ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Judicial Review

- **Scope of Judicial Review Rules**
- **Limitation Periods for Judicial Review**
- **Parties, Intervention and Service**
- **Case Flow in Judicial Review**
- **Returns, Discovery and Evidence**

Consultation Memorandum No. 12.13

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* [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 Judicial Review Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the committee are:

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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
12.13	Judicial Review	August 2004	October 31, 2004

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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 the rules relating to judicial review found currently in Parts 56 and 56.1 of the Rules.

Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the Judicial Review Committee has identified a number of issues arising from these procedures and has made proposals. These are not final proposals, 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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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.

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EXECUTIVE SUMMARY

Introduction

The Judicial Review Committee of the Rules Project was formed to look at Parts 56 and 56.1 of the Rules and to propose changes, if any, to bring the judicial review rules into line with the broader objectives of the Rules Project. The current judicial review rules are the product of ALRI's 1984 Report No. 40, *Judicial Review of Administrative Action*.[1] This Report is available in pdf format on the ALRI website, <http://www.law.ualberta.ca/alri/finalreports_pg3.html>. This review is the first assessment of the judicial review rules since then.

The Committee undertook its review by first soliciting input from the Bar and Bench on concerns related to Parts 56 and 56.1. After this initial consultation process, the Committee met and formulated a set of nine broad issues that formed the basis for its work. Issues were assigned to members of the Committee for in-depth research. In a series of monthly meetings, the Committee considered the memoranda prepared by members, discussed the issues raised therein, and arrived at a consensus on each of the issues.

The basic approach in the 1984 Report was to adopt a single procedural route to obtain prerogative remedies on judicial review consisting of some special procedures engrafted on the general rules. Thus, where Part 56.1 is silent on an issue, Rule 753.19 makes the general rules apply by default.

Applications for judicial review are commenced by way of originating notice, and may be made in respect of the decision of any person who is subject to judicial review. Applications to set aside a decision must be made within six months of the decision under review. Applications must be served on the tribunal, the Attorney-General and every person "directly affected." Where the application is to set aside a decision, the tribunal must produce a return of its record of proceedings and other materials. In applications seeking other relief, the applicant must request an order

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[1] Institute of Law Research and Reform, *Judicial Review of Administrative Action: Application for Judicial Review* (Report No. 40) (Edmonton, Alberta: Institute of Law Research and Reform, 1984) [1984 ALRI Report].

producing the return. The Rules provide the court the usual breadth of remedial discretion on judicial review.

Proposals for Consultation

The Committee's guiding principle in reviewing Parts 56 and 56.1 was to avoid a self-contained code of rules for judicial review, and to strive for specialized rules, where necessary, built on the existing foundation of the general rules. For the most part, the current use of the general rules as a default (Rule 753.19) remains the most appropriate model.

At the same time, the Committee recognized, as did ALRI in the 1984 Report, that special procedures or other departures from the model in the general rules are required by certain important distinctions between public law litigation and ordinary civil litigation. The Committee's litmus test for raising proposals for reform was, in considering each issue outlined below: “Is there any basis rooted in the uniqueness of judicial review proceedings for departing from the general rules on this issue?”

We concluded that the overall scheme under Part 56.1 is appropriate and that changes are needed only in a few areas. The following outline covers the areas in which the Committee proposes reform.

In CHAPTER ONE, we propose that the Rules be reformed to clarify that they cover statutory rights of appeal, stated cases and controverted elections. However, we also propose that in these circumstances the rules give way to any procedures set out in external legislation governing those access-to-court processes. As well, the Committee proposes repealing Part 56 altogether, seeing it as redundant.

In CHAPTER THREE, we propose that the time for delivery of judicial review materials in cases seeking to set aside a decision be the existing six months for commencing proceedings, plus 14 days for service. In addition, we propose that the Rules clarify that while service on the tribunal and the Attorney-General remains mandatory within this time frame, a failure to do so is not fatal to the application if the Attorney-General or tribunal waives the defect.

In CHAPTER FOUR, we propose that any affidavits on judicial review be filed and served "as soon as reasonably practicable" rather than 10 days before the date named in the originating notice for the hearing (R. 406).

In CHAPTER FIVE, we make FOUR basic proposals about returns.

1. We propose that the Rules better clarify the options available to an applicant for obtaining a return in cases where they are not seeking an order to set aside the tribunal's decision (i.e. when a return is not mandatory)
2. We propose confirming the court's ultimate discretion to vary the scope of the return, whether on its own motion or at the request of one or both parties.
3. We propose more precision in describing the tribunal's obligations in cases where they propose to deliver an incomplete or amended return.
4. We propose that the time frame for producing the return should be described as "as soon as reasonably practicable."

Also in CHAPTER FIVE, we propose clarifying that the usual rules about discovery do not apply on judicial review, and adding a requirement to obtain the leave of the court before issuing a notice under Rules 266 or 267.

This Consultation Memorandum covers selected issues on which the Committee deliberated. Except for the proposals we make on those issues, the Committee defers to the principles espoused in the ALRI's comprehensive 1984 Report on judicial review and suggests no other changes to the Rules in Part 56.1.

LIST OF ISSUES

SCOPE OF THE JUDICIAL REVIEW RULES

THE LIMITATION PERIOD

PARTIES, INTERVENTION AND SERVICE

JUDICIAL REVIEW CASE FLOW

RETURNS, DISCOVERY AND EVIDENCE

CHAPTER 1. SCOPE OF THE JUDICIAL REVIEW RULES

[1] This chapter discusses the Committee's review of some "scope" and "interaction" issues in judicial review procedure. In Issue No. 1, we first review the basic scope of the judicial review rules: what proceedings should be governed by them? Then, in Issues No. 2 to 4, we review issues related to the interaction between the judicial review rules and other "access-to-court" procedures found in other legislative provisions and other parts of the Rules. Finally in Issue No. 5, we ask whether Part 56 of the Rules remains necessary to preserve the *habeas corpus* remedy.

ISSUE No. 1
What should be the scope of the judicial review rules?

