ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Miscellaneous Issues

- **Time**
- **Rule 11**
- **Delay in Prosecution**
- **Discontinuance**
- **Noncompliance & Irregularities**

Consultation Memorandum No. 12.14

October 2004

Deadline for Comments: November 30, 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
The Hon. Justice June M. Ross, Court of Queen's Bench of Alberta
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This consultation memorandum was written as follows: Chapter 1 by Sandra Petersson; Chapter 2 by Debra Hathaway; Chapter 3 by Cynthia Martens; Chapter 4 by Sheryl Pearson based on research done by Doris Wilson, Q.C; and Chapter 5 by Sheryl Pearson.

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
12.14	Miscellaneous Issues	October 2004	November 30, 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 November 30, 2004 .

This consultation memorandum addresses a hodgepodge of topics not addressed in previous consultation memoranda. Unlike previous consultation memoranda, there is no common thread that unifies the chapters in this memorandum and each of the five chapters should be read and responded to as a stand alone document.

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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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

As evidenced by the title “Miscellaneous Issues”, Consultation Memorandum 12.14 is a mixed bag of topics. It consolidates the following areas of The Rules: 1) Time; 2) Time for Service of the Statement of Claim; 3) Delay in Prosecution; 4) Discontinuance; and 5) Noncompliance and Irregularities.

Chapter 1 deals with time and vacation. Currently, the Rules contain over thirty different time periods ranging in duration from 24 hours to 10 years. Most of these time periods are under 30 days and many are roughly equivalent. The General Rewrite Committee proposes to replace these 30-some time periods with a smaller number of standard time periods. The principal ones would be 24 hours, 5 days, 10 days, 20 days and 1, 2, 3, and 6 months. Rules 548 and 549 would be retained to allow for the extension or abridgment of time.

The current principles for calculating time are also overly complicated. The Committee proposes that The Rules should contain a complete set of principles for calculating time; that time should be expressed in hours, days, months and years; and that "clear days" should be abolished. Wherever possible, time periods should be counted forwards rather than backwards. If time expires on a day when court offices are closed, time should be extended in the same direction that the time period runs. The time for delivering and amending pleadings should continue to run during court vacations. Whether or not trials should be held during the vacations is best left to the courts to decide.

Chapter 2 deals with time for service of a statement of claim. Currently, Rule 11, in effect, requires service within 1 year, subject to the court’s power to grant one extension of 3 months on an application brought within the year. The General Rewrite Committee currently favours retaining Rule 11, but it seeks the opinions and input of the profession on four possible options for reform of Rule 11 before making a final recommendation. One option is the status quo. The other options involve an initial 6 months for service with choices between a) a single 3 month extension on application before the expiration of the 6 months; b) a single 3 month extension on application

brought within a year of the filing of the statement of claim; and c) a single extension which would be for 3 months with a court discretion to substitute another term.

Rule 11(9) allows the court to renew a statement of claim for 3 months if specified waiver or estoppel circumstances exist. The Committee seeks input from the profession as to whether the court should be given a general discretion to extend the time for service. This would include an extension under the circumstances specified in Rule 11(9). It would also cover the situation in which an untraceable defendant surfaces after the time for service has expired and successfully applies to set aside an order for substitutional service and a consequent default judgment.

Chapter 3 deals with the issue of dely of prosecution. There are currently three options available to address inordinate delay: 1)the parties may agree to move an action along on the basis of an agreed upon schedule; 2) the court has discretion to dismiss actions or impose terms where inordinate delay has prejudiced a party; and 3) actions (in theory) are subject to automatic dismissal on application if there is undue delay, being more than 5 years since a thing was done that materially advances an action (the "drop dead" rule) . Subject to some minor revisions, the General Rewrite Committee proposes to keep these three options for dealing with delay. The Committee thinks that these rules will continue to be useful even if the Management of Litigation Committee's proposal that parties in every action agree to a litigation schedule early in the action is adopted.

The Committee's view is that the drop dead rule should be retained, but it should provide that once 5 years has passed since the last thing that materially advanced an action, it should not be open to the defendant to avoid the operation of the rule by taking a step before the application to strike is filed.

Lastly, with respect to the delay rules, the Committee also proposes that the court should have discretion to make any orders necessary to deal with third party notices and counterclaims that may be affected by an order for dismissal due to delay.

Chapter 4 deals with discontinuance of an action and also with the withdrawal of a defence. Depending on the circumstances, there are several possible ways for a

plaintiff to obtain a discontinuance: 1) the plaintiff may unilaterally discontinue; 2) the parties may agree to discontinue; or 3) the court may give leave for the action to be discontinued. Leave is required for a unilateral discontinuance after the action is set down for trial, and for a discontinuance with consent after the trial has commenced. The General Rewrite Committee seeks input from the profession on four possible options for when the plaintiff should be required to seek leave of the court to discontinue an action. These include: a) retain the discontinuance rules in their present form; b) add a requirement for leave to discontinue without consent where a defendant has defended (so as to enable a defendant to insist on the cause of action being disposed of); c) drop the requirement of leave except in cases involving multiple plaintiffs; and d) eliminate all requirements for leave and add a rule that would allow any affected party(s) to apply for relief.

Along with the issue of when leave should be required to discontinue, the Committee also seeks input on the following two issues: whether a defendant should continue to be required to obtain leave of the court in order to withdraw a defence where consent of the plaintiff has not bee obtained, and whether a plaintiff should be allowed to discontinue against one defendant without the consent of the other defendants.

Chapter 5 deals with noncompliance and irregularities. Rule 558 provides that non-compliance with The Rules does not render any act or proceeding void but that the act or proceeding may be set aside or amended. The Committee proposes that one rule along the lines of Rule 558 should deal with non-compliance and irregularities in pleadings, affidavits, forms and steps in actions. No defect should void any of these things unless, as the Court of Appeal has stated, some real possibility of prejudice to the attacking party is shown or unless the procedure is so dramatically devoid of the appearance of fairness that the administration of justice would be brought into disrepute. The Rules should not give the court power to dispense with compliance of The Rules before the fact.

LIST OF ISSUES

TIME

TIME FOR SERVICE OF A STATEMENT OF CLAIM

DELAY IN THE PROSECUTION OF AN ACTION

DISCONTINUANCE OF AN ACTION

NONCOMPLIANCE AND IRREGULARITIES

CHAPTER 1. TIME

A. Introduction

[1] The Rules currently contain over thirty different time periods. While these time periods range from 24 hours to 10 years, twenty of them are under 30 days. Many of these are roughly equivalent: eg. 2 days / 48 hours, 14 days / 15 days, 20 days / 21 days.

[2] In addition to many time periods being redundant, the current principles for calculating time are complicated. Firstly, time may be counted forwards or backwards. Moreover, there are several counting systems. For example, there are two systems for determining when to begin calculating a given period of days (i.e. clear days vs. "non-clear" days) and a further two systems for identifying which days to count (i.e. calendar days vs. business days.) Table 1 illustrates the main permutations arising from the current principles.

[3] A telling comment was made in one of the Project's public focus groups:

> One thing the Rules of Court should be able to address and make consistent is ... the definition of time limits. A day under the *Provincial Court Act* is one thing, a day as it applies to one cause of action is another thing. Criminal appeal…it's all different. Why isn't a day a day?... Sometimes I find you have to leap around to see what this actually means, you have to refer to another rule and I would like to see consistency. ... We don't need three different ways to define what a day is.

[4] The General Rewrite Committee takes the view that the current system for calculating time is overly complex and needs to be simplified. The problem is made worse by the fact that the The Rules do not contain all of the necessary time rules. Other relevant provisions are found in the *Interpretation Act*, although several provisions of that Act may not to apply to The Rules.

[5] The Rules Project Steering Committee has approved four objectives for the Project as a whole. Those objectives and their target results are as follows:

Objective # 1: Maximize The Rules' Clarity

Results will include:

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

Objective # 2: Maximize The Rules' Useability

Results will include:

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

Objective # 3: Maximize The Rules' Effectiveness

Results will include:

- updating the rules to reflect modern practices
- pragmatic reforms to enhance the courts' process of justice delivery
- designing the rules so they facilitate the courts' present and future responsiveness to ongoing technological change, foreseeable systems change and user needs

Objective # 4: Maximize The Rules' Advancement of Justice System Objectives

Results will include:

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

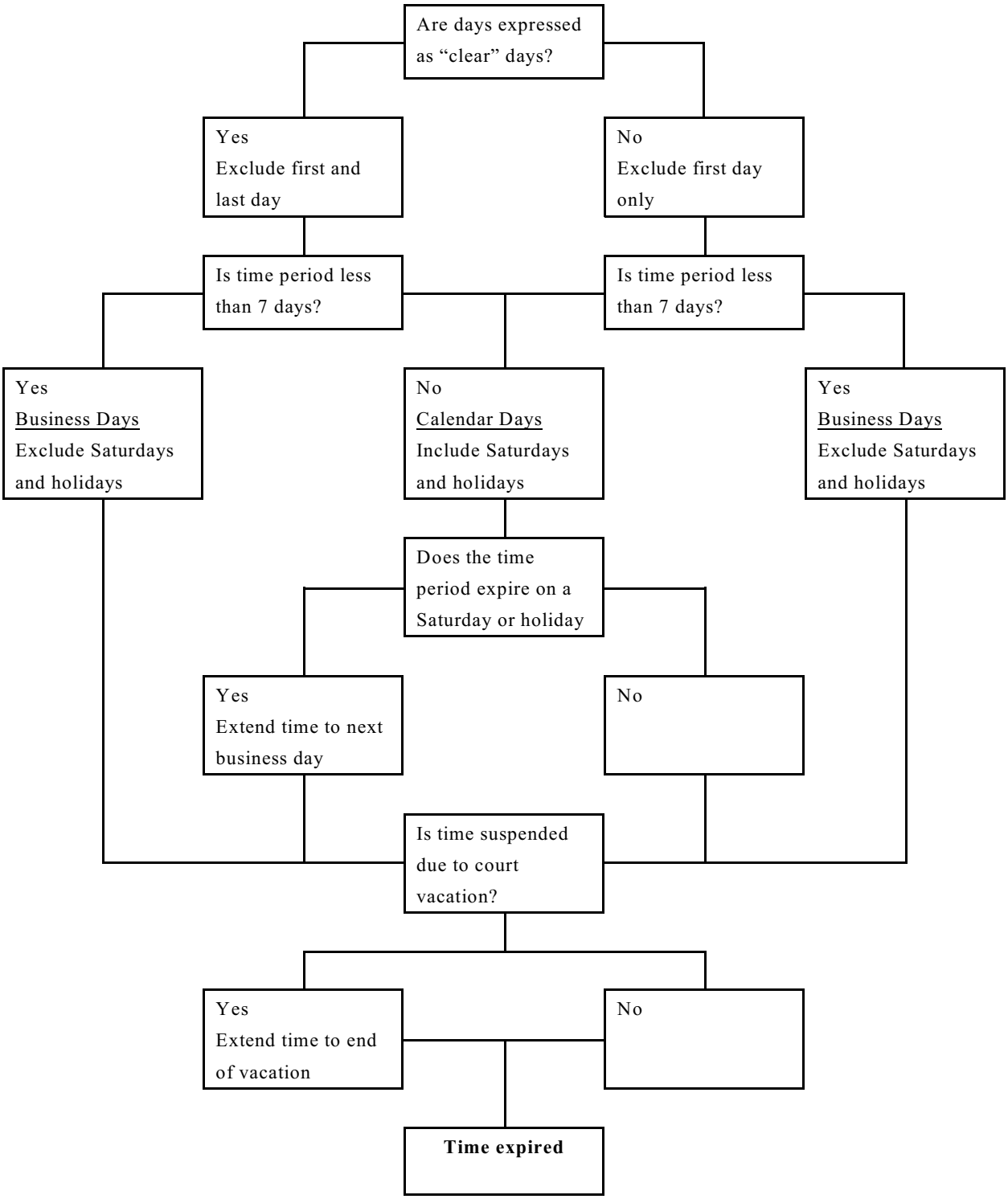
The General Rewrite Committee has concluded that a significant revision of the time rules is required in order to meet these objectives and target results.

[6] As noted, there are two main problems with the current time rules. First, there are too many different time periods; a small number of standard time periods would suffice for the majority of tasks subject to deadlines under The Rules. Second, there are too many systems for calculating each time period. A time period expressed as 5 days may extend up to 8 calendar days if time is calculated as business days or clear

days. Consequently, a simplified system of standard time periods must be supported by simpler standard principles for calculating time.

[7] This chapter addresses these two main problems. Part B proposes standard time periods for adoption throughout The Rules. Part C proposes standard principles for calculating time; these principles also operate as drafting principles and will govern how time periods are expressed in the new rules. The time periods proposed in Part B are expressed according to the principles proposed in Part C. While Parts B and C are closely related, it should be stressed that there are two separate goals to consider whenever The Rules impose a time limit. The first goal is to set aside a period of time that is adequate to complete the task at hand. For example, providing notice of motion will usually require only a few days while preparing an appeal book generally takes months. Once the appropriate time period has been determined, however, the second goal is to express that time period as clearly and simply as possible – and in a manner that promotes consistency throughout the rules. This chapter recognises the importance of both tasks. This chapter concludes with a discussion of the court vacation rules in Part D. Throughout, the focus of this chapter is on time limits in civil litigation. Time under the criminal rules will need to be consistent with the *Criminal Code* and has been referred to the Criminal Rules Committee for consideration.

Table 1: Current permutations in calculating time in days



Note: The effects of the *Interpretation Act*, R.S.A. 2000, c. I-8, ss. 22(5)-(8) have not been included in the chart.

B. Standard Time Periods

All time periods proposed here are calculated as "non-clear" calendar days in keeping with the principles proposed in Part C.

[8] This Part proposes a set of standard time periods to replace the 30 different time periods currently used in The Rules. The goal is to simplify and rationalise the system and, thereby, to avoid unnecessary confusion. For example, there is no apparent reason why some tasks are allowed 20 days and others 21.

[9] The standard time periods proposed here are based on"clusters" of time periods in the current Rules. For example, time periods currently expressed as "48 hours", "2 days", "2 clear days" and "3 days" are considered together. In most cases, the standard time period proposed for each cluster will be slightly longer than the time period allowed under the current Rules.

[10] Throughout this discussion it will be possible to raise examples that might justify a different time period from the standard proposed. However, as discussed in the next section, the new rules will retain provision for flexibility; where appropriate, time can be abridged or extended on an individual case basis.

1. Provision for flexibility: Extending or abridging time

[11] Rule 548 currently allows time to be abridged or extended as required by the court. The rule is not absolute and its application may be excluded where time periods should be strictly observed.[1] The flexibility offered by Rule 548 should be retained in the new rules. Rule 548 will also provide a means of monitoring whether the standard time periods are appropriate. In other words, a significant number of applications to extend time under a particular rule might indicate that the standard time period

[1] For example, r. 548 is currently excluded in rr.11, 187, 236.1, 243, 296.1, 331, 736.7, and 753.11.

adopted for that rule is too short and that the next longer time period should be considered.

[12] Rule 549 also allows for the extension or abridgment of time by consent of the parties without court application. Rule 549 applies throughout The Rules, in contrast to Rule 548.

POSITION OF THE GENERAL REWRITE COMMITTEE

[13] Rules 548 and 549 should be retained to allow for the extension or abridgment of time in individual cases.

2. Very short time periods

ISSUE No. 1
Is 5 days an appropriate standard time period?

ISSUE No. 2
Is 24 hours an appropriate standard time period?

[14] The Rules prescribe very short time limits for a small group of tasks where completion is possible within a few days. For example, The Rules require various tasks to be completed in "48 hours", "2 days", "2 clear days", and "3 days". At least two of these time periods could be combined for reasons of drafting consistency alone. Three days equals 2 clear days and, give or take a few hours, 2 days equals 48 hours.

[15] However, time periods in the range of 2-3 days are likely to be problematic when they run up against a weekend. This is the recurring problem of a 2-3 day notice period being triggered on Friday for a hearing scheduled on Monday or Tuesday. Fortunately, only a handful of rules raise this concern and there are several approaches to addressing the problem. For example, Rules 545, 547 and 550, all operate to prevent these time periods being shortened by weekends.[2]

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[2] See the discussion in section C.3 of this chapter.

[16] As noted in the Introduction, the rules should allow adequate time to complete the task at hand. Determining how much time to allow must consider the needs of all parties – eg. does the other side need time to respond? Time limits should also consider the scheduling and administrative requirements of the court. At present, the Queen's Bench can process non-urgent documents and have them ready in the courtroom within 48 hours. Consequently, more documents are processed on an urgent basis simply because time falls within that required for administrative purposes. For this and other reasons, the General Rewrite Committee proposes that those tasks that can be done within a few days, i.e. those currently subject to time periods of 4 days or less, should attract a standard time period of 5 days. As Rule 545 (weekends and holidays not counted for time periods less than 7 days) frequently increases many of these time periods by 2 days, 5 days is not a significant increase.[3]

[17] However, it is important to distinguish between tasks that can be done quickly (ie. because they do not require much time) and those that must be done urgently (ie. because of an emergency). The standard 5 day time period will not be appropriate for urgent matters. While urgent matters can be accommodated by abridging time under Rule 548, some urgent tasks occur too frequently to have to resort to an abridgment application. Filing an affidavit on a review of an emergency protection order provided for in Rule 578.1 is an example. It might therefore be useful to have an additional standard time period for such regularly occurring urgent matters. 24 hours is proposed on the basis of the current Rules.

[18] It is also important to recognise that further steps may be required within a 5 day time limit. For example, if 5 days notice of motion is required before an application, the time allowed for response must be less than 5 days. Rule 384 currently specifies 24 hours before the application. This seems sensible.

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[3] See section C.5. of this chapter for a further discussion of r. 545.

POSITION OF THE GENERAL REWRITE COMMITTEE

[19] The General Rewrite Committee proposes a standard time period of 5 days. Rules currently subject to time periods of 4 days or less would be rounded to 5 days. he list of rules where time would be rounded-up to 5 days includes:[4]

> **2 days** (+2 Rule 545 days where time runs from Thurs or Fri)
> 263 notice of application to read former evidence
> 386 notice for motions and applications before hearing date
>
> **2 clear days** (+2 Rule 545 days where time runs from Weds, Thurs, or Fri)
> 289 re commission evidence
>
> **3 days** (+2 Rule 545 days where time runs from Weds, Thurs, or Fri)
> 194 notice stating time and place for inspection of records
> 314.1 (b) file and serve affidavit (proceedings not commenced)

[20] The General Rewrite Committee also proposes a standard time period of 24 hours. The 24 hour time periods would apply where action needs to be taken urgently or where a further step (eg. a response) is required within the standard 5 day time period. The list of rules where time would remain at 24 hours includes:

> 384 response to notice of motion before hearing
> 578.1 serve affidavit of evidence re family violence

3. Short time periods

ISSUE No. 3
Is 10 days an appropriate standard time period?

