, *supra* note 13, vol. 2 , c. 31. What follows is a quick summary of the salient points in the *Civil Procedure Encylopedia*.

claim or part of the claim, and state that in the deponent's belief, there is no genuine issue to be tried or that the only genuine issue is as to amount (Rule 159(1)). The application for summary judgment can only be made by the plaintiff after the statement of defence has been filed.

[68] Although case law in Alberta treats the language as permissive, once the requirements of the rule have been met, it is expected that judges (and Masters) in Alberta will grant summary judgment. British Columbia uses the same language as Alberta, but both Ontario and the Federal Rules use the word "shall." The Committee discussed whether changing the word to "shall" in the Alberta rule would make the rule more consistent with the current practices across Canada.

[69] A narrowing of discretion might make the courts more inclined to dismiss novel claims or defences, which would be inconsistent with established case law and the policy of permitting access to the courts. For this reason, and because the discretion is not dangerous as it must be exercised judicially, the Committee proposes the retention of the word "may."

[70] In Alberta, the rule states only the ground upon which the application can be made, not the test which is to be applied in making the decision whether summary judgment will be granted. A plaintiff can apply "on the ground that there is no defence to a claim or part of a claim or that the only genuine issue is as to amount" (Rule 159(1)); a defendant can make application "on the ground that there is no merit to a claim or part of a claim, or that the only genuine issue is as to amount..." (Rule 159(2)).

[71] Several cases in the Alberta courts have interpreted the standard to be applied in granting summary judgment as a high one, with the Court of Appeal stating in *Huet v. Lynch* the following:

> The standard of proof applicable to a defendant under Rule 159 is high. It is not enough that the defendant shows a strong likelihood of success. There must be no reasonable prospect of success.[65]

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[65] (2000), 255 A.R. 359, 2000 ABCA 97 at para. 20 [*Huet*].

[72] Other expressions of the standard include:

- whether "it is plain and obvious that the action cannot succeed;"[66]
- whether "the action is bound to fail" or "doomed to fail"[67]or,
- the action is "obviously unsustainable;"[68] or,
- "has no prospect of success" (or "no reasonable prospect of success");[69] or,
- the claim "does not raise a genuine issue for trial."[70]

[73] A new level of scrutiny was introduced, however, by the Court of Appeal judgment in *Mellon (Next Friend of) v. Gore Mutual Insurance Co.*[71] In this case, the court held that:

> It is not manifestly clear or **beyond a reasonable doubt** that there is not a triable issue raised in the pleadings herein.[72] [emphasis added]

[74] This phrase has been referred to in numerous cases in the Court of Queen's Bench, where it has been phrased as:

> ...the Court must be satisfied **beyond a reasonable doubt** that no genuine issue or point of law exists in order to grant judgment.[73] [emphasis added]

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[66] *German v. Major*, *supra* note 1 at para. 14; *Yellowbird v. Samson Cree Nation No. 444*, 2003 ABQB 535.

[67] *Zebroski v. Jehovah's Witnesses* (1988), 87 A.R. 229, leave to appeal to S.C.C. refused, (1989), 94 A.R. 320 (S.C.C) [*Zebroski*]; *Huet*, *supra* note 65 at para. 10; *Schneider v. Zeuge*, 2002 ABQB 809 at para. 23 [*Schneider*].

[68] *Ghermezian*, *supra* note 58 at para. 70.

[69] *Zebroski*, *supra* note 67; *Boudreault*, *supra* note 29; *Ghermezian*, *supra* note 58; *Misty Ridge Dairy Ltd. v. Chinook Dairy Service Ltd.*, 2003 ABQB 383 at para. 22; *Rabbitskin*, *supra* note 61; *Huet*, *supra* note 65.

[70] *Boudreault*, *ibid.*; *Cathcart*, *supra* note 42 at para. 21.

[71] (1995), 174 A.R. 200 at para. 3 [*Mellon*].

[72] Although the reference is to 'pleadings', this was a summary judgment application, not striking out. A few Queen's Bench cases relied on this test earlier, see for example, *Cascade Developments Corporation v. Red Deer College* (1992), 129 A.R. 55.

[73] *Gerling Global General Insurance Co. v. Canadian Occidental Petroleum Ltd.* (1998), 64 Alta. L.R. (3d) 174 at 187 (Q.B.). See also: *383618 Alberta Ltd. v. National Quick-Freeze & Produce Ltd.*, 1998 ABQB 203 at para. 24 [*Quick-Freeze*]; *Cathcart*, *supra* note 42 at para. 21; *Kary Investment Corp. v. Tremblay*, 2003 ABQB 315 at paras. 21-22. In *Chong v. Flynn* (1998), 233 A.R. 120, 1998 ABQB 812 at para. 30, Justice Dea applies this test but also refers to several other tests.

[75] This language continues to be used, along with such phrases as "manifestly clear,"[74] "beyond doubt," and assessing whether an argument has an "air of reality." This last phrase, like the phrase "beyond a reasonable doubt," incorporates a concept used in criminal law and practice.

[76] Justice Belzil,[75] added the following thoughts:

- the courts apply a very rigorous standard in interpreting Rule 159;
- courts have traditionally viewed an application under Rule 159 as being similar to an application to strike out pleadings pursuant to Rule 129;
- summary judgment should be granted sparingly on the basis that the parties should not lightly be deprived of their right of action or defence; and,
- the applicant's burden of establishing that the respondent has no meritorious defence is "onerous."

[77] The Committee considered that the rule does not state the test for dismissal of an action or judgment on a defence, while other jurisdictions do. While this provides the courts and counsel some flexibility in applying the test, it also leaves open room for uncertainty. It has also led to the current situation where different cases apply seemingly different tests (and some cases apply several or all of the tests!). It also seems to have resulted in a gradual stiffening of the requirements; what started as a requirement under the rule for the plaintiff, for example, to show that the defence has no merit, has gradually morphed into a requirement that the plaintiff prove that the defence is bound to fail, is obviously unsustainable, and furthermore, that the plaintiff must prove this to the criminal law standard, "beyond a reasonable doubt."

[78] The Committee looked at several questions:

- Should the Alberta rule adopt the standard of "beyond a reasonable doubt" in determining whether or not an action should be dismissed or judgment given on a defence?
- Should it be made clear in the rule that the civil standard (on the balance of probabilities) still applies?

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[74] *Mellon*, *supra* note 71; *Quick-Freeze*, *ibid.*. at para. 24; *Brennenstuhl v. Trynchy*, [2002] A.J. No. 582 (Q.B.); *Ghermezian*, *supra* note 58 at para. 79.

[75] In *Quick-Freeze*, *ibid.* at paras. 20-21, 24 and 44.

- Should a particular wording of the test, together with the standard of proof to be applied, be adopted in the rules to provide consistency and clarity?

[79] The Committee reviewed the wording of various tests applied across Canada to see whether a particular wording should be adopted in the rules to provide consistency, clarity and lessen the confusion that seems to exist among the cases.

[80] Although Alberta has the toughest test in Canada because it uses the highest standard of proof – "beyond a reasonable doubt," the Committee felt that the standard should be maintained. The standard should be higher in the earlier stage precisely because the matter is being decided on limited evidence, because the result of summary judgment is to deny a party the right to have the party's action heard in court. Summary judgment should be reserved for cases which clearly lack a triable issue. Other cases might proceed under the summary trial procedure, discussed below.

B. Applicant's Evidence

[81] An applicant (whether plaintiff or defendant) must file an affidavit in order to apply to the court for summary judgment (Rule 159(1) and (2)). The affidavit can be made by the applicant or by "some other person who can swear positively to the facts." A plaintiff's affidavit must verify the claim and state that "in the deponent's belief there is no genuine issue to be tried or that the only genuine issue is as to amount." A defendant's affidavit must state that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it. Failure to meet these requirements will result in dismissal of the application for summary judgment, including the requirement that the affidavit be sworn by someone who can swear positively as to the facts.[76] Hearsay is not permissible in an application for summary judgment since, if granted, it is a final judgment, not an interlocutory one.

[82] The Committee considered whether the Alberta rule should specify what evidence, if any, in addition to the affidavit of the applicant (or other person with personal knowledge who can swear positively to the facts) can be used to support a chambers application for summary judgment, and whether the rule should make

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[76] *Sinclair v. Fielding*, 2002 ABQB 607, Master Quinn.

reference to how evidence on behalf of corporate parties should be put before the court. The Committee considered whether the Rule 159(2) requirement that the deponent swear that they knows of "no facts" that would substantiate the claim is too strict a standard to meet.

C. Respondent's Evidence

[83] Some other jurisdictions require the respondent to submit an affidavit. The Committee considered whether this should be incorporated into the Alberta rule. Some Committee members favoured this idea, if only because it saves respondents from their own neglect. But, overall, the Committee felt that such a provision would be inconsistent with the evidentiary onus, which is on the applicant.

[84] The Alberta rules (and the British Columbia rules) make no reference to whether a respondent to an application is required to file affidavit evidence, or whether any other sworn evidence is required to be before the court in order to defend a summary judgment application. In Ontario Rule 20.04(1), a respondent to a summary judgment application:

> may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial (20.04(1)).

[85] Almost identical wording is used in the corresponding Federal rule.

[86] While in Alberta it would seem permissible to merely argue that the applicant's affidavit evidence (and any other evidence relied upon) is insufficient and that the applicant has failed to meet the test thus necessitating dismissal of the application, the Alberta Court of Appeal has held that evidence is necessary to resist a motion for summary judgment.[77] The respondent may prefer not to file an affidavit, in case something in it can be used by the applicant. Other forms of evidence can be relied upon, as long as the evidence would be admissible in chambers.

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[77] *Watts Estate v. Contact Canada Tourism Services Ltd.* (2000), 261 A.R. 66, 2000 ABCA 160 at para. 86.

[87] The Committee discussed whether the Alberta rules should adopt the Ontario and Federal position that the respondent to a summary judgment application must file an affidavit setting out specific facts in order to resist summary judgment.

[88] The Committee also considered whether the Alberta rule should specify what evidence, if any, in addition to (or instead of) the affidavit of the respondent, can be used to resist a chambers application for summary judgment.

D. Other Evidence Issues

[89] The courts currently apply Rules 159(2) (affidavit) and 162 (admissions) disjunctively, so that these two types of evidence cannot be combined at a summary judgment hearing. This seems unnecessarily technical.[78]

E. Other Summary Judgment Rules (Rules 160-164)

[90] Although Rule 160 may not be used very often, the Committee proposes retaining it to deal with the issue of merger of causes of action in a judgment. Likewise Rule 161 deals with urgent motions before the time for defence has expired, and thus serves a useful purpose and should be retained.

[91] Since it is rarely used, the Committee proposes that Rule 163 be deleted.

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUES 7, 8 AND 9

[92] On these issues, the Committee is of the view that the court should continue to have discretion under the summary judgment rule. Also, the Committee proposes:

- that the test for summary judgment remain as it is;
- that the current (or similar) wording of the test be retained.

[93] The Committee further proposes:

- that the reference to the deponent's opinion in Rule 159(2) should be removed; however the deponent should be required to swear positively to the facts, or provide other forms of evidence that would be admissible at trial. Evidence such as admissions should be able to be combined with the affidavit evidence.

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[78] *Zickefoose (Next Friend of) v. Barotto Sports Ltd.* (1992), 99 D.L.R. (4th) 57 (C.A.), rev'g (1992), 91 D.L.R. (4th) 116 (Q.B.).

- that Rule 159 should not require the respondent to file an affidavit.

[94] With respect to other summary judgment rules, the Committee proposes that:

- Rule 160 be retained to deal with the issue of merger of causes of action in a judgment;
- Rule 161 be retained as it serves a useful purpose in allowing urgent motions before the time for defence has expired; and
- Rule 163 should be deleted.

CHAPTER 4. SUMMARY TRIAL PROCEDURE

ISSUE No. 10
Should the summary trial procedure be a one-stage procedure, a two-stage procedure, or should there be an option?

ISSUE No. 11
Should the factors to be considered by the court in applying the test for allowing a case to be determined by the summary trial procedure be set out in the rule, or in the practice note?

ISSUE No. 12
Would changes to the summary trial procedure assist in meeting the goals of lessening delay and providing increased access to justice? For example:

- **Should the rules set out the evidence needed for summary trial in different types of cases?**
- **Do the deadlines for filing materials provide enough time for cross-examination?**
- **Is the way in which summary trials are booked the most efficient method?**

ISSUE No. 13
Summary Trial vs. Jury Trial

[95] The summary trial procedure is set out in Part 11, Rules 158.1 - 158.7. It allows a judge to order one or more issues tried by this shorter, and usually simpler, procedure, even if the entire action cannot be conveniently tried in this manner. A decision under these rules is a final judgment which is appealable. Evidence is introduced by affidavit, or with an order, *viva voce*.

[96] The decision as to whether a matter can be tried by this procedure is made by way of an application in chambers; if the matter is deemed suitable, it is then set for a summary trial. Much of the evidence to be adduced at the summary trial procedure must be introduced in the chambers application. Currently the process for determining whether a case is suitable for summary trial procedure is not set out in the rules, but in a practice note.

