ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Pleadings

Consultation Memorandum No. 12.8

October 2003

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

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ALBERTA LAW REFORM INSTITUTE

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ACKNOWLEDGMENTS

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The Hon. Justice Terrence F. McMahon (Co-Chair), Court of Queen's Bench of Alberta
James T. Eamon, Code Hunter LLP
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PREFACE AND INVITATION TO COMMENT

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

This consultation memorandum addresses issues concerning pleadings, including rules relating to the form and content of statements of claim and defence, and replies. Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the Committee has identified a number of issues and 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***. 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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BACKGROUND

A. The Rules Project

The Alberta Rules of Court govern practice and procedure in the Alberta Court of Queen's Bench and the Alberta Court of Appeal. They may also apply to the Provincial Court of Alberta whenever the *Provincial Court Act* or regulations do not provide for a specific practice or procedure. The Alberta Rules of Court Project (the Rules Project) is a 3-year project which has undertaken a major review of 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. Overall leadership and direction of the Rules Project is the responsibility of the Steering Committee, whose members are:

The Hon. Mr. Justice Neil C. Wittmann (Chair), Court of Appeal of Alberta
The Hon. Judge Allan A. Fradsham, Provincial Court of Alberta
Geoff Ho, Q.C. (Observer), Secretary, Rules of Court Committee
Peter J.M. Lown, Q.C., Director, Alberta Law Reform Institute
The Hon. Justice Eric F. Macklin, Court of Queen's Bench of Alberta
Alan D. Macleod, Q.C., Macleod Dixon
June M. Ross, Q.C., Special Counsel, Alberta Law Reform Institute
Phyllis A. Smith, Q.C., Emery Jamieson LLP
The Hon. Madam Justice Joanne B. Veit, Court of Queen's Bench of Alberta

B. Project Objectives

The Alberta Rules of Court have not been comprehensively revised since 1968, although they have been amended on numerous occasions. The Rules Project will address the need for rewriting that has arisen over the course of this lengthy period. As well, the legal community and the public have raised concerns about timeliness, affordability and complexity of civil court proceedings.[1] Reforms have been adopted

[1] Notable recent civil justice reform projects responding to these concerns include: Ontario Civil Justice Review, *Civil Justice Review: First Report* (Toronto: Ontario Civil Justice Review, 1995) and Ontario Civil Justice Review, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice (continued...)

in Alberta and elsewhere to address these issues. In Alberta, some of these new procedures have been included in amendments to the rules, others have been implemented by other means, such as practice directives. The Rules Project will review and assess reform measures that have been adopted and consider other possible reforms.

The Steering Committee approved four Project Objectives that address both the need for rewriting the rules and reforming, or at least rethinking, practice:

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

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[1] (...continued)
Review, 1996); The Right Honourable H.S. Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Lord Chancellor's Department, 1995) [*Woolf Interim Report*] and 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) [*Woolf Report*]; and Canadian Bar Association, Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Toronto, Ontario: Canadian Bar Association, 1996).

- 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

C. Purpose Clause

In all Canadian jurisdictions other than Alberta and Saskatchewan, the rules contain a general principle to the effect that they are to be interpreted liberally to secure the just, most expeditious and least expensive determination of every proceeding on its merits. The Steering Committee views this purpose clause as consistent with the Project Objectives and proposes the inclusion of such a clause in the new rules.

D. Legal Community Consultation

Rules reform should address the needs and concerns of the users of the civil courts. As informed users of the system, and as representatives for public users, lawyers play a particularly essential role in reform. In conducting the Rules Project, ALRI has been looking to the legal community, including both lawyers and judges, to provide the information and views that give the project its direction.

Consultation with the legal community commenced in the fall of 2001 with ALRI presentations to 9 local bar associations across the province. This was followed by 17 meetings with law firms and Canadian Bar Association (CBA) sections in Edmonton and 17 meetings with law firms and CBA sections in Calgary. In addition, there were meetings with Queen's Bench justices and masters, and Provincial Court judges. An Issues Paper describing the Rules Project and seeking input on a range of issues was widely distributed in paper form and made available on the ALRI website and through links on the Law Society of Alberta, Alberta Courts, Alberta Justice and Justice Canada websites. In addition to the input received through consultations with local bar associations, firms and CBA sections, ALRI received 64 letters and e-mails from the legal community with feedback on the Rules Project.

Input from the legal community, whether in the form of letters, e-mails or notes from meetings, was categorized and entered into a central ALRI database. As of September 23, 2002, this database numbered 288 pages and contained 783 comments on different aspects of the civil justice system. This input has been provided to the Rules Project working committees on an ongoing basis, and is summarized in a Report available on our website: <http://law.ualberta.ca/alri/>. Excerpts from the Report are set out under the subheadings below.

1. Objectives and approach of the Rules Project

There was widespread agreement among those who commented on this issue that one of the objectives of the Rules Project should be to make the existing rules shorter, more organized and generally more user friendly. Many respondents also expressed the view that some degree of flexibility and informality needed to be retained in the rules such that counsel may reach agreements as to scheduling and other matters amongst themselves. In a similar vein, while some felt that fairly detailed rules are required, others expressed the view that the rules should stay away from "micro managing" and instead provide broad directions and principles for counsel to abide by.

Another theme running through many of the responses in this area was that the Rules Project should not go too far in trying to rewrite the substance of the rules – if it is not broken, the Project should not try to fix it. Some respondents voiced concerns about the existing rules annotation becoming redundant and procedural points needing to be re-litigated if there are too many significant changes.

Some of the responses raised the issue of implementation of the new rules – it was suggested that the educational and transitional process for the bench and bar should be an important component of the Rules Project.

2. Models from other jurisdictions

Some recommended looking to the British Columbia Rules of Court as a model – the comments reflected the view that these rules are short, effective, well-organized and generally user-friendly. Others thought that the Ontario Rules are a model of good organization. Another model suggested for consideration in framing the new rules was the Code of Professional Conduct. The new rules could be fixed, kept fairly short and

simple, and be amplified by commentaries and rulings which could change from time to time. Finally, some commented that the Federal Court Rules are not a good model.

3. Uniformity

A frequent comment was that it would be useful to make Alberta practice as consistent with other provinces as possible, particularly the western provinces, due to the increase in inter-provincial litigation and the relaxation of mobility rules.

4. Regional concerns

Some respondents commented that the concerns addressed by the rules do not necessarily apply in smaller centres. Sometimes the problems are "big city/big file" problems, but the "solutions" are imposed across the board. Another point raised was that judges visit from Edmonton, Calgary and elsewhere and each judge brings his or her own practice, which complicates practice in the smaller centres.

5. Application and enforcement of the rules

A frequently expressed concern was that the rules are not being consistently applied and enforced. Respondents pointed out that people need to know that the rules will be applied in a predictable manner, that they will be enforced, and that judges will not impose steps not contemplated by the standard rules. Some also commented on the differences in application by clerks in Edmonton and Calgary. There were concerns that clerks are making policy, for example, the "docketing statement" which is required in the Calgary Court of Appeal.