[21] There is a second cluster of time periods in the 6-10 day range. While some of these time periods are currently expressed as 4 or 5 days, Rule 545 will generally add 2 days to time periods at this lower end of the range. The General Rewrite Committee

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[4] In Alberta Law Reform Institute, *Document Discovery and Examination for Discovery* (Consultation Memorandum No. 12.2) (Edmonton, Alberta: Alberta Law Reform Institute, 2002) [ALRI CM 12.2] the Committee recommended that the 48 hour time period in Rule 204 (service of appointment re examination for discovery) be increased to 20 days.

has previously expressed a preference and reasons for rounding several of these time periods up to 10 days.[5]

POSITION OF THE GENERAL REWRITE COMMITTEE

[22] The General Rewrite Committee proposes a standard time period of 10 days. Rules currently subject to time periods greater than 4 but less than 14 days would be rounded to 10 days. The list of rules where time would be rounded-up to 10 days includes:

4 days (+ 2 Rule 545 days, except where time runs from Monday)
226 judgment for costs if unpaid after taxation
276 delivery of cross-interrogatories

5 days (+2 Rule 545 days)
67 service of third party notices and pleadings
200.1 selection of corporate representative
240 notice of entry for trial
421 furnishing a copy of all affidavits filed and a copy of the account
616(2)(g)(h) notice of client terminating contingency fee agreement (costs)

5 clear days (+2 Rule 545 days)
292 notice of the intention of compelling attendance of witness
631 serving a copy of the appointment – costs – taxation and appeal from taxation

7 days
167(2) acceptance – judgment for costs if unpaid after taxation
353(3) & (4) service deemed – registered mail and not received
381 notice of application to dispose of personal property
389 motion to rescind or vary order
500 service of notice of motion (appeal from master or referee)
646(1)(c) plaintiff serve an answer (streamlined procedure)
665(2)(b) filing of defendant's answer (streamlined procedure)

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[5] See for example, Alberta Law Reform Institute, *Pleadings* (Consultation Memorandum No. 12.8) (Edmonton, Alberta: Alberta Law Reform Institute, 2003) at paras. 67(c) and 148; and Alberta Law Reform Institute, *Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions* (Consultation Memorandum No. 12.9) (Edmonton, Alberta: Alberta Law Reform Institute, 2004) at paras. 11 and 215 [ALRI CM 12.9].

7 clear days

158.2 reply to a notice of motion for judgment in a summary trial

254 furnishing particulars – defamation of character of plaintiff

371 service of notice on an enforcement debtor

460 notice of examination of debtor

646(1) agreement taxed under Rule 643.1

655 service of notice of appeal

666(1) file and serve statement of factual and legal theory (streamlined procedure)

739 service of notice of motion

8 days

86 time to answer pleading

102 implied joinder after defence

117(1) delivery of further particulars

118 time for pleading after particulars

130(2)(b) delivery of defence after amended statement of claim

130(3)(b) delivery of reply to amended statement of defence

131 time for disallowing amendment

8 clear days

276(a) delivery of interrogatories in chief

10 days

6(3) service of petition and copy of affidavit

56(3) application to have order discharged or varied

56(4) application to have order discharged or varied after appointment of guardian ad litem or guardian of his estate

71(2.1) deliver a reply to third party's defence

77(1)(a) file and serve a notice claiming relief on a co-defendant

188(1)(a) inspection of records

241(1) deposit for jury

334(2) application for judgment by any defendant after accounts have been directed

406 service of originating notice and affidavit

426 notice of application to accept or vary report of referee or remit the whole or part of a question

509 notice of cross appeal

538(3) file and serve further factum in reply to a notice of intention to vary

555(3) notice to party of solicitor ceasing to act on the expiry of 10 days

555(4) from date of service of the notice of withdrawal solicitor deemed to have withdrawn

555(5) party's address in the notice of withdrawal deemed to be address for service unless new address furnished

616(4) service of copy of signed contingency fee agreement

655 appeal of taxation

[23] The list of rules where time would be rounded down to 10 days includes:

10 clear days

152(b) where noted in default notice of date set for assessment

4. Medium time periods

ISSUE No. 4
Is 20 days an appropriate standard time period?

[24] There is a third cluster of time periods falling in the range of 14 to 21 days.

POSITION OF THE GENERAL REWRITE COMMITTEE

[25] The General Rewrite Committee proposes a standard time period of 20 days. Rules currently subject to time periods of 14 days or more but less than 25 days would be rounded to 20 days. The list of rules where time would be rounded up to 20 days includes:

14 days

134 time for amendment after an order

218(6) application for leave to examine the court expert on his report

417(6) application to discharge or vary or add to judgment or order

14 clear days

516.1 time between service and hearing

15 days

71 delivery of defence by third party

85(1)(b) delivery of statement of defence within the jurisdiction

88(1)(e) notice and warning of time to file statement of defence stated on statement of claim

166(2) notice in writing of money paid into court

257 nonappearance - application to set aside judgment

296.1(3) service of objection to intention not to call a person

360(5) provide a written reply to requesting creditor

370(4) register a status report indicating the provision of debtor's financial report

434 civil enforcement agency to retain property

474(2) garnishee serve or mail a copy of garnishee summons to debtor

476 serve garnishee summons on the debtor

479(2)(b) garnishee served with renewal statement update the status of any contingency

481(1) distribution of funds paid into court (garnishee)

515(1) appellant shall serve a proposed agreement as to the contents of the appeal book

525(4) if a party does not respond deemed to accept the proposed agreement as to the contents of the appeal book

619(2) on request the clerk may refer a contingency agreement review to a QB judge

664(4) file and serve a written notice of objection and grounds of objection to proposed evidence adduced by affidavit and cross-examination (streamlined procedure)

729.5 original of telecopier affidavits filed with the clerk

15 clear days

242(3) trial list posted up and mailed in centres outside of Edmonton and Calgary

331(3) service of notice of motion requiring judgment debtor to appear

20 days

204(4) service of an appointment upon the solicitor of the party to be examined

506 filing of the notice of appeal

655(4) notice of appeal from taxation

[26] The list of rules where time would be rounded down to 20 days includes:

21 clear days

158.1(2) time between delivery of the notice of motion and the day named for hearing of the summary trial

665(2) before pre-trial conferences plaintiff must file and serve a statement of facts and the issues (streamlined procedure)

5. Longer time periods

ISSUE No. 5
Is 1 month an appropriate standard time period?

ISSUE No. 6
Are standard periods of 2, 3, and 6 months appropriate?

[27] As noted in Part C, time is easier to calculate in months than periods of 30 days.[6] There is a cluster of time periods in the 1 month range. There are also several time periods that would be better expressed as 2, 3 or 6 months.

[28] There is also a small group of rules with a 45 day time period. This group includes:

> 168 time for acceptance an offer
>
> 169(3) defendant's withdrawal of offer
>
> 170(5) plaintiff's withdrawal of offer
>
> 538(2) filing of respondent's factum
>
> 736.7 debtor's application to set aside ex parte order (Reciprocal enforcement of U.K. judgments)

Whether it is possible to round these time periods to 1 or 2 months has been referred to the individual subject committees for decision.

POSITION OF THE GENERAL REWRITE COMMITTEE

[29] The General Rewrite Committee proposes a standard time period of 1 month. The list of rules where time would likely be rounded to 1 month includes:

> **28 days**
>
> 855(1)(ii) delivery of factum to the respondent
>
> **30 days**
>
> 66(4) service of a third party notice after filing
>
> 179(3) investment of money received as tender re judicial sale
>
> 192(3) recipient of an affidavit of records serves notice that the fact in question is disputed
>
> 218.2 service of the expert's rebuttal report

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[6] See the discussion in section C.4 of this chapter.

230(1.1) serve a statement denying admission

230(2) the time to serve a statement denying admission cannot be abridged under Rule 548

230.1 serve a statement denying written opinion

242(2) post trial lists

296(2) serve notice of persons not to be called

363 to redeem goods removed

363(5) apply by a notice of motion to the court for directions for the disposition of goods remaining on the premises

557.3 no appeal from an order made in a divorce proceeding after this time

661(1) file and serve affidavit of records

[30] The General Rewrite Committee also proposes standard time periods of 2, 3, and 6 months, and other multiples of months as required. Determining the appropriate number of months has been left to the individual subject committees.

C. Calculating Time: Drafting Principles

ISSUE No. 7
Do you wish to comment on the proposed principles for calculating time?

[31] The General Rewrite Committee approves the following principles for calculating time:

1. The Rules should contain a complete set of principles for calculating time.

2. Wherever possible, time periods should be counted forwards from an appropriate triggering event rather than backwards from a terminal event.

3. If time expires on a day when court offices are closed, time should be extended in the same direction that the time period runs.

4. Time should be expressed in one of the following units
   - Days – for time periods less than 1 month;
   - Hours – for very short time periods which cannot be described accurately in days;

- Months – for longer time periods of 1 month or more; and
- Years – where appropriate.

5. Days should be calculated as "non-clear" calendar days.

Each of these principles is discussed further below.

1. The rules should contain a complete set of time rules

a. A user-friendly system

[32] As noted in the Introduction and illustrated in Table 1, the current principles for calculating time are overly complex. Some time periods are calculated as calendar days, others as business days, some as clear days, some as "non-clear" days, or some even as clear business days. The Rules Project aims to maximize the clarity, usability, and effectiveness of The Rules, and to advance justice system objectives. Maintaining the current principles for calculating time would detract from those aims. A single system for calculating time periods would reflect the goals of the new rules and reduce confusion.

[33] Making the new rules as user-friendly as possible also means that litigants should not have to refer too frequently to external sources. Obviously, there are limitations on the extent to which the new rules can present a complete code of civil and criminal procedure. Many aspects of the litigation process will continue to be dealt with in other sources of statute and common law. This is particularly true in areas of specific subject practice where areas of procedure and substantive law overlap. However, given the frequency with which time limits appear in The Rules (eg. there are over 100 time limits in the current rules), the principles for calculating time should be located in The Rules, rather than continuing to refer to external sources such as the *Interpretation Act*.

b. The Rules and the Interpretation Act *Section 22*

[34] The principles for calculating time in The Rules duplicate some of the provisions in the *Interpretation Act*. For example, Rule 546(1) and Section 22(4) have the same effect for calculating "non-clear" days. However, other provisions of the Act contradict the principles proposed for the rules. For example, Rule 546(2) (clear days)and Section 22(3) have the same effect and the General Rewrite Committee proposes that Rule 546(2) be repealed. Moreover, the extent to which some provisions

of the Act currently apply to The Rules is open to question. In particular, Sections 22(5)-(7) (calculating time in connection with specified days) were not enacted until 1980.[7] While the Act has scope for retroactive effect,[8] the majority of The Rules were enacted well before this time and on a narrower set of time rules.[9] Moreover, applying Sections 22(5)-(7) to The Rules would further complicate the system rather than simplify it. Thus, in order to achieve the simplest set of time principles possible, it will be necessary to exclude the application of several time provisions contained in the *Interpretation Act*. The Act allows for exclusion but it should be expressly stated.[10] In particular, Sections 22(3), (5), (6), and (7) should be excluded. Subsections 22(1), (2), (4), and (8) should also be excluded but their effect will be achieved by equivalent provisions in The Rules.[11]

POSITION OF THE GENERAL REWRITE COMMITTEE

[35] The General Rewrite Committee proposes that the rules contain a complete set of time rules. Those time rules will duplicate some but not all of the time rules in s. 22 of the *Interpretation Act*.

c. Scope of general principles

ISSUE No. 8
Should the general principles for calculating time in the rules apply to orders?

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[7] *Interpretation Act*, S.A. 1980, c. 70, based on Uniform Law Conference of Canada, *Proceedings of the Fifty-Fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada Held August 20 - August 24, 1973* (Victoria, British Columbia: Uniform Law Conference of Canada, 1973) at 19, 26, and 275.

[8] *Interpretation Act*, R.S.A. 2000, c. I-8, s. 2.

[9] For example, the 1968 Rules would have been drafted on the basis of rr. 546(1)-(2) and the *Interpretation Act*, S.A. 1958, c. 32, s. 18(1) which was equivalent to r. 546(1).

[10] *Interpretation Act*, *supra* note 8, s. 3(1). See also *Judicature Act*, R.S.A. 2000, c. J-2, s. 63, as am. *Justice Statutes Amendment Act*, S.A. 2004, c. 11, s. 3.

[11] *Interpretation Act*, *ibid.*, s. 22(9) is not discussed here as it has little relevance to The Rules. R. 583 appears to be the only instance of an age-based provision in The Rules. If there is ambiguity as to when a person turns 14 that ambiguity can be dealt with within r. 583.

ISSUE No. 9
Should the general principles for calculating time in the rules apply to practice notes?

[36] The new Civil Procedure Rules expressly state that the time rules apply to both judgments and orders as well as practice directions:

> 2.8 (1) This rule shows how to calculate any period of time for doing any act which is specified –
>
> (a) by these Rules;
>
> (b) by a practice direction; or
>
> (c) by a judgment or order of the court.[12]

Our current time rules are not expressly extended to orders or practice notes. While Rule 544 specifies that the definition of "month" extends to judgments and orders, there is no similar provision in the other time rules. Nor does the *Interpretation Act* apply to court orders.[13] It may be court practice to follow the principles established in The Rules and *Interpretation Act* when drafting orders and practice notes. However, it would assist litigants in interpreting the deadlines set down by the court to have an express statement that the same principles apply.

[37] The current problems of calculating time in The Rules are reflected in the practice notes. For example, Queen's Bench Civil Practice Note 1 adopts business days as the standard for case management time periods.[14] In contrast, the Court of Appeal Consolidated Practice Directions expressly state business days as regards motions in Part F but adopts calendar days for procedural appeals in Part J.[15]

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[12] United Kingdom, *Civil Procedure Rules (1999)*, r. 2.8 [United Kingdom]. See also British Columbia, *Supreme Court Rules*, r. 3(1) [British Columbia]; Ontario, *Rules of Civil Procedure*, r. 3.01(1) [Ontario] and *Federal Court Rules, 1998*, r. 6(1) [Federal] which specify that the time rules extend to orders.

[13] *Interpretation Act*, *supra* note 8, ss. 1(1)(c) and 28(1)(m).

[14] Para. 52 of QB Civil Practice Note 1 states:

> 52. The computation of all time periods referred to in this Practice Note excludes Saturdays, Sundays, and holidays, but includes the long vacation and the Christmas vacation.

[15] Para. J.14(a) of the CA Consolidated Practice Directions states:

> Notwithstanding Rule 545, any reference to number of "days" in this Part J. refers to actual calendar days, weekends and holidays included.

POSITION OF THE GENERAL REWRITE COMMITTEE

[38] The general principles for calculating time in The Rules should also apply to orders and practice notes.

2. Time periods should generally run forwards

[39] Counting forwards is the most common approach to calculating time. The rule identifies a triggering event (eg. service), time starts running, and something else must be completed before the time period expires.

[40] In a smaller but still substantial number of rules, time is counted backwards. The rule identifies a terminal event (eg. trial) in advance of which other tasks must be completed. For example, Rule 406 requires service of an originating notice "10 days before the day named in the notice for hearing of the application." In this example, as in many other instances, counting time backwards is used to provide an adequate notice period. The General Rewrite Committee considers that notice provisions are an appropriate use of backwards-running time periods.

[41] In other instances, however, it appears that time has been counted backwards because there has not been a clear reference point from which to count forwards. For example, Rule 218.1 provides that notice of intention to use expert evidence must be made "not less than 120 days before the day of trial." Rule 218.1 operates as both a notice provision and a scheduling step. Other events with deadlines will follow from one party's decision to use expert evidence and sufficient time must be allowed for their completion – hence the extreme length of the "notice" provision.[16] However, the Management of Litigation Committee has proposed litigation timetables for completing scheduled events; under these timetables, time will run forwards from a clearly identified reference point.[17] Consequently, there will be less cause for backwards-running time periods in the future.

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[16] See rr. 218.1 and 218.12 for steps that follow the notice of intention. See also QB Civil Practice Note 1 (Case Management) which includes a deadline of 9 months before trial.

[17] See Alberta Law Reform Institute, *Management of Litigation* (Consultation Memorandum No. 12.5) (Edmonton, Alberta: Alberta Law Reform Institute, 2003) at 35-41 [ALRI CM 12.5].

POSITION OF THE GENERAL REWRITE COMMITTEE

[42] The General Rewrite Committee considers that, whenever possible, time periods should be counted forwards from an appropriate triggering event. Backwards-running time periods should generally be avoided, although their use is appropriate in connection with notice provisions.

3. Automatic extensions should run in the same direction as the time period in question

[43] Rule 547 (the next business day rule) automatically extends time forwards where the deadline for completion falls on a day when court offices are closed.[18] For example, if time expires on Saturday, Rule 547 will extend time to Monday. While Rule 547 has the effect of extending forwards-running time periods, it truncates backwards-running time periods. For example, if 5 days notice must be given in advance of a Thursday hearing, the notice period runs back to Saturday. Were Rule 547 to apply, notice would still be in time if given on Monday, although the notice period would be shortened to 3 days. While the truncating effects of Rule 547 will be less severe over 5 day notice periods, in order to ensure minimum notice periods, the General Rewrite Committee considers that Rule 547 should not apply to backwards-running time periods. Backwards-running time periods should be extended to the "previous business day" rather than shortened to the next business day.

[44] The Rules already contain the basis for a previous business day rule. Backwards-running time periods are best used in connection with notice provisions which will typically have service requirements. Rule 550 (service after 5:00 p.m. or on weekend), thus, comes into play. Using the previous example of 5 days notice in advance of a Thursday hearing, the notice period runs back to Saturday. However, Rule 550 deems Saturday service to have been made on the next business day, i.e. Monday. Consequently, Saturday service will be late. In a backwards-running time period, Rule 550 operates as a "previous business day rule", to require service on Friday. This effect further ensures that notice periods are not truncated. As the new rules are drafted, backwards-running time periods may be required in other than notice periods; the issue of dealing with time expiring when court offices are closed will be dealt with if such time periods arise.

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[18] See also the *Interpretation Act*, *supra* note 8, s. 22.