[2] The threshold question in our Report is to revisit the basic scope of the judicial review rules. Rule 753.01 applies Part 56.1 to any "board, commission, tribunal or other body ... subject to judicial review." This clearly covers the entire range of decision-makers acting under formal statutory authority.

[3] On the margins, however, are "domestic" tribunals and other privately-constituted bodies whose reviewability may be in doubt. The Committee looked at this issue, as well as the broader question of whether the current definition in Rule 753.01 suffices to capture the real scope of public law proceedings.

[4] The Committee noted that some provinces (e.g. British Columbia and Ontario) have developed a definition of "statutory power" or "statutory power of decision" to differentiate the public law scope of judicial review from the procedure used in private law matters. The attempt to statutorily define the boundary between public and private law in this manner has caused troublesome litigation. In 1984, ALRI concluded that there should be "an open frontier"[2] between judicial review procedure and ordinary civil proceedings. As explained in the ALRI Report:

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[2] This expression is borrowed from H.W.R. Wade, "Public Law, Private Law and Judicial Review" (1982) 99 Law Q. Rev. 166 at 170.

> 7.20 We do not think that applicants should be denied their remedies because they cannot bring themselves within a definition of "statutory power" or "statutory power of decision." Nor do we think that a satisfactory definition can be devised to delineate the class of public law matters for which judicial review would be available. We think that any definition which is adopted will lead to difficulties of interpretation and to consequent litigation over procedure, which is precisely what should be avoided.
>
> 7.21 The only practical alternative is, in our view, a procedure under which the choice of procedure is ultimately within the discretion of the court.[3]

ALRI summarized the effect of its recommendation as follows:

> Under our proposal it will be for the claimant to choose to follow the judicial review procedure or another procedure; and for the Court, if it is not satisfied with the applicant's choice, to direct that the application continue under the other procedure. The claimant would not be deprived of his remedy (e.g. through the expiry of a limitation period after the commencement of the proceeding) and the proceeding would go ahead with the minimum of cost and delay.[4]

[5] Our current Rule 753.01, then, anchors the scope of Part 56.1 in administrative law principles governing who is subject to judicial review. This approach has worked well.

[6] On the issue of domestic tribunals, Alberta jurisprudence already establishes that they can fall under the judicial review rules.[5] Further, even if a tribunal is found not to fall under Part 56.1, much the same relief can be obtained by applying for a declaration or injunction under the general rules. Accordingly, at present there are no real barriers to relief, whether through public or private litigation, from decisions of domestic tribunals that warrant any changes to the existing Rules.

POSITION OF THE JUDICIAL REVIEW COMMITTEE

[7] The Committee saw no grounds for changing the description of the bodies subject to Part 56.1. Retaining the reference, in Rule 753.01, to a "board, commission,

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[3] 1984 ALRI Report, *supra* note 1 at 49-50.

[4] *Ibid.* at 4-5.

[5] *Kaplan v. Canadian Institute of Actuaries* (1994), 161 A.R. 321, aff'd (1997), 206 A.R. 268 (C.A.).

tribunal or other body whose decision, act or omission is subject to judicial review" is preferable to trying to expressly define the boundary between public and private law matters for the procedural purpose of judicial review.

ISSUE No. 2
How should the judicial review rules interact with statutory rights of appeal?

[8] Whereas Issue No. 1 addressed who is subject to judicial review, this issue and Issue No. 3 deal with the route litigants may take to apply for relief in the Court of Queen's Bench in other proceedings with a public law aspect to them. The Committee considered three instances where the judicial review rules overlap with "access-to-court" provisions found elsewhere in legislation and elsewhere in the general rules. The present Rules provide no specific procedure for these types of proceedings.

[9] The first instance of overlap is with statutory rights of appeal (SRAs) from tribunals to the Court of Queen's Bench that are found in a wide array of provincial legislation.[6] These provisions are diverse and in some cases prescribe procedures that differ from the provisions in Part 56.1 of the Rules. At present the Rules have no provisions addressing SRAs specifically. One possibility is to accommodate them in the judicial review rules.

[10] While the Committee recognized some merit in uniformity of procedure for all proceedings that involve court review of administrative action, the practical challenges of trying to bring such a wide variety of SRA procedures under one umbrella alone weighs heavily against such an approach. In addition, the rules should, on principle, defer to the particular procedures set out in external legislation. Sound policy reasons underpin many key elements of statutory appeals from tribunals. Also, adopting a universal comprehensive code for all SRAs would needlessly disrupt established patterns of litigation practice in a wide range of specialized fields. Therefore, deference to these procedures is important, although some procedure for handling SRAs is called for.

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[6] See e.g. *Health Care Protection Act*, R.S.A. 2000, c. H-1, s. 23(2); *Health Information Act*, R.S.A. 2000, c. H-5, s. 82(4); *Mental Health Act*, R.S.A. 2000, c. M-13, s. 43.

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[11] The Committee proposes extending the scope of the judicial review rules to include statutory rights of appeal that involve matters of public law. The rules would, of course, apply subject to any specific procedures set out in the governing statute.

ISSUE No. 3
How should the judicial review rules interact with stated cases and controverted elections?

1. Stated cases

[12] The statutes governing some Alberta tribunals permit the tribunal to state a question of law to the Court of Queen's Bench.[7] The Rules however contain no procedures to deal with them. As with statutory rights of appeal, the issue is whether the judicial review rules should gather these procedures within their scope.

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[13] Given the parallels between stated cases and issues of law on judicial review proper, the Committee believes it would be useful to provide tribunals making a stated case with the same "entry point" to the court, while giving way to any unique procedures found in stated case provisions. In other words, the Committee thought it would be appropriate to bring the application by way of originating notice under the judicial review rules.

2. Controverted elections

[14] Under s. 127(2) of the *Local Authorities Election Act*, proceedings to contest an election are to be commenced by notice of motion.[8] Under s. 184 of the provincial *Election Act*, proceedings are to be commenced by petition.[9] Section 524 of the

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[7] See e.g. *Marketing of Agricultural Products Act*, R.S.A. 2000, c. M-4, s. 43:

> At any stage of any proceedings before an appeal tribunal it may, and if so directed by the Court it shall, state in the form of a special case for the opinion of the Court any question of law arising in the course of the proceedings.