[97] The Committee discussed whether the two-stage procedure should remain, and if so, whether it should be in the rules, not just a practice note. Consideration was given to whether the evidence required in support of the application for summary trial procedure should be in the rules or a practice note, and to whether the amount of detail presently required is necessary. One possible solution was to make the number of stages optional, with the use of the summary trial procedure a choice that the plaintiff can make, with other parties having the right to object, or to apply to use it if the plaintiff didn't choose to do so. And finally, the Committee considered whether it is reasonable that an application for summary trial procedure can be successful, but then a different judge who hears the matter can decide that it is inappropriate.

[98] The Rules do not set out a test nor a process for determining whether a case is suitable for summary trial procedure, other than indicating that a notice of motion is required to apply for judgment (Rule 158.1), and that "on or before the hearing of a summary trial...the judge may" determine whether any issue is suitable for disposition under this procedure (Rule 158.4(1)(a)), or dismiss the summary trial "on the grounds that (i) the issues raised by the notice of motion are not suitable for disposition under this Division, or (ii) the summary trial will not assist the efficient resolution of the action" (Rule 158.4(1)(b)).

[99] Not all matters are suitable for disposition by way of a summary trial. In Alberta, Rule 158.4 gives a discretion to the judge hearing a summary trial to adjourn or dismiss it on the grounds that the issues are not suitable for disposition as a summary trial or that a summary trial will not assist the efficient resolution of the action. The rule states that this determination may be made "on or before the hearing of a summary trial" (158.4(1)). The amendments in 2000 added an option of providing advice and directions "including, without determining the merits of a summary trial procedure, a determination, subject to 158.6(1), whether any issue raised in the notice of motion is suitable for disposition under this Division" (Rule 158.4(1)(a)).

[100] The correct process for determining whether a matter is suitable for summary trial was established more firmly in September 2000 when Practice Note 8 [PN8] was introduced. It confirmed that:

> 2(a) There are two components to a summary trial - (1) is/are the issue(s) suitable for a summary trial determination, and (2) the merits of the summary trial application.

Further, PN8 stated that the determination of these two components could occur in one application or as two separate matters. Specifically,

> 2(b) Counsel may proceed with a two stage application. That is, they must comply with Rule 158.1, but may set the matter down in the first instance in regular chambers for advice and directions consistent with the Summary Trial Rules and this Practice Note. They may also seek a preliminary determination of issue (1) before proceeding to issue (2). However, in this circumstance, whether or not there has been a determination of issue (1) in chambers, at the summary trial the presiding justice may, having regard to the evidence, still determine that the matter is not appropriate for the summary trial procedures.
>
> (c) For those counsel wishing to put issues (1) and (2) together, they may proceed with a one stage application. Indeed, many have suggested that a one stage application is preferred, but there is freedom to counsel to so determine and the Court to rule.
>
> (d) The flexibility for either a one stage or two stage application gives counsel the opportunity to evaluate the risks of time and cost of each alternative....

[101] The stage one application can be made as a regular chambers application (if it will take less than 20 minutes), or if it will take more than 20 minutes to argue, counsel must reserve a date and time on the civil trial list (PN8, para. 3). The Rules do not address, and the practice note is not entirely clear about, what evidence must be produced at the first stage application: however, the case law establishes that generally most, if not all, of the material that would be filed in support of the summary trial application will be required at the first stage as well.[79] That is why a number of lawyers commented that this type of application involves a great deal of work.

[102] PN8 also confirms that counsel can choose to make the application for determination of suitability for summary trial at the time the summary trial is to be heard, and that even though a preliminary determination is made that the summary trial procedure is appropriate for a particular case, the judge hearing the summary trial

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[79] See: *Adams v. Norcen Energy Resources Ltd.* (1999), 248 A.R. 120 (Q.B.) [*Norcen*]; *Compton Petroleum Corp. v. Alberta Power Ltd.* (1999), 242 A.R. 3, 1999 ABQB 42 [*Compton*]; *Elliott v. Amante* (2001), 306 A.R. 82, 2001 ABQB 1080; *Discovery Ridge Development Corp. v. Well International Holdings Corp.* (2003), 337 A.R. 1, 2003 ABQB 406 [*Discovery Ridge*]; *Bank of Montreal v. Lysyk* (2003), 334 A.R. 308, 2003 ABQB 186. There are many other cases to similar effect.

can reverse that decision and set the matter for a regular trial (as is set out in Rule 158.6).

[103] The merits of each approach are for the litigants and counsel to weigh. As was noted in the legal community consultations, the summary trial procedures can be very effective but seem to be rarely granted and require a lot of paper work to make the initial application.[80]

[104] The Committee observed that the two-stage process is not set out in The Rules – it exists only in a practice note. The Committee queried whether it makes more sense for the party who wants the summary trial procedure to simply make the application, subject to an opposition application, or whether the two stage process serves to protect the court's time.

[105] British Columbia Rule 18A(8), worded almost identically to Rule 158.4, also permits the court "on or before" the hearing of a summary trial application, to adjourn or dismiss the application if the issues are not suitable for disposition under the summary trial rule or if the application will not assist in the efficient resolution of the proceeding. As noted by Justice Macaulay,[81] "in spite of the wording of the subrule, it will almost always be necessary to hear the whole of the summary trial judgment application in order to determine whether the application is unsuitable for disposition under Rule 18A." He goes on to state that: "It is only appropriate to hear the

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[80] All comments drawn from the ALRI database:

> ...there is no guarantee that the summary trial judge will actually determine that the matter can be heard on the basis of affidavit evidence only, unless the parties use the 2 stage procedure set out in Practice Note "8".
>
> ...While the introduction of summary trials sounded like a time and $$ saver; only one person I know has actually been successful in getting to book one. The judges seem to be applying a very high standard for cases which qualify for this procedure. Summary trial can be a very effective way to quickly hear a case where both counsel are committed to the process.
>
> ...Several counsel [at a large firm] thought that the current ... procedure did not work well partly because it required a great deal of [paper] work by counsel and then could still go to trial after that.
>
> ...Summary trial [requires] a lot of preparation which takes time and is expensive.

[81] The Honourable Mr. Justice M.D. Macaulay, "Rule 18A – Summary Trial in British Columbia" (Court of Queen's Bench of Alberta Judicial Conference, Edmonton, Alberta, November 12, 2003) [unpublished] at 12 [Macaulay]. The following statements are taken from page 12 as well.

application as a preliminary matter in very clear cases." Clear cases would include those where extensive litigation means the summary trial hearing will be lengthy; it is clearly unsuitable since credibility is in issue; the summary trial may introduce additional complexity; or the litigation will not be ended by the summary trial.

[106] The British Columbia Court of Appeal determined that Rule 18A(8) does not create a formalized two-step process, and that the determination referred to can be made at any time in the summary trial process: "At any stage of the application a trial judge may become satisfied that one or other of those conditions makes the case not suitable for disposition, or that the application is not improving the efficiency of the trial process, and thereupon bring the hearing to an end."[82]

[107] In 2003 further amendments were made to British Columbia Rule 18A(8) to clarify that an application can be made separately for an order that the case is unsuitable for summary trial or will not assist in the efficient resolution of the proceeding; Rule 18A(10) was amended to allow the preliminary order to be made by a judge or a master on or before the actual hearing of the summary trial; and to confirm that a judge making such an order is not seized of the matter unless so ordered.[83]

[108] Rule 158.4(1) already contains wording similar to British Columbia Rule 18A(8) indicating that the application can be made "on or before" the hearing of the summary trial. While it may be implied in the Alberta rule, the British Columbia rule does seem more specific in stating that the application can be made "at the same time" as the summary trial hearing. Rule 158.4(1)(a.1) contains wording similar to the British Columbia rule indicating that a judge is not seized of the matter.

[109] The Committee noted that summary trial procedure is not yet widely used in Alberta, contrary to the experience in British Columbia where the summary trial process originated in 1983 and is now used in 60% of cases. One reason may be that the British Columbia Rules provide for a presumptive one-step process. Bringing the

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[82] *Foreman v. Foster*, [2001] 3 W.W.R. 396, 2001 BCCA 26 at para. 19.

[83] Macaulay, *supra* note 81 at 13.

Alberta procedure in line and adopting a one-stage procedure might increase its use here. This could be accomplished by reversing the default rule so that the respondent in a summary trial application would have the onus of making an opposition application to stop the procedure if it is not appropriate.

A. Test for Allowing a Case to be Determined by Summary Trial Procedure

[110] Although PN8 provided the mechanism for determining whether an issue is suitable for disposition, namely the two-stage proceeding, it did not set out the appropriate test nor the factors to be considered. The only test in the Rule is at 158.4, which gives discretion to a judge to dismiss a summary trial application on the grounds that the issues are not suitable for disposition as a summary trial, or that a summary trial will not assist the efficient resolution of the action. However, there have been many cases in Alberta considering what factors need to be reviewed in order to make that determination.[84]

[111] The onus is on the applicant for summary trial procedure to establish on the balance of probabilities that the action is suitable for summary trial.[85] There is a broad discretion in the chambers judge hearing the application (or the trial judge if it proceeds as a one stage application for summary trial and judgment) to refuse summary trial if there is insufficient evidence or if it would be unjust to summarily decide the issues.[86]

[112] The Alberta cases have considered many of the same factors reviewed in the British Columbia cases, including the following:

- Is there is a factual matrix within which a judge can prefer one set of facts over the other and come to factual findings?

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[84] See: *Norcen*, *supra* note 79; *Compton*, *supra* note 79; *Re Indian Residential Schools*, 2002 ABQB 308; *Bank of Montreal v. Lysyk*, *supra* note 79; *Discovery Ridge*, *supra* note 79; *Noland v.Telila* (2003), 35 C.P.C. (5th) 86, 2003 ABQB 410; *Goulbourne v. Buoy* (2003), 15 Alta. L.R. (4th) 375, 2003 ABQB 409; *Bakker v. Van Santen*, *supra* note 38. There are many other cases applying the same factors.

[85] *Re Indian Residential Schools*, *ibid.*; *Elliott v. Amante*, *supra* note 79; *Chevron Canada Resources v. Canada (Executive Director of Indian Oil and Gas)* (2001), 295 A.R. 388, 2001 ABQB 544.

[86] *Ibid*. See also: *Placer Developments Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (C.A.) [*Placer Developments*]; *N.V. Reykdal & Assoc. Ltd. v. 571582 Alberta Ltd.* (2000), 90 Alta. L.R. (3d) 37 (C.A.); *Norcen*, *supra* note 79.

- Will it be necessary to hear the testimony of the parties and other witnesses?
- Does this case require that the parties be able to cross-examine witnesses without leave of the court?
- How simple or complex are the questions in the case? Even if simple, do they involve complicated decisions regarding admissibility or relevance?
- Would affidavit evidence be challenged by live testimony, which might create an unequal contest?
- Are there issues of credibility?
- How large are the issues, and how many parties are involved?
- Is there any urgency to the litigation?
- What stage is the litigation at? Will there be prejudice by reason of delay?
- Will the summary trial judge be able to find the facts necessary to decide the issues of fact or law?
- Would it be unjust to decide the issues raised on the application?[87]

[113] The leading British Columbia case, *Inspiration Management*, urged courts to be "careful but not timid in using Rule 18A for the purpose for which it was intended,"[88] namely finding facts and rendering judgment unless it would be unjust to do so. Alberta cases also establish that the use of the summary trial procedure is not precluded by:

- the absence of consent of one party to the process;
- the expectation that the court will be required to draw inferences from the evidence;
- the expectation that the court may allow cross-examination of some deponents; or,
- the expectation that the court will look to other evidence in the face of contradictory affidavit evidence and weigh one witness's evidence in terms of its consistency with other undisputed evidence and other known circumstances.

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[87] The factors are derived from a review of the following cases: *Norcen supra* note 79; *Compton*, *supra* note 79; *590988 Alberta Ltd. v. 728699 Alberta Ltd.* (1999), 30 C.P.C. (4th) 201, 1999 ABQB 227. These Alberta cases drew on the factors considered in B.C. cases including the following: *Sinnott v. Westbridge Computer Corp.* (1993), 15 C.P.C. (3d) 376 at 384 (B.C.S.C.); *Inspiration Management Ltd. v. McDermid St. Lawrence* (1989), 36 B.C.L.R. (2d) 202 (C.A.); *Placer Developments*, *ibid*.

[88] *Ibid.* at para. 47.

Rule 18A is used extensively in British Columbia with as much as 60% of trials using the summary trial procedure.[89] The recent case of *Foreman v. Foster* from the British Columbia Court of Appeal confirms the "robust nature" of Rule 18A.[90]

[114] The Committee noted the many factors and circumstances which are considered by a judge in deciding whether a case is appropriate for summary trial procedures and that these factors are set out in a practice note but not in The Rules. The Committee considered whether it would be possible to reduce the factors into a rule. One option reviewed was to retain the factors in a practice note so that they are flexible and can be changed from time to time; however, the Committee felt that practice notes are less accessible and a reduction in the number of practice notes would be desirable. While it may be difficult to reduce all of the circumstances under which it might be appropriate to have a summary trial into a rule, the Committee felt that many of the factors are redundant and could be consolidated.

[115] One of the main criteria in determining whether a matter is appropriate to be dealt with in a summary trial is whether an assessment of credibility is required. However, to include this factor in the rule might have the effect of making the rule overly restrictive, particularly given that the case law is clear that assessment of credibility will not necessarily preclude an action from proceeding to summary trial.

[116] The Committee reached agreement that the test in the rule should be a general statement such as that set out in Rule 158.4(1)(b); the test should be stated positively but remain discretionary (using the word "may" rather than "shall").