E. Public Consultation

A Public Consultation Paper and Questionnaire was prepared and distributed to organizations with interests that relate to the civil justice system and to the general public. Despite extensive circulation of the Questionnaire, the return rate was disappointing. A total of 98 questionnaires were received by the cutoff date of June 30, 2002. A Public Consultation Paper describing the responses has been prepared and is available on our website: <http://law.ualberta.ca/alri/>. Some of the respondents indicated a willingness to participate in focus groups about rules reform. In the fall of 2002, focus groups were conducted in Edmonton and Calgary. A Report of the Focus Groups has been prepared and is also available on the website.

Overall, survey respondents provided insightful feedback and suggestions on various aspects of the Alberta Rules of Court. While many areas received moderate to relatively high satisfaction scores, the purpose of this study is to focus on areas of improvement, or areas receiving relatively high dissatisfaction ratings. Aspects under study can be grouped into high, medium and low levels of respondent dissatisfaction.

Aspects with **high** levels of dissatisfaction (50% or more of respondents dissatisfied) included:

- cost of legal fees;
- time to resolve legal cases; and
- the overall legal process.

Aspects with **medium** levels of dissatisfaction (40 - 49% of respondents dissatisfied) included:

- court forms;
- information available through the court;
- ease of understanding of the legal process;
- the trial;
- the discovery stage; and
- interlocutory hearing(s).

Aspects with **lower** levels of dissatisfaction (30 - 39% of respondents dissatisfied) included:

- documentation required;
- alternatives to a full trial;
- the pleadings stage; and
- formality of the legal process.

F. Working Committees

Over the course of the Rules Project, working committees have been and will be established to examine particular areas of the rules. The committee structure reflects the “rewriting” and “rethinking” objectives of the Rules Project, and ensures that specialized topics will be reviewed by persons with relevant experience. The General Rules Rewrite Committee and the “Rethink” Committees dealing with Early

Resolution of Disputes, Management of Litigation, and Discovery and Evidence were the first to commence. Specialized areas of practice are now being reviewed by committees dealing with rules relating to the Enforcement of Judgments, Appeals, Costs, Judicial Review and Criminal Practice.

G. Process for Developing Policy Proposals

The major task for working committees is the development of policy proposals regarding the topics included in their mandates. The committees consider the project objectives and purpose clause, rules from other jurisdictions, research prepared by ALRI counsel, and information received in the consultation process. At the current stage of the Rules Project, the committees are concerned with issues of policy, dealing with civil practice and the content of the rules. Drafting issues, such as the organization and the wording of the rules, will be addressed at a later stage.

H. General Rewrite Committee

The Committee members 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

James T. Eamon, Code Hunter LLP

Alan D. Fielding, Q.C., Fielding Syed Smith & Throndson

The Hon. Judge Allan A. Fradsham, Provincial Court of Alberta

Debra W. Hathaway, Counsel, Alberta Law Reform Institute

The Hon. Justice Eric F. Macklin, Court of Queen's Bench of Alberta

Alan D. Macleod, Q.C., Macleod Dixon

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I. Consultation Memorandum

This consultation memorandum addresses issues concerning pleadings, in five chapters: (1) Fundamental Principles; (2) Contents of Pleadings; (3) Rules Applicable to Defences; (4) Reply, Joinder of Issue and Close of Pleadings; and (5) Formalities of Pleadings. Counterclaims and Third Party Notices will be addressed in a later

consultation memorandum, together with other rules pertaining to the joinder of claims and parties.

EXECUTIVE SUMMARY

A. Fact Pleading

The system of "fact pleading" reflected in Alberta Rule 104 was adopted in the English *Judicature Act 1875*, replacing the earlier system of common law pleading. Under common law pleading, there had developed intricate sets of specialized rules for the various common law forms of action. The change to fact pleading was an effort to exclude "pleas of law, argument, reasons, theories, conclusions, and evidence," and thus shorten pleadings and clarify the issues between the parties. Under fact pleading "a party must plead all the material facts on which it intends to rely at the trial" and "no averment must be omitted which is essential to success." Fact pleading is today employed in all Canadian common law jurisdictions, and is the predominant approach to pleadings in all common law systems.

Fact pleading may be contrasted with the system of "notice pleading" employed in American federal courts and in a majority of state courts. The test of adequate pleading under a notice pleading system is whether the opposing party has been sufficiently notified of a claim or defence so as to meet it. There is no need to allege all required facts for every element of a claim or defence, only a basic understanding of the claim or defence needs to be communicated.

Notice pleading has been a controversial innovation. While some point to advantages in eliminating the technicalities and associated controversies of fact pleading, others argue that notice pleading does not impose meaningful limits on the discovery process.

On the issue of whether fact pleading should continue to be used in Alberta, the General Rewrite Committee reviewed the common criticisms of pleadings – they are too long, too general, misleading, and so forth. It concluded that a change to notice pleading was not warranted. The Committee members felt that problems with pleadings did not derive from the system of pleading or the rules, but from poor practice. In fact if the rules governing pleadings were followed, it is likely that pleadings would be more useful. Generally, the quality of pleadings depends on the lawyer' s skill and training, and on enforcement of the pleadings rules by the courts.

Therefore, changes that would clarify the current rules, and facilitate lawyers in following the rules and courts in enforcing them, should be encouraged.

B. Certification of Pleadings

Many criticisms of pleadings focus on what may be characterized as misuse of the system, in which many possible claims or defences are raised as alternatives without any reasonable basis for many of the allegations. A possible response to this concern is to require some form of certification or verification of pleadings, indicating that the allegations in them are true or are reasonably believed to be true.

The Committee decided against having either the client or the lawyer certify the pleadings. There was concern that it would be impossible for a lawyer to verify a claim, or to advise his or her client regarding verification, at such an early stage in the proceedings. When drafting pleadings, the lawyer has only heard one side of the case. Both lawyer and client are entitled to hear the other side in discovery. Further, certification asks the lawyer to sit in judgment of the veracity of the client's case and that is not the lawyer's job. To the extent that certification is employed simply to control frivolous suits, it is unnecessary as every lawyer is already bound by professional obligations not to bring frivolous suits.

While the consensus of the Committee was against certification of pleadings, we would be interested in receiving the views of the Bar and Bench on this point.

C. Contents of Pleadings

Changes should be made to clarify the requirements of the rules and facilitate lawyers in complying with them and courts in enforcing them. One such change would be to list clearly the separate elements of Rule 104 together with other basic rules of pleading. The Committee favours the adoption of a rule setting out the basic principles of pleading, following the model of Queensland Rule 149.

1. Pleading Law/Specific Pleading

A basic characteristic of fact pleading is that facts, rather than causes of action or law, are to be pleaded. However, the rule is qualified, so that the statement in Rule 104 that a pleading shall contain 'only' material facts is misleading.

First, there is permission, although not a requirement, to plead law in Rule 112, which provides that a "party may by his pleading raise any point of law." Rule 112 is also capable of misleading, as it must be read in the context of Rule 104 - which states that one is only permitted to raise a point of law if the material facts to support it are pleaded. The Committee agreed that the need to plead supporting facts when pleading a conclusion of law or point of law should be made explicit in the rules.