[8] *Local Authorities Election Act*, R.S.A. 2000, c. L-21, Part 5.

[9] *Election Act,* R.S.A. 2000, c. E-1, Part 7.

Canada Elections Act does not specify any particular originating document for an election challenge.[10]

[15] Only proceedings under the *Local Authorities Election Act* are mentioned in the Rules. Rule 813 provides:

> The practice upon proceedings under the Local Authorities Election Act, where not provided for by the Act shall be governed by the practice for similar proceedings in the Court of Queen's Bench.

Rule 815 provides forms specifying the style of cause in the proceedings and a recognizance for payment of any costs awarded against the applicant. The recognizance form refers to an "application for leave to serve a notice of motion in the nature of a quo warranto" upon the member of the elected authority whose right to hold the seat is being challenged. A motion in the nature of a *quo warranto* is the procedure specified in the *Local Authorities Election Act* for contesting matters relating to an election.[11] Rule 814 provides that costs are to be allowed under Part 47.

[16] Controverted elections are properly a part of public law. As with a stated case, one issue is whether the judicial review rules should gather controverted elections within their scope to the extent that doing so is not inconsistent with procedures provided in the statute. A second issue is whether Rules 813-815 should be preserved in the Rules, placed in a Regulation under the *Local Authorities Election Act* or repealed. We will deal with these two issues in reverse order.

[17] The *Local Authorities Election Act* does not specify how the motion is to be brought. Rule 815 refers simply to the "practice for similar proceedings in the Court of Queen's Bench." We see two possibilities. First, the judicial review rules in Part 56.1 permit the court to grant any relief that the applicant would be entitled to in a proceeding for a quo warranto, among other remedies. This is one "practice for similar proceedings." Alternatively, Part 30 provides for special application to the court. Under Rule 394, it applies:

> (a) where by a statute or regulation the court or a judge is designated as having authority to issue any certificate or make any direction or order (otherwise than in any action), and

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[10] *Canada Elections Act*, S.C. 2000, c. 9.

[11] *Local Authorities Election Act*, *supra* note 8.

> (b) no procedure for an application to the court or a judge is provided.

Under Rule 395, the application, which may be brought ex parte, is to be supported by affidavit. It is not necessary to file any document commencing proceedings. In other respects, and subject to the direction of the court, the application is to be treated like an originating notice under Part 33.

[18] The Rules Project General Rewrite Committee has taken the position that the special application procedure should not be retained. Instead an application under a statute or regulation that authorizes the court to issue a certificate or make any direction or order (otherwise than in an action) and does not provide a procedure for the application, should be commenced by originating notice.

[19] What should happen to Rules 813-815? The choices are to keep a specialized set of rules for controverted elections, use the general originating notice rules, or utilize the judicial review procedures. (Petitions are not included among the choices because the General Rewrite Committee has proposed that the petition be abolished.) Given the rarity of controverted election applications, and in accordance with the principle adopted by our Committee that special rules should not be implemented where general rules are adequate, the Committee proposes that Rules 813-815 be repealed.

[20] Our Committee recognized some advantages in a single procedure for all court reviews of the exercise of public law powers whether those reviews involve stated cases, controverted elections, SRAs or applications for judicial review. The Committee therefore proposes that all controverted elections be dealt with under the judicial review rules. The Committee also saw risks in proposing a universal code with too much detail. In our view, the interests of user-friendliness and simplicity can be adequately met by providing a universal, but minimalist and deferential, "single entry point" model. Attempting to go further and prescribe a more detailed universal framework would be needlessly disruptive.

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[21] The Committee proposes that the judicial review rules be expanded to cover most aspects of public law, including conventional judicial review applications, SRAs, stated cases and controverted election proceedings. The Committee proposes that all

such proceedings be commenced by originating notice under the judicial review rules, unless statutory provisions themselves specify the means by which a proceeding shall be commenced. Part 58 (Rules 813-815) should be repealed.

[22] The proposed judicial review rules will provide that all judicial review proceedings be commenced by originating notice. The *Local Authorities Election Act* and the *Elections Act* should be amended to the same effect.

ISSUE No. 4
How should the judicial review rules interact with applications under Rule 410(e)?

[23] The final area of overlap with judicial review that the Committee looked at was Rule 410(e) applications. Rule 410(e) provides for the commencement by originating notice of:

> (e) proceedings for the determination of any question where there are no material facts in dispute and the rights of the parties depend upon the construction of
>
> (i) a written instrument, or
>
> (ii) a statute or order-in-council or a regulation,
>
> and for a declaration of the rights of the persons interested.

In short, a declaration can be obtained in an application under Rule 410 or in an application for judicial review under Part 56.1, and either application may concern the construction of a written instrument, statute, order-in-council or regulation.

[24] At present, Rule 753.16 governs this overlap by empowering the court to change the "track" of an application from the general rules to the judicial review rules, or vice-versa, where appropriate. The 1984 ALRI Report on judicial review regarded this provision as "a safety valve" to deal with situations where an applicant made a mistake in the choice of procedure or where there was an allegation that there had been a mistaken choice of procedure.

[25] The Committee discussed whether some form of amendment to the rules is required to more clearly delineate Rule 410(e) applications and applications for judicial review. In the Committee's opinion, this is a matter best left to the court. Any attempt to create additional rules to delineate the boundary between Rule 410(e)

applications and judicial review applications would likely add complexity and the potential for disputes in interpretation without any corresponding benefit in terms of clarity. The Committee saw the existing Rule 753.16 as an adequate provision to address this issue.

[26] The Committee notes that the Rules Project has already proposed rephrasing Rule 410(e) to allow all proceedings where "no significant factual disputes exist" to proceed as applications.[12] However, this proposal does not change our position, as it relates solely to how the general rules define applications.