POSITION OF THE GENERAL REWRITE COMMITTEE

[45] The General Rewrite Committee considers that if time expires on a day when court offices are closed, time should be extended in the same direction that the time period is counted. Rule 547 will produce this result for forwards-running time periods. Rule 550 will produce this result for backwards-running notice provisions, provided that Rule 547 does not apply. Therefore, Rule 550 should continue to apply in all cases but Rule 547 should be continued only for forwards-running time periods and should not apply to backwards-running time periods.

4. Time periods should be expressed in appropriate units

The units of time proposed here are in keeping with the standard time periods proposed in Part B.

a. Days

[46] Days are used to describe many time periods within the existing Rules. Their use should continue. However, there are several additional issues to consider as discussed in section C.5 of this chapter.

b. Hours

[47] Currently, the use of hours in The Rules suggests two considerations for determining when it may be appropriate to calculate time in hours:

- The time period cannot accurately be expressed as days.
- The time period can be clearly expressed to begin and end at specific points in time or scheduled events.

Each of these is discussed below.

i. Accuracy

[48] Hour-based time periods have greater accuracy than periods calculated as days. With the exception of service under Rule 550, The Rules do not specify when a day

begins or ends, although the court's business hours will limit the length of a day as regards filing. However, there can be variation in short time periods expressed as days. For example, Rule 314.1 requires that an affidavit in opposition be filed and served 24 hours before the hearing. If the hearing is scheduled for 10 a.m. Friday, the time period runs back to 10 a.m. Thursday. Specifying 1 day before hearing would still require filing on Thursday but would move the deadline to 5 p.m. Where accuracy is required, there is reason to express very short time periods in hours rather than days.

ii. Clear beginning and end points

[49] The key factor for determining when an hour-based time period starts or stops is having a pinpoint time or scheduled event. For example, if a notice period is expressed as 24 hours before hearing, the time of the hearing must be stated in order to define the notice period. If the hearing is scheduled for 10 a.m. Friday, then the notice period runs back to 10 a.m. Thursday. Vague or variable starting and ending points should be avoided. For example, Rule 384 requires notice at least 24 hours "before the day for hearing". Is time counted back from the hearing (eg. 10 a.m.) or from the day for hearing (eg. midnight)? All time periods calculated in hours should start or end at a clearly identified point in time on a specific day.

POSITION OF THE GENERAL REWRITE COMMITTEE

[50] The General Rewrite Committee proposes that hours should be used to express very short time periods that cannot accurately be expressed as days, provided that the beginning and end points of such time periods are clearly stated.

c. Months

i. What is a month?

[51] Rule 544 defines "month" as a calendar month. This definition reflects a waning preference for lunar months that was still in place when interpretation provisions came into common use in the mid-1800s. However, the equivalent provision in the *Interpretation Act* was repealed with the adoption of the Uniform Act in 1980. It is now sufficiently clear that "month" means calendar month and a definition in The Rules is no longer required.

POSITION OF THE GENERAL REWRITE COMMITTEE

[52] The definition of month in Rule 544 can be deleted from the new rules.

ii. When do months begin and end?

[53] The *Interpretation Act* defines when a period of months begins and ends:

> 22(8) If an enactment contains a reference to a period of time consisting of a number of months after or before a specified day, the number of months shall be counted from, but not so as to include, the month in which the specified day falls, and the period shall be reckoned as being limited by and including
>
> (a) the day immediately after or before the specified day, according as the period follows or precedes the specified day, and
>
> (b) the day in the last month so counted having the same calendar number as the specified day, but if that last month has no day with the same calendar number, then the last day of that month.

This section also comes into Alberta in 1980 via the Uniform Act and will not have been taken into account in many of the existing Rules. The first step in assessing whether s. 22(8) should be included within the new rules is to work out what it means.

[54] For example, assume that Rule X requires that a task be completed within 6 months after filing the statement of claim. The statement of claim is filed on 15 June. What is the deadline for completing the task? [**Note**: It is informative to answer this question off the top of your head before considering Section 22(8).] Section 22(8) provides that July will be counted as month 1. December is thus the sixth month. As to when in December the time period expires, Section 22(8)(b) specifies that the time ends on the day with the same calendar number as the specified day. Thus, the deadline for completion is 15 December. As to when the time period started, Section 22(8)(a) specifies the day after the specified day, thus 16 June; however, in a time period calculated in months and ending on the same calendar number as the specified day, there does not seem to be much point in excluding the specified day from the time period. For example, if the time period were instead to run backwards from 15 December, the deadline for completion would still be 15 June. Thus, aside from specifying what happens in moving between months of differing lengths, Section 22(8) is a long-winded way of stating common sense. However, although the result is common sense, in order to maintain consistency between The Rules and the *Interpretation Act*, Section 22(8) should have a parallel provision in The Rules. In keeping with the objectives of the Rules Project, a plain language version of Section 22(8) would be appropriate.

POSITION OF THE GENERAL REWRITE COMMITTEE

[55] The rules should contain a plain language equivalent of the *Interpretation Act*, Section 22(8).

iii. What time periods should be expressed in months?

[56] Many time periods in The Rules are currently expressed as months. Others are described in multiples of 30 days. However, despite the impression created by s. 22(8) of the *Interpretation Act*, calculating time in months is much simpler and faster than calculating time in days. For example, starting from 15 June, it is relatively simple to work out that a time period of 3 months expires on 15 September or that 4 months expires on 15 October. By contrast, calculating 90 or 120 days from 15 June is considerably more difficult; calculated as calendar days, time expires on 13 September and 13 October respectively. Will this difference of a few days ever be significant enough so as to warrant the additional math? While law firm computer systems might perform these calculations automatically, many users will not have that facility. Simplicity favours longer time periods being expressed as months.

[57] There is the fact that months are not of equal length. Days perhaps have an advantage in providing a more consistent time period. However, again, the difference of a day here or there as between longer time periods running at various points of the year is not particularly significant. As indicated in the examples in the previous paragraph, time periods calculated in months will generally be a few days longer to start with.

POSITION OF THE GENERAL REWRITE COMMITTEE

[58] The General Rewrite Committee proposes that months should be used to express time periods that are now greater that 25 days.

d. Years

[59] Years are currently used to describe several time periods in The Rules. Where appropriate, the use of years should continue.

5. Days should be counted as "non-clear" calendar days

[60] As Table 1 indicates, the complexity in calculating time under The Rules is a peculiar feature of calculating time in days. A variety of provisions have evolved over

the years to govern which days are counted (eg. calendar days or business days) and when counting begins and ends (eg. clear days or "non-clear" days). The General Rewrite Committee proposes that days should be calculated according to one system – "non-clear" calendar days. The reasons for this proposal are set out below.

a. Calendar v. business days

[61] Currently, under The Rules, some time periods are calculated as calendar days and others as business days. Calendar days apply in the general case. Business days only apply in specific cases. Rule 545 provides that holidays and Saturdays are not counted in time periods less than 7 days, i.e. days are counted as business days.[19] While the term "business days" is not used in The Rules it does appear in some practice notes.

[62] Opting for one of business or calendar days would simplify the time rules. Two arguments favour calendar days. First, calendar days match the common sense meaning of "day" and, thus, advance the plain language objective for the new rules. In contrast, business days would have to be defined by an interpretation provision. How business days would be defined raises a further concern. Would it be commercial business days or court business days? Business days is a defined term within commercial legislation; adopting a different definition for The Rules might result in confusion. Second, calendar days are easier to calculate. For example, compare counting 10 calendar days to counting 10 business days. From the 5th of the month, 10 calendar days will always run to the 15th; 10 business days will variably run to the 19th or 20th. Thus, both plain language and plain math favour calendar days. Nevertheless, calendar days are problematic for the simple fact that court offices are closed for roughly 120 calendar days each year. However, The Rules currently deal with this fact by extending time to the next business day.[20]

[63] To date, the main advantage of business days has been their ability to ensure that very short time periods are not further reduced by having time continue to run over the weekend and statutory holidays. Indeed, this is the very nature of Rule 545 as it only

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[19] However, a time period stated as "within 7 days" does not attract r. 545 and is to be counted as calendar days: *Greenidge v. Barr*, 1998 ABCA 365.

[20] See the discussion in section C.3 of this chapter.

applies to time periods less than 7 days. However, the effect of Rule 545 is variable. While Rule 545 will almost always add 2 days to time periods of 4 or more days, it may not do so for time periods of 2 or 3 days. The standard time periods proposed in Part B have taken Rule 545 into account in rounding up these shorter time periods to 5 or 10 days.

POSITION OF THE GENERAL REWRITE COMMITTEE

[64] Time periods in the new rules should be based on calendar days. All days – including weekends and holidays – will be counted. Rule 545 should be repealed, as the proposed standard time periods are sufficient to cover Rule 545's current effect.

b. "Non-clear" v. clear days

[65] Rule 546 sets out two systems for determining when to start and stop counting the days. In the general case, Rule 546(1) provides that counting begins on the second day and continues to the last, i.e. "non-clear" days.[21] In contrast, Rule 546(2) provides for clear days where counting begins on the second day and ends on the second last day.[22]

[66] Calculating time could be simplified by having only one system for determining when to start and stop counting. Such a choice was made in the new British Civil Procedure Rules. Rule 2.8 provides that all days are computed as clear days and incorporates examples to illustrate the rule's application:

> 2.8(3) In this rule "clear days" means that in computing the number of days –
>
> (a) the day on which the period begins; and
>
> (b) if the end of the period is defined by reference to an event, the day on which that event occurs[23]
>
> are not included.

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[21] See also the *Interpretation Act*, *supra* note 8, s. 22(4).

[22] See also *ibid.*, s. 22(3).

[23] It should be noted that United Kingdom, r. 2.8 differs from r. 546. R. 546 always excludes the last day; United Kingdom, r. 2.8 only excludes the last day where the period is defined by reference to an event. Using the example given in paragraph (ii), applying r. 546 would move the hearing to 31 October.

Examples

(i) Notice of an application must be served at least 3 days before the hearing.

An application is to be heard on Friday 20 October.

The last date for service is Monday 16 October.

(ii) The court is to fix a date for a hearing.

The hearing must be at least 28 days after the date of notice.

If the court gives notice of the date of the hearing on 1 October, the earliest date for the hearing is 30 October.

(iii) Particulars of claim must be served within 14 days of service of the claim form.

The claim form is served on 2 October.

The last day for service of the particulars of claim is 16 October.

[67] Similarly, but with the opposite effect, Ontario Rule 3.01(1)(a) requires that all days be counted as "non-clear" days, even if expressed as clear days:

> 3.01 (1) In the computation of time under these rules or an order, except where a contrary intention appears,
>
> (a) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, even if they are described as clear days or the words "at least" are used;

[68] Under The Rules in Alberta, the majority of time periods are calculated as ordinary rather than clear days. The only instance of the expression "clear days" occurs in Rule 289 regarding commission evidence.[24] While there are many examples of time periods expressed as "at least" or "not less than", the use of clear days is the exception rather than the rule. Moreover, where clear days are used they occur in backwards-running time periods and such time periods will have a narrower role in the new rules.

[69] Further, unless time periods are always expressed as clear days, adopting clear days as the standard would create a potential trap for infrequent litigants; interpretation provisions are helpful but they require a higher level of legal literacy.

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[24] However, the expression "clear days" also appears in several criminal appeal rules which have been excluded from the scope of the memorandum: see rr. 840, 849, 850, 860B and 860.8.

Time periods are more user-friendly when calculated as "non-clear", i.e. ordinary days, rather than clear days. For example, if notice must be served 5 days before a hearing scheduled for 20 October, most people would conclude that service was required by 15 October. If the rules are to be drafted in plain language, they should also reflect plain math: 20 - 5 = 15.

POSITION OF THE GENERAL REWRITE COMMITTEE

[70] Time should be calculated on the basis of ordinary days, i.e. "non-clear" days according to Rule 546(1). Rule 546(2) should be repealed.

D. Court Vacations

1. Pleadings

ISSUE No. 10
Should the time for delivering or amending pleadings continue to run during the court vacations?

[71] Rule 553 defines the court vacations:

> 553 The vacations of the Court of Appeal and the Court of Queen's Bench are
>
> (a) The long vacation to consist of the months of July and August, and
>
> (b) The Christmas vacation to consist of the period from the 22nd day of December to the 6th day of the following January.

Rule 552 provides that vacation days are not counted in calculating time for delivering or amending pleadings except in the case of a statement of defence. Consequently, the time period for bringing pleadings to a close will be extended by the court vacations. Moreover, time will be extended for periods that are disproportionate to the steps that would ordinarily have to be taken. For example, Rule 85 allows 15 days for delivering the statement of claim or defence to third party notice. In comparison, the Christmas vacation extends time for 15 days, while the long vacation adds 2 months. Aside from weekends and statutory holidays, however, court offices are open during the vacations, as shown in the annual Court Calendars.

[72] A general theme emerging from the work of the Management of Litigation Committee is that there should be time limits for completing various litigation steps. Although pleadings are not included in the litigation timetables proposed by that

Committee, that does not indicate that pleadings should be exempted. On the contrary, the Management of Litigation Committee favourably compares the initial stage of litigation to later stages where time is often not accounted for:

> The initial stage of issue definition is fairly well serviced by the rules, in that there are steps which include time lines in the rules, for commencing an action, for Service of the Statement of Claim, and for responding with a Statement of Defence. The next step is filing of an Affidavit of Records, and again, there is a time limit set out in the rules, one which counts "forward" from the filing of the Statement of Defence.[25]

Though the Management of Litigation Committee did not discuss the effect of court vacations on this initial stage of litigation, automatically extending time for the 2 week or 2 month vacation periods undermines the exchange of pleadings within well-defined time lines. Similarly, Queen's Bench Civil Practice Note 1 (Case Management) provides that time continues to run during the vacation.

POSITION OF THE GENERAL REWRITE COMMITTEE

[73] The time for delivering and amending pleadings should continue to run during the court vacations.

2. Trials

[74] Rule 552(1) also provides that trials will not be held during the court vacations unless otherwise directed by the court. The court's ability to schedule trials during July and August and over the Christmas period depends on available resources. As an administrative rather than a procedural matter, the General Rewrite Committee makes no comment on scheduling trials during the vacations.

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[25] ALRI CM 12.5, *supra* note 17 at para. 89.

CHAPTER 2. TIME FOR SERVICE OF A STATEMENT OF CLAIM (RULE 11)

[75] Rule 11 is a tough rule with an unforgiving nature. It severely limits the amount of time within which a plaintiff can serve a statement of claim on the defendant(s). Rule 11 provides that a statement of claim is in force for a period of 12 months following its issuance and expires at the end of that time. Provided that an application is brought before the end of that 12 month period, the statement of claim can be renewed for a single further period not exceeding 3 months. If the original 12 month period ends before a renewal application is made, Rule 11(9) provides that the statement of claim can only be renewed in very limited circumstances that essentially amount to waiver by or estoppel against the defendant. None of these time periods can be enlarged or abridged by the court, because Rule 548 is expressly stated not to apply to Rule 11.

> Beware of this rule! Delay in serving a statement of claim can result in a plaintiff's claim in effect being struck. If a statement of claim is not served or renewed within 12 months of the anniversary of its issue and the limitation period of the claim has also expired, the action and cause of action in effect are dead ....
>
> This Rule was radically amended in 1991 to eliminate the ability to bring a renewal application after the expiry of the statement of claim, to limit the number of possible renewals to one, and to clarify that the court's discretion to extend time under R. 548 is not applicable. These changes attest to the purpose of this Rule: to prevent delay and encourage expedient litigation.
>
> . . .
>
> Plaintiffs' solicitors are typically caught by this Rule in one of two ways. They have left service to the last minute, only to discover that the plaintiff cannot be readily found. Or the solicitors deal directly with the defendant's insurer, forgetting that the defendant, and not the insurer, is the real litigant.[26]

[76] In its current form, Rule 11 serves as a check on the propensity of both lawyers and judges to allow litigation to drag on. Rule 11 makes it inadvisable for lawyers to procrastinate when serving a statement of claim and it also removes judicial discretion to forgive such procrastination. Traditionally, judges are reluctant to exercise their

---

[26] The Honourable W.A. Stevenson & The Honourable J.E. Côté, *Alberta Civil Procedure Handbook 2005* (Edmonton, Alberta: Juriliber, 2004) at 28 [*Civil Procedure Handbook*].

discretion not to renew the time for service because doing so can end a claim that may otherwise be valid. By eliminating discretion, Rule 11 removes that burden from the judiciary and replaces it with an objectively established deadline which is virtually absolute.

A. Other Canadian Jurisdictions

[77] Other Canadian jurisdictions often state a shorter period than Alberta for service of a statement of claim but allow multiple extensions, including applications to extend following expiry of the period.

[78] There are three approaches to how long the initial period should be for serving a statement of claim:

- **12 months** is the period in four jurisdictions: Alberta,[27] British Columbia,[28] Northwest Territories[29] and Newfoundland/Labrador.[30]
- **6 months** is the period in six jurisdictions: Saskatchewan,[31] Manitoba,[32] New Brunswick,[33] Ontario,[34] Prince Edward Island,[35] and Nova Scotia.[36]
- **2 months [60 days]** is the period in one jurisdiction: Federal Court.[37]

[79] On the issue of whether the initial period for service can be extended or renewed, all the jurisdictions allow such extensions to occur. Alberta is unique in

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[27] R. 11.

[28] British Columbia, r. 9.

[29] *Rules of the Supreme Court of the Northwest Territories*, r. 13 [Northwest Territories].

[30] Newfoundland and Labrador, *Rules of The Supreme Court, 1986*, r. 5.06 [Newfoundland/Labrador].

[31] *Saskatchewan Queen's Bench Rules*, r. 16 [Saskatchewan].

[32] Manitoba, *Court of Queen's Bench Rules*, r. 14.07 [Manitoba].

[33] *Rules of Court of New Brunswick*, r. 16.08 [New Brunswick].

[34] Ontario, r. 14.08.

[35] Prince Edward Island, *Rules of Civil Procedure*, r. 14.08 [Prince Edward Island].

[36] *Nova Scotia Civil Procedure Rules*, r. 9.07 [Nova Scotia].

[37] Federal, r. 2.03.

having quite severe restrictions on this aspect because the renewal is for a much shorter time period than the original period and can only occur once. A couple of other jurisdictions allow extension or renewal for a shorter period as well (half the length of the original period: Northwest Territories[38] and Newfoundland/Labrador)[39] but it can be renewed more than once. Multiple renewals (at the discretion of the court, of course) are possible in the other jurisdictions as well (but again, not in Alberta).