The second qualification to the requirement to plead facts and not law is that issues of law sometimes must be specifically pleaded. Specific pleading is required wherever the failure to plead might take the opposite party by surprise. The rules contain examples of legal issues and supporting facts that must be specifically pleaded. The Committee favours bringing together and building on the examples of matters requiring specific pleading already found in the rules. Again, the Committee recommends following the model of the Queensland rules, and listing in one rule matters that currently require specific pleading in Alberta. What is intended is a change in the format of the rules, not in proper pleading.

2. Pleading Remedies

The Alberta rules do not impose clear requirements regarding the pleading of remedies. Nonetheless, the remedies sought in an action are usually specified in a "prayer for relief" at the conclusion of the pleading. This practice has the benefit of preventing surprise, by notifying the defendant of what the plaintiff is seeking to recover.

The Committee is of the view that remedies should be specifically pleaded, including:

(a) type of remedy sought, including type of damages;
(b) amount of damages; and
(c) for a claim for interest, the basis for the claim and the calculation of the interest should be specified.

The Committee proposes that the rules require a "claim" (rather than a "prayer") for relief, which includes these matters. However, the rules should also continue to provide that general and unpleaded relief may be granted. A recognition in the rules of

the court's authority to grant such relief is consistent with the court's duty under s. 8 of the *Judicature Act*.

3. Particulars

Particulars are details specifying the nature of certain alleged facts. They provide a degree of specificity to the allegation, but do not reach the level of indicating how the allegations will be proved, which would require the pleading of evidence. The functions of particulars are to permit the other party to plead in response, to narrow issues for trial and to save time and expense in the trial process.

The Committee believes that the rules should continue to require particulars of the matters referred to in Rule 115, and that defamation should be added to this list.

An issue was raised regarding the pleading of mental states, particularly fraudulent intention, malice and bad faith. Ontario's rules require particulars of such allegations. The Committee proposes to adopt the Ontario approach. It was thought that requiring particulars would mean that these claims, which involve serious attacks on integrity, would be more carefully considered by those making them and more effectively investigated by those subject to them.

With regard to the procedure for demanding further particulars, the Committee proposes that the rules make express provision for a demand for particulars, and require that a demand for particulars must precede the bringing of a motion for particulars.

The Committee reviewed the other subsidiary pleadings rules, in Alberta and elsewhere, and makes a number of proposals, including:

- no change in practice regarding alternative pleas, but Rules 111 and 110(2), which are related, should be brought together;
- repealing Rule 114 (notice) and Rule 106 (documents and conversations), as they are superfluous;
- retaining Rule 107 (presumptions of law) and Rule 108 (conditions precedent); and

- retaining Rule 110(1) (matters arising after action started), but eliminating the special amendment procedure.

D. Rules Applicable to Defences

Canadian rules vary as to whether silence in a pleading presumes a denial or an admission. A related issue is the permissibility of a "general denial" form of defence. Alberta presumes a denial (Rule 119), and permits "general denial" defences in most cases. The Committee proposes to retain Alberta's present approach. Silence should continue to constitute a denial. Further, the rules should continue to permit a general denial.

The Committee also reviewed the rules providing exceptions to Rule 119, and proposes:

- eliminating the exception to the general rule now found in Rules 124, 125 and 126 for actions on bills of exchange and money demands;
- retaining the exceptions now found in Rules 122 and 127, so that incorporation, representative status and the constitution of a partnership must be specifically denied;
- retaining the requirement for specific pleading of the illegality or insufficiency in law of a contract; and
- retaining the requirement for specific pleading of matters likely to cause surprise, together with a list of examples.

The early admission of undisputed facts advances the objective of identifying the real issues between the parties. The rules of most Canadian jurisdictions deal explicitly with the requirement to make admissions in pleadings. The Committee proposes to add to the pleadings rules an explicit duty to admit undisputed facts.

The review of other rules pertaining to defences led to a recommendation to repeal Rule 110(3) (confession of a defence) and retain Rule 92 (defence of tender).

E. Reply, Joinder of Issue and Close of Pleadings

The Committee proposes that filing of a joinder of issue should no longer be permitted, and that replies should be employed only to plead new matters or make

admissions. Pleadings should close, as they do now, with the filing of a reply or the expiry of the time to file.

F. Formalities of Pleadings

The Committee makes several proposals relating to the formalities of pleadings and other documents, including:

- the rules should provide for use of a short style of cause on documents after the statement of claim or other originating document;
- notices on documents that are now found on the backer could appear in the document as the first paragraph after the style of cause and the backer eliminated – the Committee would be interested in receiving the views of the legal community: "Are there any backers for backers?"; and
- different concepts applied to the treatment of documents are confusing and unnecessary – the rules should speak simply of "filing" documents, rather than "issuing" an originating document, and "filing" other documents.

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RULES APPLICABLE TO DEFENCES

REPLY AND JOINDER OF ISSUE AND CLOSE PLEADINGS

FORMALITIES OF PLEADINGS

CHAPTER 1. FUNDAMENTAL PRINCIPLES

A. Fact Pleading

ISSUE No. 1
Should we continue to use a system of fact pleading; i.e., to require that pleadings contain a summary statement of the material facts on which a party relies for the claim or defence?

[1] Rule 104 provides:

> Summary of facts – Every pleading shall contain only a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.[2]

[2] The system of "fact pleading" reflected in this rule was adopted in the English *Judicature Act 1875*, replacing the earlier system of common law pleading. Under common law pleading, there had developed intricate sets of specialized rules for the various common law forms of action.[3] The change to fact pleading was an effort to exclude "pleas of law, argument, reasons, theories, conclusions, and evidence," and thereby shorten what had previously been a lengthy and confusing document, and clarify the issues between the parties.[4] Fact pleading is today employed in all Canadian common law jurisdictions, and is the predominant approach to pleadings in all common law systems.[5]

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[2] Alberta, *Rules of Court* [Alberta].

[3] J.A. Jolowicz, *On Civil Procedure* (Cambridge, U.K.; New York: Cambridge University Press, 2000) at 34-35.

[4] Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System: Consultation Drafts* (Perth, W.A.: Law Reform Commission of Western Australia, 1999) vol. 1, Section 2.5, Civil System: Pleadings – Sacrificing the Sacrosanct at 323 [WALRC, *Sacrificing the Sacrosanct*].

[5] American Law Institute, *ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure* (Discussion Draft No. 4) (Philadelphia, Pa.: American Law Institute, April 18, 2003), online: American Law Institute <http://www.ali.org/TransCivilDD4.pdf> [American Law Institute]. It remains the approach in England and Wales, with some degree of simplification under the *Civil Procedure Rules 1998* (discussed below at paragraph 12) [United Kingdom]. It remains the system employed in Australian

(continued...)