B. Time and Expense

[117] The goal of the process is to save litigants' time and expense by delivering justice in a more expeditious, less expensive manner. As noted in PN8, the purpose of these rules and this practice note is to expedite the early resolution of cases and

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[89] Macaulay, *supra* note 81 at 2: "The volume of summary trial judgment applications has grown steadily to the point where they now make up about 60 percent of the court's civil and family litigation."

[90] *Supra* note 82 at para. 14.

provide cost effective justice.[91] Some issues were raised by legal commentators responding to these points.

1. Booking court time

[118] Several commentators thought that the rules for summary trial worked well, but that the timelines for booking them did not.[92] However, the Committee was advised that booking procedures have changed, so that litigants can obtain early dates for summary trials.

[119] Comments were received from the Bar indicating that lawyers feel the timeline for filing materials in the summary trial procedure is too short and should be extended. Other comments suggest that once materials are filed, it takes so long to get a trial date that the materials get out of date. Recent improvements in assigning trial time have likely taken care of these concerns, however.

2. Time and expense to prepare for summary trial

[120] Justice Macaulay cites a concern that judges require more time to deal with the voluminous evidence in a largely "paper" summary trial procedure.[93] He notes that this

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[91] Introduction, PN8.

[92] Some comments gathered from ALRI consultations:

> ...I am all in favour of summary trials to avoid unnecessary waste of time. We need to develop the rules concerning the evidence needed for summary trial in different types of cases.
>
> ...These work really well, but the timelines for filing materials are completely inadequate. You need to book a date 3 months in advance, but you don't have to file materials, including affidavits, until 21 and 7 days respectively in advance. This does not allow for proper cross-examination, which has an effect on written submissions. Either have deadlines for affidavits and completing cross-examinations well in advance (such as 60 days) and then briefs a few weeks before, or have all materials filed before can book a date (like for an actual trial).
>
> ...The other problem is that although you may move through the process faster, when it comes to booking a trial you still have a year and a half wait. There should be a way for getting a trial time faster for a smaller matter.
>
> ...There are the same problems as with special chambers in terms of getting dates in a timely manner. Also...the Court is often reluctant to dispose of matters summarily, and tend not to make decisions if there are any disputed facts.
>
> ...It still takes six months to get to pretrial conference...

[93] Macaulay, *supra* note 81 at 17.

was "largely unanticipated by the drafters" in British Columbia.[94] He suggests that the Alberta courts keep track of the "actual delay between delivery of the notice of motion and the hearing date so that [the courts] can re-visit the timing issue as required."[95]

[121] Justice Macaulay also comments on the role of counsel in the use of the summary trial procedure, noting the following concerns:[96]

- the deceptive simplicity of Rule 18A presents a trap for the inexperienced, unwary, or lazy counsel;
- failure to understand the differences between modes of proof at summary trial as opposed to interlocutory applications;
- lawyers fail to detect credibility conflicts which cannot be resolved by affidavits alone;
- inadequate preparation;
- failure to appreciate how judges analyse and resolve conflicts in evidence at trial;
- inadmissible evidence sworn on information and belief;
- failure to establish admissibility of documents attached to affidavits;
- attempts to re-use affidavits prepared for interlocutory applications at the summary trial.

3. Experts' reports

[122] Several commentators raised the issue that being required to comply with Rule 218.1 could delay a summary trial, as the timelines under Rule 218.1 may be significantly longer than the time within which a summary trial can be set down.

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[94] *Ibid*.

[95] *Ibid.* at 20. See also, 10-17. Other problems faced by judges in British Columbia relating to summary trial process include:

- counsel applying too late in the litigation (on the eve of a regularly scheduled trial), which was remedied by an amendment requiring that summary trial applications be heard at least 45 days before the date set for trial;
- applications which are demonstrably unsuitable for disposition under the rule or will not assist in the efficient resolution of the proceeding. Again a recent amendment allowing an application in advance of the trial was expected to remedy this problem.
- litigating serious questions of law "in slices"; and
- separating out defendants in multiple party litigation.

[96] *Ibid.* at 6-10.

Committee members considered whether the proposed timelines for summary trials should be modified to accommodate expert reports. It was suggested that if a case requires expert reports, perhaps it is not appropriate for summary trial. However, it was noted that Rule 18A(5)(a) in the British Columbia Rules deals with statements of expert opinion. Other Committee members suggested that Rule 218.1 requirements are not waived by summary trial process and that the summary trial procedure must accommodate Rule 218.1.

[123] It was observed that the parties can waive the Rule 218.1 requirements by consent. Generally, however, if one of the parties says it is a complex matter and wants to use a specialist, they cannot be denied that right. Judges would need to be persuaded there is special rationale for reducing the Rule 218.1 timeline.

[124] The Committee looked for case law discussing expert report exchange timelines under Rule 218.1 in the context of the summary trial procedure under Rules 158.1-158.7. In one case where a matter was set for summary trial and the expert reports had not yet been exchanged, the defendant applied for a civil jury trial and was refused on substantive grounds; the plaintiff applied for a summary trial procedure, and this was granted. Associate Chief Justice Wachowich (as he then was) presumably then used the "directions provisions" (Rule 158.4(1)) of Part 11 to order the defendant to file his expert evidence in a shorter period than allowed in the rules:

> ...I direct that the issues between the Plaintiff and the Defendant as set out in their pleadings be adjudicated by way of this procedure. The Plaintiff is to file and deliver its Rule 158.1 Notice of Motion within 60 days hereof together with the required notice of any evidence on which the Plaintiff intends to rely at the trial of this matter. **The Defendant has 30 days from service of the Notice of Motion in which to file his Reply and Rule 218.1 information, if any.** If any other directions are required, counsel may arrange to come before me for the same. (emphasis added)[97]

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[97] *Alberta Treasury Branches v. Hammond* (1999), 249 A.R. 295, 1999 ABQB 702 at para. 33. There were cases deciding whether a matter was suitable for summary trial and permitting the parties to return for advice and directions, but this was the only case which addressed the question of timelines for experts in the summary trial procedure squarely.

In *Elliott v. Amante*, 2000 ABCA 286 at para. 4, the Court of Appeal mentioned that the trial judge had "referred to r. 218.1 as fixing the time for delivering expert reports prior to summary trial. That does not appear appropriate to the summary trial procedure". However, there is no positive comment as to what would be appropriate for the exchange of expert reports in a summary trial procedure. Justice McMahon

(continued...)

[125] The Committee felt that it was useful for summary trial matters to have some options for dealing with expert evidence without invoking the full requirements of Rule 218.1. As a result, the Committee agreed that Rule 158.1 should state that the applicant can include expert evidence in the affidavit; that Rule 218.1 does not need to be complied with; and that timelines can be modified with leave.

C. Summary Trial vs. Jury Trial

[126] Whether an applicant can have a summary trial procedure if the matter is set for a jury trial has also been in issue for awhile, despite efforts to resolve it through changes to The Rules and to the *Jury Act*.[98] A conflict between the summary trial procedure and the right to a jury trial is usually resolved in favour of a jury trial.

[127] In 2000, Rule 158.1 was amended to require that a "summary trial under this Division shall be heard by a judge alone even though a party may have obtained an order directing that the trial of the action be heard with a jury" (Rule 158.3). The party applying for a summary trial still had to make out the case that a summary trial was the correct procedure on the facts in question.

[128] In 2003, the *Jury Act* was amended to raise the amount of the claim required to $75,000 (if the action was filed after March 1, 2003) from $10,000 to be entitled to a civil jury trial.[99]

[129] Two recent cases in the Court of Queen's Bench[100] considered these issues subsequent to the amendments to the *Jury Act*, effective in 2003 and the amendment to Rule 158.3. In these cases, Chief Justice Wachowich concluded that "in situations

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[97] (...continued)
had stated in *Elliott v. Amante*, *supra* note 79 at para. 7, that "in principle there is no apparent reason why a personal injury damage assessment cannot be tried using summary trial procedures, provided there is compliance with the balance of the rules, including particularly the use of expert evidence and r. 218.1"; he made a further comment to this effect at para. 13 .

[98] See Harris Hanson, "Competing Applications for Summary Trial and Jury Trial" (2002) 63 The Barrister 8.

[99] Subject to the same provisions as previously, that the trial not involve a prolonged examination of documents or accounts, or a scientific or long investigation.

[100] *Noland v. Telila*, *supra* note 84; *Goulbourne v. Buoy*, *supra* note 84.

of conflict where a party is entitled to a civil jury trial pursuant to the provisions of the *Jury Act*, R.S.A. 2000, c. J-2 but where a summary trial otherwise would be ordered, the right to a jury prevails."[101]

[130] The Committee's discussions and review of case law identified a conflict between Rule 158.3 and the provisions of the *Jury Act*. Although Rule 158.3 stated that a

> ...summary trial under this Division shall be heard by a judge alone even though a party may have obtained an order directing that the trial of the action be heard with a jury

case law had interpreted the rule to be "trumped" by the *Jury Act*, which gave a "right" to a jury trial as long as the matter was not too complex for a jury, and met the threshold requirements.

[131] Bill 10 was passed by the Alberta Legislature on March 10, 2004. It amends section 17 of the *Jury Act* (R.S.A. 2000 c. J-3) by adding the following:

> (1.1) If, on an application made under subsection (1) or on a subsequent application, a judge considers it appropriate, the judge may direct that the proceeding be tried pursuant to the Summary Trial Procedure set out in the *Alberta Rules of Court*.[102]

The current amount in the regulation under (1)(c) is $75,000. As a result of this legislation, there should be no need for a change to the rules.

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUES 10,11,12 AND 13

[132] The Committee proposed the following:

- the rules should not set out the evidence needed for summary trial in different types of cases.
- Rule 158.4(3) should be deleted as it is unnecessary.

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[101] *Noland v. Telila*, *ibid.* at para. 2.

[102] S. 17(1) reads as follows:

> (1) Subject to subsection (2), on application by a party to the proceeding, the following shall be tried by a jury:
>
> (a) an action for defamation, false imprisonment, malicious prosecution, seduction or breach of promise for marriage,
>
> (b) an action founded on any tort or contract in which the amount claimed exceeds an amount prescribed by regulation, or
>
> (c) an action for the recovery of property the value of which exceeds an amount prescribed by regulation.

- Rule 158.1 should state that the applicant can include expert evidence in an affidavit; that 218.1 does not need to be complied with; and that timelines can be modified with leave.

[133] The Committee agreed that the summary trial procedure rules should be changed to reflect a presumptive one-stage procedure, rebuttable on application by a respondent who wants to argue that summary trial procedure is not appropriate in the circumstances.

[134] With respect to the test for summary trial, the Committee agreed that the test should be stated in a rule, not a practice note, and should articulate the factors in Rule 158.4(1)(b), although the wording should be clarified and the test should be stated positively. The Committee also agreed to retaining the word "may" in the rule as opposed to making the procedure mandatory.

[135] Given the recent legislative change, the Committee agreed that no change be made to the summary trial rule regarding jury trials now.

CHAPTER 5. STREAMLINED PROCEDURE (RULES 659-673)

ISSUE No. 14
Do we need a separate Streamlined Procedure?

[136] Alberta's rules setting out a streamlined (shorter, quicker) procedure for smaller dollar-value claims were introduced in 1998, although there had been a previous Part 48 dealing with Small Claims Procedure, which was repealed in 1991.[103] Alberta's rules were drafted specially for this jurisdiction, although other provinces do have similar regimes, referred to as "simplified procedure," "accelerated procedure," or "fast track litigation."[104]

[137] The main features of these rules are as follows:

- The procedure applies only to actions where the claims are under $75,000 not including interest and costs; where the court considers it appropriate, or when the parties so agree in writing and file the agreement with the clerk.
- It applies only to actions commenced after September 1, 1998 unless ordered by the court or agreed by the parties.
- Other rules continue to apply but only to the extent consistent with this procedure.
- There is no discovery or inspection, except as provided by this part or ordered by the court.
- An Affidavit of Records must be filed by each party within 30 days of service of a statement of defence; there are some limitations on what must be in the Affidavit of Records; a list of witnesses must be endorsed on or attached to the Affidavit of Records.
- Discovery is limited to 6 hours (unless ordered by the court or agreed in writing); discovery can be by Interrogatories instead.
- Evidence may be given at trial by affidavit, subject to cross-examination before trial.

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[103] *Civil Procedure Handbook*, *supra* note 4 at, note 4 (part of the pinpoint 566).

[104] See: Doris I. Wilson, Q.C., "Managing Litigation in Canada" (2002) 5 Canadian Forum on Civil Justice, News & Views on Civil Justice Reform 4. The chart at p. 8 lists the procedures available in different jurisdictions across Canada.

- A pre-trial conference or case management can be applied for, and if granted, can include an order that statements of facts be served by the parties.
- Before trial, each of the parties must file a short written statement of the factual and legal theory of the case.
- Appeals are limited.

[138] The legal community provided us with quite a few comments on the streamlined procedure, and there was support for maintaining methods for dealing with actions in a quicker, more efficient manner. However, there were concerns raised about whether the current streamlined procedure is actually quicker.