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[27] The Committee does not believe any reform is needed to address the overlap between Rule 410(e) and the judicial review rules.

ISSUE No. 5
Is Part 56 redundant?

[28] The final issue in this chapter asks whether or not the provisions in Part 56 remain necessary. Part 56 is a remnant of the old judicial review rules, and now just essentially preserves, in Rule 738, the *habeas corpus* remedy as a freestanding remedy available through traditional proceedings or through judicial review. The Committee noted that Rule 738 is seldom invoked in practice.

[29] On the other hand, would removing Part 56 altogether somehow curtail access to *habeas corpus*, in that it would force all such applications into the judicial review rules? We agree with the position taken in the 1984 ALRI Report on judicial review that any reforms to the Rules must take care not to conflict with this access. However, we ultimately did not see that removing Part 56 would in any way lead to this result.

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[30] Overall, the Committee proposes removing Part 56 altogether. The passage of time has demonstrated that there is no need to retain it. In the Committee's view,

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[12] See Alberta Law Reform Institute, *Commencement of Proceedings in Queen's Bench* (Consultation Memorandum No. 12.1) (Edmonton: Alberta Law Reform Institute, 2002) at 13, para. 29.

habeas corpus applications can still be brought under the general rules, and it is unlikely that the rules would be interpreted in a way that would limit access to this remedy.

CHAPTER 2. THE LIMITATION PERIOD

[31] In this chapter, we review the six-month limitation period for bringing judicial review applications. In Issue No. 6 we address the length and the "start time" of the limitation period, and in Issue No. 7 we address the issue of judicial discretion to extend the six-month limitation period. A related question, which we take up in Issue No. 11 in the next chapter, is how the limitation period applies to service obligations.

ISSUE No. 6
Is a six month limitation period still appropriate, and should the rules clarify the start time?

[32] This issue has two related aspects: whether the six month time frame is still appropriate, and whether more clarity is needed on the start time. At present Rule 753.11 imposes a strict six-month time limit for bringing applications to set aside a decision or act. Rule 548 specifically does not apply to afford relief against this time limit. Alberta's six-month time frame is comparable to the time frame in other jurisdictions.[13] In its 1984 Report, ALRI affirmed the strictness of this approach.

[33] Case law affirms the strictness of the 6-month time limit.[14] An applicant cannot circumvent it by seeking other remedies.[15]

[34] The Committee noted several points in support of retaining the six-month period:

- Most people are capable of reviewing a decision, contacting counsel, and having them commence proceedings within 6 months.

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[13] They range from 30 days to 6 months. Ontario, Saskatchewan and British Columbia have no limitation period.

[14] *Spanach v. Workers' Compensation Board (Alta.)* (1987), 75 A.R. 212 at 215 (Q.B.); *Cardinal and Cowpar v. Canada (Ministry of Forestry Lands & Wildlife)* (1988), 93 AR 38 at 41 (Q.B.); *OH Ranch Ltd. v. Surface Rights Board (Alta.)* (1994), 148 A.R. 315 (Q.B.); *Skyline Roofing Ltd. v Workers' Compensation Board (Alta.)* (1996), 186 A.R. 69 (Q.B.); *Canadian Broadcasting Corp. v. Canadian Media Guild* (1998), 224 A.R. 172, 1998 ABQB 652.

[15] *Krawec v. Alberta (Workers' Compensation Board, Appeals Commission)* (1998), 233 A.R. 110, 1998 ABQB 886; *Simlote v. Alberta*, [1989] A.J. No. 818 (C.A.).

- Under some statutes, judicial review has to be commenced within 30 days, but the parties to those proceedings are usually more aware of statutory time limits.
- There should be some finality in administrative decisions; people should be able to rely on outcomes and order their affairs accordingly.
- Although there are cases where an applicant misses the time limit, these are relatively rare.

[35] The second aspect of this issue is when the limitation period begins to run. Rule 753.11(1) states that the filing and service must take place "within six months after the decision or act to which it relates." The issue here is whether the Rules should give more clarity to "decision or act" to ensure the limitation period does not catch persons who do not receive notice of a tribunal decision until weeks or months after it was made.

[36] The case law, however, already addresses this issue. A 1999 decision held that, notwithstanding the wording of the rule, the 6 months runs from the date of *receipt*, not the date of the *decision*.[16] That case involved judicial review of a decision of the Municipal Government Board. There, the applicant *filed* within the 6 months but failed to *serve* in time.

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[37] The Committee affirms the six-month time frame, and sees no reason for changing the rule to clarify more precisely when the limitation period commences. The existing Rule 753.11 is satisfactory with respect to the 6-month time period for filing and the determination of when time starts to run. The case law adequately deals with parties who have no notice of the order. Determining what constitutes the "decision" and when it occurs is a matter for the court on the facts of the particular case.

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[16] *Edmonton (City) v Braul Gaffney* (1999), 313 A.R. 161, 4 M.P.L.R. (3d) 99, 1999 ABQB 649, Perras J.

ISSUE No. 7
Should the rules provide for judicial discretion to extend the limitation period?

[38] Pursuant to Rule 753.11(2), the court has no power to extend the six-month limitation period. In the Committee's view, giving the court a discretion to extend the time creates undesirable uncertainty about the finality of administrative decisions.

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[39] The Committee proposes no reforms on this point.

CHAPTER 3. PARTIES, INTERVENTION AND SERVICE

[40] In this chapter, the Committee outlines its positions on the "who" – and some of the "when" – of judicial review proceedings: who are the proper parties, who can intervene, who must be served, and by what time. Issue No. 8 deals with party and intervenor status on judicial review. Issue No. 9 addresses service on the tribunal under review, and Issue No. 10 reviews service on the Attorney-General. Finally, in Issue No. 11 we consider the consequences of failing to serve within the six-month limitation period (a subject touched on briefly under Issue No. 6, above).

ISSUE No. 8
Should the judicial review rules have special provisions for parties and intervenors?