[80] On the issue of whether an application to extend the time for service must be brought before or after the expiry of the original time period, only Alberta restricts the application so that it must be made before expiry.[40] Newfoundland has a "hybrid" approach: the *registrar* may renew or extend on application made before expiry of the original time period, but only a *court* may renew or extend on application made after expiry of the original time period.[41]

[81] Generally speaking, Canadian jurisdictions have a liberal attitude to extending the time for service of a statement of claim.[42]

> While Canadian courts now take a more generous attitude to the question of an extension for time for service after the limitation period, leave is by no means a matter of course (though the case law suggests that granting an extension is now more common than refusal).[43]

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[38] Northwest Territories, r. 13.

[39] Newfoundland/Labrador, r. 5.06.

[40] In British Columbia, r. 9 provides that a renewed writ of summons can be further renewed by the court for another period of not more than 12 months, on application made "during the currency of the renewed writ." On a strict reading of this language, it should mean that there can be no application to renew a renewed writ if it has expired. However, case law has interpreted this provision to allow such applications even after expiry of a renewed writ: *Mussell v. Cronhelm* (1994), 111 D.L.R. (4th) 95 (B.C.C.A.); *Christenson v. Mleczko* (1988), 24 B.C.L.R. (2d) 310 (S.C.).

[41] Newfoundland/Labrador, r. 5.06.

[42] Professor Garry D. Watson & Mr. Justice Craig Perkins, *Holmested and Watson Ontario Civil Procedure*, looseleaf (Toronto: Carswell, 1984), vol. 2 supp. at 3-12.

[43] *Ibid*.

B. Conceptual Language

ISSUE No. 11
What conceptual language should be used in Rule 11?

[82] Rule 11 speaks of statements of claim as being "in force" or "expired" and being capable of "renewal." Some other Canadian jurisdictions, including Ontario and the Federal Court, have abandoned this old conceptual language. They now simply provide that a statement of claim must be served within a specified time and that such time can be extended.

POSITION OF THE GENERAL REWRITE COMMITTEE

[83] The language of Rule 11 should be updated to match the language used in the rules of other jurisdictions like Ontario and the Federal Court. Conceptual language which characterizes a statement of claim as being in force, expired or renewed should no longer be used. However, Rule 11 should clarify the status of a statement of claim which is not served within the original time period or within any extended time period ordered by the court. Rule 11 should provide that failure to serve within those time periods will constitute a deemed withdrawal of the statement of claim.

C. What Should Rule 11 Provide?

ISSUE No. 12
Should changes be made to any of the following aspects of Rule 11?

- **length of original time period to serve a statement of claim**
- **whether it is possible to extend the time for service**
- **when an application to extend must be brought**
- **how long an extended time period should be**
- **how many extensions should be allowed**

POSITION OF THE GENERAL REWRITE COMMITTEE

[84] The General Rewrite Committee debated whether it would be best to liberalize Rule 11, make it even tougher than it currently is or just retain the *status quo*. The Committee considered the comments received from the profession during our initial public consultation, the models found in other Canadian jurisdictions and a proposal

from the Management of Litigation Committee of the Rules Project that Rule 11 should be made even more restrictive.

[85] The Management of Litigation Committee strongly feels that Rule 11 provides a much longer period for service than is really required. Combining the typical 2 year limitation period with the 15 months available for service under Rule 11 means that a defendant may well be unaware of a claim for over 3 years. Defendants have a need to assemble their defence and such a passage of time can make that more difficult. As well, many businesses have a legitimate need to know the extent of potential financial risks facing them, for purposes such as setting the reserves of insurance companies and the proper valuation of a business for sale or financing purposes. This unduly lengthy passage of time also adversely affects third parties, who are brought into the litigation within 6 months of the filing of the statement of defence.

[86] Consequently, the Management of Litigation Committee suggests that the initial time for serving a statement of claim should be cut in half and reduced to 6 months.

[87] After much discussion, the General Rewrite Committee has decided to seek the opinions and comments of the legal profession and judiciary about various options. The Committee's own preference is to retain the *status quo* (option # 1) but it wants the benefit of consultation before making a final recommendation. Please advise the Committee which of the following options is preferable:

> ***Option # 1***
> Keep Rule 11 as it currently exists (12 months to serve and a single 3 month extension on application brought before expiry of the original 12 month period).
>
> ***Option # 2***
> Amend Rule 11 as suggested by the Management of Litigation Committee. The time for service of a statement of claim would be 6 months, with one additional 3 month extension on application to the court made prior to the expiry of the original 6 month period.

Option # 3

Time for service would be 6 months, with one additional 3 month extension on application to the court, but the application for an extension could be made at any time within 1 year of the date of filing the statement of claim. In other words, an application could be brought after expiry of the original 6 month period for service, but there is a cap on how long afterwards it could be brought. Under this option, the total amount of time that could pass before the statement of claim could no longer be served would be the same as under current Rule 11.

Option # 4

Time for service would be 6 months, with one additional extension on application to the court brought within 1 year of filing, but the court will have more discretion by being able to order that the extension period is 3 months or such other period of time as the court may order.

D. The Problem of the Untraceable Defendant

ISSUE No. 13
Should Rule 11 have a general, discretionary exception for special or exceptional circumstances so as to allow an extension of the time to serve a statement of claim even long after the initial time for service has ended?

[88] Rule 11's short time period for serving a statement of claim can be a problem when dealing with an untraceable defendant. If a plaintiff truly has no idea where to find a defendant who has disappeared and cannot be traced, the plaintiff will have to get a court order dispensing with service (very rare) or an order of substitutional service (more common). Default judgment would then follow. But if the defendant reappears later, the defendant may be able to set aside both the default judgment and the order for substitutional service or the order dispensing with service. If the defendant can set aside the order for substitutional service or the order dispensing with service, the plaintiff will by then usually be unable to get an extension under Rule 11 to serve the expired statement of claim on the newly-surfaced defendant. If the limitation period has also expired, the plaintiff's claim will be defeated. In these

circumstances, the strictness of Rule 11 merely serves to reward defendants who disappear in order to avoid service.

[89] This scenario occurred in the Alberta Queen's Bench case of *Hansraj v. Ao*.[44] The plaintiff obtained an *ex parte* substitutional service order based on speculative and inadequate evidence about the defendant's whereabouts. There was no evidence that the statement of claim ever came to the defendant's attention. Sufficiency of service was later successfully challenged by the defendant's insurer and the substitutional service order and default judgment were set aside. The statement of claim had long since expired under Rule 11 and therefore the claim was effectively ended against the missing defendant.

[90] On appeal, the Court of Appeal recognized the difficulties faced by a plaintiff dealing with an untraceable defendant. The Court suggests legislative reform to facilitate service of motor vehicle claims in these circumstances. Legislation could authorize

> service of a motor vehicle statement of claim by delivery at, or registered mail to, the last address of the defendant registered with the Motor Vehicle Registry (and upon the insurer, named in any insurance pink card produced, or otherwise later notified). Another might be to allow substituted service upon the Superintendent of Insurance or Registry of Motor Vehicles (the latter having the name and address of the declared insured).[45]

POSITION OF THE GENERAL REWRITE COMMITTEE

[91] The Court of Appeal's suggested solution to this issue constitutes a fairly dramatic change to conventional rules about service and would benefit plaintiffs involved in motor vehicle cases only. But untraceable defendants and the problematic effect of Rule 11 can occur in any type of litigation. A broader solution to this issue would be to make Rule 11 more flexible so that the issue can be addressed in all types of litigation.

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[44] *Hansraj v. Ao* (2002), 314 A.R. 262, 2002 ABQB 385.

[45] *Hansraj v. Ao*, 2004 ABCA 223 at para. 118.

[92] The General Rewrite Committee considered whether to propose an exception to Rule 11 that would allow an extension of time for service following expiry of the original period specifically where an order for substitutional service or the order dispensing with service is later overturned. But such an exception would have to be subject to considerations of due diligence by the plaintiff in searching for the defendant and preparing the affidavit in support of the now-challenged order, because sometimes it is perfectly justifiable to overturn those orders. The exception must not relieve a plaintiff from the consequences of using sloppy or inadequate evidence in obtaining such orders.

[93] There can also be other problems with Rule 11's restrictions and service that have nothing to do with the adequacy of the substitutional service order, yet have the effect of shifting liability onto a party other than the original defendant. For example, if a substitutional service order provides for publication in a newspaper and the newspaper inadvertently fails to run the advertisement before the time for service expires, the newspaper will likely be liable for the plaintiff's loss.

[94] Instead of trying to list in the Rule all the specific scenarios justifying an exception to Rule 11, the Committee wonders if there should be a general exception to Rule 11 that would give a court the discretion, at any time, to extend the time for service for a specified period if there are special or exceptional circumstances to justify the extension. Such an exception would allow a court to remedy the problem when dealing with a truly untraceable defendant in any type of litigation, but not when dealing with other situations where service has been legitimately set aside. It would also cover other circumstances where it would be unfair not to let a plaintiff serve a statement of claim despite the passage of time. This general exception would also eliminate the need to list the exceptions currently contained in Rule 11(9) relating to waiver and estoppel, as they would be subsumed in the general exception's concept of exceptional circumstances. (However, the prohibition in Rule 11(4) against the application of Rule 548 to extend time would continue to apply generally).

[95] The potential problem with having such a general exception is that judges may use it too loosely and grant extensions in less than exceptional circumstances, thereby undermining the legislative intent of Rule 11 to eliminate procrastination and delay. Any provision will have to be carefully worded to discourage that outcome.

[96] The Committee seeks the opinions and comments of the legal profession and judiciary about whether such a general exception to Rule 11 should be created.

CHAPTER 3. DELAY IN THE PROSECUTION OF AN ACTION

[97] It has long been recognized that there is a need to have procedures to deal with inordinate or inexcusable delays in actions. Lengthy delays can cause prejudice to parties in that evidence can be lost or destroyed; witnesses can disappear, die or experience fading memories; and unforeseen events affecting the action are more likely the longer the action takes to reach resolution. Further, defendants should not be forced to live with "the Sword of Damocles" hanging over their heads for inordinate periods during which they face the unsettling prospect of potentially being found liable for indeterminate and potentially substantial amounts of money. For all of these reasons it is necessary to have some mechanism in The Rules to ensure that actions are prosecuted in a timely manner.

[98] The rules that existed prior to the enactment of the new Part 24 required parties to seek leave of the court if they failed to "take the next step" in an action:

> 243. Except an application under r. 244, no new step in an action prior to judgment shall be taken after the expiration of one year from the time when the party desiring to take the step first became entitled to do so, except with leave of the court which may impose terms.

The case law under the former rules established a three part test for granting leave under Rule 243:

(1) there must not have been inordinate delay;

(2) the delay must not be inexcusable; and

(3) the delay must not have caused a likelihood of serious prejudice to the defendant.[46]

[99] Despite repeated comments from the Court of Appeal that the test for leave should be applied strictly,[47] the test is generally not difficult to meet in reality, and leave is commonly granted in the absence of proof of the probability of serious prejudice to the defendant.

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[46] *Wright v. Disposal Services Ltd.* (1977), 4 Alta. L.R. (2d) 173 at 180 (S.C.T.D.); *Lethbridge Motors v. American Motors (Canada) Ltd.* (1987), 53 Alta. L.R. (2d) 326 (C.A.); *Alberta Government Telephones v. Arrow Excavations & Trenchers (1972) Ltd.* (1989), 69 Alta. L.R. (2d) 332 (C.A.).

[47] *Miller v. Duwors* (1981), 63 A.R. 141 (C.A.); *Re S.(J.)* (1987), 54 Alta. L.R. (2d) 390 (C.A.).

[100] Part 24 of The Rules (Rules 243-244.5) was enacted in 1994 and made significant changes to the procedures for dealing with delay.[48] There are now three options available to address inordinate delay: 1) the parties may agree to move an action along on the basis of an agreed upon schedule; 2) the court has discretion to dismiss actions where inordinate delay has prejudiced a party; and 3) actions (in theory) are subject to automatic dismissal on application if there is undue delay, being more than 5 years since a thing was done that materially advances an action (the drop dead rule).

ISSUE No. 14
Is there a need for separate rules addressing delay in light of the proposed mandatory scheduling recommendations?

[101] The rules dealing with delay in prosecuting actions arise from the peculiarities of the litigation system in Alberta. The Rules contain some deadlines for certain steps in the litigation process (such as filing Statements of Defence, Affidavits of Records, and serving expert reports) but there is no requirement that parties in all actions agree on a litigation schedule at any time. Under the current litigation regime it is possible for litigation to stall without a justifiable reason. This is likely to happen where a plaintiff, for whatever reason, decides not to pursue the action and instead of concluding the action through a discontinuance or settlement, simply lets the action languish. Some plaintiffs simply disappear without explanation and stop responding to their lawyers' repeated attempts at communication. This puts their counsel in a difficult position as they can neither discontinue nor settle the action without instructions to do so.

[102] The usual course of action when it seems that a client has disappeared is to send a letter to the client's last known address advising of the consequences of failing to prosecute the action, followed by a notice of ceasing to act. Consequently, in matters where the plaintiff suddenly disappears, the defendant often takes the view that it is best to "let sleeping dogs lie" and not pursue the action, as this is the least costly alternative. The knowledge that there will be an opportunity to dismiss the action after a period of time likely factors in the defendant's decision to do nothing until pressed

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[48] Alta. Reg. 234/94.

to do so by the plaintiff. Under these conditions it makes sense to have a procedure to deal with truly stale claims.

[103] As noted above, Part 24 of The Rules provides alternatives for dealing with delay beyond striking actions. For instance, pursuant to Rule 243.2 parties may move actions along on their own accord by serving proposed timetables. Rules 244 and 244.4 authorize the court to give directions for the expedient determination of the action and to prescribe terms to remedy any prejudice suffered by a party due to delay.

[104] The Management of Litigation Committee has recommended that mandatory schedules be imposed on all litigation at an early stage.[49] This Committee proposes that parties create their own schedules though there will be default schedules prescribed by the rules if parties cannot reach agreement. One would expect that such schedules would theoretically address all of the mechanisms currently in Part 24. There will not be any specific sanctions for failing to adhere to the schedule; it will be up to the parties to bring a motion to enforce the timelines in a schedule. This system then will not address the situation described above where a plaintiff disappears, as again the defendant is likely to choose the least expensive method of doing nothing until the plaintiff surfaces.

[105] While the mandatory scheduling procedure would likely negate the need for rules similar to those in the current Rule 243.2 (proposals as to timing), it is likely that we will need to include other mechanisms to deal with undue lengthy delays.

Rules in Other Jurisdictions

[106] Other Canadian jurisdictions employ differing methods in dealing with delay. Several jurisdictions require a party to file and serve a "notice of intention to proceed" on all other parties after the passage of prescribed period of time and the party may

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[49] These are the most recent recommendations from the Management of Litigation Committee to the Rules of Court Project Steering Committee. While some changes are still possible, we will rely on these recommendations for the purposes of developing principles underlying the delay rules. After consultation is complete we will ensure that our final recommendations in the area of delay are consistent with those of the Management of Litigation Committee.

only proceed 1 month after service of this notice.[50] If no step has been taken for year, a party must file and serve on all parties a notice of intention to proceed. The party may not proceed for a set time after service of this notice. A defendant or respondent may apply to have the action struck for want of prosecution without filing a notice of intention to proceed.[51]

[107] The rules in Ontario, Manitoba, Prince Edward Island and New Brunswick include specific circumstances in which a party may seek to have an action dismissed on the grounds of delay. A defendant not in default may move to dismiss an action for delay if the plaintiff has failed:

(a) to serve the statement of claim on all defendants within the prescribed time;
(b) to have noted in default any defendant who has failed to deliver a statement of defence within 30 days after the default;
(c) to set the action for trial within 6 months after the close of pleadings;
(d) to move for leave to restore to a trial list an action that has been struck off the trial list within 30 days of the action being struck.[52]

[108] Newfoundland[53] provides that if the plaintiff fails to set matter for trial the defendant may apply to have action dismissed for want of prosecution. The Federal Rules[54] contain only a general provision regarding delay, being that a court may dismiss an action or impose other sanctions on the grounds of undue delay by the plaintiff, applicant or appellant if the party bringing the motion is not in default of any requirements under the rules.

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[50] British Columbia, r. 3(4) (must serve notice of intention after 1 year, cannot proceed for 28 days after service of notice); Saskatchewan, r. 536 (must serve notice of intention after 1 year, cannot proceed for 30 days after service of notice) and r. 5 (actions may be dismissed for non-compliance with deadlines in rules); Nova Scotia: r. 3.04 (must serve notice of intention after 6 months, cannot proceed for 30 days after service of notice); Newfoundland/Labrador (r. 3.04 must serve notice of intention to proceed after 12 month delay unless court dismisses for want of prosecution).

[51] British Columbia, r. 3(5).

[52] Ontario, Manitoba and Prince Edward Island, r. 24.01; New Brunswick, r. 26.01.

[53] Newfoundland/Labrador, r. 40.12.

[54] Federal, r. 167.

Comments from the Legal Community

[109] All of the comments on this issue from the legal community favoured simple, effective and efficient mechanisms in the rules to deal with delay. Several commentators supported the parties' ability to propose schedules to move matters along. All agreed that there should be a procedure to strike actions that lay dormant without good reason. In fact, most of those who commented suggested that the waiting period to do so be reduced significantly (discussed below).

POSITION OF THE COMMITTEE

[110] The Committee agrees that the new rules should expressly deal with situations of inordinate delay. The Committee also is of the view that the rules must provide a mechanism permitting parties to agree to schedules to govern the timing of actions. As this likely will be addressed in the rules governing mandatory scheduling no such provision will be necessary in the delay rules section. If for some reason mandatory schedules are not adopted, the Committee proposes that there should be a provision in the delay rules similar to the existing Rule 243.2 that permits parties to set schedules, or apply to the court for scheduling assistance.

ISSUE No. 15

Should there be an ultimate drop dead rule whereby actions will be struck if there has been undue delay for a specific period of time?

[111] Currently Rule 244.1 provides:

> 244.1(1) Subject to Rule 244.2, where 5 or more years have expired from the time that the last thing was done in an action that materially advances the action, the Court shall, on the motion of a party to the action, dismiss that portion or part of the action that relates to the party bringing the motion.
>
> (2) This Rule does not apply in respect of an action commenced under Part 49 or Rules 754 to 757.[orders under the *Winding Up Act*].

[112] As noted in the Introduction, Rule 244.1 is a relatively new rule that came into force in 1994. Originally this rule was understood to mean that an action would be struck if:

(i) there had been a 5 year delay since the last "material step" was taken in the action, and

(ii) there was no agreement between the parties that the time would stop running for the purposes of this rule.