1. Requirements of Fact Pleading

[3] Judicial interpretation of rule 104 and similar rules indicates that "a party must plead all the material facts on which it intends to rely at the trial" and "no averment must be omitted which is essential to success."[6] Under a modern approach, cases should not be won or lost on the pleadings, so that amendments of defective pleadings are typically permitted, although there can be significant costs penalties if this is done late in the process. Thus what may be characterized as "technical" deficiencies should not determine the outcome of the case, but it is clear that they can cause delay and expense.[7]

2. Objectives of Fact Pleading

[4] The objectives of fact pleading include defining the issues between the parties and notifying parties of the case to meet:

> The primary function of a system of fact pleading is to compel the parties to disclose the essential facts that they are relying on to sustain their claim or defence. Disclosure functions to facilitate due process and a fair hearing because the parties are given notice of the case that they confront and because the parties and the court are able to identify the matters that are uncontested and the issues that must be resolved by trial.[8]

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[5] (...continued)
jurisdictions, including in the new Supreme Court of Queensland, *Uniform Civil Procedure Rules 1999* [Queensland]. The Australian Law Reform Commission, in *Managing Justice: A Review of the Federal Civil Justice System* (Report No. 89) (Sydney, NSW: Australian Law Reform Commission, 1999) [ALRC, *Managing Justice*] recommended only minor changes to pleadings rules.

[6] *Wyman, and Moscrop Realty Limited v. Vancouver Real Estate Board* (1957), 22 W.W.R. 133 at 135 (B.C.C.A.), as cited in Allan A. Fradsham, *Alberta Rules of Court Annotated 2003* (Toronto : Carswell, 2003) at 16.

[7] See, for example, *Corrigan v. Fanta*, [1989] 4 W.W.R. 523 (Alta. C.A.). The Alberta Court of Appeal dealt with an application by a defendant to strike out a statement of claim as against the corporate owner of a motor vehicle, and a cross-application by the plaintiff to amend. The claim alleged that the corporate defendant owned a vehicle driven by the individual defendant when it was involved in an accident, but did not "allege that the driver had the consent of the corporate Defendant, nor any other grounds which would establish liability of the owner." The court accepted that this was "a seriously defective statement of claim". An amendment was permitted, notwithstanding the expiry of the limitation period, but the plaintiff was required to pay costs of the appeal and the chambers application.

[8] P.M. Perell, "The Essentials of Pleading" (1995) 17 Advoc. Q. 205 at 205;G.S. Holmested et al., *Holmested and Watson Ontario Civil Procedure*, looseleaf (Toronto: Carswell, 1984) at r. 25.06 [Holmested and Watson]; W.B. Williston and R.J. Rolls, *The Law of Civil Procedure* looseleaf (Toronto: Butterworths, 1970) at 637.

3. Criticisms of Pleadings

[5] Do pleadings achieve their purposes? Some think not. It is argued that pleadings do not successfully identify or limit the issues between parties because they are often too general and inadequately particularized; they tend to longwindedness; there is overuse of alternative positions; there is reluctance to admit the accuracy of the pleadings of an opponent; and there is frequent amendment of pleadings, often late in the proceedings. In addition, it is noted that pleadings pose a significant barrier for self-represented litigants.[9]

[6] We asked the Alberta legal profession for its views on pleadings in the Rules Project Issues Paper, posing questions as follows:

> Pleadings are intended to define precisely the matters in dispute in an action. Documents including a statement of claim, a defence and, occasionally, a reply are exchanged. Some think that pleadings obscure the issues in dispute rather than disclose and clarify. The identification of the "real" issues in a case may be hampered by the reluctance of either party to make any significant admissions prior to trial.
>
> The process of preparing, filing and exchanging pleadings is time consuming and expensive. Opposing parties may attack each other's pleadings in interlocutory hearings. The time and cost of these hearings may outweigh the significance of the issues involved.
>
> - Do the cost and delay associated with formal pleadings outweigh their value?
> - Should pleadings be abolished and replaced by a less formal narrative of fact and law provided by each party?

[7] One Alberta commentator responded with a description of "typical pleadings" in a personal injury claim that illustrates many of the problems described above:

> [The] Statement of Claim ... sets out many possible allegations of negligence on the part of the Defendant, summarizes the injuries suffered and usually ends with a Prayer for Relief that may claim an exorbitant sum of money....The usual Statement of Defence denies that the accident happened and states that if it did happen then it is all the fault of the Plaintiff, and that the Plaintiff had prior or subsequent conditions or accidents that caused their current condition, and failed to mitigate. They add little to defining the real issues of the lawsuit. When a

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[9] This list is a synopsis of criticisms identified in the following reports: *Woolf Interim Report*, *supra* note 1 at c. 17; Australian Law Reform Commission, *Review of Federal Civil Justice System* (Discussion Paper 62) (Sydney: Australian Law Reform Commission, 1999) at c. 10; Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System: Final Report* (Perth, W.A.: Law Reform Commission of Western Australia, 1999) at c. 10 [WALRC, *Final Report*].

> Defendant gets served with a Statement of Claim, the Defendant usually panics. When the Plaintiff gets a copy of the Statement of Defence, the Plaintiff usually gets really upset and says, "How can they deny the accident happened; they were there."

[8] However, the general trend of the comments received provided support for the current system of pleadings:

> The majority of those who responded to this issue felt that formal pleadings were valuable enough to outweigh the associated cost and delay and should be retained in favour of a less formal narrative. Formal pleadings were thought to help keep the parties on track and prevent them from reinventing their case. Some respondents commented that a more informal approach would likely result in more time and money being spent trying to get the facts and issues of the case defined. Some thought that a more narrative form of pleadings would widen the scope of discovery.[10]

4. Alternative Systems of Pleading

[9] Fact pleading in the United States predated the English *Judicature Act*.[11] By 1938, criticism of the technicalities and disputes arising from fact pleading led to reform of the *Federal Rules of Civil Procedure* through the introduction of "notice pleading." Federal Rule 8 requires a plaintiff to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." The objective of notice pleading was to strip away the remaining technicalities of pleading. Notice pleading is today employed in American federal courts and in a majority of state courts.[12]

[10] The test of adequate pleading under a notice pleading system is whether the opposing party has been sufficiently notified of a claim or defence so as to meet it. There is no need to allege all required facts for every element of a claim or defence, only a basic understanding of the claim or defence needs to be communicated.[13]

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[10] Alberta Law Reform Institute, *Report on Legal Community Consultation* (Alberta Rules of Court Project) (Edmonton: Alberta Law Reform Institute, 2002) at 6 [Legal Community Consultation Report].

[11] J.H. Friedenthal et. al., *Civil Procedure*, 3rd ed. (St. Paul, Minn.: West Group, 1999) at 245 (where it is known as "Code Pleading").

[12] *Ibid*. at 258-59.

[13] However, there still are instances of disagreement as to whether the amount of detail provided is sufficient to give fair notice of a claim. *Ibid*. at 259-260.

[11] Notice pleading has been a controversial innovation. While some point to advantages in eliminating the technicalities and associated controversies of fact pleading,[14] others argue that notice pleading does not impose meaningful limits on the discovery process. American academics have described a trend, particularly relating to complex securities or civil rights actions, in which the courts effectively ignore Rule 8 and require the pleading of specific and detailed facts.[15] The Law Reform Commission of Western Australia commented that the American system legitimates 'fishing' in discovery, and added that "any system which prolongs isolation of the relevant facts, issues and evidence and permits shapeless proceedings should not be emulated."[16] The American Law Institute concluded that notice pleading as a system is "largely unsuccessful" because it "simply postpones disputes as to the legal sufficiency of a claim until later stages in the litigation," and, accordingly, it recommended that proposed "Transnational Civil Procedure Rules" provide for fact pleading.[17]

[12] The new English Civil Procedure Rules, adopted as a result of the Woolf reforms, require "a concise statement of the facts on which the claimant [or respondent] relies."[18] It has been suggested that pleadings (now called statements of case and response) should be "less formalistic and more factually oriented with facts tending to be briefly stated."[19] But others argue that pleadings that were previously "over-stylised and complex, using anachronistic language and obscure terminology," were due to defects in practice, not in the former rules, and that the new rules do not

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[14] *Ibid*. at 259.