[41] Rule 753.1 empowers the court to add or remove a party, gives hearing rights to the Attorney-General, and allows for a non-party to apply to take part in the proceedings upon showing he or she is "affected by the proceeding." Otherwise, issues relating to parties to judicial review proceedings fall under the ordinary rules. The Committee saw no difficulties with this approach.

[42] The Committee also considered the specific issue of whether the judicial review rules should have their own provisions for intervention. At present, the Alberta approach is to defer to the default intervention rules. This is also the approach adopted in most other Canadian jurisdictions. Intervention is often a key procedural issue when the public law issues raised by the case have implications for non-parties. However, the Committee noted that the existing intervention provisions, both in the ordinary and judicial review rules, already contain sufficient flexibility to accommodate these unique aspects of public law litigation.

[43] The Committee also notes that the Rules Project has proposed a new provision in the general rules relating specifically to intervention.[17] Under this proposal, the court would have the power to grant leave to intervene "to any person." In the Committee's

[17] Alberta Law Reform Institute, *Parties* (Consultation Memorandum No. 12.4) (Edmonton: Alberta Law Reform Institute, 2003) at 21-24.

view, this flexible approach, which leaves intervention in the sole discretion of the court, is well-suited as the default mechanism both in the ordinary and judicial review rules.

POSITION OF THE JUDICIAL REVIEW COMMITTEE

[44] In conclusion, the Committee believes no reforms to the judicial review part of the Rules are necessary on the issues of parties or intervention.

ISSUE No. 9
Should service on the tribunal remain mandatory, and what should the consequences be for failure to serve?

[45] This issue, and the next two, deal with service of the application for judicial review. Rule 753.09 requires service on the tribunal or other body under review, and on the Attorney-General and "every other person affected." This requirement applies whether or not the tribunal has been named as a party.

[46] The Committee asked whether this rule requires any changes in light of the variety of situations in which judicial review proceedings can be brought. In most proceedings, the applicant both names the tribunal as a party and serves it with his or her originating process. In some proceedings, however, the applicant neither names the tribunal as a party nor serves it with the application. In others, the applicant serves the tribunal but does not name it as a party.

[47] The Committee noted some circumstances unique to public law litigation that weigh in favour of the current approach of naming and serving the tribunal. These include:

- Under our case law, the tribunal has a proper role to play – at least in explaining the record and making submissions on jurisdiction (which can be important to the court in determining standard of review). It would be unusual for the tribunal to have to seek party status on a case-by-case basis in order to do this.
- Judgments and orders are normally only binding on the actual parties to the proceedings.
- The tribunal should also have a right of appeal (at least on matters for which they have standing to argue).

- Party status brings with it the same procedural rights and obligations of the other parties, e.g., to seek adjournments, to be involved in any pre-hearing steps, to file a brief.
- Finally, the tribunal is sometimes the only possible respondent. Where there were two parties before the tribunal, there is a logical applicant and respondent for any later judicial review (e.g., union v. management). But where there was only one party (e.g., a person applies for a licence, approval, permit), only the applicant and the tribunal are involved in the judicial review application. As a matter of necessity, the tribunal has to be named as the respondent.

[48] In addition, the Committee noted that it is important for the tribunal to know about the judicial review application. The tribunal needs to know it is required to provide a return. The application may also affect the tribunal's practices or policies.

[49] However, the Committee also noted the risk that a mandatory service rule may leave some applicants vulnerable to attack for a technical failure to serve the tribunal in a case where the failure to do so is inconsequential. The consequences of failing to serve the tribunal can range from minor to severe depending on the nature of the judicial review proceeding. In cases at the minor end of the spectrum, the tribunal should be able to waive service and relieve against a technical breach of the service rules by the applicant.

POSITION OF THE JUDICIAL REVIEW COMMITTEE

[50] The Committee proposes keeping the existing requirement to serve the tribunal but clarifying that failure to serve the tribunal within the six-month limitation period (plus 14 days, as discussed in Issue No. 11 below) is not fatal to the application if the applicant is able to secure waivers of service from the tribunal.

ISSUE No. 10
Should service on the Attorney-General remain mandatory, and what should the consequences be for failure to serve?

[51] At present, the Rules require service on the Attorney-General of all judicial review applications. Most other provinces have the same requirement, although in some provinces this requirement applies only to applications to set aside. The 1984

ALRI Report supported this approach, noting the public nature of judicial review and the fact that the Attorney-General has a clear interest in all public law proceedings, whether or not named as a party.

[52] The Committee reaffirms this position, noting as well that:

- The Attorney-General has explicitly stated its wish to be served with all judicial review proceedings.
- Where an application affects the Crown, a government department or a statutory official, it is possible that the Attorney-General will seek to be added as a party once it is served.
- Where someone already acts for one of the respondents (e.g., the board or commission whose decision is challenged), counsel for the Attorney-General will be able to confirm that and avoid duplicate representation.

POSITION OF THE JUDICIAL REVIEW COMMITTEE

[53] The Committee affirms the existing requirement. The Attorney-General has a legitimate interest in public law proceedings and expects to be served. However, for the reasons given under Issue No. 10 above, failure to serve the Attorney-General should not be fatal where the Attorney-General waives the defect in service.

ISSUE No. 11
Should failure to serve within the limitation period be fatal?

[54] Where the previous two issues dealt with who must be served, this issue addresses the consequences of serving after the expiry of the six-month limitation period. The difficult aspect of this issue is the rigidity of the six-month time limit, which applies both to the commencement of the action and service of process. In contrast, the general rules allow an additional period of time to serve process after it is issued. An applicant for judicial review may believe that the six-month period applies to issuing the originating process and does not include service, only to discover later that their failure to serve was fatal to their case.[18]

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[18] In *Heikkila v Alberta (Workers Compensation Appeals Commission* (2003), 21 Alta. L.R. (4th) 283, 2003 ABQB 544, the court dismissed an application, one of the grounds being the failure to serve the tribunal within the six month period.

[55] To address this problem, the Committee saw merit in giving applicants an additional 14 days to serve in addition to the six month time limit for instituting an application, after which a failure to serve would be fatal. This strikes a balance between maintaining the finality of the limitation period and affording applicants some time after issuance to serve, following the general model in the Rules.