[113] The courts have since held that this rule is not as automatic or as final as it may seem on first reading. In *Filipchuk v. Ladouceur*[55] the Court of Appeal held that there are two possible interpretations of Rule 244.1. The first is that an action that has languished for 5 years without an agreement between the parties will be struck upon application of an adverse party. The second interpretation is that a party can revive the 5 year period *even after its expiration* by taking a material step, if that step is taken prior to the filing of the motion to strike under Rule 244.1. The Court of Appeal held that as striking an action is a severe penalty, the interpretation "most favourable to the preservation of the right to litigate" should be adopted. Essentially the court created a "race to the courthouse" situation whereby the defendant (or other party adverse in interest) must now ensure that the motion to strike is filed immediately upon expiration of 5 years lest the plaintiff take a material step that will restart the 5 year period.

[114] There are competing principles to consider prior to creating a non-renewable delay period. The Court of Appeal favoured the principle that a party's right to litigate issues should be protected in the absence of clear legislative direction to the contrary. However, one must remember the original purpose of the rules dealing with delay in general, as well as some of the primary goals of the Rules of Court Project. Clearly, undue delay can severely prejudice a party's ability to pursue an action as a result of loss of documentary evidence as well as problems with witness availability and fading memory. Delay in litigation may be viewed as a denial of justice as it is unjust to force parties to live with unresolved litigation hanging over their heads. Indeed, there is a distinction between lengthy actions where matters are progressing and parties can see that some resolution is on the horizon and languishing actions where there is no progress being made towards a resolution.

[115] Having a mandatory drop dead rule would serve the purpose of moving actions along, minimizing undue delay and increasing access to justice. Adopting the Court of Appeal's interpretation in *Ladouceur* would defeat all of these goals. Based on the

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[55] (2001), 277 A.R. 192 (C.A.).

current interpretation of the rule, a party can drag out litigation for 10 years with very little action in the interim. Ideally, in a situation like *Ladouceur* the court would impose stringent terms on a party requiring timely prosecution of the remainder of the action. In reality though, parties may not even appear before the court if a plaintiff takes some step after the 5 year period. Court applications are expensive and a defendant may choose to respond to the late step rather than risk an unsuccessful application to strike. Defendants may also adopt the attitude that the plaintiff is likely to go away again for a period of time, thus the least expensive option is to do nothing. In such a case the action may continue to languish for an additional period of time.

[116] A mandatory drop dead rule would not unduly restrict a party's right to litigate a matter because parties can agree to suspend the operation of this period if there is good reason to do so. It is true that problematic situations may arise if a party cannot afford to pursue litigation, or if a party becomes temporarily incapacitated and unable to direct counsel. The first situation can be addressed to some degree by contingency agreements; presumably, if there is merit to a claim some lawyer may take it on a contingency basis. However, contingency agreements may not address the situation of a defendant who fails to pursue a third party claim. The second issue may be dealt with through the appointment of a litigation representative under the appropriate rules. In any event, extenuating circumstances where counsel do not consent to delay may be dealt with by the court which may use its discretion to suspend the running of the period prior to the expiration of the period.

[117] If a mandatory drop dead rule is adopted, a mechanism for implementation will be required. One suggestion would be to automatically dismiss and action where no material step has been taken at the end of a prescribed period (and adverse parties have not consented to the delay). Automatic dismissal would require the court or the clerk to dismiss actions on the court record that appear to have been dormant for the prescribed period. The problem with this approach is that not all material steps appear on the court record, including ongoing discoveries, answering undertakings, and attempting non-court related alternate dispute resolution (which may or may not be considered to be a material step). Unless parties are required to provide the court with continual updates on the status of the action it will be difficult if not impossible for the court to determine when a prescribed time period has lapsed. One way to monitor the time would be to require the parties to submit regular reports to the court. If regular

reports are required, however, they would likely have to be reviewed by the court and not the clerk[56] to determine if the steps taken constitute a material step (assuming that this concept is retained in the rules) and this would present a serious resource problem.

Comments from the Legal Community

[118] All of those who commented on this issue favoured some form of automatic dismissal for actions that linger unnecessarily. Some also suggested that the former "leave to take the next step" rule in fact moved actions along more quickly as parties were required to appear before a judge to explain the delay more often than once in 5 years. It was therefore suggested by some commentators that a similar rule be imposed again to restrict judges' discretion.

[119] Many commentators noted that a significant problem with the current delay rules is a "sympathetic" court that is loath to dismiss actions on the basis of delay. There were complaints that the court tends to accept any kind of weak excuse for delay and does not impose sufficient sanctions for inexplicable delay. Several people strongly disagreed with the Court's interpretation in *Ladouceur*, commenting that although Rule 244.1 may have once had teeth, they were removed in this decision and the rule has lost its utility as a result.

[120] Prior to the enactment of Rule 244.1, the delay rules required that a party must seek leave of the court to "take the next step" if more than a year had passed since the expiration of time to do so and where there was no consent from adverse parties. Some commentators suggested that this was a more effective method of dealing with delay as parties were forced to explain delay to the court on a regular basis. However, the issue of a "sympathetic court" seemed to arise under that rule. Further, when the court did grant leave, only minor cost consequences followed in most actions.

Position of the General Rewrite Committee – See Erratum page 62

[121] The Committee supports the idea of having an ultimate drop dead period upon expiry of which the court must strike the action upon application of an adverse party.

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[56] It is questionable whether a court clerk is able, constitutionally or otherwise, to exercise discretion in a matter that results in the striking of an action.

The Committee is of the opinion that the rule should be absolute and a party should not be able to "restart" the period upon its expiration. To follow the result in the *Ladouceur* decision effectively negates the benefits of this rule, which is to recognize that where there has been inexcusable or inordinate delay there is no reason to give a party a second chance to further delay an action. The Committee proposes that the rule be modified clearly to state that the court has no discretion in deciding whether to strike the action; the action must be struck at the end of the prescribed period.

[122] The Committee sees no need to exempt any types of actions from the drop dead rule and accordingly proposes to eliminate Rule 244.1(2) that currently exempts both foreclosure actions and actions under the Winding Up rules.[57]

ISSUE No. 16
What is the appropriate time period after which an action must be dismissed?

[123] Currently Rule 244.1 provides that an action shall be dismissed if no material step is taken within five years. It may be questioned what purpose is served by allowing an action to lie dormant for 5 years in the absence of a justifiable reason to do so.

Comments from the Legal Community

[124] Many people were of the opinion that 5 years is too long a time period to wait to have an action dismissed and suggested that the period prior to automatic dismissal should instead be 2 or 3 years. Conversely, there was also concern that the rules may cause injustice in personal injury claims where the 'delay' is not caused by counsel or parties. For instance, the passage of time is necessary to assess the damages in these actions and it is not uncommon for a plaintiff to take several years to reach maximum medical improvement prior to commencing functional, vocational or economic assessments. Arguably, claims should not be dismissed during this "healing" period. It was also noted that parties must be able to agree to suspend the time running where, for instance, negotiations, settlement discussions, or other types of alternate dispute

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[57] Though the General Rewrite Committee is of the view that these types of actions should not be excluded from the drop dead rules, it has referred this issue to the Foreclosure Committee for its comments. As the Enforcement of Judgments Committee has recommended that the Winding Up rules be repealed there is no need to consider that issue any further.

resolution are ongoing (though the courts have held that "without prejudice" discussions do not suspend the running of the rule absent agreement between the parties).[58]

POSITION OF THE GENERAL REWRITE COMMITTEE

[125] The Committee considered the suggestion to shorten the drop dead period from the current 5 year requirement. However, the Committee is concerned that if the drop dead period is shortened, valid actions may be struck in cases where the plaintiff does not have the financial resources to pursue the action in the short term. In the Committee's view, this would create an unduly harsh and unjust situation. The Committee agreed that the correct balance between justice to plaintiffs and defendants will be achieved if there is an unambiguous rule requiring that actions shall be struck after an inexcusable delay of 5 years.

ISSUE No. 17
Should the court have discretion to strike an action before the expiration of the prescribed time period?

[126] Rule 244 provides the court with discretion to dismiss an action prior to the expiration of the 5 year period in Rule 244.1:

> 244(1) Where there has been a delay in an action, the Court on application by a party to the action may, subject to any terms prescribed by the Court,
>
> (a) dismiss the action in whole or in part for want of prosecution, or
>
> (b) give directions for the expeditious determination of the action.
>
> (2) If the Court denies the relief sought under subrule (1)(a), the Court
>
> (a) shall prescribe terms or give directions that, in the opinion of the Court, are sufficient to substantially prevent or remedy, as the case may be, any non-trivial prejudice caused to any adverse party by reason of the delay, and
>
> (b) may prescribe terms or give directions that, in the opinion of the Court, will prevent further delay in the action.
>
> (3) If in the opinion of the Court it is unable to devise terms or directions that are sufficient to satisfy subrule (2)(a), the Court shall find that there has been serious prejudice to the party moving to dismiss the action.

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[58] *J.K. Campbell & Associates Ltd. v. Lethbridge General and Auxiliary Hospital* (2000), 264 A.R. 107 (Q.B.).

> 4) Where, in determining an application under this Rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay shall be prima facie evidence of serious prejudice to the party that brought the application.

"Prejudice" is defined in Rule 243(2):

> 243 (2) For the purposes of this Part, prejudice to adverse parties in an action caused by delay can be of any nature and is not restricted to procedural or evidentiary difficulties.

[127] Essentially Rule 244 has retained elements of the mechanism that existed for dealing with delay prior to the enactment of the new Rules. Rule 244 permits the court to consider two things: first, whether there is a reasonable excuse for delay; and second, whether the length of delay has caused serious prejudice to a party that cannot be remedied by imposing terms. This differs from motions to dismiss under Rule 244.1, where neither of these factors are relevant considerations. The Court has adopted a three part test for applications under Rule 244:

(i) is there inordinate delay;

(ii) is the delay inexcusable; and

(iii) has the delay resulted in serious prejudice to a party?[59]

Dismissal of the action is only mandatory where the prejudice cannot be remedied by terms, though the court theoretically has discretion to dismiss actions even if the prejudice can be remedied.

[128] Rule 244.4 provides a long list of alternatives available to the court to deal with actions where dismissal is not mandatory and may be viewed as too harsh:

> 244.4 Without restricting the generality of the Court's power to grant an order under this Part subject to any terms or directions, the Court may in granting an order do one or more of the following:
>
> (a) award solicitor-client costs;
>
> (b) deny to the party causing the delay all or any part of the party's substantive claim, defence or relief, whether respecting principal, damages, interest or otherwise;
>
> (c) curtail or forbid discovery or other interlocutory proceedings by the party causing the delay;
>
> (d) require compulsory admission of facts related to the prejudice caused by the delay;

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[59] *Volk v. 331323 Alberta Ltd.* (1998), 212 A.R. 64, 1998 ABCA 54 [*Volk*].

(e) modify the types or effect of evidence that may or may not be used at trial to prove some or all facts;
(f) amend pleadings;
(g) enlarge or abridge substantive or procedural time periods otherwise applying;
(h) deny costs for tardy proceedings;
(i) direct that costs be payable personally by a solicitor;
(j) require security for costs;
(k) award interim costs;
(l) give directions respecting case management.

POSITION OF THE GENERAL REWRITE COMMITTEE

[129] The Committee favours retaining a separate rule that gives the court discretion to strike actions on the basis of inordinate delay prior to the expiration of the drop dead period if there is good reason to do so. It was noted that the threat of a motion is a useful mechanism to force tardy counsel to move an action along.

[130] The Committee proposes to retain Rule 244 in its present form. The broad definition of "prejudice" in Rule 243(2) should also be retained. However, the Committee is of the view that the shopping list of remedies in Rule 244.4 is unnecessary and should be replaced simply by a broad provision giving the court the jurisdiction to impose any terms it deems just or necessary to deal with delay if striking the action is not appropriate.

ISSUE No. 18
Should parties be able to agree to suspend the running of time periods under the delay rules?

[131] Currently Rule 243.1(1) provides that parties may expressly agree to suspend or vary the application of any of the delay rules. Rule 243.1(2) requires written notice of this agreement to be given to all other parties in the action, including parties to counterclaims or third parties.

[132] It must be remembered that the purpose of the delay rules is to prevent actions from languishing *unnecessarily*. As some commentators pointed out, there may be good reasons why an action is not pursued actively for a lengthy period of time. The classic example is a personal injury action where a plaintiff may require several years

to reach "maximum improvement" to ensure accurate assessments of loss of income and future cost of care claims.[60]

POSITION OF THE GENERAL REWRITE COMMITTEE

[133] The Committee agrees that there are times when lengthy periods of delay are unavoidable and justifiable. Accordingly, there must be a mechanism enabling parties to suspend the running of the time period for the purposes of the delay rules. As such, the Committee proposes to retain a rule similar to Rule 243.1 permitting parties to expressly agree to suspend or vary the application of some or all of the delay rules, including both the discretionary rule and the drop dead rule. The Committee also proposes some amendments to the current rule, namely that agreements must be in writing, and that agreements to suspend or vary the application of the delay rules must be between *all parties* to the action, not just some parties. The reason for this change is that third parties or parties to a counterclaim may be unduly prejudiced by long delays in the main action. Presumably, if there is a valid reason for significant delay in the main action the other parties will agree. But if there is not, parties who are indirectly involved should not be forced to have actions hanging over their heads for an indeterminate period of time.

ISSUE No. 19
Should (or can) a "thing done that materially advances the action" (i.e. "material step") be defined?

[134] The question of what constitutes a "thing that materially advances the action" in Rule 244.1 is the most common issue seen in applications to dismiss for delay. This is also an issue that the legal community flagged during consultation and many commentators asked for a more clear definition as to what constitutes a "thing done that materially advances an action".[61]

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[60] This may raise the issue as to whether actions should be bifurcated in these circumstances wherein parties should proceed on liability issues even though it may be necessary to wait on issues concerning damages. This issue is outside of the scope of this memo. Bifurcation of discovery was addressed briefly by the Discovery and Evidence Committee; see ALRI CM 12.2 , *supra* note 4 at 77. The Committee held that the current rules permitting (but not encouraging nor requiring) bifurcation of issues should be retained.

[61] This term is referred to as "material step" for ease of reading in this memorandum.

[135] Some judicial guidance has been given as to the meaning of this phrase,[62] including:

(i) a procedural step required by the Rules of Court will always be a thing that materially advances the action;

(ii) procedural steps contemplated by the Rules, although not required, may also materially advance the action;

(iii) as the term "thing" is broader than "step", an action may be materially advanced by other things, even though they are not procedural steps in the rules;

(iv) the step must be completed and not merely commenced in order to escape the repercussions of Rule 244.1 (though an earlier decision Court of Appeal decision suggests that filing a notice of motion may suffice);

(v) merely advancing the action is not enough; the thing must materially advance the action;

(vi) the court may consider things done by any party in the action.

[136] While there is general agreement on the validity of these principles, the court has disagreed as their application to specific fact situations. An example is the provision of answers to undertakings. One line of decisions has held that answering undertakings is not a new thing that materially advances the action.[63] Another line suggests that some answers to undertakings may be significant to an action and they should be considered to suffice as a thing that materially advances an action for the purposes of Rule 244.1.[64] The distinction seems to be based on the substance of the answers given rather than on the general character of the step, being answers to undertakings. Another disputed issue is whether filing a notice of motion materially advances the action. The principles set out in the *Morasch* decision suggest that merely filing the motion is not sufficient as it is not a completed step. However, the

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[62] *Morasch v. Alberta* (2000), 250 A.R. 269, 2000 ABCA 24; *Bishop v. Calgary (City)* (1998), 228 A.R. 73, 1998 ABCA 23; *Volk*, *supra* note 59.

[63] *Smith v. Alberta* (1996), 188 A.R. 159 (Q.B. Master); *Appleyard v. Reed* (1997), 55 Alta. L.R. (3d) 279 (Q.B.); *Pro-Man Construction v. Lennie* (1998), 59 Alta. L.R. (3d) 178 (Q.B.).

[64] *Bentley v. Stringer* (1999), 246 A.R. 1 (Q.B. Master); *Peterka v. Nieman,* 1998 ABCA 14.

Court of Appeal found in a previous decision[65] (not mentioned in *Morasch*) that filing a notice of motion is a thing that materially advanced the action.

POSITION OF THE GENERAL REWRITE COMMITTEE

[137] The terms 'thing that materially advances the action' and 'material step' have led to much confusion in the case law. Defining either term precisely is quite difficult. Any attempts to clarify this definition will depend on whether it is desirable to take a broad or narrow view of the term 'material step'. A narrow interpretation would be easier to define, such as a step required under the rules. A broader interpretation is more difficult to define, though the Committee considered whether it would be useful to guide the court's interpretation by including a list of considerations such as those set out by the Court of Appeal.

[138] The Committee is of the view that the problem lies in the fact that actions are complicated and it is difficult to devise a term that covers all potential steps or events in a matter that could be said to materially advance the action. The consensus is that it is preferable to retain a broader test for matters that trigger the drop dead period rather than a narrower test. The Committee noted that redefining the term 'material step' as something required by The Rules is not sufficient as there are many steps that are not required, but merely permitted by The Rules. In the same vein, not all steps allowed by The Rules necessarily materially advance an action either. The Committee is of the view that the present term in Rule 244.1 (1): "last thing done that materially advances the action" should be retained and that the courts should continue to exercise discretion to determine whether a particular step materially advances the action in the context of that action. The Committee prefers not to include a list of factors to guide the court's exercise of discretion, as that is a matter that should be left to the case law to develop.

ISSUE No. 20
How should the delay rules deal with counterclaims and third party notices? Should counterclaims or third party notices be deemed to be dismissed if the main action is dismissed for delay?

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[65] *Petersen v. Kupnicki* (1996), 187 A.R. 251 (C.A.).

[139] Currently Rules 244 and 244.1 provide that 'a party to an action' may bring motion to dismiss on the basis of undue delay. Rule 243(1) states that for the purposes of the delay rules, "action" includes a proceeding. There is no definition of "proceeding" in The Rules, although it likely refers to matters commenced by originating notice or petition in addition to those commenced by statements of claim.[66]

[140] Normally one would expect that a motion to dismiss on the ground of delay would be brought by a defendant against a plaintiff. However, there may be situations involving counterclaims and third party notices where other parties may seek to have a matter dismissed on the basis of delay. In these situations, the motion would be made by the plaintiff/defendant by counterclaim,[67] or by third parties.[68]

[141] Two separate questions arise in the context of counterclaims or third party notices and the delay rules. The first question is how to deal with counterclaims or third party notices when the primary action is dismissed due to delay. The second question is whether third parties or defendants by counterclaim can bring motions to dismiss the actions against them on the grounds of delay.