[15] R. Marcus, "The Revival of Fact Pleading under the Federal Rules of Civil Procedure" (1986) 86 *Colum. L. Rev.* 433.

[16] WALRC, *Sacrificing the Sacrosanct*, *supra* note 4 at 342-343.

[17] The proposed Transnational Rules require "that pleading be in detail with particulars as to the basis of claim and that the particulars reveal a set of facts that, if proved, would entitle the claimant to a judgment". R. 12.1 of the draft Rules of Transnational Civil Procedure provides that the "plaintiff shall state the facts on which the claim is based, the plaintiff's contentions concerning the legal grounds that support the claim . . . [and] so far as reasonably practicable, set forth detail as to time, place, participants, and events." (American Law Institute, *supra* note 5).

[18] United Kingdom, r. 16.4. See also the discussion in *Woolf Interim Report*, *supra* note 1, c. 20.

[19] M. Bramley & A. Gouge, *The Civil Justice Reforms One Year On – Freshfields Assess Their Progress* (London: Butterworths, 2000) at 51.

require a "a fundamental readjustment," but only "a *refocusing* on the original aims" of pleadings.[20]

POSITION OF THE GENERAL REWRITE COMMITTEE

[13] On the issue of whether fact pleading should continue to be used or be replaced by another method, the Committee reviewed the common criticisms of pleadings – they are too long, too general, misleading, and so forth. It concluded that a change to the alternative "notice pleading" approach would be a move in the wrong direction. Generally, Committee members concurred that problems with pleadings did not derive from the rules, but from poor practice. In fact, if the rules governing pleadings were followed, it is likely that pleadings would be more useful. The problem is that many lawyers do not follow the rules. Plaintiffs seem to "throw in the kitchen sink" out of anxiety not to miss an issue. Defendants tend to file *pro forma* pleadings because they do not have enough time to prepare a meaningful pleading, and because the claim may require investigation. In any event, although pleadings may include more issues than ultimately end up in dispute, issues can be narrowed through discovery and other aspects of the litigation process. It may be unrealistic to expect pleadings to be refined at the outset of the action.

[14] Generally, therefore, the consensus was reached that the quality of pleadings depends on the lawyer's skill and training, and on enforcement by the courts. Changing the system would be unlikely to result in improved pleadings, so we should continue to use the system of fact pleading, requiring a summary statement of the material facts on which a party relies for the claim or defence. However, changes that would clarify the current rules, and so facilitate lawyers in following the rules and courts in enforcing them, should be encouraged.

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[20] W. Rose, *Pleadings Without Tears – A Guide to Legal Drafting Under the Civil Procedure Rules*, 6th ed. (Oxford: Oxford University Press, 2002) at x. See also *McPhilemy v. Times Newspapers Ltd.,* [1999] 3 All E.R. 775 at 792-93 (C.A.) and *Best v. Charter Medical of England Ltd.*, [2002] E.M.L.R. 18 (C.A.).

B. Certification of Pleadings

ISSUE No. 2
Should we consider the adoption of a system of certification of pleadings by parties and/or their lawyers?

[15] Many criticisms of pleadings focus on what may be characterized as misuse of the system, in which many possible claims or defences are raised, as alternatives, without any reasonable basis for many of the allegations. A possible response to this concern is to require some form of certification or verification of pleadings.

[16] Rule 11 of the United States *Federal Rules of Civil Procedure* is an example of a certification system. It was adopted as a measure to control frivolous suits that might be encouraged by the notice pleading system.[21] Originally, Rule 11 required certification that the attorney had "read the pleading," that there was "good ground to support it," and that it was "not interposed for delay." As interpreted, this screened out only cases where the lawyer knew or had compelling reason to know that the claim was baseless.[22] Rule 11 was subsequently amended to impose a stricter standard, and now requires, among other things, that "factual contentions have evidentiary support or, if specifically so identified are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."[23]

[17] The Woolf reforms in England include another form of verification of pleadings. Pleadings (statements of case and response) are to be accompanied by a statement that "the party putting forward the document ... believes the facts stated in the document are true."[24] The statement may be signed by either the party or his or her legal representative.

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[21] F. James, G. Hazard & J. Leubsdorf, *Civil Procedure*, 4th ed. (Boston: Little, Brown, 1992) at 162.

[22] *Ibid*. at 163-164.

[23] R. 11(b)(3), as found online: Legal Information Institute of Cornell Law School <www.law.cornell.edu/rules/frcp/Rule11.htm> (August 12, 2003).

[24] Part 22 of the Civil Procedure Rules and Practice Direction – Statements of Truth, r. 22.1(4)(b), online: <www.lcd.gov.uk/civil/procrules_fin/contents/parts/part22.htm> (August 12, 2003).

[18] A system of certification of pleadings has also been adopted in the Australian Federal Court, requiring "a legal representative who has prepared a pleading to sign a certificate ... to the effect that factual and legal material available to the representative provides a proper basis for each allegation in the pleading, each denial in the pleading, and each non-admission in the pleading."[25]

[19] In Alberta (and other Canadian jurisdictions), pleadings are not certified or verified. As noted by the Alberta Court of Appeal in *Can-Air Services Ltd. v. British Aviation Insurance Co.*, a pleading "is not under oath." It "does not really state that certain facts are true. It is a claim to territory, not a declaration of ownership of territory. It states the most that the party's advisers hope that he may achieve at trial."[26] However, clearly unmerited pleadings might be found to be an abuse of process and a violation of professional obligations:

> A lawyer ... may assert a position on a client's behalf, including one that the lawyer does not believe will ultimately prevail, if the position is supportable by a good-faith argument on the merits. A lawyer may have greater latitude if (for example) all of the facts have yet to be fully substantiated or the lawyer expects to develop further evidence through discovery. It is an abuse of process, however, for a lawyer to commence or defend an action on grounds that are not, and have no chance of becoming, a legitimate and meritorious claim or defence. In evaluating the client's position and determining the extent to which it should be pursued, a lawyer must realistically assess all factual, evidential and jurisprudential factors bearing on the matter. A step taken for the sole purpose of embarrassing, inconveniencing or harassing another party is improper.[27]

[20] Some commentators in our Legal Community Consultation supported certification of pleadings:

> Some respondents thought it a good idea to consider having the parties certify, to some degree, that there is merit in the pleadings. It was

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[25] Federal Court Amendment Rules 2002 (No. 1) (Statutory Rule 130 of 2002) commencing 14 June 2002, which includes new Order 11, r. 1B, online: <www.fedcourt.gov.au/new/new.html> accessed August 12, 2003). See the discussion in ALRC, *Managing Justice*, *supra* note 5 at 7.169, and similar recommendations in WALRC, *Final Report*, *supra* note 9 at 10.17.