[139] The Canadian Bar Association *Systems of Civil Justice Task Force Report* recommended that every jurisdiction establish "expedited and simplified" proceedings for actions where the claim was $50,000 or less; likewise the Ontario *Civil Justice Review* and *Lord Woolf's Report* in England concluded that simplified proceedings would have the effect of increasing access to justice.[105]

[140] The Ontario "Simplified Procedure" provides one model for reform.[106] An independent evaluation of a pilot project commencing in 1996 concluded that Rule 76 was a more efficient, faster and economical process and it became a permanent part of the Ontario Rules in 2001.[107] In 2002 the claims limit was raised from $25,000 to $50,000.[108]

[141] The basic issue considered by the Committee was whether it is worthwhile having a separate procedure for claims under a certain amount, when we have several other methods of achieving an expeditious resolution available in The Rules. It was noted that some cases will be simple regardless of the dollar value, and that there is

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[105] For a full discussion of simplified proceedings in Canadian jurisdictions, see: June M. Ross, "Simplified Proceedings" (1998-1999) 1 Canadian Forum on Civil Justice, News & Views on Civil Justice Reform 4 [Simplified Proceedings].

[106] Information regarding the Simplified Procedure can be accessed online: http://www.attorneygeneral.jus.gov.on.ca and follow the links [Simplified Procedure].

[107] *Ibid*. See also: *Courts of Justice Act*, R.S.O. 1990, c. C.43; O. Reg. 184/90.

[108] Simplified Procedure, *ibid*.

already a less complicated process for claims where the dollar value is low, namely Provincial Court, Civil Division (often referred to as Small Claims Court). Given that the limit for filing claims in the Provincial Court changed in 2002 from $7,500 to $25,000,[109] Committee members were of the view that there was no longer a need to have a separate process in the Court of Queen's Bench for matters where the claims total less than $75,000. The Committee then reviewed whether it was worthwhile to have separate rules or a separate procedure for claims under some other monetary limit, such as $150,000 or $200,000. After discussion, the Committee decided that there should not be a separate process for such claims, given that the Management of Litigation Committee has made suggestions for different "tracks" for different types of cases.

[142] The Committee compared the usefulness of Alberta's streamlined procedures with similar ones available in British Columbia and Ontario.[110] In British Columbia, the procedure is a "fast track" rather than a "simplified procedure" and is often used in wrongful dismissal cases because they have a lower value and because they require a speedy trial date. In British Columbia, a matter is set for the "fast track" on the request of one party, if it is expected to take less than 2 days to try the matter, and there are costs consequences if the 2-day limit is exceeded at trial.

[143] The Ontario procedure is available for smaller dollar-value cases and also at the plaintiff's option for larger dollar-value cases. An Affidavit of Documents must be served by all parties 10 days after the close of pleadings, including a list of witnesses. There is no Examination for Discovery, cross-examination on affidavits, or examination of witnesses before trial. The Ontario procedure requires the parties to consider settlement within 60 days after the statement of defence is filed; within 90

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[109] Provincial Court Civil Division, Alta. Reg. 329/1989, as am. by Alta. Reg. 215/2002. See also Wilson, *supra* note 104, chart at 8-9, which indicates that the Federal Court limit for a Simplified Action is claims not exceeding $50,000.; that Ontario and Saskatchewan each have a Simplified Procedure which is mandatory for actions not exceeding $50,000.; that Manitoba has an Expedited Action which is mandatory for actions not exceeding $20,000.; and Prince Edward Island's limit is $25,000. for its Simplified Procedure, while Newfoundland's Expedited Trial applies to claims not exceeding $15,000.

[110] See Wilson, *ibid.* and Simplified Proceedings, *supra* note 105.

days, the matter is set for trial. There is a mandatory pre-trial conference, which sets deadlines for the management of the action, and gives directions for trial.[111]

[144] While the Committee recognized advantages to having such procedures available, it was also observed that under the case management regime proposed by the Management of Litigation Committee as part of the revision to The Rules, there will be a process available for simpler cases (the Simple Track procedure) which is expected to have the effect of making justice more accessible. There was consideration of maintaining the streamlined procedure and merging it with the simple track so that the appropriate procedure would be based on the complexity of the claim rather than on the basis of the dollar amount, but after consideration, the Committee agreed to replace the Streamlined Procedure with the Simple Track. The corresponding time limits of the case management track would apply, thus achieving the goals of efficiency and faster resolution of litigation at a more economical cost.

[145] The Committee reached a consensus that the time has come to render Alberta's streamlined procedure obsolete given the increase in the jurisdiction of the Provincial Court.

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUE 14

[146] The Committee agreed that there is no need to maintain a separate streamlined procedure in the rules. The Committee agreed that the streamlined procedure should be eliminated in light of the expanding jurisdiction of the Provincial Court and in light of the proposed simple track procedure in the management of litigation model.

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[111] See note 106, table at page 8-9 and www.attorneygeneral.jus.gov.on.ca.

CHAPTER 6. COMBINING SUMMARY DISPOSITION PROCEDURES

ISSUE No. 15
Can any of these procedures be combined to shorten legal proceedings?

[147] There are overlaps between the purpose and requirements of Rules 159 (summary judgment), 129 (striking out), 158.1-158.7 (summary trial procedure), 220-224 (trial of an issue) and 232(special case), and the streamlined procedure available under Rules 659-673. The Committee considered whether it would be useful to combine some or all of these rules so that all summary disposition options would be available in one place in The Rules.

A. Striking Out Compared to Summary Judgment (Rule 129 vs. Rule 159)

[148] The Committee considered the similarities and the differences between applications brought under Rules 129 and 159. While many cases indicate that an application could have been brought under one or the other, or was brought under one and should have been brought under the other,[112] the courts have continued to maintain a distinction between these rules. As was stated by the Court of Appeal of Alberta: "...it is important to recognize that there is a distinction between applications brought under Rule 129(1) and those brought under Rule 159(2). The relevant test to be applied depends on the rule that is at issue."[113] The court goes on to confirm that the test for applications under Rule 129(1) is "an onerous one," citing the *Cerny* case, and that the appellate courts will not lightly interfere with discretionary orders such as those made under Rule 129(1).[114]

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[112] Some examples: *Martel v. Spitz*, 2003 ABQB 903; *Rebel Heart Water Hauling Ltd. v. Southside Equipment Sales Ltd.* (2003), 337 A.R. 289, 2003 ABQB 226.

[113] In *Tanar Industries v. American Home Assurance Co.* (1998), 223 A.R. 348, 1998 ABCA 313 at paras. 3, 5, 6.

[114] Master Funduk commented in a recent case that: "More time and money is wasted over this Rule [129] than any other, for two reasons. The first but smaller reason, is that in the occasional case where there is some hope of disposing of a suit summarily, it can almost always be done under R. 159 as easily as under R. 129, and usually more easily. The grounds for the two Rules are very different, but almost any fatal flaw in an opponent's pleading would also give ground for summary judgment under R. 159. The second and much bigger reason, is that rarely is there a fatal flaw which falls within R. 129." *Qualiglass Holdings v. Zurich Indemnity*, *supra* note 4 at 1, quoting in part from the *Civil Procedure Handbook*, *supra* note 4.

[149] The Court of Appeal addressed this issue directly in a recent judgment. An application was brought under both Rule 129 and Rule 159 in *Huet v. Lynch*.[115] In Master's Chambers, the application for summary judgment and alternatively, striking the statement of claim, was dismissed. It was appealed to Special Chambers, where in a 3-day hearing, extensive affidavits, cross-examinations, exhibits, briefs of argument and related materials were relied upon. The cause of action was struck out pursuant to Rule 129 and summary judgment was granted in favour of the defendants under Rule 159. The Court of Appeal set aside the striking out, and varied the judgment granted under Rule 159, holding that dismissal under Rule 129 was in error, and the defendants should have applied for summary judgment under Rule 159 only:

> *Boudreault* established that in cases where a defendant seeks to strike an action on the ground that a limitations issue provides a complete defence, the defendant should apply for summary judgment under Rule 159 rather than applying to have the statement of claim struck under Rule 129. The two rules are distinct and their applications mutually exclusive.[116]

[150] The Court of Appeal in *Decock v. Alberta*[117] also distinguishes the use of Rule 129 from an application under Rule 159, implying that it is up to counsel (or the litigant) bringing the application to determine which is the correct rule to use, not for the court to unilaterally decide to apply standards imported from another rule:

> There is no precedent for an appeal court turning a Rule 38 or Rule 129 application into a summary judgment application. Therefore, it is not up to this Court to consider whether these applications would have been allowed if they had been brought under Rule 159. That is for another court to decide on another day.

[151] Some legal commentators thought that there should be some flexibility in making applications under either Rule 129 or 159, although the opinion was also put

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[115] *Supra* note 65.

[116] *Ibid.* at para. 15, citing *Fernwood Construction of Canada Ltd. v. Century 21 Birch Realty Ltd.* (1982), 48 A.R. 147 (Master); *Western Capital Trust v. R.W.C. Holdings Ltd.* (1982), 21 Alta. L.R. (2d) 388 (Master); and *Nystrom v. Tarnava* (1996), 44 Alta. L.R. (3d) 355 (Q.B.).

[117] (2000), 255 A.R. 234, 2000 ABCA 122 at para. 95. However, some cases say it doesn't much matter which rule is used, implying that this is a mere technicality; see *Medicine Hat (City) v. Wilson* (2000), 271 A.R. 96, 2000 ABCA 247. Other cases simply determine the applications sequentially, usually starting with the r. 129 application (without evidence), and moving to the r. 159 application; see *Wolfert v. Shuchuk* (2003), 15 Alta. L.R. (4th) 5, 2003 ABCA 109, aff'g 2001 ABQB 937.

forward that this would put a judge in a difficult position if affidavit evidence was introduced under one ground but then the application was granted on a ground not permitting affidavit evidence.[118]

[152] The Committee recognized that applications under Rule 129(1)(a), where no evidence can be adduced, should not be joined with applications for summary judgment under Rule 159. The Committee then considered whether there would be any harm in joining applications under the other parts of Rule 129 with an application under Rule159, since evidence can be referred to in such applications.

[153] One option would be to have applications under the other parts of Rule 129 (lack of jurisdiction and abuse of process) as part of Rule 159 so that transcript evidence, cross-examinations on affidavits, documentary evidence, and perhaps even oral evidence could be used in support of the application. As noted, the courts have allowed evidence to be used in arguments that there was a lack of jurisdiction, even though this technically falls under Rule 129(1)(a). An advantage to this approach would be that if parts of the two rules were amalgamated, it would be less likely that applications would be dismissed on technical grounds.

[154] Some Committee members felt that it could be difficult to effectively divide the pleadings and summary disposition aspects of Rule 129. It was further noted that an application for striking out does not necessarily mean that an action is over because amendment is an option under that rule, whereas a successful application under Rule 159 will end an action, or at least part of it. In the end, the Committee decided that Rules 129 and 159 were not sufficiently alike to combine.

B. Striking Out Compared to Determination of a Point of Law (Rule 129 vs. Rules 220-224)

[155] An alternative approach would be to combine parts of Rule 129 with Rules 220-224. Issues similar to those considered under Rule 129 (striking out) have been decided by the courts under Rules 220-224 (trial of an issue). The principles underlying estoppel by *res judicata* are to prevent waste of the courts' time and

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[118] This is also an issue raised in the *Civil Procedure Handbook*, *supra* note 4.

resources, to prevent unfairness, and to promote finality between the parties. A judicial determination of a point of law under Rules 220-224 has the same binding effect that it would have if made at the conclusion of a trial.[119] Even though there are similarities, after discussion the Committee felt that these rules should not be combined.

C. Summary Trial Procedure Compared to Trial of an Issue (Rules 158.1-158.7 and Rule 221)

[156] Rule 158.1 indicates that judgment may be sought in a summary trial procedure "either on an issue or generally." Rule 158.4 allows a judge to order one or more issues tried by summary trial procedure, even if the entire action could not be conveniently tried in that manner. Rule 158.6, as a matter of discretion, enables a judge to grant judgment after hearing a summary trial, on a single issue or generally.

[157] There are similarities between Rule 158.1 and Rule 221. Each results in a final judgment. The test for using these rules is similar: whether it "substantially disposes of the proceeding or renders the trial of further issues unnecessary" or "assists the efficient resolution of the action." The court gives directions for the trial of each and can order trial by different modes. Rules 158.1-158.7 can be used for trial of a single issue; likewise, the main purpose of Rule 221 is trial of a single issue.

[158] The Committee considered whether these rules could be conveniently joined in one rule. Both Rules 158.1 and 221 deal with substantially the same type of hearing. The test for both rules is similar: "substantially disposes of the proceeding or renders the trial of further issues unnecessary" (Rule 221) versus "assists in the efficient resolution of the action" (Rule 158.4(b)(ii)). Trial of an issue under Rule 221 is often used where there is dispute over liability. Often litigants will have a trial of an issue regarding liability (based upon written materials) and then a separate trial on the issue of damages (with *viva voce* evidence).

[159] Is the summary trial procedure an analogous process to the trial of an issue under Rule 221 and if so, is it necessary to maintain both rules? The Committee

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[119] *Guaranty Trust*, *supra* note 46 at para. 16.

acknowledged that the need for trial of an issue will still arise in some cases where a matter cannot be disposed of using written materials but also noted that *viva voce* evidence is permissible at a trial of an issue under Rule 221 and in a summary trial with a judge's order.