(i) Counterclaims

[142] The only delay rule that addresses the interplay of counterclaims and motions to dismiss due to delay is Rule 244.2:

> 244.2 Notwithstanding Rule 244 or 244.1, where in an action
>
> (a) there are cross actions, or
>
> (b) there is a counterclaim or plea of set off,
>
> any order made under Rule 244 or 244.1 may be made subject to those terms or directions that the Court considers necessary to prevent any substantial injustice.

[143] In some circumstances a counterclaim may be considered to be a separate action thus permitting a defendant by counterclaim to bring an application under Rule 244.1 to dismiss, presuming that the issues therein do not overlap with issues in the main

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[66] See discussion of the term "proceedings" in ALRI CM 12.9, *supra* note 5 at 6-8.

[67] *Riveria Developments Inc. v. Midd Financial Corp.*, 2002 ABQB 953 [*Riveria Developments*].

[68] *Miller v. Carter*, 2002 ABQB 100.

action. If overlapping issues exist, steps taken in the main action could prevent a defendant by counterclaim from relying on Rule 244.1.

[144] The rules in several Canadian jurisdictions deal specifically with delay and counterclaims:[69] These jurisdictions require parties with counterclaims to specifically reinstate the claim if the main claim has been dismissed on the ground of delay. Thus, where an action against a defendant who has a counterclaim is dismissed for delay, the defendant may, within 30 days, deliver a notice of election to proceed with the counterclaim. If the defendant fails to do so, the counterclaim is deemed to be discontinued without costs.

(ii) Third party notices

[145] As "parties to an action" third parties can bring motions to strike the action on the basis of delay pursuant to Rules 244 or 244.1.[70] However, the question is whether the delay giving rise to the motion to dismiss is delay in the main action (i.e. between the plaintiff and the defendant) or delay vis a vis the defendant who issued the notice against the third party.

[146] It has been held that the "action" referred to under Rule 244.1 refers only to the primary action. Thus, any material step taken in the primary action negates the application of Rule 244.1. The step that materially advances the action need not apply to all of the adverse parties in order to preclude the drop dead rule.[71] Accordingly, a party may not bring a motion under Rule 244.1 if a material step relating to other parties has been taken in that time. Third parties may bring motions on the basis of delay in the primary action, but not on the basis of delay in the third party notice only. One may question whether this does justice to a third party who is subject to a third party notice that has languished for a lengthy period of time. While it is possible for a third party to apply to have a third party notice dismissed on the basis of delay pursuant to Rule 4 (which permits the court to apply The Rules by analogy where a

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[69] Ontario and Prince Edward Island, r. 24.03; Manitoba, r. 24.04; New Brunswick, r. 26.02.

[70] See *Riviera Developments*, *supra* note 67.

[71] *Protasiwich v. Archer Memorial Hospital* (1998), 251 A.R. 332, 1999 ABQB 595.

specific situation is not covered), there are no reported decisions where this procedure has been attempted.

POSITION OF THE GENERAL REWRITE COMMITTEE

[147] The Committee has discussed reforms to counterclaims and third party notices in a previous Consultation Memorandum.[72] Many of the proposals in that memorandum extend to the delay rules. For instance, the Committee proposed that The Rules should provide that counterclaims be treated as independent actions.[73] It follows that defendants by counterclaim would be able to bring motions to strike on the basis of delay.

[148] Third party notices are more complicated to deal with in the context of delay. Generally issues in third party notices will be advanced by material steps in the primary action. As such, the Committee proposes the adoption of a rule permitting third parties to bring a motion to dismiss the primary action. However, the Committee does not propose the adoption of a rule enabling third parties to dismiss the third party proceedings on the basis of delay in the third party proceeding alone.

[149] The Committee suggests the implementation of a rule similar to Rule 244.2 that gives the court discretion to impose terms to avoid injustice where there are counterclaims or third party notices that may be affected by motions to strike due to delay. The Committee also proposes to eliminate the current reference to "cross actions" and "plea of set-off" in Rule 244.2 because cross actions do not exist in Alberta and set-off is pled via counterclaims.

ISSUE No. 21
Should counterclaims or third party notices be deemed to be dismissed if the main action is dismissed for delay?

[150] Some jurisdictions provide that where the main action is dismissed on the ground of delay, any counterclaims are deemed to be dismissed with costs (unless

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[72] ALRI CM 12.9, *supra* note 5.

[73] *Ibid.* at 72.

otherwise ordered).[74] Similarly, third party notices are also deemed to be dismissed with costs and the defendant may subsequently claim these costs from the plaintiff.[75] The deemed dismissal of any claim on the basis of delay is not a defence to a subsequent action.

POSITION OF THE GENERAL REWRITE COMMITTEE

[151] The Committee does not support a deemed dismissal of a counterclaim upon dismissal of the primary action because the counterclaim is considered to be an independent action. Rather, the Committee is of the opinion that a provision similar to Rule 244.2(b) should be retained to give the court the jurisdiction to prescribe terms to deal with counterclaims on a case by case basis, which may include dismissing such claims if to do so would be the most effective method of preventing substantial injustice.

[152] The Committee also considered the question of whether third party notices should be deemed to be dismissed upon dismissal of the primary action. In its previous recommendations, the Committee suggested that the current scope of third party notices be expanded from "contribution and indemnity" to include independent claims for damages as between the defendant and the third party that relate to the subject matter of the main action.[76] It follows that third party notices that merely seek contribution or indemnity should be dismissed if the plaintiff's action against a defendant is dismissed due to delay. However, third party notices involving independent claims for damages may not necessarily be negated upon dismissal of the primary claim. The Committee is of the view that third party notices should be dealt with in the same manner as counterclaims, namely, that the court will have discretion to impose terms to prevent any substantial injustice.

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[74] Ontario and Prince Edward Island, r. 24.03; New Brunswick, r. 26.03; Manitoba R. 24.02.

[75] Ontario and Prince Edward Island, r. 24.03; New Brunswick, r. 26.03; Manitoba, r. 24.02.

[76] ALRI CM 12.9, *supra* note 5 at 48.

ISSUE No. 22
Should a party who has been noted in default be permitted to rely on the delay rules?

[153] The current delay rules have been interpreted to permit a defendant who has been noted in default to bring an application to dismiss under Rule 244.1 if the plaintiff has failed to establish the claim for damages or file a final judgment. The justification for this is that The Rules do not specifically exclude the motion of a defendant who has been noted in default. Further, "a defendant who has been noted in default is entitled to expect the plaintiff to pursue his claim for damages in a diligent manner in the same way a defendant who has filed a statement of defence has this entitlement."[77]

[154] Conversely, the delay rules in Ontario, Manitoba, Prince Edward Island and New Brunswick provide that a defendant may only rely on the delay rules if that defendant is not in default.[78] This approach is likely justified on the basis that defaulting parties have failed to comply with rules compelling them to take a step (filing a defence) and they should not therefore benefit from the delay rules.

POSITION OF THE GENERAL REWRITE COMMITTEE

[155] The Committee is of the view that while all parties should endeavour to move actions along in a timely manner, the primary burden should rest on the plaintiff to take all steps necessary to establish its claim. The Committee is also of the opinion that there should not be any limitations on a defaulting defendant's ability to invoke the delay rules. Defaulting defendants should not automatically lose their right to have plaintiffs proceed in a timely manner simply as a result of their failure to defend. Inordinate delay, even subsequent to the filing of a praecipe to note in default, can still cause significant prejudice to a defendant and the defendant should not be without a remedy.

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[77] *Yaremchuk v. Haight* (2001), 89 Alta. L.R. (3d) 311 at para. 6, 2001 ABCA 7.

[78] Ontario and Prince Edward Island, r. 24.01; New Brunswick, r. 26.01.

ISSUE No. 23
Is it necessary to retain the current evidentiary rules specific to motions under the delay rules?

[156] The current delay rules contain lengthy provisos dealing with examinations used in motions to dismiss due to delay:

> 244.3 On an application under this Part, affidavits containing statements as to the belief of the deponent and setting out the source and grounds under which the deponent was able to form that belief are admissible in respect of the application.
>
> 244.5(1) At or after the filing of a notice of motion under Rule 244 or 244.1, any party may, by appointment issued by the clerk or an examiner, cross-examine orally and under oath any party adverse in interest in regard to matters relevant to the motion.
>
> (2) The Court may set aside an appointment issued under subrule (1) or end a cross-examination, if the motion, the appointment or the cross-examination is not issued or conducted in good faith.
>
> (3) The party cross-examined under this Rule may be required to make further inquiries or to produce documents.
>
> (4) Nothing in this Rule affects the right of any party to cross-examine a deponent of an affidavit filed in the motion.
>
> (5) On hearing a motion under this Part, the Court may draw an adverse inference against any party who in the opinion of the Court fails, without reasonable justification, to produce direct evidence on matters touching the issues in the motion.

[157] Where an application may result in the final disposition of an action, a deponent of the supporting affidavit is normally required to have personal knowledge of the facts supporting the application (as is the case in a summary judgment application).[79] Although an application under Rule 244.1 can result in the final disposition of an action, Rule 244.3 creates an exception to the requirement of personal knowledge by permitting affidavits to be based on information and belief (similar to affidavits in interlocutory applications).

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[79] The Committee has recommended that the personal knowledge requirement be retained in applications that could potentially end actions; see, Alberta Law Reform Institute, *Motions and Orders* (Consultation Memorandum No. 12.10) (Edmonton, Alberta: Alberta Law Reform Institute, 2004) at 26-27 [ALRI 12.10].

[158] Rule 244.5(5) follows and permits the court to draw an adverse inference. One questions whether Rule 244.5(5) is necessary. The court is always free to assess credibility and accordingly assign due weight to any affidavit that is based on information and belief rather than personal knowledge. Accordingly, the court can attribute an adverse inference if the circumstances so warrant and a rule providing such authority is not necessary.

[159] Rule 244.5(1) to (3) establish a procedure for the examination of an adverse party for the purposes of a motion to dismiss an action under Rules 244 or 244.1, including a provision that the examining party can cross-examine the party being examined. These rules exist in addition to Rules 266-268 – the general rules for the examination of witnesses for the purpose of motions. This Committee previously suggested that examinations under Rule 266 and Rule 267 be cross examinations rather than examinations in chief.[80] As such, there is no apparent reason for a separate code for the examination of parties under Rule 244.5.

POSITION OF THE GENERAL REWRITE COMMITTEE

[160] The Committee is of the view that Rule 244.3 should be retained. While a requirement of personal knowledge may be suitable for most applications that potentially end an action, the same requirement may be problematic for applications under the delay rules because a deponent is unlikely to have personal knowledge that nothing has been done (particularly in relation to an application under the drop dead rule). Further, the timing of a "thing that materially advances the action" is a legal conclusion that would normally be based on advice from the party's solicitor. Likewise, the communications in most actions will be with a party's solicitor rather than the party itself, again requiring any such evidence to be based on information and belief rather than personal knowledge. The Committee therefore proposes to retain a provision that applications under the delay rules may be made on the basis of information and belief, so long as the source and grounds of that belief are included.

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[80] *Ibid.* at 35-39.

[161] The Committee makes the following proposals in relation to Rule 244.5:

a) Rules 244.5(1) to (3) should be deleted. The general rules applicable to examining witnesses, including parties for the purposes of motions, should apply to applications for dismissal on the ground of delay.

b) Rule 244.5(4) should be deleted. Rules providing for the examination of witnesses and parties do not affect the right of a party to cross-examine the deponent of an affidavit.

c) Rule 244.5(5) should be deleted. Under the general rules of evidence the court is always permitted to assess credibility of the evidence before it and assign weight accordingly.

Erratum

Filipchuk v. Ladoudeur has recently been considered by the Court of Appeal *in Trout Lake Store Inc. v. Canadian Imperial Bank of Commerce et al.* ((2004) 330 A.R. 379). Justice Conrad, on behalf of the court, sets out a 5 step test that will guide the application of Rule 244.1.

1. The proceedings should be examined as at the date of the application to dismiss for want of prosecution pursuant to Rule 244.1.

2. If at any time in the action there has been a gap of five years or more where no "thing" has been done to materially advance the action, the judge shall examine what has occurred since that five-year gap.

3. If the delaying party has not done a thing to materially advance the action since the five-year gap, the action shall be dismissed, absent agreement to the delay.

4. If the delaying party has done a thing to materially advance the action after the five-year gap, and the other party objected and applied for a dismissal, the action shall be dismissed, absent any agreement to the delay.

5. If the delaying party has done a thing to materially advance the action after the five-year gap, and the applicant has participated int hat thing, continued to participate in the action or otherwise acquiesced in the delay, the action shall continue, and the application for dismissal refused.

Justice Conrad's articulation of the correct approach under Rule 244.1 is consistent with the original recommendations of the General Rewrite Committee to amend Rule 244.1 so that it clearly states that an action must be dismissed upon an application where no material step has been taken in the previous 5 years. As such, the Committee adopts the approach recommended by Justice Conrad in its entirety.

Back to Position of the General Re-write Committee–paragraph 121

CHAPTER 4. DISCONTINUANCE OF AN ACTION

[162] The rules regarding discontinuance have been in effect in Alberta since 1883, although they have been modernized somewhat over the years.[81] The general rule is that a plaintiff may discontinue a suit unilaterally without creating *res judicata* or other bars to a new suit for the same thing.[82] In most cases, the discontinuance arises because there is a settlement agreement between the parties. In this situation, the parties determine the allocation of costs. Where there is no settlement agreement, The Rules provide that the plaintiff who discontinues the action is liable for the costs of other defendants.[83]

[163] A discontinuance may be obtained in one of three ways: 1) the plaintiff may unilaterally discontinue; 2) the parties may agree to discontinue; and 3) the court may give leave for the action to be discontinued. There are some limits on a plaintiff's ability to unilaterally discontinue and, depending on the stage of the proceeding, the plaintiff may be required to seek leave of the court.

[164] Under Part 18 of The Rules a defendant is also required to seek leave of the court before withdrawing a statement of defence or any part thereof.

[165] Discontinuance of an action and any terms imposed by the court, if any, is a discretionary remedy. As such, an appeal court will only interfere with the terms of a discontinuance if the wrong principles have been applied or there is a clear injustice.[84]

ISSUE No. 24
Should the only form of discontinuance be a formal document?

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[81] *Civil Procedure Handbook*, *supra* note 67 at 242.

[82] *Ibid.* at 243.

[83] R. 225(3).

[84] The Honourable W.A. Stevenson & The Honourable J.E. Côté, *Civil Procedure Encyclopedia* (Edmonton, Alberta: Juriliber, 2003), vol. 2 at 30-3 [*Civil Procedure Encyclopedia*].

[166] A discontinuance may be entered with the consent of all parties, but a formal document must be filed and a letter will not suffice.[85] A formal document is important because a discontinuance has a number of significant effects, such as:

- ending the suit;
- ending obligations to attend discovery (except as to costs);
- preventing trial;
- ending garnishment;
- ending an interim injunction in the plaintiff's favour, but not one in the defendant's favour (but not the plaintiff's undertaking as to damages);
- ending a pending appeal in an interlocutory matter;
- possibly ending obligations as between defendants;
- requiring the plaintiff to pay costs, unless otherwise agreed or ordered.[86]

POSITION OF THE GENERAL REWRITE COMMITTEE

[167] Given the significant effects of the discontinuance, and given that the discontinuance signals to the court system that an action is completed and that resources no longer need not be reserved to deal with the action, the Committee proposes that the discontinuance be maintained as a formal document.

ISSUE No. 25

Should a plaintiff be required to seek leave of the court to discontinue an action:

a) At all times where the consent of the other parties has not been obtained?

b) Only after the statement of defence has been filed (whether or not the matter has been set down for trial) if the consent of the defendant has not been obtained?

c) After the commencement of the trial even if the consent of all parties has been obtained?

d) When there is more than one plaintiff and the consent of the other plaintiffs has not been obtained?

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[85] *Ibid.*, vol. 2 at 30-15.

[86] See discussion in *ibid.*, vol. 2 at 30-5.

[168] Currently, a discontinuance can be filed unilaterally by the plaintiff without leave of the court at any time before a matter has been set for trial. However, once a matter is set for trial, leave of the court becomes necessary unless written consent of all parties is filed with the clerk.[87] Further, after the trial has commenced, the effect of Rules 225(3) and (5) appears to be that an action cannot be discontinued without leave, even if all of the parties consent. Upon an application for leave, the court may impose terms, including the following:

- that the plaintiff not sue again, without leave;
- that there be no costs payable by the plaintiff (without the court application, the plaintiff would be required to pay costs by Rule 225(3));
- that there be no further action in the suit;
- that the plaintiff pay costs (calculated on some other basis, such as solicitor/client costs);
- that discovery be completed before the action is discontinued; and
- that there be no costs payable by any party.[88]

[169] The question which then arises is whether a plaintiff should ever be required to seek leave of the court to discontinue an action and, if so, under what circumstances?

[170] On the one hand, the longer an action continues, the greater the investment of court resources. From this perspective, it seems reasonable for the court to have a say as to the terms of the discontinuance once the action has been set down for trial. What's more, it may not be fair for a plaintiff to be able to discontinue unilaterally when a defendant has taken steps to defend. Indeed, at that stage of the action the defendant might want the matter to be determined. This issue is contemplated in the Ontario Rules because there, one must have consent or leave of the court to discontinue any time after the statement of defence is filed (after the close of pleadings).[89]

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[87] R. 225(1).

[88] Examples are all given in *Civil Procedure Encyclopedia*, *supra* note 84, vol. 2 at 30-3.

[89] Ontario, r. 23.01(1)(b) and (c).

[171] Leave is also useful in situations where there are multiple plaintiffs because the unilateral discontinuance of the action by a plaintiff may result in the loss of the other plaintiff's claim. Indeed, there are instances where one plaintiff's claim is necessary to maintain the other plaintiff's claim. While it may be possible in these cases to name the first plaintiff as a defendant and thereby save the cause of action, this will not always be an option because of limitation periods. This problem raises a sub-issue about whether The Rules should explicitly require that leave to discontinue be sought in actions with more than one plaintiff. Currently, the case law precludes one plaintiff from discontinuing an action without the consent of other plaintiffs,[90] but The Rules do not.