[26] (1988), 63 Alta. L.R. (2d) 61, [1989] 1 W.W.R. 750, 30 C.P.C. (2d) 1 (C.A.). The lack of a statement of the truth of pleadings was commented on by Veit J. in *321665 Alberta Ltd. v. Mobil Oil Canada Ltd.*, 2002 ABQB 967, with the suggestion that pleadings might, as a result, not be an "effective tool" to restrict discovery.

[27] *Code of Professional Conduct*, c. 10, Commentary to Rule # 1.

> pointed out that under the U.S. Federal Rules of Court the attorney must acknowledge in writing as part of their pleadings that the action is not frivolous or without merit. The comment was made that the use of this requirement together with costs sanctions imposed upon lawyers who are bringing baseless actions would be a welcome addition to the Alberta Rules.[28]

POSITION OF THE GENERAL REWRITE COMMITTEE

[21] The General Rewrite Committee decided against having either the client or the lawyer certify the pleadings. There was concern that it would be impossible for a lawyer to verify a claim, or to advise his or her client regarding verification, at such an early stage in the proceedings. When drafting pleadings, the lawyer has heard only heard one side of the case. Both lawyer and client are entitled to hear the other side in discovery. Further, certification asks the lawyer to sit in judgment of the veracity of the client's case and that is not the lawyer's job. To the extent that certification is employed simply to control frivolous suits, it is unnecessary as every lawyer is already bound by professional obligations not to bring frivolous suits. Finally, the transferability of either English or American practice to Canada was doubted. Under English rules, discovery is not generally available. In comparison with the United States, it was thought that there is less need in Canada to develop measures to control frivolous lawsuits. In general, the perception was that Canadian legal culture is not plagued by outrageous litigation claims – our pleadings are labourious, not outrageous.

[22] In addition to the General Rewrite Committee, other working committees within the Rules Project discussed whether pleadings could be improved by a system of certification. Some (minority) support for the idea was expressed. One committee member commented as follows:

> The idea of certification has some merit and I would favour looking at that issue more closely. The Rules presently provide for the possibility of costs sanctions due to baseless allegations or senseless denials but in practice, the sanctions are rarely invoked. A certification requirement might cause lawyers to be more critical and precise in their pleadings. That would help focus the *lis* on the real issues more quickly.

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[28] Legal Community Consultation Report, *supra* note 10 at 6-7.

[23] While the consensus of the General Rewrite Committee was against certification or verification of pleadings, the Committee would be interested in receiving the views of the Bar and Bench on this point.

CHAPTER 2. CONTENTS OF PLEADINGS

A. Basic Rule

ISSUE No. 3
How could the requirements of proper pleading be clarified?

[24] Under Issue 1, it was noted that should we decide to continue with a system of fact pleading, reforms may still be made, and changes should still be encouraged that would clarify the requirements of the rules and facilitate lawyers in complying with them and courts in enforcing them. Such changes were called for in a number of the comments from the Alberta Bar and Bench, who recommended reforms including a reorganization of the pleadings rules (a general rule followed by examples was suggested); a requirement that pleadings state the relief sought and issues to be determined by the court; and a clarification of the need for particulars and the matters for which particulars are essential.

[25] One change that might clarify the rules would be to list clearly the separate elements of Rule 104 together with other basic rules of pleading. A model is found in Queensland Rule 149:

> 149(1) Each pleading must –
>
> (a) be as brief as the nature of the case permits; and
>
> (b) contain a statement of all the material facts on which the party relies but not the evidence by which the facts are to be proved; and
>
> (c) state specifically any matter that if not stated specifically may take another party by surprise; and
>
> (d) subject to rule 156, state specifically any relief the party claims; and
>
> (e) if a claim or defence under an Act is relied on – identify the specific provision under the Act.
>
> (2) In a pleading, a party may plead a conclusion of law or raise a point of law if the party also pleads the material facts in support of the conclusion or point.

[26] Queensland Rules 149 through 156, the "Rules of Pleading,"[29] are set out in their entirety in the Appendix.

[27] There are a number of advantages to Queensland Rule 149 as compared with Alberta Rule 104. The Queensland Rule sets out clearly the elements of Rule 104: the requirement of brevity and the pleading of material facts and not evidence. It also clarifies other Rules and principles of pleading, including:

- Alberta Rule 112 states only that a party may plead "any point of law" – the Queensland rule makes it clear that this includes a conclusion of law, and that pleading law does not relieve one of the concurrent requirement to plead "the material facts in support of the conclusion or point;"
- Alberta Rule 109 requires "in any pleading subsequent to a statement of claim," the specific pleading of any matter that "might take the opposite party by surprise" – the Queensland rule establishes this as a general principle, and, following this principle, requires specific pleading of statutory claims and defences;
- Alberta Rule 120 indicates that it is not necessary to "ask for general or other relief" – the Queensland rule clarifies the practice of specifying the relief claimed in a prayer for relief.

POSITION OF THE GENERAL REWRITE COMMITTEE

[28] The General Rewrite Committee favours the adoption of a rule setting out the basic principles of pleading, modelled on Queensland Rule 149. Elements of this rule pertaining to the pleading of law and remedies are addressed in further detail below.

B. Pleading Law/Specific Pleading

ISSUE No. 4

Should any changes be made to the rules regarding the pleading of law, such as:

(a) making explicit the need to plead supporting facts; and,

(b) continuing the current list of examples of matters that should be specifically pleaded, or extending the list, or not having a list?

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[29] Queensland.

[29] A basic characteristic of fact pleading, the essence of the *Judicature Act* reforms, is that facts, rather than causes of action or law, are to be pleaded. However, the rule is qualified, and as a result, the statement in Rule 104 that a pleading shall contain 'only' material facts is misleading.

[30] First, there is permission, although not a requirement, to plead law in Rule 112, which provides that "a party may by his pleading raise any point of law." Rule 112 is also capable of misleading, as it must be read in the context of Rule 104, which states that one is only permitted to raise a point of law if the material facts to support it are pleaded. The Queensland rule, as well as those of a number of Canadian jurisdictions,[30] permit the pleading of a conclusion of law or point of law, but also explicitly state the necessity to plead material facts in support.

[31] The second qualification to the requirement to plead facts and not law is that issues of law must sometimes be specifically pleaded.[31] For example, an issue of law (and facts in support) must be pleaded under Rule 109, in pleadings subsequent to a statement of claim, wherever the failure to plead might take the opposite party by surprise.[32] Rule 109 provides a list of examples: performance, release, payment, any statute of limitations, statute of frauds, fraud or any fact showing illegality. There is a large amount of case law dealing with Rule 109 and the common law requirements of specific pleading (that apply to statements of claim). In addition to the matters listed in Rule 109, the following have been held to require specific pleading: section numbers in long statutes, regulations, bylaws, statutory exceptions or exemptions, matters related to misconduct as well as illegality, certain defences in tort and contract, damages, and other matters.[33] The failure of a condition precedent and defences relating to the legality or sufficiency in law of a contract must be specifically pleaded (Rules 108 and 123). Further, Rule 115 requires particulars of misrepresentation,

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[30] E.g., Ontario, *Rules of Civil Procedure*, r.25.06(2) [Ontario], British Columbia, *Supreme Court Rules*, r. 19(9)(9.1) [British Columbia].