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUE 15

[160] With respect to this issue, the Committee agreed to the following proposals:

- As noted above at Issue 5, the Committee agreed that the content of Rules 220-224 and Rule 232 should be combined into a re-written Rule 221.
- The proposed re-written Rule 221 (Trial of an Issue) and the current Rules 158.1-158.7 (Summary Trial Procedure) should be maintained as separate rules, but the Committee agreed to give drafting instructions to put them under the same heading in the rules.
- Rule 129 should remain separate and in the pleadings part of the rules.
- Rule 159 should remain a separate rule, as its purpose is distinct from the other summary disposition rules. Rules 158.1-158.7 (Summary Trial Procedure) and Rule 159 (Summary Judgment) should not be combined as their functions are too different. These two rules should, however, be placed in a section for rules dealing with disposition short of trial.
- Drafting instructions should be given that procedures which have the effect of shortening legal proceedings should be in the same part of the rules, as far as possible (except for Rule 129 which should remain in the pleadings section).

CHAPTER 7. DEFAULT PROCEDURES

A. Introduction

[161] Default procedure can be broken down to three major phases. At each phase, the burden of responsibility shifts between the plaintiff and defendant:

1) After the statement of claim has been served, the onus is on the defendant to respond to the claim within the specified period of time by filing and serving a statement of defence or demand of notice. The defendant currently has 15 days within which to file and serve a response, unless otherwise specified in an order for service *ex juris* or a substitutional order. The 15 day time limit can also be extended by agreement.
2) In the absence of the defendant's response to the statement of claim within the prescribed time, the plaintiff, at their leisure, chooses amongst several options. The options available to the plaintiff include filing a noting in default, entering default judgment, applying *ex parte* for final judgment, serving the defendant with notice of an assessment hearing, or doing nothing at all. The option chosen by the plaintiff will depend, in part, on whether the claim is for a debt/liquidated demand, or for unliquidated damages. However, up to the point in time that the plaintiff takes an active step, and regardless of the amount of time that passes, the defendant continues to have the ability to file a statement of defence or demand of notice.
3) If a judgment is obtained against a non-defending defendant, there are remedies available to the defendant to set aside or vary the judgment depending on the circumstances under which it was obtained. Where the judgment is obtained administratively or without notice to the defendant (i.e. default judgment), the remedy is an application to vary or set aside under Rules 157 or 158. Where the judgment was obtained on notice to the defendant, there may be a remedy available to set aside under Rule 257, or the defendant may simply have to appeal the judgment.

[162] There are three competing interests that underpin default procedures:

i) the need for plaintiffs to be able to advance their claims against unresponsive defendants and the need to do so efficiently and with some degree of finality;

ii) the need to ensure that there is due process for non-defending defendants; and

iii) the need to promote confidence in the fairness of the justice system.

[163] These interests must be balanced against each other and against availability of resources when considering what is the best procedure for dealing with undefended actions.

B. Responding to a Statement of Claim

ISSUE No. 16
What should be the specified time to respond to a statement of claim?

ISSUE No. 17
Should Alberta adopt an intermediate pleading, such as the Appearance Notice in British Columbia or the Notice of Intent to Defend in Ontario, to extend the time period a defendant has to file and serve a statement of defence? If an intermediate pleading is adopted, how much time should it add to the time period to respond to a statement of claim?

ISSUE No. 18
What will be the implications for responding to a statement of claim served *ex juris* if the time period for responding to a statement of claim served in Alberta is increased?

1. Timeline for filing and serving a statement of defence or demand of notice?

[164] Rule 85(1) sets out the time a defendant has to deliver the statement of defence. The time period for delivering a statement of defence or demand of notice in Alberta is 15 days from service of the statement of claim. If the statement of claim is served outside of Alberta, Rule 85(1) provides that time will be fixed by the order permitting service *ex juris*.

[165] The time period in Alberta to file and serve a statement of defence is a shorter time period than that provided for in most other Canadian jurisdictions. In Ontario, for instance, the time for delivery of a statement of defence is 20 days from the date of

service of the statement of claim, unless a notice of intent to defend is filed within the 20 days which will add on an additional 10 days to the prescribed time to file a statement of defence. For service of a statement of claim elsewhere in Canada or the United States, the timeline is 40 days, and for service anywhere else the time period is 60 days.[120]

[166] British Columbia requires that a statement of defence must be filed and delivered within 14 days of service of the statement of claim. Similar to Ontario's notice of intention to defend, the British Columbia defendant has the option of filing an appearance and, in doing so, extends the time allotted to file the statement of defence from 14 to 21 days.[121]

[167] The Federal Rules provide that a statement of defence must be served and filed within 30 days of service of a statement of claim served within Canada. Where the statement of claim is served in the United States, the timeline is 45 days, and 60 days for elsewhere.[122]

[168] Comments from the legal community are divided on the issue of the appropriate timeline for filing a statement of defence or demand of notice. Some lawyers are of the opinion that 15 days to meet with a client and to file and serve a defence is inadequate, especially when the plaintiff may have had several years within which to file and serve their pleadings. The comment was also made that the 15 day time period is not realistic or practical and, as a result, the rule is not followed. It was suggested that the time period should be extended to reflect a more reasonable period for the defendant to meet with counsel and prepare a defence.

[169] Generally, lawyers with debt action and foreclosure practices were opposed to the idea of increasing the time to file and serve a statement of defence.[123] When asked

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[120] *Ontario Rules of Civil Procedure* [Ontario].

[121] British Columbia, *Supreme Court Rules*, r. 21(5) [British Columbia].

[122] Canada, *Federal Court Rules, 1998*, r. 204 [Federal].

[123] Members of the Creditors' Rights bar were specifically consulted on their opinion regarding a proposed increase from 15 to 30 days to file and serve a statement of defence.

for their opinion about a proposed increase from 15 to 30 days, one consulted member suggested that commercial lenders would be prejudiced because it would mean the loss of one month's rent in commercial properties before the property could be foreclosed on. Another comment was made that the increase would be prejudicial to creditors in debt actions because a 15 day extension would simply give debtors an additional 15 days to organize their affairs to avoid collection. Still another argument made by those who favour the status quo was that an additional 15 days will not benefit most defendants anyway because it is still insufficient time to prepare a defence in complex litigation. As a result, those lawyers will continue to rely on extension agreements to get more time. Although there will be a small benefit to a small group of defendants who rely on and use the extended period, the benefit, it is argued, will be at the expense of plaintiffs in foreclosures and debt actions because a 15 day extension of time will have the negative effect of unnecessarily delaying all undefended actions.

[170] One lawyer commented that although 15 days is too short, 20 days would probably be sufficient time in many cases (the same amount of time provided to serve a dispute note in Provincial Court). The same lawyer was also of the opinion, however, that an increase in time to 30 days would not significantly prejudice lenders, particularly those in foreclosure proceedings, for the following reasons: first, a preservation order can be obtained if necessary; second, lenders can have a receiver appointed immediately upon default of payment under the mortgage and an assignment of rents prepared; and third, lenders can always negotiate out of the procedural rules via the mortgage contract for instance, as is often the case in relation to Rule 6.1.

2. Intermediate pleading

[171] One alternative to a global increase in time to file a statement of defence would be for the rules to incorporate an intermediate pleading that would extend time but only in those cases where there is an intention to defend. Other jurisdictions, namely British Columbia and Ontario, have incorporated intermediate pleadings (appearance and notice of intent to defend, respectively) which, if filed, increase the time frame within which a statement of defence can be delivered.

[172] The adoption of an intermediate pleading would, of course, have certain implications as well. On one hand, it would serve the purpose of increasing the time to deliver a defence while still allowing undefended matters to proceed expeditiously. On the other hand, it would add yet another procedural step and thereby complicate, rather than simplify, the litigation process. Further, it would marginally increase the costs of litigation. Lastly, it may result in some defendants unwittingly submitting to the jurisdiction. This is the case in Ontario where applications to set aside service or stay the proceedings must be brought *before* delivering a defence or a notice of intent to defend.[124] Thus, even though an intermediate pleading provides more time to prepare a defence, the defendant must have resolved all jurisdiction issues before utilizing this pleading.

[173] Notably, the Committee has rejected the adoption of additional pleadings in other contexts, for instance, commencing a proceeding with a writ prior to issuing the statement of claim, for the simple reason that it unnecessarily complicates the process.[125]

3. Code of professional conduct

[174] Another factor to consider when contemplating an increase in the time to file a statement of defence is whether the Code of Professional Conduct is sufficient, on its own, to ensure defendants will have adequate time to prepare a defence. The Code states that "[a] lawyer must agree to reasonable requests by another lawyer for extension of time, waivers of procedural formalities and similar accommodations unless the client's position would be materially prejudiced."[126] As suggested by the comments received, many lawyers already rely on a gentle person's agreement to extend the period and may, in all likelihood, continue to rely on these agreements. That being said, although extension agreements have the benefit of flexibility, this flexibility is geared to the whims of the plaintiff. Indeed, it is the plaintiff's

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[124] Ontario, r. 17.06.

[125] See Alberta Law Reform Institute, *Commencement of Proceedings in Queen's Bench* (The Rules Project, Consultation Memorandum No. 12.1) (Edmonton: Alberta Law Reform Institute, 2002) at 5-6 [ALRI CM 12.1].

[126] Law Society of Alberta, *Code of Professional Conduct*, c. 4, r. 4.

prerogative to grant an extension or not. Further, self represented litigants are not bound by the Code and they are generally less likely to grant extensions as a courtesy.

4. Proposals regarding time generally

[175] In a subsequent Consultation Memorandum, the General Rewrite Committee will make suggestions to standardize time periods in the rules and the issues related to the time period for responding to a statement of claim must be considered in this context. Generally, the General Rewrite Committee will propose a reduction in the sheer number and variability of time periods in the rules. Specifically, the Committee will propose the elimination of 14 and 15 day time periods in favour of a standardized 20 day period instead. This proposal will result in the effective elimination of the status quo time period for filing a statement of defence such that the 15 day period will automatically become 20 days.

[176] The Committee will also propose that "months" should be used to express longer time periods rather than days. Thus, an existing time period of 30 days would instead be referred to as "one month." Any rules with time periods falling in between a round month, for instance 45 days, will be referred to the relevant committee for consideration about whether to round the time period up or down.

5. Service *ex juris*

[177] Altering the time to respond to a statement of claim served within Alberta may have implications for the time allotted to respond to a statement of claim served *outside* of Alberta. In a previous Consultation Memorandum dealing with Commencement of Proceedings in Court of Queen's Bench, the General Rewrite Committee considered the time periods for responding to a statement of claim served extra-jurisdictionally.[127] The Committee has suggested eliminating the current requirement that an order for service *ex juris* be obtained and served with the statement of claim. Instead, the Committee suggests that the rules should provide for the standard time periods for defending where service takes place extra-jurisdictionally. The Committee proposed that "30 days be permitted to defend an

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[127] ALRI CM 12.1, *supra* note 125 at 60.

action served within Canada, 45 days for service in the United States and 60 days for service elsewhere."[128]

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUES 16, 17 AND 18

[178] The Committee recognizes three possible options with respect to the time period for responding to a statement of claim. The Committee seeks the input of the profession in deciding which of the following three options should be adopted:

a) Increase the time to file a statement of defence or demand of notice from 15 to 30 days (which would actually be "one month" in light of the forthcoming proposals relating to time generally); or

b) Leave the time period as is (which will, in effect, result in an increase of the time to file a statement of defence or demand of notice from 15 days to 20 days given the forthcoming proposal to eliminate 15 days as a time period in the rules);

c) Leave the time period as is (or will be) but adopt an intermediate pleading which, if filed, will increase the time to file and serve a statement of defence or demand of notice to 30 days total (resulting in a 10 day extension given the standard time period of 20 days).

[179] With respect to the time period for responding to statements of claim served *ex juris*, the Committee proposes to wait until a decision has been made regarding the time to respond to a statement of claim served within Alberta. At that time, the Committee may reconsider the appropriateness of its original proposal regarding the time periods where service is *ex juris*. In addition, the proposal to eliminate partial month time periods in favour of whole months will impact on the current suggested timelines for responding to a statement of claim served *ex juris*.

ISSUE No. 19
Should there be a cap on the time extensions to defend on consent of the parties?

[180] Another issue that arises when considering the timeline for responding to a statement of claim is whether there should be a cap on the total time that parties can agree to extend the time to defend before having to seek leave of the court. According

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[128] *Ibid*.

to *Blanchet Neon Ltd. v. Athenian Pizza & Steak House Ltd.*, extensions by agreement are to be used only to allow counsel the time to meet with the defendant and obtain instructions.[129] In spite of this authority, extensions do not appear to be used only in that limited sense. This highlights the issue of whether the rules should specify a cap on time extensions by agreement.

[181] In Ontario under the new case management rules, there are limits pertaining to time extensions, even on consent of the parties. The Ontario Rules provide that a defence must be filed or judgment entered within 180 days after the date of issue of the originating process or the claim will be dismissed by the registrar as abandoned.[130] One Ontario lawyer wrote to the Institute and commented that the 'defence due' rule frustrates many Toronto personal injury lawyers because it assumes that when a claim is issued, it should immediately proceed to litigation and that a defence lawyer should be hired. It does not take into consideration the fact that in many ongoing personal injury claims negotiations occur with insurance adjusters and it is often unnecessary for a statement of defence to be filed.