[172] Another problem would arise if the requirement for leave is eliminated. Where the defendant has issued a third party notice, or claimed against a co-defendant under Rule 77, the plaintiff's claim may be necessary to keep the defendant's claim alive. Although the first situation could be addressed by adding an explicit rule to the third party proceedings allowing a third party claim to proceed even where the primary action has been discontinued, the second problem may require correction by the court. The current requirement to apply for leave gives the court the opportunity to consider all of these circumstances and ensure that no injustice will arise from the discontinuance.

[173] On the other hand, and in spite of the problems identified above, there is significant justification for eliminating the requirement for leave altogether. First, why should a plaintiff be required to apply for leave to discontinue given the unlikely prospect that a court would ever refuse leave when asked? Indeed, it is improbable that a judge would ever compel a plaintiff to go to trial against his will so why, therefore, should a plaintiff be required to make an application in the first place? This argument is even more compelling where all the parties have consented to the discontinuance. It is true that a leave application gives the court an opportunity to rebuke the parties for wasting court resources, but it does so only at the expense of further demands on the resources of both the court and the parties.

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[90] *Aetna Insurance Co. v. Canadian Surety Co.* (1991), 81 Alta. L.R. (2d) 141 (Q.B.).

[174] As to actual refusal of leave, Stevenson & Côté give the following examples of cases where leave was refused to discontinue unilaterally:[91]

- a divorce petitioner could not discontinue and start over in the province she moved to if one of her aims was to prevent the respondent from concluding the proceedings;[92]
- leave to discontinue was not given where the plaintiff had to bring a second action;[93]
- the plaintiff did not provide security for costs as ordered;[94]
- the plaintiffs were not allowed to discontinue their personal or their representative suits leaving only an action by an Indian Band alone, as their only motive was to avoid discovery;[95]
- the plaintiffs were not allowed to discontinue to recommence in provincial court, to avoid letting the defendants have a jury;[96]
- Sequestration is penal, should be started only with care, and needs leave to discontinue.[97]

[175] Circumstances such as those listed above do not prevent a plaintiff from discontinuing before an action is entered for trial. So the question arises: why should entry for trial make a difference as to whether leave is necessary or not?

[176] If some recourse is needed to protect defendants against prejudicial consequences of unilateral discontinuances, it might be more efficient to allow a defendant, upon unilateral discontinuance, to apply to the court for such relief as is just, upon showing prejudice from the discontinuance. This would effectively reverse the default rule so that the onus would shift from the plaintiff being required to justify

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[91] *Civil Procedure Encylopedia*, *supra* note 84, vol. 2 at 30-15.

[92] *Abramsen v. Abramsen* (1976), 30 R.F.L. 320 (Ont. S.C. H.C.J. Master).

[93] *W.E. Phillips Co. v. Robinson*, [1940] O.W.N. 426.

[94] *Heakes v. Geo. Hardy*, [1955] O.W.N. 242.

[95] *Muchalaht Indian Band v. R.* (1989), 30 F.T.R. 120.

[96] *Kirk v. Ciceri* (1994), 31 C.P.C. (3d) 291, 99 B.C.L.R. (2d) 26 (S.C.).

[97] *Showerings v. Fern Vale Brewery Co.*, [1958] R.P.C. 462.

the discontinuance, to the defendant being required to establish the existence of an injustice or hardship as a result of the discontinuance and to apply for relief. This would focus on real concerns, and it would avoid applications where there is no need for them.

[177] The remedies available to the defendant would also need to be available to any other party as well so that other plaintiffs adversely affected could also make an application for relief. The problem with this reversal of onus is that there is always a risk that a plaintiff may not be successful in a remedial application and the claim could be lost. To remedy this problem, a provision could be added that gives a party the ability to set aside the discontinuance after the fact.

[178] Alternatively, if the leave requirement is removed, a specific rule could be added that requires leave in situations where there is more than one plaintiff. This arrangement is not without its drawbacks, however, because it would create a situation whereby leave was required in some situations but not others.

POSITION OF THE GENERAL REWRITE COMMITTEE

[179] The Committee seeks input from the profession on the following four options:

1) Retain the discontinuance rules in their current form. Leave or consent to discontinue would remain a requirement only after the action has been set down for trial. Although The Rules don't currently specify that multiple plaintiffs require leave to discontinue in the absence of consent, the case law does specify this requirement and a rule need not be added to that effect.
2) Add a requirement to seek leave to discontinue whenever a statement of defence has been filed (regardless of whether the matter has been set down for trial) unless consent of the parties has been obtained.
3) Eliminate the requirement to seek leave to discontinue after trial entry for single plaintiffs, but create an exception so that leave would be required for claims involving multiple plaintiffs.
4) Eliminate all requirements for leave and add a rule that allows any affected party(s) to apply for relief.

ISSUE No. 26
Should a defendant require leave to withdraw a statement of defence?

[180] Alberta Rule 225.(4) provides that the defendant must obtain leave of the court in order to withdraw a defence, or any part of it. By contrast, the equivalent British Columbia and Ontario rules allow a defendant to withdraw a statement of defence at any time, although the Ontario rule provides that upon the withdrawal of a defence the defendant is then "deemed to be noted in default" and the plaintiff gets costs for the whole action.[98] The question then arises whether the requirement to seek leave is warranted or justified.

[181] On one hand, the requirement for leave to withdraw a statement of defence seems unnecessary given that the withdrawal of a defence, or part of it, is unlikely to prejudice the plaintiff. Indeed, it would be more likely to have the opposite effect and result in a benefit to the plaintiff.

[182] On the other hand, leave may be required because The Rules do not deal with costs upon the withdrawal of a defence and a leave application gives the court the opportunity to consider this issue. Further, unlike the Ontario rule, the Alberta rule is not explicit that the withdrawal of a defence constitutes an admission of liability. As such, if the requirement for leave is removed, Rule 225.(4) should explicitly state that withdrawal constitutes an admission of liability. A further problem is that The Rules do not require a defendant to seek leave to substantially amend a statement of defence. Without a requirement for leave to withdraw, it will be impossible for the court to distinguish situations where the defendant has withdrawn the statement of defence and admitted liability, versus situations where the defendant has merely amended the statement of defence.

POSITION OF THE GENERAL REWRITE COMMITTEE

[183] The Committee sees merit in retaining the requirement to seek leave to withdraw a statement of defence. At the same time, the Committee also recognizes that the unilateral withdrawal of a defence is unlikely to prejudice the plaintiff. As such, the

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[98] Ontario, r. 23.06(2).

Committee seeks input from the profession regarding whether the requirement to obtain leave should be retained in this situation.

ISSUE No. 27
Should the plaintiff (or plaintiffs) be allowed to discontinue against only one defendant without the consent of other defendants?

[184] Rule 225.(1) provides that the plaintiff may discontinue the action against any or all of the defendants, but the rule does not require the consent of other defendants.

[185] The right of the plaintiff to discontinue against any defendant has been consistently upheld in the case law. For instance, after a Pierringer Agreement which partially settles an action, a plaintiff has the right to discontinue against any defendant if the plaintiff wishes.[99] This is also consistent with the courts' interpretation of the various parties' rights to discovery and use of evidence after entering a Pierringer Agreement.[100] Even if there is an impact on third party proceedings (such as precluding discovery of settling parties), a plaintiff is clearly entitled to discontinue against any of the parties named in the statement of claim.[101]

POSITION OF THE GENERAL REWRITE COMMITTEE

[186] Although the case law and The Rules are quite clear that the consent of one defendant is not required in order to discontinue the action against another, the Committee seeks the input of the profession on whether or not consent should be required in this circumstance, in addition to cases with multiple plaintiffs.

ISSUE No. 28
Should there be a requirement that every settled, abandoned, or withdrawn action be formally withdrawn from the court system by filing a discontinuance?

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[99] *Vandevelde v. Smith* (1999), 243 A.R. 161, 1999 ABQB 365.

[100] *Amoco Canadian Petroleum Co. v. Propak Systems Ltd.* (2003), 334 A.R. 197, 2003 ABQB 261.

[101] *supra* note 99 at para. 18

[187] One issue raised in our research[102] was that many actions are filed in the Alberta court system[103] but only a small percentage (2% -10%)[104] go to trial. Yet, many actions are neither discontinued nor formally ended in a way that can be recognized by the court system. This creates the appearance that the court system is heavily under-resourced with many pending actions requiring trial when, in fact, many of the actions on the books will not go to a formal trial.

[188] There are a number of ways that actions can be ended:

1) there may be a formal settlement with concluding court documents that are filed (for instance a consent judgment or a discontinuance of action);
2) an action may be concluded by way of a settlement that is documented by letters between counsel with an understanding that no action will proceed;
3) the pleadings may have been filed but not served and the limitation has expired. As a result, the action is effectively concluded but there is nothing to signal to the court system that the action is dead;
4) an action or a substantial issue in the action may be finalized through arbitration or mediation pursuant to legislation, a contractual requirement, or the initiative of the parties or counsel. Unless the parties agree to formally discontinue the action, there is currently no mechanism for reporting back to the court system that the matter is completed;
5) the action may be finalized through a voluntary processes initiated by counsel such as a Judicial Dispute Resolution, a mini-trial, an informal discussion in a judge's office, or a hybrid mechanism with some formal and some informal elements. There is no requirement in The Rules that the outcome of the JDR be filed and the parties may decide that the result of the JDR will be kept confidential; and

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[102] See ALRI CM 12.5, *supra* note 17 at 2-10.

[103] 54,000 Statements of Claim were filed in 1999-2000 as set out in the QB Annual Report 1999-2000.

[104] In Alberta there are about 1000 trials per year, approximately 2%. This is consistent with the ratio of trials to filings in other Canadian and foreign jurisdictions (See Canadian Bar Association, Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Toronto: Canadian Bar Association, 1996) at 11; Ontario Civil Justice Review, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, 1996) at 171; The Right Honourable H.S. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996) at 32).

6) the action may be abandoned as a result of an interlocutory court order which effectively resolves the balance of the action because of the importance of the issue. Although the interlocutory court order would be filed, it might not be obvious that the entire action was effectively ended as a result.

[189] Except for the first scenario, each of the above scenarios gives the appearance that the court system has numerous live actions which, in reality, have been disposed of in an alternative manner. As a result, the Committee considered whether it would be beneficial to require the filing of a discontinuance of action within a prescribed period of time after the action is concluded.

[190] There are, of course, arguments on both sides of the issue. On one hand, a mandatory discontinuance would signal that the action is no longer active and the court would be able to better track the actual number of pending actions. In addition, a mandatory discontinuance would address the issue of credit searches. Currently, as long as a claim is alive on the court record, it appears on credit searches. This situation often causes problems for defendants because although an action may have been settled, defendants must often go to the expense of bringing an application down the road to dispose of the claim so that their credit rating is not impacted.

[191] On the other hand, the idea of a mandatory discontinuance is fraught with problems. First, there is the issue of enforcement: there is no obvious mechanism to sanction or enforce. Who would be responsible for ensuring that all parties file a discontinuance and what would be the consequence of a failure to do so? Second, what happens if the plaintiff gives up on the claim or moves away? One option would be to impose an obligation on the lawyers to discontinue. This option is riddled with problems, however, because the lawyer could be liable for discontinuing an action if the plaintiff later returns and wants to continue the action. A third and final problem with a mandatory discontinuance is the fact that the filing of a discontinuance triggers a costs implication. Why would a plaintiff willingly discontinue an action (in the absence of a settlement agreement) when the costs consequence can be avoided altogether by simply abandoning it?

[192] Given the complications of implementing mandatory discontinuance, the Committee considered whether it would be more feasible to address the issue by

changing the 5 year drop dead rule so that the rule applies automatically, rather than requiring an application by the defendant. As discussed in Chapter 3, one of the problems with an automatic drop-dead rule is that the court does not always know when and whether a step has been taken that materially advances the claim. Indeed, many steps, including examinations for discovery, do not even show up on the court record.

POSITION OF THE GENERAL REWRITE COMMITTEE

[193] Given the problems of enforcement, the imposition of an obligation on counsel, and the triggering of an automatic costs consequence, the Committee does not support the mandatory filing of a discontinuance due to the problems inherent in doing so.

ISSUE No. 29
Should the discontinuance rules address counterclaims or third party claims?

[194] Counterclaims and third party claims are not explicitly dealt with in Part 18. Instead, Rules 93 and 96 provide that counterclaims have a separate status and are to be dealt with separately even if the action of the plaintiff is stayed, discontinued or dismissed. In addition, Rule 79 provides that third party procedure applies to counterclaims. Lastly, Rule 5 defines "action" as including any issue directed to be tried. Since the word "action" is used in the discontinuance section, it seems that counterclaims and third party claims should be treated the same as a main action for the purposes of discontinuance.

POSITION OF THE GENERAL REWRITE COMMITTEE

[195] The Committee is of the view that it is unnecessary to specifically address third party claims and counterclaims in the discontinuances rules. The Committee is also of the view that the definition of "action" in Rule 5 should be modified so that it clearly includes third party claims and counterclaims.

ISSUE No. 30
Should Part 18 clarify that "filing" of the discontinuance is necessary? Should Part 18 add a requirement for "service" of the discontinuance?

[196] With the exception of Rule 225(5) which requires that written consent of all parties be filed, Part 18 does not explicitly require the filing or service of the discontinuance. The current wording of Rule 225(1) refers to "notice in writing"as opposed to "filing or service."

[197] Although the Saskatchewan Rules require that the written notice of the discontinuance be "filed and served,"[105] the case law is clear that a discontinuance need only be "filed" in order to be effective.[106] This is counter-intuitive because a discontinuance is a subsequent document in an action and one would expect that it should be served, although not necessarily personally served.

[198] What's more, if the requirement for leave to discontinue is eliminated, service of the discontinuance may become necessary so that the defendant has knowledge of the discontinuance.

POSITION OF THE GENERAL REWRITE COMMITTEE

[199] The Committee is of the view that Rule 225(1) should be revised to make explicit the requirement that a discontinuance must be filed. As such, the Committee proposes: a) the removal of the reference to "notice in writing" in the rule; and b) inclusion of the requirement to "file and serve."

ISSUE No. 31
Should the language of Rules 225-227 be modernized?

[200] The wording of the rules is somewhat complex and could usefully be re-written in a simpler manner.

POSITION OF THE GENERAL REWRITE COMMITTEE

[201] The Committee agrees that the wording of the rules in Part 18 should be modernized in accordance with the general objectives of the Rules Project.

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[105] Saskatchewan, r. 198(1).

[106] See *Schmid v. Giffin*, [1916] 10 W.W.R. 1356, 23 B.C.R. 459; *Pavonia SA v. Bison Petroleum & Minerals Ltd.* (1982), 132 D.L.R. (3d) 309 (Ont. H.C.J. Div. Ct.).

CHAPTER 5. NONCOMPLIANCE AND IRREGULARITIES

A. Introduction

[202] Part 43 of The Rules consists of Rules 558 through 561.01 and deals with noncompliance and irregularities. These rules are commonly referred to as "slip rules" and, according to Stevenson & Côté, "[they] are the lawyer's friend."[107]

[203] Slip rules, which are currently scattered throughout The Rules, are designed to soften the impact of procedural errors, such as missed dates and time lines, drafting or clerical errors, omissions in pleadings, and incomplete or inaccurate judgments and orders, among other things. Many of the slip rules, specifically those that deal with the variation and setting aside of orders and judgments, have been addressed in conjunction with other topics in ALRI CM 12.10.[108] Other slip rules which provide for the amendment of pleadings and proceedings are dealt with in ALRI CM 12.9.[109]

[204] This Chapter will discuss the utility of, and issues associated with each rule in Part 43 and will undertake a comparison with rules in other jurisdictions. The discussion will be limited primarily to the rules in Part 43, although the proposals already made by the General Rewrite Committee and other Committees in relation to other slip rules will be considered as they become relevant to the discussion.

B. Rule 558 - the most general of the slip rules

> 558. Setting aside proceeding — Unless the Court so directs non-compliance with the Rules does not render any act or proceeding void, but the act or proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with.

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[107] *Civil Procedure Handbook*, *supra* note 26 at 527.

[108] ALRI CM 12.10 *supra* note 79 deals with rr. 157, 158, 257, 330, 339, 387(2), 389, 390 and 548.

[109] ALRI CM 12.9, *supra* note 5, deals with rr. 132 & 133.

[205] Rule 558, according to Stevenson & Côté, is the most general of the slip rules.[110] It gives the court authority to cure certain irregularities in proceedings and set others aside where the defect or breach causes irreparable harm (i.e. cannot be remedied by paying costs).[111]

[206] Rule 558 is a frequently used rule. The circumstances of its application are varied and the case law is peppered with citations of this rule.[112] Generally, Rule 558 serves the purpose of enabling the court to cure, as an irregularity, that which might otherwise be characterized as a nullity.[113] The Supreme Court of Canada has held that fairness, justice and judicial administration all favour characterizing errors as irregularities rather than nullities.[114] Indeed, for these reasons most other jurisdictions in Canada have a rule similar to Rule 558 that prevents procedural irregularities from nullifying pleadings and/or proceedings.[115]

[207] Rule 558 is commonly relied upon by plaintiffs to cure deficiencies in relation to service. Plaintiffs often use the rule as authority for making applications to deem service good and sufficient when there has been imperfect personal service. In a previous consultation memorandum the General Rewrite Committee proposed the creation of an explicit rule that will provide the court with the authority to deem service good and sufficient. Adoption of an explicit rule is not intended to change the practice, but rather, to reflect the actual practice.[116] As such, Rule 558 will no longer be the source of authority in those situations.

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[110] *Civil Procedure Handbook*, *supra* note 26 at 527.

[111] *Ibid*.

[112] See, for instance, *Rorbak v. Gibb* (1982), 44 A.R. 18, [1983] 2 W.W.R. 339 (C.A.) at para. 5 where the Court of Appeal declined to strike out a counterclaim on the ground that it was not "conjoined and pleaded with the Statement of Defence" contrary to s. 93(4) of The Rules.

[113] See *Fontaine v. Serben*, [1974] 5 W.W.R. 428 (Alta. Dist. Ct.).

[114] *Berry Estate v. Guardian Trust Co. of Canada*, [1980] 2 S.C.R. 931, 115 D.L.R. (3d) 513.

[115] Ontario, r. 2.01; British Columbia, r. 2(1) & (2); Federal, rr. 56 & 60.

[116] Alberta Law Reform Institute, *Commencement of Proceedings in Queen's Bench* (Consultation Memorandum No. 12.1) (Edmonton, Alberta: Alberta Law Reform Institute, 2002) at 45-46.