[31] J. E. Côté, "Some Notes on Pleadings" (1974) 12 Alta. L. Rev. 535; Perell, *supra* note 8 at 213-14.

[32] See also Ontario, r. 25.07(4) and British Columbia, r. 19(15)(b).

[33] The Honourable William A. Stevenson & The Honourable Jean E. Côté, *Civil Procedure Encyclopedia* (Edmonton, Alberta: Juriliber, 2002), vol. 1 at 11-12 - 11-14 and 13-30 - 13-40 [Stevenson & Côté, *Encyclopedia*].

fraud, breach of trust, wilful default and undue influence, which, in effect, requires the pleading of conclusions of law.

[32] Neither Ontario nor British Columbia list examples of matters that must be pleaded, as the Alberta rules do.[34] On the other hand, Queensland has opted to take the approach of providing a longer, but not exhaustive, list of examples of matters that must be specifically pleaded, including those matters required by Alberta rules or case law, as well as others.[35] The matters to be specifically pleaded under Queensland Rule 150 are set out and compared with Alberta law in the Chart below.

Matters that must be expressly pleaded in Queensland and Alberta

Queensland r. 150	Alberta Rules	Case Law
(a) breach of contract or trust	r. 115 requires particulars of breach of trust	
(b) every type of damage claimed including special and exemplary damages	r. 116: "where it is necessary to give particulars of a debt, expenses or damages..."	*Canadian Commercial Bank v. McLaughlan*: particulars of special damages required[36]
(c) defence under *Limitation of Actions Act*	r. 109 requires specific pleading in defence or reply of a statute of limitations	
(d) duress		*Northgate Trailer Industries Ltd. v. Osprey Projects (1992) Ltd.*:duress must be properly established in the pleadings[37]

[34] British Columbia, r. 19(15)(b); Ontario, rr. 25.07(4), 25.08(2).

[35] Several reform reports have suggested increased reference to law in pleadings, including the *Woolf Report*, *supra* note 1, ALRC, *Managing Justice*, *supra* note 5 and WALRC, *Final Report*, *supra* note 9. The American Law Institute's proposed Transnational Rules of Civil Procedure would also require the pleading of law, *supra* note 5 at r. 12.1.

[36] (1988), 62 Alta. L.R. (2d) 362 (Q.B.).

[37] 1998 ABQB 1065.

Queensland r. 150	Alberta Rules	Case Law
(e) estoppel		*Milano's Dining Room & Lounge (1989) Ltd. v. CTDC No. 1 Alberta Ltd.*: estoppel must be expressly pleaded[38]
(f) fraud	r. 109 requires specific pleading in defence or reply r. 115 requires particulars r. 113 sufficient to allege fraudulent intention as fact	
(g) illegality	r. 109 requires specific pleading in defence or reply r. 123 denial of contract not a denial of legality or sufficiency in law of contract	
(h) interest (including the rate and method of calculation)		*Stoner v. Canadian National Resources Ltd.*: requirement to plead the *Judgment Interest Act*[39] *Bank of America Canada v. Mutual Trust Co.*: requirement to plead compound interest[40]
(i) malice or ill will	r. 113 sufficient to allege malice as a fact	
(j) misrepresentation	r. 115 particulars required	

[38] (1994), 153 A.R. 347 (Q.B.).

[39] (1988), 55 Alta. L.R. (2d) 238 (Q.B.) [*Stoner*].

[40] 2002 SCC 43.

Queensland r. 150	Alberta Rules	Case Law
(k) motive, intention or other conditions of mind, including knowledge or notice	r. 113 sufficient to allege knowledge or other condition of mind as a fact r. 114 sufficient to allege notice as a fact	
(l) negligence or contributory negligence		*Guitard Estate v. Gérard Gagnon Ltée*: plaintiff passenger must plead gross negligence[41] *Tally v. Klatt*: defendant alleged plaintiff solely at fault – sufficient to apply *Contributory Negligence Act*[42]
(m) payment	r. 109 to be specifically pleaded in defence or reply	
(n) performance	r. 109 to be specifically pleaded in defence or reply	
(o) part performance		Not specifically required, but arises in the context of the *Statute of Frauds* (see the specific reference below)
(p) release	r. 109 to be specifically pleaded in defence or reply	
(q) undue influence	r. 115 particulars required	
(r) voluntary assumption of risk		*Wetherley v. Calgary Coop Association Ltd.*: requirement to plead *volenti*[43]

[41] (1981), 33 N.B.R. (2d) 672 (Q.B.) at para. 14.

[42] (1979), 17 A.R. 237 (C.A.).

[43] (1990), 103 A.R. 153 (Q.B.).

Queensland r. 150	Alberta Rules	Case Law
(s) waiver		
(t) want of capacity, including disorder or disability of the mind	r. 113 condition of mind – sufficient to allege as a fact r. 122 denial of incorporation r. 127 denial or right to claim as executor, trustee or in a representative capacity	
(u) that a testator did not know and approve of contents of a will		
(v) that a will was not properly made		
(w) wilful default	r. 115 particulars required	
(x) anything required by practice note or form		
(y)	*Statute of Frauds* r. 109 requires specific pleading in defence or reply r. 123 denial of contract not a pleading of *Statute of Frauds*	
(z)	r. 108 non-performance of a condition precedent	
(zz)	r. 92 requires payment into court where a defence of tender before action is pleaded	

In addition to Rule 150, Queensland Rule 149(1)(e) indicates that if a claim or defence under an Act is relied on, the specific statutory provision is to be identified.[44]

[44] A party is also specifically required to plead a statute or regulation relied upon under the rules of New Brunswick, *Rules of Court*, r. 27.06(14) [New Brunswick]; Manitoba, *Court of Queen's Bench Rules*, r. 25.06(4) [Manitoba] and Saskatchewan, *Queen's Bench Rules*, r. 142 [Saskatchewan].

POSITION OF THE GENERAL REWRITE COMMITTEE

[33] Generally speaking, the Committee found Queensland Rules 149 and 150 to be both better organized and more informative than Alberta rules. They clarify things that are obscure in the Alberta rules. The Committee agreed that the need to plead supporting facts when pleading a conclusion of law or point of law should be made explicit in our rules.

[34] The Committee agreed that matters of law that might take another party by surprise should be pleaded, but thought that matters that often would not cause surprise, such as breach of contract or negligence, should not have to be specifically pleaded in every case. There is no desire to return to a system of pleading causes of action.