[182] The Ontario lawyer also commented that the problems with the rule are compounded by the cumulative measure of time for service of the claim and the time to file a defence. For instance, where the 180 day deadline is approaching and the defendant fails to file a defence, even after indicating an intention to do so, the plaintiff has no choice but to note the defendant in default in order to avoid dismissal of the claim. The defendant must then go through the unnecessary exercise of applying to set aside the default. If the plaintiff fails to note in default by the 180th day, they must then bring an application to set aside the dismissal.

[183] Although the 'defence due' rule in Ontario was adopted with the intention of keeping the litigation moving after the commencement of an action, it deprives the parties of the flexibility to negotiate or settle the claim prior to being forced into the litigation system.

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[129] [1984] A.J. No. 99 (Master) at para. 16.

[130] Ontario, r. 77.08

[184] Amongst consulted members of the creditors' rights bar there was no support for the notion of imposing a cap on agreements to extend the time to defend. Plaintiff's counsel indicated that they appreciate the flexibility of being able to negotiate a claim without requiring the defendant to file a statement of defence, the result of which would simply be a greater cost to the defendant.

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUE 19

[185] The General Rewrite Committee does not support the implementation of a cap on extensions by agreement.

C. Demand of Notice

[186] Alberta is one of a handful of jurisdictions that use the demand of notice.[131] Rule 146 provides that where a defendant delivers a demand of notice, the plaintiff may proceed as though the plaintiff failed to defend, except that notice of all subsequent motions must be given and judgment can only be obtained on notice. The Stevenson and Côté *Civil Procedure Handbook* notes the following about the demand of notice:

> ...It is used by someone who has no defence to liability, but wants notice of later proceedings, such as a motion for judgment. It prevents default judgment by the Clerk. A demand of notice does not give the right to contest liability (unless the court later allows the defendant to withdraw the demand and substitute a statement of defence). A defendant who does not file and serve a statement of defence admits liability. The demand of notice is common where the only dispute will be about the timing and terms of the relief, especially in foreclosures. It could be used in a damage action where the only issue is assessing the amount of damages, but defendants in those actions often file a statement of defence. A demand of notice is an invitation to the plaintiff to move for summary judgment (which is what a foreclosure order nisi/sale is).[132]

ISSUE No. 20
Should the demand of notice be retained as a pleading?

[187] On one hand, there are several arguments in favour of eliminating the demand of notice. Practically speaking, the application of the demand of notice is limited

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[131] Of the Canadian jurisdictions, only Northwest Territories, Nova Scotia, and Saskatchewan use the demand of notice.

[132] *Civil Procedure Handbook*, *supra* note 4 at 126.

primarily to foreclosure proceedings, although it is also sometimes used in builders liens actions and actions involving third parties. Arguably, in the foreclosure context it is redundant because an order nisi cannot be obtained without giving notice to the defendant in the first place.

[188] On the other hand, the demand of notice is also sometimes utilized in the context of debt actions. In this context, the demand of notice has the effect of requiring the plaintiff to prove their claim because a plaintiff must bring a motion with accompanying affidavit prior to obtaining judgment. As a result, the demand of notice can be an effective tool for defendants who want reassurance of the merit of the claim without having to defend. In addition, the demand of notice is a useful tool to provide an effective address for service.

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUE 20

[189] The Committee is of the view that the demand of notice does not unnecessarily complicate the rules or the litigation process. Although its application is limited in practice, it does serve a useful purpose in the circumstances in which it is commonly used. Further, it is the only formal mechanism in an undefended action by which a defendant can provide an address for service. The Committee therefore proposes that the demand of notice be retained.

ISSUE No. 21

Should the demand of notice be combined with an intermediate pleading which would entitle a party to notice while at the same time increasing the time to file a defence if desired (like the appearance in British Columbia)?

[190] In British Columbia, the filing and serving of an appearance serves two purposes: (1) the responding party becomes a party of record and is entitled to receive essential pleadings and notifications in the proceeding;[133] and (2) an appearance increases the time to file a defence by 7 days.[134] At Issue No. 2, above, the Committee

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[133] Allan P. Seckel & James C. MacInnis, *British Columbia Supreme Court Rules Annotated* (Toronto: Carswell, 2003) at 105.

[134] British Columbia, r. 14(3). See *Baker v. Abunnadi* (1979), 15 B.C.L.R. 190, 12 C.P.C. 1 at para. 6 (Co. Ct.)

posed the question as to whether Alberta should adopt an intermediate pleading similar to Ontario or British Columbia to increase the time to prepare a defence. Depending on the response from the legal community, an intermediate pleading could be adopted for the purpose of extending the time to defend. The question still remains, however, whether an intermediate pleading, if adopted, should be combined with the demand of notice to serve a dual purpose similar to the appearance in British Columbia.

[191] From the perspective of the creditors' rights bar, collapsing an intermediate pleading with a demand of notice would unnecessarily drag out claims that typically go undefended, such as foreclosures. This will defeat the purpose of adopting an intermediate pleading in the first place, which is to avoid a global extension of the time to defend.

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUE 21

[192] In the event that support exists to adopt an intermediate pleading to extend time to defend, the Committee is of the view that this pleading should not be combined with the demand of notice for the dual purpose of ensuring that notice is given in undefended actions.

ISSUE No. 22

Should there be a requirement to obtain leave of the court in order to dispute liability after liability has been admitted? If so, should it be codified in the rules?

[193] Although not currently specified in The Rules, leave of the court is required to file a statement of defence after filing a demand of notice. Justice McFadyen in *Bell v. Grande Mountain Apartments* determined that leave to file a defence is necessary after drawing an analogy with the circumstance wherein a defendant must seek leave to file a statement of defence after having been noted in default.[135]

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[135] *Bell v. Grande Mountain Apartments Ltd.* (1983), 50 A.R. 372, 29 Alta. L.R. (2d) 270 [*Grande Mountain Apartments*].

[194] The issue is whether the rules should explicitly state the law as stated in *Grande Mountain Apartments*. On one hand, one purpose of the Rules Project is to clarify and remedy gaps in practice. From this perspective, Rule 146 should be modified to incorporate the requirement for leave. On the other hand, Rule 146 is already very efficiently drafted. Presumably, if a defendant wishes to file a statement of defence after having filed a demand of notice, there would be a motion for judgment which they would attend and oppose the plaintiff's application for judgment.

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUE 22

[195] The Committee views the unstated requirement for leave as a gap in the rules and therefore the Committee proposes that Rule 146 be amended to reflect the requirement to seek leave to file a statement of defence where a demand of notice has been filed, as established in *Grande Mountain Apartments*.

D. Commencement of default procedures

ISSUE No. 23
Should service, in addition to filing, of the statement of defence/demand of notice continue to be a requirement to avoid commencement of default procedures?

[196] Rule 142 sets out the requirements for the commencement of default procedures. Currently, Rule 142 distinguishes between the procedure for failure to *file* a defence and the procedure for failure to *serve* a defence. Subrule (1) provides that "[i]f the defendant has failed to file a statement of defence or demand of notice" the plaintiff may enter final judgment against the defendant or note the defendant in default. Subrule (2) provides that "[i]f the defendant has filed but has failed to serve a statement of defence or demand of notice" the plaintiff may enter judgment or note in default.

[197] The question arises whether it is just to allow the commencement of default procedures pursuant to Rule 142(2) where the defendant has filed the statement of defence or demand of notice within the requisite period of time, but has failed to serve the documents within the same time period.

[198] On the one hand, where a defendant has filed a defence or demand of notice within the requisite time frame, suggesting a clear intention to defend, one must ask whether it is just to permit the commencement of default proceedings in the presence of a filed document that has not yet been served. This question is particularly pointed given that the plaintiff has access to the pleadings through the courthouse and could be fully informed of the defendant's apparent intention to defend as well as the contents of the defence. Further, a defendant would most certainly be successful in an application to set aside a default judgment or noting in default if default proceedings were initiated after filing, but before service of the statement of defence.[136]

[199] On the other hand, the plaintiff must have the ability to continue to advance their claim failing service of a defence. Further, there is no compelling reason to eliminate the requirements of service when service of the defence documents does not, in and of itself, pose a significant problem given that the address for service is known and personal service is not required. Although the requirement to serve the statement of defence/demand of notice appears trite due to the fact that a default judgment/noting in default would probably not stand up in the face of a filed but unserved statement of defence, the service requirement is nonetheless essential so that the plaintiff does not have to incur the real costs of doing a search to determine whether the action is being defended or if notice is required.

[200] As far as other jurisdictions go, none of the Federal Rules, Ontario Rules or British Columbia Rules distinguishes between the time period to file versus the time period to serve for the purpose of commencing default proceedings.[137]

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUE 23

[201] The Committee is of the view that the requirement to serve the statement of defence must be retained. However, the Committee is also of the view that a plaintiff should not be able to note in default or enter default judgment if a defence has been filed but not served in the requisite time. Instead, the plaintiff should be able to get

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[136] Indeed, this is borne out in the case of *657618 Alberta Ltd. v. Brett* (1996), 191 A.R. 262, 44 Alta. L.R. (3d) 202 (Q.B.) which confirms that where a defence is served while the default judgment or noting in default is on its way to the courthouse, the default judgment must be set aside.

[137] See discussion, above, at pages 58-65 under B. Responding to a statement of claim.

scheduled costs. As such, Rule 142(2) in its current form should be deleted and a costs consequence inserted in its place.

ISSUE No. 24
Should the process of noting in default be retained or should a "pleadings closed" rule be adopted instead?

[202] A defendant may be noted in default upon failure to file a statement of defence or demand of notice within the prescribed time limit. The passing of the time to file a statement of defence signals to the plaintiff that default procedures can begin but the defendant is not precluded from defending before the plaintiff takes action. A notation of default is generally only used for claims involving unliquidated demands, otherwise the plaintiff will usually enter default judgment.[138]

[203] A noting in default serves three functions in Alberta:

1) It signals to the court that the prescribed time for filing a defence has passed and precludes a defendant from filing a statement of defence without first making an application to set aside the noting in default.
2) It denies the defendant the right to receive notice of subsequent proceedings (although there are several exceptions to this rule).
3) Where there is more than one defendant, a noting in default preserves the claim against defendants who are alternatively liable so that the doctrine of merger does not defeat the claim. Rules 148(2)[139] and 154[140] function to prevent merger of actions where the defendants are cumulatively liable, but if the defendants are alternatively liable, default judgment against one defendant will bar the

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[138] *Civil Procedure Handbook*, *supra* note 4 at 127.

[139] R. 148(2) allows the plaintiff to enter default judgment against the defaulting defendants and then proceed with the lawsuit against any other defendants. The rule permitting the plaintiff to proceed against other defendants after obtaining default against one defendant, prevents the operation of the old rule of merger of the cause of action against the other defendants; *Capital Carbon & Ribbon Co. Ltd. v. West End Bakery*, [1949] 1 D.L.R. 509 (Ont. C.A.); *Altech Aluminum Ltd. v. Pendulum Construction Ltd.* (1991), 47 C.P.C. (2d) 241 (B.C.S.C.).

[140] R. 154 allows the plaintiff to proceed to trial against those defendants who have defended or apply to court and obtain judgment against those who have not defended, without prejudice to the right of the plaintiff to proceed with the action against the other defendants.

> plaintiff's claim against the others.[141] The noting in default procedure is therefore particularly relevant in multi-defendant actions where the defendants are alternatively liable because the plaintiff can decide at a later stage in the proceedings, perhaps after the filing of the affidavit of records or examination for discovery, against which defendant judgment should be sought.

[204] Most jurisdictions in Canada have a noting in default procedure or something similar,[142] although the Federal Rules, the Newfoundland, *Rules of The Supreme Court, 1986* and the *Nova Scotia Civil Procedure Rules* do not. Unlike Alberta where the commencement of default procedures is determined by the plaintiff, the Federal Rules have a time driven procedure in which the pleadings close after a fixed period of time and the defendant is no longer entitled to file a defence.[143]

[205] The issue of whether to maintain a plaintiff driven procedure (signalled by a noting in default), or adopt a time driven procedure (signalled by a close of pleadings) boils down to the following question: is it is more desirable for the plaintiff to have the flexibility to decide at which point the defendant will be noted in default and to give undertakings not to note in default, or is it more desirable to have a predictable process that does not require a positive step on the part of the plaintiff to signal default, but requires a positive step, such as a formal extension agreement, to prevent it?

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUE 24

[206] The Committee is of the view that a time driven rule for the filing of a statement of defence/demand of notice would not easily fit within the Alberta default scheme because it depends on counting time from the date of service of the statement of claim.

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[141] *Fritz Plumbing Co. Ltd. v. Guasp,* [1972] 1 W.W.R. 692 (Alta. Dist. Ct.); *Bank of Nova Scotia v. Lam* (1986), 72 A.R. 190 (Q.B.); *Calmonton Investments Ltd. v. Tangye* (1988), 87 A.R. 22 (C.A.). Cumulative liability exists where the defendant's have signed a joint and several note, or one is a debtor and the other a guarantor, or they are sued in one statement of claim for different debts. Alternative liability exists in principal and agent situations, for instance.

[142] Ontario, r. 19.02; Manitoba, *Court of Queen's Bench Rules*, r. 19.01(1) [Manitoba]; New Brunswick, *Rules of Court*, r. 21.02; Prince Edward Island, *Rules of Civil Procedure*, r. 19.02; Northwest Territories, *Rules of the Supreme Court*, rr. 19-20 and Saskatchewan, *Queen's Bench Rules*, r. 114(3).