POSITION OF THE JUDICIAL REVIEW COMMITTEE

[56] The Committee believes that the period for service should be six months plus 14 days. That is, the basic limitation period for bringing judicial review applications should be strictly applied but with two weeks' additional time to serve the originating notice. The court should not be given discretion to vary either the 6-month or 14-day time period. However, failure to serve the tribunal or the Attorney-General even within this 6-month, 14-day period should not be fatal to the application where the tribunal or Attorney-General waives any deficiencies in service.

[57] To reiterate for clarity: Under our proposal, an applicant for judicial review would have six months from the decision or act to issue process, and six months plus 14 days to serve process. For example, for a tribunal decision dated January 1, the applicant may issue process at any time until July 1, and may serve process at any time until July 1 plus 14 days. And again, while late *issuance* of process is fatal to an application, late *service* is not if the tribunal or Attorney-General waives the defect.

CHAPTER 4. JUDICIAL REVIEW CASE FLOW

[58] In this chapter we review "case flow" issues, that is, issues related to promoting the expeditious resolution of judicial review proceedings. Here, we are confining our issues to time limits: how detailed they should be (Issue No. 12), and what time limits should govern affidavits (Issue No. 13). We discuss the time lines for returns separately under Issue No. 17 below.

ISSUE No. 12
Should the judicial review rules adopt specific or general time limits for case flow?

[59] At present, the Rules in Alberta adopt a flexible approach to timing in a judicial review application. In contrast, the *Federal Court Rules, 1998* specify particular time lines for each step of the process.

[60] A precise sequence of steps, each with its particular time requirement, may promote a quicker determination of judicial review applications. On the other hand, a rigid sequence of steps invites applications to the court to extend time. The approach of parties under Part 56.1 seems to have been working well without precise delineation of time requirements. Other factors the Committee noted were:

- In truly urgent cases, fixed time limits are meaningless, as they must usually be abridged. By contrast, in non-time-sensitive cases the parties usually establish a hearing date and work towards it. Counsel can usually work out a schedule for most interlocutory steps.
- Special rules on this type of procedural issue should remain in a practice note if possible because they can be changed more easily as circumstances require.

POSITION OF THE JUDICIAL REVIEW COMMITTEE

[61] The Committee saw no need for any reforms to the current approach to timing issues.

ISSUE No. 13
What should be the time limits for affidavits?

[62] Two rules of general application govern the service of affidavits (Rules 310 and 406). Rule 310 governs motions. Under Rule 310, affidavits must be served along with the motion. Judicial review proceedings are commenced by originating notice. Rule 406 is the general rule governing originating notices. Under Rule 406, affidavits must be served 10 days before the date named in the originating notice for hearing of the application. At present, a problem in meeting the service requirement for an affidavit could be met by application under Rules 548 and 549 which allow for the abridgement or enlargement of time, or by the operation of Rule 558 which provides that non-compliance with the Rules does not render a proceeding void and for the curing of an irregularity.

[63] Noting that judicial review applications increasingly rely on affidavit evidence, the Committee thought it would be beneficial to review the timing requirements for affidavits. Requiring the applicant to serve affidavits concurrently with the originating notice would give the respondent clearer notice of the basis of the application. Early filing and service of affidavits also allows time for cross-examination. However, the Rule 406 requirement that affidavits must be served 10 days before the date named in the originating notice for hearing or the Rule 310 requirement that affidavits be served along with the motion may not be realistic for judicial review applications. In practice, the hearing of a judicial review application is often adjourned to a later special chambers date and, if used, affidavits are usually filed and served along with the brief and authorities.

[64] The Committee recognized that there may be circumstances where affidavits or supplementary affidavits need to be filed later. For example, the return of the record may disclose unfair procedures, or disclose unanticipated gaps in the evidence which the applicant will then need to address in an affidavit. In our view, a compromise principle is to adopt a middle-ground obligation to supply affidavits “as soon as is reasonably practicable.”

POSITION OF THE JUDICIAL REVIEW COMMITTEE

[65] The Committee proposes amending the Rules to provide that affidavits on judicial review be filed and served "as soon as is reasonably practicable." The Committee does not feel it is practical to set a fixed time for service that would be workable in all cases.

CHAPTER 5. RETURNS, DISCOVERY AND EVIDENCE

[66] This chapter focuses on issues related to the fact-finding aspects of judicial review. The Committee reviewed three such aspects. The first aspect, discussed in IssueS No. 14 to 18, is the duty of the tribunal to deliver up a basic return of its decision and other materials related to its proceedings, and the question whether additional affidavit evidence can be submitted. The second aspect of fact-finding we canvass is discovery, discussed in Issue No. 19. The third aspect is taking evidence under the service-of-appointment powers found in Rules 266 and 267, which we review under Issue No. 20.

ISSUE No. 14
What should be the "triggering mechanism" for returns?

[67] This issue concerns *when* a return is required. At present, Part 56.1 contains two possibilities. First, Rule 753.12 requires a return automatically whenever the applicant seeks "an order to set aside a decision or act." Second, Rule 753.14 requires applicants seeking other remedies to apply to the court for an order that the tribunal "make the return" of its record. This distinction between an application to set aside and any other application came about as a result of a recommendation made by ALRI in its 1984 Report on judicial review. Where the application is one to set aside, ALRI recommended that:

> ...the applicant should be entitled to see the entire record and the return of that record should be mandatory. Where other relief is sought, the applicant should notify the public authority if he wants the record to be returned. The public authority should be able to object and the court should have the power to order the production of as much of the record as it considers appropriate[19]

[68] The Committee compared the Alberta approach with the triggering mechanisms for returns in other jurisdictions. The Federal Court, for instance, uses a passive approach, leaving to the applicant the initial determination of what should be produced by the tribunal. The applicant then requests production from the tribunal and

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[19] 1984 ALRI Report, *supra* note 1 at 79.

incorporates it into its "record." Any objection to production is dealt with before the hearing proper. In contrast, Ontario and Prince Edward Island employ Alberta's more activist approach by statutorily requiring production of the record of the hearing that is the subject of the application. Overall, the Committee believes that the current two-track model remains appropriate as a triggering mechanism.