[208] Rule 558 is also used to cure deficiencies or irregularities in the procedures associated with service, such as the procedures for obtaining orders for substitutional service and service *ex juris*.[117] It has also been applied retroactively to ratify what has already occurred, for instance, when service has been effected outside of the jurisdiction without an order for service *ex juris* first having been obtained.[118]

[209] In addition to curing irregularities, Rule 558 can also be used to set aside an act or proceeding on the basis of an irregularity. For instance, it may be used as an alternative to Rule 158 to set aside judgments that have been irregularly entered or unlawfully obtained and which are void *ab initio*.[119] In these cases, where there is no slip or error on the part of the defendant, the use of Rule 558 instead of Rule 158 enables a defendant to have a judgment set aside, to avoid the imposition of "terms" as required under Rule 158, and may even entitle the defendant to costs.[120]

[210] Although broad in scope, the application of Rule 558 is not without limits and it cannot be used to cure a failure to comply with substantive law. For instance, it cannot be used to cure inadequate evidence in support of an order for service *ex juris*,[121] nor can it be relied upon to correct a failure to serve altogether.[122]

[211] In spite of its varied use, and in spite of the complex situations in which it is often applied, there appear to be few outstanding procedural issues in relation to the

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[117] See *Clarke v. Treadwell*, [1997] A.J. No. 683 (C.A.) where the Court cured an irregularity where the defendants had actual and substantial, though imperfect knowledge of the statement of claim within the limitation period; *Murray v. Canada (Attorney General)* (2003), 340 A.R. 215, 2003 ABQB 260 [*Murray*] where Justice Moen held that the late filing of an affidavit in support of an order for service *ex juris* was a curable irregularity, but the inadequacy of evidence in support of the order was not curable.

[118] See *Leister v. Whitstone* (2000), 96 Alta. L.R. (3d) 372 (Q.B. Master) where the plaintiff applied for an order for service *ex juris* after the statement of claim had been served, in effect retroactively ratifying what had already occurred.

[119] See *Rizzie v. J.H. Lilley*, [1976] 2 W.W.R. 97 (Alta. Dist. Ct.) and *Gibb v. Nigeria* (2003), 341 A.R. 339, 2003 ABQB 604.

[120] *Gibb v. Nigeria*, *ibid*.

[121] *Murray*, *supra* note 117; *BTI Corp. (Delaware) Inc. v. Gener S.A.* (2003), 340 A.R. 211, 2003 ABQB 223.

[122] *Hansraj*, *supra* note 45.

application of this rule. However, a comparative analysis between Rule 558 and the analogous rules in other jurisdictions, Ontario in particular, highlights some issues for consideration.

ISSUE No. 32
Should the test for application of Rule 558 be codified?

[212] Although Rule 558 sets out the parameters of the court's authority, it does not specify the grounds for application of the Rule. Rule 559 imposes a lose time limit on the setting aside remedy available under rule 558 to the extent that applications to set aside proceedings must be made within a "reasonable time." Rule 559 also acts as an estoppel, preventing a party from setting aside a proceeding where a fresh step has been taken with knowledge of the irregularity. Aside from Rule 559, there is no guidance in Rule 558 as to the parameters of its application. Instead, the test is specified in the case law.

[213] The Alberta Court of Appeal in *Bridgeland Riverside Community Association. v. Calgary (City)* set out the test for when a procedural defect shall vitiate a proceeding:

> ...absent an express statutory statement of effect, no defect should vitiate a proceeding unless, as a result of it, some real possibility of prejudice to the attacking party is shown, or unless the procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute.[123]

[214] *Bridgeland* is frequently cited as the authority for the application of Rule 558.[124] The meaning of "prejudice" in *Bridgeland* is not self-evident, but according to Stevenson & Côté, a "fleeting prospect of avoiding responsibility imposed by the substantive law or its loss is not prejudice."[125]

[215] In contrast with the Alberta rule, the equivalent Ontario rule sets out vague parameters for application of the rule. It provides as follows:

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[123] *Bridgeland Riverside Community Association. v. Calgary (City)* (1982), 37 A.R. 26, 135 D.L.R. (3d) 724 at para. 28(C.A.) [*Bridgeland*].

[124] *Ibid.*

[125] *Civil Procedure Encylopedia*, *supra* note 84, vol. 1 at 22-2.

> 2.01 Effect of Non-Compliance - (1)A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,
>
> (a) may grant all necessary amendments or other relief, on such terms as are just to secure the just determination of the real matters in dispute; or
>
> (b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

[216] The Ontario rule incorporates two conditions: (1) "on such terms as are just to secure the just determination of the real matters;" and (2) "in the interest of justice;" as benchmarks for the application of the rule. The test for when something will be in the interests of justice is very similar to the test set out in *Bridgeland*: if there will be substantial prejudice to the party applying for the exception and if the other party will not be unfairly prejudiced.[126]

[217] The Ontario rule is also unique in the sense that it clearly sets out that the court should act in an escalating manner by first attempting to amend or cure the deficiency and then, where it is in the interest of justice, set aside the proceeding or thing. While the practice in Alberta is the same as in Ontario, the sequential nature of the Ontario rule is not explicit in the Alberta rule.

POSITION OF THE GENERAL REWRITE COMMITTEE

[218] The Committee is of the view that Rule 558 should be modified to reflect the sequential structure of the Ontario rule and should codify the test from *Bridgeland* in subsection (b) of the rule.

ISSUE No. 33
Should Rule 558 be revised so that it can be applied before the fact to allow the court to dispense with strict compliance with a rule?

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[126] *Re: Air Canada*, *infra* note 130 at para. 15.

[219] In *Hamblin v. Ben*, Justice Veit considered the issue of whether Rule 558 can be applied to a rule *a priori* and concluded that it could not.[127] In *Hamblin,* the issue was whether Rule 558 could operate to modify Rule 248 so that the order of addresses to a jury could be altered. In concluding that Rule 558 did not give the court jurisdiction to modify Rule 248 before the fact she stated:

> [The] rule is a saving rule, dealing with the effect of a breach of the Rules. It is merely a back-stop to nullity. It does not give the court the jurisdiction, a priori, to amend any particular rule.[128]

[220] Conversely, the Ontario rule does give the court *a priori* discretion and provides that "the court may, only where and as necessary in the interest of justice, dispense with compliance with any rule *at any time.*"[129] A review of the Ontario case law suggests that the rule does indeed give the court jurisdiction to make an order that provides for an exception to a requirement of the rules before the fact.[130] However, the Ontario rule is applied very restrictively and only where it would be in the interest of justice. Like Alberta, the test in Ontario for when something will be in the interests of justice is if there will be substantial prejudice to the party applying for the exception and if the other party will not be unfairly prejudiced.[131] Some situations where litigants have attempted to rely on the discretionary rule, albeit unsuccessfully, include the following:

- A plaintiff wife made an application for an order allowing her to cross-examine the defendants in the absence of each other (contrary to the mandatory language of Ontario Rule 56.02(2)). The application was refused because the wife did not show cause why the court should exercise its discretion, in the interests of justice, to make an order for exclusion.[132]

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[127] *Hamblin v. Ben* (2003), 344 A.R. 282, 2003 ABQB 459 at para. 17.

[128] *Ibid*.

[129] Ontario, r. 2.03 (emphasis added).

[130] See *Re: Air Canada* (2003), 173 O.A.C. 154 (S.C.), *Changoo v. Changoo* (1999), 33 C.P.C. (4th) 86 (Ont. Gen. Div.) and *Kuretic v. Audette* (1999), 34 C.P.C. (4th) 303 (Ont. Gen. Div.).

[131] *Re: Air Canada*, *ibid*. at para. 15.

[132] See *Changoo v. Changoo*, *supra* note 130.

- A plaintiff made an application to transfer a proceeding out of the simplified rule stream but the court declined to exercise its authority under Rule 2.03 because the interests of justice did not justify allowing the plaintiff to do something that the Ontario Rules do not specifically provide for.[133]

[221] The Committee considered whether it would be useful to have a general rule in Alberta giving the court the authority to dispense with compliance of a rule before the fact where it is in the interests of justice. On one hand, the Committee recognizes that a general discretion to adapt and modify the rules could promote fairness in some situations. In addition, the Provincial Court has such a rule, although it is limited to circumstances of expeditiousness and cost effectiveness.

[222] On the other hand, the Committee identified several reasons that necessitate against an *a priori* application of the discretion under Rule 558. First, there is a disinclination in the Ontario Rules to limit or restrict the court's discretion. This is different from The Rules which, at times, impose limits on the court's discretionary power. Second, a number of Alberta rules are intended to be mandatory and a general *a priori* discretion would undermine this intent. And third, a general *a priori* discretion, if applied too liberally, would undermine the scheme of The Rules which are in place to promote certainty and predictability.

POSITION OF THE GENERAL REWRITE COMMITTEE

[223] In the Committee's view, there should not be a rule giving the court a general discretion to dispense with strict compliance of a rule before the fact and Rule 558 should not be amended to that effect.

C. Rules 559 and 560

> 559. Motion must be made promptly — An application to set aside any process or proceedings for irregularity shall be made within a reasonable time and shall not be allowed if the party applying has taken a fresh step after knowledge of the irregularity.

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[133] See *Kuretic v. Audette*, *supra* note 130.

> 560. Action improperly begun — An action improperly begun by statement of claim, originating notice or petition may be treated as an irregularity and the action may be continued upon such terms, and subject to such conditions as the Court may impose.

ISSUE No. 34
Should Rules 559 and 560 be modified in any way?

[224] According to Stevenson & Côté, Rule 559 is an important rule which requires a party to object to procedural flaws as soon as they are evident so that "one cannot lie in the weeds and hold the flaws in reserve."[134] This rule has the effect of imposing an automatic waiver of a procedural irregularity where a party takes a fresh step with knowledge of the irregularity.

[225] Notably, each of the corresponding rules in Ontario, British Columbia. and the Federal Rules are virtually identical to the Alberta rule in that each imposes a time limit and an automatic waiver where a fresh step is taken with knowledge of the irregularity.[135]

[226] Rule 560 has a very specific purpose of ensuring that actions improperly commenced using the wrong originating document are treated as irregularities rather than nullities. Again, Ontario, British Columbia and the Federal Rules all have a very similar rule in place.[136]

POSITION OF THE GENERAL REWRITE COMMITTEE

[227] The Committee is of the view that Rules 559 and 560 should be retained in their current form and that no changes are necessary.

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[134] *Civil Procedure Handbook*, *supra* note 26 at 529.

[135] See Ontario, r. 2.02; British Columbia, r. 2(4); Federal, r. 58.

[136] See Ontario, r. 2.01(2); British Columbia, r. 2(3); Federal, r. 57.

D. Rules 561 and 561.01

> 561. Pleading not defeated by defect — No pleading or other proceedings shall be defeated on the ground of an alleged defect of form.
>
> 561.01 Forms —
>
> (1) In this Rule "deviation" includes the deletion of material that is not applicable or the addition of material that is applicable.
>
> (2) Where a person
>
> (a) uses a form that is prescribed by these Rules, or
>
> (b) prepares a document that is based on or that is to be used in place of a form prescribed by these Rules,
>
> any deviation in that form or document from the prescribed form that, in the circumstances under which that form or document is to be used, does not adversely affect
>
> (c) the substance of the prescribed form, or
>
> (d) the information reasonably required or specifically required by the Court,
>
> and is not intended to mislead does not invalidate that form or document.

ISSUE No. 35
Can one or both of Rules 561 and 561.01 be eliminated from The Rules?

[228] Rule 561 provides that no defect in a pleading or proceeding will be fatal to an action and Rule 561.01 provides that no deviation in a form or document will invalidate that form or document. It appears that Rule 561 is intended to remedy accidental defects, while 561.01 is intended to authorize intentional deviations in forms.

[229] The *Civil Procedure Handbook* notes the following about Rule 561:

> Rule 561 is generally very useful, and has a specific function not obvious at first. Sometimes a statute or the Rules prescribe a form or wording for a document. A party may depart from that wording either accidentally, or because the prescribed wording does not fit the facts at hand.[137]

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[137] *Civil Procedure Handbook*, *supra* note 26 at 530.

[230] Rule 561 is often cited as authority by both parties and judges to allow for the correction of defects in pleadings. For instance, in *Havlik v. Havlik Estate*, Justice Johnstone cited Rule 561, along side of 558 and 560, as authority for granting leave to allow the applicant to amend her application so she would have the requisite standing needed to bring the application.[138]

[231] Conversely, in *Keehmn v. Hodgkinson* Master Funduk used Rule 561 to deny the respondent's attempt to prevent the entry of an order.[139] The respondent argued that the notice of application wrongly set out the return date as Tuesday, March 11 when March 11 was actually a Monday and, as a result, a formal order was entered on March 11 without the presence of the respondent's counsel. The respondent's counsel ignored the notice, but when he learned of the order applied to have the application reheard. Master Funduk dismissed the application on the basis of Rule 561. He noted that notice was served on counsel for the Respondent and the fact that the originating notice said that the returnable date on the originating notice read "Tuesday" instead of "Monday" March 11, 1991 was a slight error, not a fatal flaw that enabled the respondent to lay back in the weeds.

[232] Attempts have also been made by litigants to apply Rule 561 beyond its intended purpose. For instance, In *Canadian Engineering Service Ltd. v. Doraty* the plaintiff tried to use the rule to oppose the defendant's application under the drop dead rule (Rule 244.2).[140] The defendant argued that the plaintiff (a corporate body) had dissolved and could therefore not have taken a step that materially advanced the action in the 5 year period. The plaintiff unsuccessfully argued that the dissolution of the corporate body was a mere defect of form that could not be defeated under Rule 561. Master Quinn disagreed with the argument that the dissolution of the company was a mere defect of form and allowed the application to dismiss.

[233] In spite of the frequency with which Rule 561 is cited, it may be a redundant rule. Indeed, it is commonly cited as part of a cluster of rules, along with Rule 558,

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[138] (2000), 262 A.R. 88, 2000 ABQB 242 [*Havlik*].

[139] (1991), 118 A.R. 141 (Q.B. Master).

[140] (1999), 246 A.R. 392, 1999 ABQB 250.

when it is not exactly obvious which rule provides the necessary authority. This was the case in *Havlik v. Havlik Estate*.[141] Another reason for the redundancy of Rule 561 is the fact that Rule 558, in its current form, also applies "proceedings." The precise meaning of the word "proceedings" has been the source of discussion in another consultation memorandum[142] and it does not clearly subsume the word "pleading". However, if the term pleadings is ncorporated into Rule 558, or if a broader term that encompasses pleadings is included, Rule 558 will functionally replace Rule 561.

[234] Unlike Rule 561, Rule 561.01 has not been cited in the case law since it was adopted in 1997.[143] While Rule 561.01 appears to be an extension of Rule 561, its distinct purpose as compared to Rule 561 is unclear because it has not been judicially considered. The recommendation to adopt Rule 561.01 came from the Resolved Agenda of the Rules of Court Committee. The minutes from that Committee provide some clue as to the rule's intended purpose, noting that "a provision akin to s. 24(1) of the *Interpretation Act* [would be] helpful in interpreting the forms used under the Rules, even thought the *Interpretation Act* actually applies to the Rules."[144] Based on this statement, it appears that Rule 561.01 was adopted to make explicit the fact that section 24(1) of the *Interpretation Act* applies to forms in The Rules.

[235] Section 26(1) (formerly Section 24(1)) of the *Interpretation Act* reads:

> 26(1) When a form is prescribed by or under an enactment, deviations from it not affecting the substance and not calculated to mislead do not invalidate the form used.
>
> (2) In an enactment, words importing male persons include female persons, words importing female persons include male persons and words importing either sex include corporations.
>
> (3) In an enactment, words in the singular include the plural, and words in the plural include the singular.

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[141] *Supra* note 138.

[142] See discussion in ALRI CM 12.9, *supra* note 5 at 6-8.

[143] A search of Quicklaw and the Alberta Courts website reveals no cases that have relied upon r. 561.01.

[144] The Resolved Agenda of the Rules of Court Committee - February 25, 2002.

> (4) When a word or expression is defined in an enactment, other parts of speech and grammatical forms of the same word or expression have corresponding meanings.[145]

[236] Based on this section of the *Interpretation Act*, Rule 561.01 was probably adopted for the specific purpose of ensuring that technical aberrations in forms (not affecting substance) would not invalidate the forms. From this perspective, the purpose of Rule 561.01 is clearly different from the existing Rule 561 which does not refer to "forms," but instead refers only to "pleadings." In the same vein, Rule 561.01 refers to "deviations," while Rule 561 refers to "defects," suggesting that intentional alterations to prescribed forms would not be accommodated by Rule 561. The definition of "deviation" in Rule 561.01, which is expressed as "the deletion of material that is not applicable or the addition of material that is applicable," also supports this interpretation. In spite of this difference, neither rule is so unique that a broadly stated rule dealing generally with noncompliance and irregularities could not function in their place.

[237] Notably, Ontario, British Columbia, and the Federal Rules do not have rules comparable to either 561 or 561.01. Instead, Ontario and British Columbia each have a general rule that provides for variations in the use of forms as the circumstances require.[146]

POSITION OF THE GENERAL REWRITE COMMITTEE

[238] The Committee is of the view that both Rules 561 and 561.01 should be eliminated from The Rules. Regardless of the fact that these two rules may apply to specific circumstances, their functions can easily be consolidated within a general non-compliance rule. Rule 558 is wide enough to accommodate all circumstances contemplated by these two rules, provided that the wording in Rule 558 is expanded to incorporate the words "pleadings" and "forms" or an alternative, but equally inclusive word such as "documents."

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[145] *Interpretation Act*, *supra* note 8.

[146] Ontario, r. 1.06; British Columbia, r. 4(1).

ISSUE No. 36
Should Rule 306 dealing with irregularities in affidavits be eliminated?

[239] Rule 306, which allows an affidavit to be filed with leave of the court notwithstanding any irregularity, has not previously been discussed in any of the consultation memoranda. This is another slip rule that allows for the correction of a procedural irregularity. Although functional, Rule 306 is also redundant given the broad parameters of Rule 558. There is no apparent reason that the authority to correct irregularities in affidavits could not be accommodated by Rule 558.

POSITION OF THE GENERAL REWRITE COMMITTEE

[240] The Committee is of the view that Rule 306 should be eliminated and Rule 558 drafted broadly enough to address noncompliance and irregularities in pleadings, affidavits, forms, and steps in procedures. Use of the word “document” in Rule 558 would be sufficient to accommodate this purpose, but the decision regarding the most appropriate choice of language will remain with the drafter.