[143] Federal, r. 202

The court would have no idea when time starts to runs unless plaintiffs were required to file an affidavit of service as a matter of course. A time driven process works well in the federal system because pleadings are served before they are filed, thus the very filing of the statement of claim signals the running of time. The Committee therefore proposes that the practice of noting in default be maintained and default procedures continue to be plaintiff driven.

E. Liquidated Versus Unliquidated Demands

ISSUE No. 25
Should separate procedures be maintained for obtaining judgment in undefended actions for liquidated versus unliquidated claims?

[207] In Alberta, there are two separate procedures for obtaining judgment in undefended claims based on whether the claim is for a liquidated or unliquidated demand:

1) Rules 148 and 149 provide for a quick, efficient process to obtain default judgments where the amount is easily calculable. Under these rules, judgments in undefended actions for debt and liquidated demands can be administratively entered.
2) If all, or even part of the claim is unliquidated (even for sale of goods), one must follow the procedure set out in Rule 152 and obtain judicial approval of the judgment and the amount sued for.[144]

[208] All jurisdictions in Canada, with the exception of the federal system, distinguish between liquidated and unliquidated claims for the purpose of default procedures.[145] The federal system is unique because a failure to defend does not constitute an admission of liability, as is the case in Alberta and most other jurisdictions. In the federal system, all undefended actions require a motion for judgment and the plaintiff is required to prove their case.

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[144] *Metropolitan Life Insurance Co. v. Hover* (1999), 91 Alta. L.R. (3d) 226, 1999 ABCA 123.

[145] See, for instance, British Columbia, rr. 17(3) & 25(4) and Ontario, r. 19.04(1)

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUE 25

[209] The Committee is of the view that the current procedural distinction between default procedures for liquidated and unliquidated demands should be maintained.

ISSUE No. 26
Should the terms "liquidated" and "unliquidated" in The Rules be replaced with plain language terms?

[210] The procedural distinction between liquidated and unliquidated demands is recognized in all common law jurisdictions in Canada and in most common law jurisdictions throughout the world. However, the terminology used to reflect these concepts differs from jurisdiction to jurisdiction. Although many jurisdictions use the terms "liquidated" and "unliquidated," many jurisdictions have departed from the use of those terms in favour of plainer language.

[211] In Canada, every province uses the terms "liquidated" and "unliquidated." Below is a list of the terms used in various common law jurisdictions throughout the world.

Jurisdiction	Terminology
Canada	
• all common law provinces	"liquidated" and "unliquidated"
• Federal Rules	No procedural distinction
Britain	
• *Civil Procedure Rules*	"specified amount of money" and "an amount of money to be decided by the court."[146]

[146] Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System*, (Oxford: Oxford University Press, 2003) at 495. See England, *Civil Procedure Rules*, r. 12.4(1)(a)(b). Ian Granger and Michael Fealy note that this change in the language broadens the scope of the rule, and creates the possibility that "not only debts of a certain amount but also claims for damages where the claimant has put a fixed amount of damages in his claim form" will be allowed to be registered (see Ian Granger & Michael Fealy, *The Civil Procedure Rules in Action*, 2d ed. (London: Cavendish Publishing Limited, 2000).

Australia	
• Australian *Federal Court Rules* • Queensland *Uniform Civil Procedure Rules* • *Rules of the Supreme Court of Western Australia* • New South Wales *Supreme Court Rules*	"liquidated" and "unliquidated"[147]
• South Australia *Supreme Court Rules* • Australian Capital Territory *Supreme Court Rules*	"liquidated demands" and "pecuniary damages"[148]
• Victoria *Supreme Court Rules* *Rules of the Supreme Court of the Northern Territory of Australia*	"debt" and "damages"[149]
New Zealand	
• New Zealand *High Court Rules*	"liquidated" and "unliquidated"[150]
United States	
• United States *Federal Rules of Civil Procedure*	If the "sum is certain or for a sum which can by computation be made certain" a default judgment can be registered, but in all other cases the plaintiff must apply to the court[151]
• New York *Civil Practice Rules* • *California Code of Civil Procedure*	a default judgment can be registered "upon contract or judgment for the recovery of money or damages only" and all other default applications must be heard by the court.[152]

[147] Australia, *Federal Court Rules*, Or. 10, r. 8; Queensland, *Uniform Civil Procedure Rules*, rr. 283(1), 284(1); Western Australia, *Rules of the Supreme Court*, Or. 22, rr. 2(1), 3(1); New South Wales, *Supreme Court Rules, 1970*, ss. 17.4(1), 17.5.

[148] South Australia, *Supreme Court Rules, 1987*, r. 51.02(a)(b); Australian Capital Territory, *Supreme Court Rules*, Or. 31, rr. 2(1), 4.

[149] Victoria, *Supreme Court Rules, 1996*, r. 21.03(1)(a)(b); Northern Territory of Australia, *Rules of the Supreme Court*, r. 21.03(1)(a)(b).

[150] New Zealand, *High Court Rules*, rr. 460, 463.

[151] United States, *Federal Rules of Civil Procedure*, r. 55(b)(1)(2).

[152] New York, *Civil Practice Rules*, s. 3215, California, *Code of Civil Procedure*, s. 585(a).

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUE 26

[212] The Committee is of the view that the terms "liquidated" and "unliquidated," while commonly used, are not descriptive and therefore not intuitive. That being said, there is a level of familiarity with these terms given their long-standing use. The Committee seeks the input of the profession regarding the continued use of these terms versus adopting more plain language descriptors such as those used in the United States *Federal Rules of Civil Procedure* and the New York *Civil Practice Rules.*

ISSUE No. 27
Should notice under Rule 152 be required:
a) all of the time?
b) none of the time?
c) some of the time (the current two-pronged approach)?

1. The evolution of Rule 152

[213] Rule 152 provides that a plaintiff can either make an *ex parte* application for judgment, or set the matter down for an assessment hearing on 10 days' notice to the defendant. If the plaintiff applies *ex parte* for judgment, the judge hearing the application may give final judgment or direct an accounting, or set the matter down for an assessment hearing on notice to the defendant.

[214] Rule 152 states:

> 152. If a sole defendant has, or all the defendants have, been noted in default, the plaintiff may
>
> (a) apply *ex parte* to the court for judgment, and the judge hearing the application may
>
> (i) upon proof of the plaintiff's claim by affidavit or otherwise, give final judgment or direct an accounting,
>
> (ii) set the matter over for a hearing on notice, and notice shall be given to the defendant in the same manner as hereinafter provided on assessment.
>
> or
>
> (b) set the matter down for assessment, giving at least 10 days notice of the date set for assessment.

[215] Rule 152 came from the 1944 Rule 118:

> 118. (1) If a sole defendant has, or all the defendants have, been noted in default, the plaintiff may apply *ex parte* to a Judge and the Judge may with such proof of the plaintiff's claim, as he shall see fit, make such order for final judgment or assessment of damages or otherwise as the plaintiff is entitled to.
>
> (2) Notice of assessment of damages shall be given to a defendant unless otherwise ordered.[153]

[216] And Rule 118 was expanded from the 1914 Rule 157 which provided:

> 157. If a sole defendant has, or all the defendants have, been noted in default, the plaintiff may apply *ex parte* to a Judge and the Judge may with or without proof of the plaintiff's claim, as he shall see fit, make such order for final judgment or assessment of damages or otherwise as the plaintiff is entitled to.[154]

[217] Rule 118 and Rule 157 were substantially the same except that Rule 118 added the requirement to give notice of the assessment of damages. Notice of assessment hearings continued to be required under Rule 152, however, there is one major difference between Rules 118 and 152: Rule 152 created the two-pronged approach that enables the plaintiff to choose whether to proceed *ex parte* or with notice. Rule 152 also provides the judge with the option to assess damages on an *ex parte* basis by directing an accounting.

[218] The leading authority on the interpretation of Rule 118 is the Supreme Court Appellate Division case *Sulef v. Parkin*.[155] The issue in *Sulef v. Parkin* was whether a plaintiff could obtain a final judgment for damages in the absence of an assessment hearing and notice to the defendant. Smith C.J.A, on behalf of the Court, rejected the argument that the rule was permissive or that it provided the judge with an alternative to ordering the assessment of damages.[156] Smith C.J.A. stated:

> In my view, the practice in Alberta is settled under R. 118 that when a defendant in an action for damages is noted in default the proper order

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[153] *Rules of the Supreme Court of Alberta, 1944*, r. 118.

[154] *The Consolidated Rules of the Supreme Court of Alberta, 1914*, r. 157.

[155] *Sulef v. Parkin*, [1966] 57 W.W.R. 236 (C.A.).

[156] *Ibid.* at 238.

> for the judge to make is an order that the defendant is liable to the plaintiff for damages to be assessed. The amount of the damages is to be ascertained upon the assessment, of which the defendant is entitled to notice unless otherwise ordered. It appears to me that it would be a rare and exceptional case in which notice to the defendant could be dispensed with.[157]

[219] As a result of *Sulef v. Parkin*, the practice in Alberta in relation to undefended actions for unliquidated demands was, supposedly, to always have an assessment hearing on notice to the defendant, except in very rare circumstances.

[220] After *Sulef v. Parkin* was decided, Rule 152 came into effect. The Supreme Court Appellate Division considered the meaning of Rule 152 in *Spiller v. Brown*[158] and dealt with the issue of whether 152(2)(ii) has the same meaning as the like part of the old Rule 118. Johnson J.A. noted that if the meaning was the same there would be no difference between the rules. If not, he observed that the rule would have the effect of introducing a new alternative for the judge. He describes the alternatives as follows:

> What these alternatives are is made quite clear: (a) when permissible and upon proper proof he may direct final judgment, (b) he may set the motion down for hearing. The nature of the hearing will be settled by the judge making the order. If he is satisfied that the plaintiff has a cause of action, the hearing may be limited to an assessment of damages.[159]

[221] Ultimately, the court in *Spiller* v. *Brown* concluded that both alternatives exist. The broader scope of Rule 152 was later confirmed by Justice Lee in *Syncrude Canada Ltd. v. Tibo Steel Products Ltd.*:

> I conclude that the new Rule 152 gives a judge wider discretion than the old Rule 118, under which the *Sulef* case was decided. Under Rule 152, the Plaintiff may apply and the Court can, if satisfied by affidavit, give final judgment or direct an accounting, or set the matter over for hearing on notice or set the matter down for assessment.[160]

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[157] *Ibid.* at 239-240 (emphasis added).

[158] *Spiller v. Brown*, [1973] 6 W.W.R. 663 at para. 6 (Alta. S.C.A.D.).

[159] *Ibid*.

[160] *Syncrude Canada Ltd. v. Tibo Steel Products Ltd.* (2001), 292 A.R. 368, 2001 ABQB 478 at para. 19.

[222] The evolution of Rule 152 can therefore be mapped out as follows:

- Under Rule 157 a notice requirement was not stipulated;
- Rule 118 stipulated that where an assessment hearing was ordered, notice was required and *Sulef v. Parkin* established that assessment hearings would be required before a final judgment could be obtained in undefended actions for damages (except in rare cases).[161]
- Rule 152 expanded Rule 118 by creating a two-pronged approach for the plaintiff to obtain judgment in undefended actions for damages: 1) damages could be assessed *ex parte* by way of an accounting; or 2) damages could be assessed at an assessment hearing on notice to the defendant.
- The existence of a two-pronged approach was confirmed in *Spiller v. Brown*.[162]

2. The Requirement of Notice - When and why is notice required?

[223] Although Rule 152 provides for a two-pronged approach, the rule provides no guidance as to when a plaintiff should proceed using one prong or the other. Nor is the case law of much assistance in that regard. There is also significant uncertainty about when assessment hearings are required, and what kind of evidence is required when you get there. A comment was received at the Institute from a lawyer who asked for clarification on this area of practice:

> What is the defendant entitled to do? Cross-examine and make submissions but not lead evidence? What about the plaintiff's experts–do they need to appear to give oral evidence or can their reports be submitted as exhibits without more? And just when does notice have to be given to the defendant? Just in divorce/matrimonial property proceedings? Personal service?

[224] This comment highlights the uncertainty that exists regarding whether an assessment hearing is akin to a chambers application and limited in scope to affidavit evidence, or whether it is more akin to a trial where *viva voce* evidence is permissible. This comment also reflects the confusion among practitioners as to when it is appropriate to proceed *ex parte* and when notice is required.

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[161] *Supra* note 155.

[162] *Supra* note 158.

[225] Indeed, there does not appear to be any hard and fast rule to guide this procedural decision except in the following cases: a) where a demand of notice has been filed and the claim necessarily proceeds by way of assessment hearing, or b) in cases involving complicated claims for unliquidated damages the plaintiff may set the matter down for an assessment hearing on the presumption that a judge would set it down for an assessment in any event if the plaintiff attempted to proceed *ex parte*.[163]

[226] Although there does not appear to be a clear answer as to "when" notice is required, answering the question of "why" notice is required does shed some light on its application.