[69] At the same time, the Committee saw merit in clarifying the second triggering mechanism. Currently, Rule 753.14 is not clear enough on how an applicant is to obtain a return when they are not seeking to set aside the decision. In this scenario, three basic possibilities exist:

- The applicant could ask the tribunal to voluntarily make a return.
- The tribunal could simply volunteer a return.
- The applicant could ask the court to order the tribunal to make a return.

In the Committee's view, it would be helpful if the Rules made the availability of each of these three alternatives more explicit.

POSITION OF THE JUDICIAL REVIEW COMMITTEE

[70] The Committee supports the existing approach of requiring returns in set-aside applications. In other applications a return could be requested by the applicant, volunteered by the tribunal, or ordered by the court.

ISSUE No. 15
What should be the scope of returns?

[71] This issue concerns *what* a return must contain. Rules 753.12 and 753.13 require that a tribunal produce the following materials:

(a) the judgment, order or decision, as the case may be, and the reasons therefor;
(b) the process commencing the proceedings;
(c) the evidence taken at the hearing and all exhibits filed;
(d) all other papers or documents touching the matter.

Rule 753.14(2) permits the court to dispense with or vary the scope of the return on non-set-aside applications. By contrast, for set-aside applications, the court's discretion under Rule 753.13(5) ("evidence or exhibits" only) is much narrower.

[72] The Rules extend the common law which defines the "record" as including:

(a) the document or information which initiated the proceedings and thus gave the tribunal its jurisdiction; and

(b) the document which contained the tribunal's decision.

At common law, it is not necessary to set out the evidence or the reasons, unless the reasons are incorporated in the tribunal's adjudication.[20]

[73] Alberta's approach to defining the scope of a return is consistent with the approach taken in other jurisdictions. Typically, return obligations consist of a fixed list of items the courts have said should be included in the record, and a catch-all category requiring the return of "all other papers or documents touching the matter."

[74] A related question is whether the parties should be able to agree on the contents of the return. On the face of the current Rules, it seems that they cannot, at least in applications to set aside. The Committee considered competing perspectives on this issue. On the one hand, parties ought to be able to define the issues and thus limit the contents of the record. On the other hand, judicial review is on "the face of the record," and if the court has only a partial record, it may be missing an important element. Also, there is a public interest in the entire record being before the court, notwithstanding the parties' agreement. Given the difficulty of fashioning a fixed rule to deal with the exigencies in all cases, the court should retain the discretion to permit variations in the return, whether or not they are proposed jointly by the parties.

[75] The Committee supports expanding the court's residual discretion to amend the scope of the return (now found in Rule 753.14(2)) to cover all judicial review proceedings, including applications to set aside. Expanding the court's ultimate powers over the return's contents in this way also accommodates cases where the parties agree on the return's contents and seek court approval to modify the strict requirements of the Rules.

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[20] *R. v. Northumberland Compensation Appeal Tribunal ex parte Shaw*, [1952] 1 K.B. 338 at 352; see also David P. Jones & Anne S. deVillars, Principles of Administrative Law, 3d ed. (Scarborough: Carswell, 1999) at 419-420.

POSITION OF THE JUDICIAL REVIEW COMMITTEE

[76] The Committee proposes that the court be empowered to dispense with or vary the contents of the return in all cases, whether on its own motion or on motion by either or both parties. No changes need be made to the list of materials that must be produced in a return.

ISSUE No. 16
How should the judicial review rules govern the tribunal's ability to amend the return?

[77] In some cases, the tribunal or other administrative decision-maker simply does not have the materials required by the Rules to be in the return. This could arise because of unforeseen circumstances, tribunal practice or other administrative factors. Rule 753.13(3) permits the tribunal to "state and explain" where it does not have required parts of the return. This is consistent with the approach in other jurisdictions.[21]

[78] The Committee considered the merits of framing the ability to explain omissions from the return in general terms. We noted that often, depending on the type of tribunal, the standard language in the rule relating to the certificate does not reflect what actually goes into the return, so in those situations, some tribunals have amended the certificate to better reflect the actual contents of the return.

[79] In light of this problem, the Committee saw merit in specifying the "state and explain" obligations in more general terms, and in giving the court greater overall control over whether a return amendment is permitted or not.

POSITION OF THE JUDICIAL REVIEW COMMITTEE

[80] The Committee therefore proposes expanding the tribunal's ability to explain circumstances where they propose to deliver a non-compliant return. As well, the court's powers to approve or reject a modified return ought to be confirmed in the Rules.

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[21] The Newfoundland, *Rules of The Supreme Court, 1986*, r. 54.08(2) and *Nova Scotia Civil Procedure Rules*, r. 56.08(2) provide for a slightly broader amendment to the certificate.

ISSUE No. 17
Should "forthwith" remain the deadline for returns?

[81] The final return issue we considered was how to describe the time frame in which the tribunal must deliver the return. Currently, the Rules use "forthwith" as the measure of time tribunals have for providing the return. This is consistent across most Canadian jurisdictions, with some exceptions.[22]

[82] The Committee's main concern about the continued use of "forthwith" is that it has been interpreted to mean "immediate," with little concern for practicality. Instead, the Committee discussed the merits of a more flexible standard that took the overall circumstances into account. While the Committee considered the idea of fixing a number of days, with provision for extensions, it was ultimately resolved that fixing a specific time was not appropriate because different circumstances would make the same time reasonable for some and unreasonable for others. The court can always deal with delays in producing the return.

POSITION OF THE JUDICIAL REVIEW COMMITTEE

[83] The Committee therefore proposes that the time frame for producing the return should be described as "as soon as reasonably practicable."

ISSUE No. 18
Should the judicial review rules specifically provide for supplemental evidence (affidavits)?

[84] The present judicial review rules are silent on the use of evidence to supplement the return. The Committee considered the question whether the Rules should specifically provide for the admissibility of affidavits or other evidence supplemental to a return, including subjecting a deponent to cross-examination to the return. One option is explicitly to bar such evidence except with leave of the court. Another option is to go further and define some of the circumstances in which a court may grant leave.

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[22] The Federal Court requires that the record be served within 20 days of a request and, in Prince Edward Island, s. 8(1) of the *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3 requires that the record be served within 10 days.

[85] While neither of these additions would be significant reforms, the Committee ultimately concluded they were unnecessary. In short, the case law adequately governs the issue of supplemental evidence.

POSITION OF THE JUDICIAL REVIEW COMMITTEE

[86] The Committee sees no reason to propose any changes to the Rules in respect of supplemental evidence on judicial review.

ISSUE No. 19
Should discovery rights exist on judicial review?

[87] Should the rules provide for discovery rights and obligations on judicial review? The current judicial review rules in Part 56.1 contain no express provisions on either the discovery of records (beyond production of the return) or oral examination for discovery.

[88] Rule 753.19 provides that the general rules apply where no special provision is made in Part 56.1. Rule 753.19 notwithstanding, case law has established that the normal discovery rules (presently found in Part 13) are not available on judicial review applications, except at the discretion of the court. The court has also held that documentary discovery is the exception rather than the rule, because the return already covers the most relevant documents.[23] As well, examinations for discovery were traditionally not part of judicial review applications.[24] To the extent that the examination of witnesses is possible, it is addressed by Rules 266 and 267, discussed below.

[89] The case law limiting discovery on judicial review proceeds from the principle that judicial review actions are essentially a review of administrative action based on the record before the administrative actor. As such, unless certain exceptions are met (e.g., that a party may place additional evidence before the court in order to establish a breach of natural justice), it is viewed as improper to review any materials beyond the

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[23] *Robertson v. Edmonton (City) Police Service*, [2003] A.J. No. 1057, 2003 ABQB 719.

[24] *Broda v. Edmonton (City)* (1989), 102 A.R. 255 (Q.B.); *Apotex Inc. v. Alberta* (1996), 182 A.R. 321 (Q.B.).

record. One procedural benefit of this process is that judicial review applications can be addressed more quickly than normal actions.

[90] On the other hand, the benefits of discovery include facilitating the search for truth and ensuring that parties have access to the evidence required to prove their cases. Discovery avoids unfairness that could otherwise arise if a respondent was permitted to conceal the truth.

[91] In its final analysis, the Committee agrees that discovery should not become part of the usual practice in judicial review proceedings. Despite any particular advantages it may offer in certain circumstances, making special provision for discovery on judicial review would have negative practical consequences in terms of added procedure and delay, and it would significantly alter the notion of judicial review as a review based on the record. Judicial discretion to permit discovery is adequate.

[92] The Committee considered whether potential interpretation problems may be created by making express provision regarding discovery on judicial review. Precisely, the concern is that the *expressio unius* principle in statutory interpretation may be invoked by a party to argue that other parts of the Rules not so expressly excepted should be deemed to apply. In the Committee's view, this problem can be addressed at the drafting stage by the use of language that guards against an unintended interpretation. Overall, the Committee took the view that the mischiefs created by including an express provision in the Rules are far smaller than those prevented by it.

POSITION OF THE JUDICIAL REVIEW COMMITTEE

[93] Based on the foregoing, the Committee proposes adding a rule to clarify that, except where permitted in the discretion of the court, the general discovery rules do not apply to judicial review applications.

ISSUE No. 20
Should leave be required for issuing notices under Rules 266 and 267?

[94] As mentioned above, judicial review is unique because it is has traditionally been a review on the record of the tribunal only. In this light, the Committee considered whether it would be advisable to add a mechanism to the judicial review

rules that requires a party to obtain the leave of the court to seek examination of a witness under Rule 266 or 267. Rules 266 and 267 are general rules under Part 26 on evidence which are incorporated into judicial review practice pursuant to Rule 753.19. It is now well settled that examinations under Rules 266 and 267 are available on judicial review applications.[25]

[95] A party cannot invoke Rule 267 without an order of the court. The current procedure under Rule 266 may be called "notice-and-object." No prior leave is necessary for the issue and service of a notice requiring a witness to attend an appointment for examination. If the witness objects to the notice, the person issuing the notice must establish a basis for it.[26] A notice under Rule 266 is sound if there is a possibility the witness will have something relevant and material to say on an issue in the proceedings; otherwise, it is an impermissible fishing expedition. To avoid the notice, the witness who has been notified must show that his or her evidence is either not relevant or not material.

[96] The Committee considered some of the possible drawbacks of the "notice-and-object" approach in the judicial review context. Placing the onus on the tribunal or other person sought for examination to object to the notice could place a hardship on tribunals and subject them to oppressive motions, a mischief that the current case law restricting discovery recognizes as well. On the other hand, a leave requirement for applicants to invoke Rule 266 may go too far in the other direction by inserting an additional procedural step in the way of examination.

[97] The Committee ultimately agreed that a leave provision is the most appropriate way to govern how Rules 266 and 267 apply to judicial review. Regardless of onus, the issues on a leave application are similar to the issues on an objection to a notice under Rule 266 or 267. Therefore, in substance, if there is a good case for examination, leave will be granted.

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[25] See e.g. *Robertson v. Edmonton Chief of Police* (2003), 334 A.R. 151, 2003 ABQB 188 [*Robertson*], aff'g *Dechant v Law Society of Alberta* (2002), 266 A.R. 249, 2000 ABCA 265.

[26] *Robertson*, *ibid.* at para. 40: Clackson J. also noted that in such cases there must be "a proper foundation for a clearly articulated and objectively reasonable concern that a relevant legal right may have been infringed."

POSITION OF THE JUDICIAL REVIEW COMMITTEE

[98] The Committee therefore proposes the addition of a special provision requiring parties to judicial review proceedings to obtain leave before proceeding under Rule 266, and a continuation of the present provision requiring leave before viva voce evidence is heard on a judicial review under Rule 267.