[227] *Sulef v. Parkin* established that a failure to defend constitutes an admission of liability.[164] This principle does not, in and of itself, automatically entitle a plaintiff to judgment against the defendant, however. Johnson J.A. in *Spiller v. Brown* refers to *Sulef v. Parkin* and clarifies the principle. He states:

> [B]ut the matter does not end there. Neither by pleadings nor admissions can a defendant give a court jurisdiction that it does not otherwise have [Viscount Cave L.C. in Donald Campbell & Co. v. Pollak (1927) A.C. 732 at page 804], and I think it is equally clear that admissions cannot create a cause of action where none exists. The plaintiff's manoeuvring to remove the other defendants from the action aroused a suspicion in the trial judge that her counsel did not wish to be forced to prove that the defendant Brown was guilty of gross negligence. Where a judge has doubt as to the existence of a cause of action it is his duty, in my opinion, to invoke (ii) of Rule 152(a) and direct a hearing on the point.[165]

[228] Based on this reasoning, the assessment hearing is also used to enable the court to satisfy itself that: 1) a cause of action exists; and 2) that it warrants an award for damages. But the question still remains: *Why notice*? Cannot the court satisfy itself that a cause of action exists on an *ex parte* basis? If not, and *viva voce* evidence is required, the assessment hearing resembles a trial. If what is meant by an assessment

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[163] On the difference between subrules 152(a) and 152(b), see *Civil Procedure Handbook*, *supra* note 4 at 131 which suggests that "R. 152(a) gives alternative procedures which can be used if the amounts are smaller, or if the matter is not very contentious. For example, sometimes a claim is technically unliquidated, but there is not much doubt how to compute it."

[164] *Supra* note 155 at 239.

[165] *Supra* note 158 at para. 8.

hearing on notice is really a trial, then perhaps the rule should state as much. Further, even if the defendant receives notice, they cannot defend without first applying to set aside the noting in default.

[229] Manitoba and Ontario have structured their default rules that way. The *Manitoba Queen's Bench Rules* specify that a plaintiff may make a motion for judgment[166] and that notice is not required.[167] If the judge has doubts as to the amount of damages or whether a cause of action exists, the judge may dismiss the motion or order that the action proceed to trial on the basis of oral evidence.[168] The Ontario rule is similar and provides as follows:

> 19.05 (1) Where a defendant has been noted in default, the plaintiff may move before a judge for judgment against the defendant on the statement of claim in respect of any claim for which default judgment has not been signed.
>
> (2) A motion for judgment under subrule (1) shall be supported by evidence given by affidavit if the claim is for unliquidated damages, a divorce or a declaration of the invalidity of a marriage.
>
> (3) On a motion for judgment under subrule (1), the judge may grant judgment, dismiss the action, or order that the action proceed to trial and that oral evidence be presented.
>
> (4) Where an action proceeds to trial, a motion for judgment on the statement of claim against a defendant noted in default may be made at the trial.[169]

[230] Rule 152 was at issue in *Goulet v. da Silva.*[170] In that case the defendant applied to set aside a judgment obtained pursuant to Rule 152. The question was whether the judgment was a final judgment granted on notice that could not be set aside under Rule 158 (granted pursuant to 152(a)(ii)), or whether the judgment was a default judgment that could be set aside under Rule 158 (granted pursuant to Rule 152(a)(i)).

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[166] Manitoba, r. 19.05(1).

[167] *Ibid.*, r. 19.02.

[168] *Ibid.*, r. 19.05(3).

[169] Ontario, r. 19.05(3).

[170] *Goulet v. da Silva* (2002), 313 A.R. 32, 2002 ABQB 369 [*da Silva*].

[231] Watson J. *in da Silva* confirmed that it is the fact of notice which dictates whether an assessment hearing has occurred for the purpose of Rule 152(a)(ii) – not the existence of *viva voce* evidence and not the fact that the plaintiff is required to provide additional evidence as to the existence or the amount of the claim.
[232] Are there any benefits to requiring notice then? It is true that notice serves the useful purpose of establishing finality, otherwise the defendant can seek to have the judgment set aside under Rule 158, as was the case in *da Silva*. Where a plaintiff has gone to the lengths of serving the defendant with the statement of claim, noting them in default, attending chambers on an *ex parte* basis to obtain a final judgment (with or without an accounting), and then even proceeding with enforcement, it would no doubt be a real, or at least perceived, injustice to then have the judgment set aside. Requiring notice could prevent this situation from arising.

[233] On the other hand, the total number of judgments sought to be set aside each year are relatively few in number and the setting aside of a few judgments is probably not a big enough problem to justify a notice requirement in all cases.[171] Further, if notice is not required in actions involving liquidated claims, why should it be required in actions involving unliquidated claims? One reason might be that defendants should be entitled to know the amount of the judgment before it is entered against them. Conversely, if the defendant wanted to know the amount of the judgment, they would have filed a demand of notice.

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUE 27

[234] The Committee is of the view that the two options currently available to the plaintiff should be reduced to a single option so that there is a standard approach to all applications for judgment involving unliquidated claims. This will reduce the confusion among applicants as to when and under what circumstances notice is required.

[235] The Committee takes the position that notice is not warranted in every case and an *ex parte* application will be sufficient in most cases to address the mischief sought

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[171] Statistics provided by Wayne Samis, Deputy Clerk of the Court and Manager, Court of Queen's Bench, suggest that in 2002 only 2.3% of default judgments were set aside and in 2003 only 3.3% of default judgments were set aside.

to be remedied by the rule in the first place. As such, all applications for final judgment under Rule 152 should proceed *ex parte.* A standard approach will eliminate the requirement for the plaintiff to choose which way to proceed and thereby eliminate the risk that an application will unnecessarily proceed by way of assessment.

[236] Nonetheless, the rule must still enable the judge to carry out the duty of the court to ensure that a cause of action exists before giving final judgment.[172] Therefore, the Committee proposes that, like the Ontario approach, the rule should enumerate the options available to the judge at the *ex parte* motion for judgment. The rule should state that the judge may:

- give final judgment;
- direct an accounting of damages;
- adjourn the application and order additional evidence (affidavit or *viva voce*);
- dismiss the action;
- order that the action proceed to trial and that notice be given to the defendant; or
- make such further orders as may be just.

[237] The Committee is also of the view that Rule 152 should be worded similarly to the Ontario rule so that the application of the rule is not limited to claims for monetary relief. The Committee noted, however, that the reference in the Ontario Rule to "divorce or a declaration of the invalidity of a marriage" should not be adopted because Alberta has specific rules dealing with divorce matters. Similarly, subsection (4) of the Ontario rule need not be adopted because Rule 154 already contemplates this situation.

F. Liquidated Demands and Judgment Interest

ISSUE No. 28
Should Rule 148 be revised to take into consideration the right to claim interest under the *Judgment Interest Act*?

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[172] *Spiller v. Brown*, *supra* note 158.

ISSUE No. 29
Should the definition of liquidated demand in Rule 5(1)(i) be revised to include a reference to interest on liquidated demands?

[238] Under Rule 148 default judgment can be entered only for liquidated claims. Liquidated demand is defined in Rule 5(1)(i) and the test is whether "an exact or easily calculable amount is sued for."[173] Rule 148 sets out the circumstances under which interest may be entered as part of a default judgment. Generally speaking, if a claim for a debt or liquidated demand in a statement of claim includes interest, (whether as debt or damages) default judgment for that amount may be entered against the defendant. But the rule does not stop there. Rule 148(1) also excepts some interest from being included in the default judgment and states that where the "interest is claimed by way of damages (whether under statute or otherwise) judgment for the interest may only be entered by leave of the court" and may be subject to assessment under Rule 152.

[239] The *Judgment Interest Act* came into force in 1984.[174] Section 2(1) of the *Act* provides for an award of interest pursuant to the rate set under "this Part" (the Judgment Interest Regulations). Section 2(3) allows the court to award interest for another amount where it considers it just to do so. Section 2(5) allows the clerk of the court to calculate interest for the purpose of entering a default judgment, but precludes the clerk from exercising the discretion provided to the court in subsection (3).

[240] Rule 148 is not inconsistent with the *Act.* Both provide that where the calculation of interest is based on a set rate, either under contract or statute, it can form part of the default judgment. However, where the calculation of interest requires the exercise of discretion, both are clear that interest should not form part of a default judgment.

[241] Even though the *Act* and Rule 148 have a consistent meaning, the wording of Rule 148 is confusing in light of the *Act*. It provides for the inclusion of interest for a liquidated claim "(whether as debt or damages)" but later in the rule it excepts interest

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[173] *Civil Procedure Handbook*, *supra* note 4 at 127.

[174] *Judgment Interest Act*, R.S.A. 2000, c. J-1 [*Act*].

"claimed by the way of damages (whether under statute or otherwise)" from being included in the default judgment without leave of the court.

[242] The definition of liquidated demand also lacks clarity in relation to when interest will form part of the liquidated demand. The definition is set out in subrule 5(1)(i):

> "liquidated demand" means a claim for a specific sum payable under an express or implied contract for the payment of a sum of money not being in the nature of a penalty or unliquidated damages, the amount whereof is fixed by the terms of the contract or can be ascertained by calculation only or upon the taking of an account between the plaintiff and the defendant; or a claim for a specific sum of money, whether or not in the nature of a penalty or damages recoverable under a statute which contains an express provision that the sum sued for may be recovered as a liquidated demand or as liquidated damages.

The definition in Rule 5(1) makes no direct reference to interest. That being said, interest claimed pursuant to a contract (i.e. as a debt) already falls within the existing definition of liquidated demand based on the current wording ("the amount whereof is fixed by the terms of the contract"). Conversely, interest claimed at common law pursuant to the *Judgment Interest Act* does not necessarily fall within the definition as it currently exists because the *Judgment Interest Act* does not contain an "express provision", as stipulated in the rule, that the interest may be recovered as a liquidated demand. As such, the definition may need to be revised to accommodate interest claimed at a set rate pursuant to a statute.

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUES 28 AND 29

[243] The Committee is of the view that Rule 148, as it relates to the *Judgment Interest Act*, is accurate and need not be revised as to substance. The Committee suggests, however, that the rule be redrafted so that it is clear that where the calculation of interest is based on a set rate, either under contract or statute, it can form part of the default judgment, but where the calculation of interest requires the exercise of discretion, interest should not form part of a default judgment.

[244] The Committee is also of the view that the definition of "liquidated demand" in Rule 5 should state clearly that interest claimed at a fixed rate pursuant to a contract or statute will form part of the sum capable of entry by default judgment.

G. Setting Aside Default Judgments

[245] Rules 157 and 158 provide for the variation and setting aside of default judgments. Both of these rules are addressed in Chapter 3 of Consultation Memorandum No. 12.10 entitled "Motions and Applications" which deals with the variation and setting aside of orders and judgments generally.

H. Circumstances Requiring Leave of the Court Before Default Judgment can be Entered

ISSUE No. 30
Should the requirement for leave of the court be maintained in Rule 16(2)?

[246] Rule 16(2) deals with the process for obtaining default judgment against a defendant when a solicitor fails to carry out their undertaking to file a statement of defence or demand of notice under Rule 16(1).

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUE 30

[247] The Committee previously proposed changing Rule 16(1) to provide that a solicitor may accept service alone without giving an undertaking to defend or appear.[175] If Rule 16(1) is changed to omit the undertaking to defend, there would be no reason to maintain the requirement to seek leave of the court to commence default proceedings in those circumstances. The Committee therefore proposes the deletion of Rule 16(2).

ISSUE No. 31
Should the requirement to seek leave of the court be maintained in Rule 23(4)?

[248] When prompt personal service is impracticable, Rule 23(1) requires a plaintiff to obtain an order allowing a defendant to be served substitutionally. Rule 23(4) currently requires the plaintiff to seek leave of the court in order to enter default judgment where the statement of claim has been served pursuant to an order for substitutional service.

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[175] ALRI CM 12. 1, *supra* note 125 at 40.

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUE 31

[249] The Committee has previously proposed deleting from Rule 23(4) the requirement to obtain leave because the requirement "is typically met by an additional paragraph in the substitutional service order, and therefore serves no real function."[176]

ISSUE No. 32
Should the requirement to seek leave of the court be maintained in Rules 73 and 74?

[250] Rule 73 applies when the defendant does not file a statement of defence or demand of notice, but nonetheless issues a third party notice. Rule 73 stipulates that the defendant may, by leave of the court, have judgment against the third party to the extent claimed in the third party notice. Rule 74(1) deals with the situation when the third party fails to defend and the plaintiff has obtained a judgment other than by default. It gives the court authority to give judgment for the defendant against the third party as the case requires.

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUE 32

[251] The Committee was of the view that the situation contemplated by Rule 73 could not possibly arise. First, Rule 66(4) requires a defendant to file a statement of defence or demand of notice in order to issue a third party notice. Second, why would a defendant choose not file a statement of defence but yet choose to file a third party notice? The Committee suggests that Rule 73 be deleted from the rules.

[252] The Committee was of the view, however, that Rule 74(1) should be maintained. Rule 74(2) will be addressed by the Enforcement of Judgments Committee in its forthcoming consultation memorandum on enforcement of judgments.

ISSUE No. 33
Should the requirement for leave be maintained in Rule 143?

[253] Rule 143 provides that judgment shall not be entered against an infant or person of unsound mind on default except by leave of the court. All jurisdictions in Canada

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[176] *Ibid.* at 45.

(with the exception of the federal jurisdiction) require leave of the court before a party can initiate default proceedings against an infant or person under disability.

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUE 33

[254] The Committee previously considered this issue in Consultation Memorandum No. 12.4 and agreed that leave should continue to be required under Rule 143 before default judgment can be entered against a person under disability.[177]

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[177] Alberta Law Reform Institute, *Parties* (The Rules Project, Consultation Memorandum No. 12.4) (Edmonton: Alberta Law Reform Institute, 2003) at 41.