[35] The Committee favours bringing together and building on the examples of matters requiring specific pleading already found in the Alberta rules. To eliminate the examples, as under the Ontario and British Columbia rules, was thought to be a move in the wrong direction, as the examples provide guidance for proper pleading. Thus the Committee favours the approach of the Queensland rules, with the list of examples modified so that it includes only those matters that currently require specific pleading under Alberta rules and case law. What is intended is a change in the format of the rules, not in proper pleading. It is hoped that by drawing together requirements now scattered among several rules and case law, observance and enforcement of the rules will be facilitated.[45] Specific pleading should be required for the following matters (letters correspond with chart on pp. 14-17):[46]

(a) breach of trust;

(b) every type of damage claimed, including special and exemplary damages (see Issue 5);[47]

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[45] The Committee was concerned about the situation of self-represented litigants, who will always need assistance with preparing pleadings. The issue of whether and how self-represented litigants might be accommodated by the Rules or other practices will be addressed in a subsequent consultation memorandum.

[46] The items are listed in the order they appear in Queensland, r. 150 and the Chart above. Once the items to be included have been finalized, an effort will be made to organize them topically.

[47] The requirement for specific pleading of remedies could be set out separately, in a provision dealing

(continued...)

(c) any statute of limitation (see Issue 16);
(d) duress;
(e) estoppel;
(f) fraud (see Issue 16);
(g) illegality and any grounds for asserting the invalidity of a contract (see Issues 15 and 16);
(h) interest (including the rate and method of calculation) (see Issue 5);[48]
(i) malice or ill will;
(j) misrepresentation;
(m) payment (see Issue 16);
(n) performance (see Issue 16);
(p) release (see Issue16);
(q) undue influence;
(r) voluntary assumption of risk;
(s) waiver;
(t) want of capacity or authority (see Issue14);
(w) wilful default;
(y) statute of frauds (see Issues 15 and 16);
(z) non-performance of condition precedent (see Issues 9 and 16);
(zz) defence of tender (see Issue 18).

[36] Just as is currently the case under Rule 109, and is provided in Queensland Rule 150, and is provided in Queensland Rule 150, these would be examples only, and would not limit the general principles that all material facts and all matters that would cause surprise must be pleaded. The pleading of statutory and regulatory provisions relied upon by the parties would also be required under the general pleadings rule (Issue 3).

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[47] (...continued)
with a "claim for relief."

[48] The requirement for specific pleading of remedies could be set out separately, in a provision dealing with a "claim for relief."

C. Pleading Remedies

ISSUE No. 5
Should any changes be made to the rules regarding the pleading of remedies, such as:
(a) a specific requirement to plead remedies; or,
(b) a specific requirement as an aspect of pleadings rules to plead the amount of damages claimed?

[37] The Alberta Rules do not impose clear requirements regarding the pleading of remedies. Nonetheless, the remedies sought in an action are usually specified in a "prayer for relief" at the conclusion of the pleading. This practice has the benefit of preventing surprise, by notifying the defendant of what the plaintiff is seeking to recover.

[38] Far from imposing a requirement for specific pleading, Rule 120 states that "costs need not be claimed and it is not necessary to ask for general or other relief." This may be seen as consistent with the Alberta *Judicature Act*, s. 8, which requires the court to grant "all remedies to which any of the parties ... may appear to be entitled in respect of any and every legal and equitable claim properly brought forward by them in the proceeding."[49] On the other hand, it has been held that the right to a remedy does not relieve one from the obligation to claim it,[50] and that the "general or other" relief available under Rule 120 must be ancillary to relief specifically claimed.[51]

[39] Rule 606 requires that the amount of a damages claim be specified, but it is found in Part 47 of the Rules (Costs). It has been held that the purpose of this rule is to

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[49] *Judicature Act*, R.S.A. 2000, c. J-2, s. 8.

[50] *Stoner*, *supra* note 39. Approved in *Nathu v. Imbrook Properties Ltd.* (1992), 2 Alta. L.R. (3d) 48; 89 D.L.R. (4th) 751 (C.A.).

[51] *Northwest Co. Ltd. v. Merland Oil Co. and Gas & Oil Products Ltd.*, [1936] 2 W.W.R. 577 (Alta. C.A.) at 598. Apart from any issues relating to the specifying of relief in the prayer for relief, the remedy must, of course, also be justified based on the cause of action pleaded: *Wagar v. Little (No. 2)*, [1924] 1 W.W.R. 112 (Alta. C.A.); *Hoover & Robertson and Hoover v. Burrows*, [1945] 3 W.W.R. 683 (Alta. C.A.).

determine the scale of costs, and not to limit the remedy that may be ordered. Thus, a court can order an amount in excess of the stated amount without an amendment to the statement of claim, although a substantial understatement could be prejudicial, and thus a proper basis for an adjournment.[52] And, Rule 116 acknowledges, at least implicitly, the necessity of giving particulars of a debt, expenses or damages.

[40] Despite Rule 120, the practice in Alberta is to conclude a pleading with a prayer for relief, specifying the relief sought. The fact that practice relating to the prayer for relief is not clearly stated in the Rules, and may even be seen as inconsistent with the Rules, has been commented upon:

> It is customary to put at the end of a statement of claim or counterclaim a specific prayer for relief, but R. 606 seems to be the only Rule expressly calling for it. Doubtless a prayer is a good idea to prevent surprise and allow the right column of Schedule C to be selected for costs. Most prayers violate R. 120, but that is presumably harmless, especially as some courts have interpreted R. 120 narrowly or even overlooked it at times.[53]

[41] *Stoner v. Canadian Natural Resources Ltd.* dealt with the purpose of the prayer for relief, in the context of pleading a claim for interest under the *Judgment Interest Act*.[54] Neither the body of the statement of claim nor the prayer for relief made any reference to the claim or the Act. Justice McDonald held:

> There is no fact to be alleged or proved. The fact upon which the award of interest is based is the fact of judgment, which by its very nature does not need to be proved and therefore need not – cannot – be alleged as a fact....
>
> Is there a significant reason to require the plaintiff to include a claim for pre-judgment interest in his prayer for relief if he intends to ask the court at the conclusion of the trial, or the clerk of the court on entering judgment by default for a liquidated amount, for judgment for such interest? ... [T]he existence of an absolute right to have judgment for a sum of money does not relieve the plaintiff of the obligation to claim

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[52] *Campbell v. Moxness*, [1975] 2 W.W.R. 64 (Alta. C.A.), appeal dismissed [1976] 2 W.W.R. 384 (S.C.C.), expressly distinguishing the situation under Ontario rules, which required a statement of the amount of damages claimed as an aspect of pleading (*Burkhardt v. Beder* (1962), 36 D.L.R. (2d) 313 at 318).

[53] The Honourable W.A. Stevenson & The Honourable J.E. Côté, *Alberta Civil Procedure Handbook 2003* (Edmonton: Juriliber, 2003), note in the annotation to r. 120 [Stevenson & Côté, *Handbook 2003*].

[54] R.S.A. 2000, c. J-1.

> judgment for such a sum or for a sum to be calculated in a certain manner. In reaching that conclusion I rely on what I think is an important function of the prayer for relief in a statement of claim: it notifies the defendant of just what it is that the plaintiff intends to seek to recover whether through judgment at the conclusion of trial or where judgment is entered by default. The defendant, upon reading the prayer for relief, is put on notice as to just what money he is going to be required to pay to the plaintiff if he does not defend the case or if he defends it through trial.[55]

[42] There are varying approaches in Canadian rules to the pleading of remedies. Ontario statements of claim, counterclaims, cross-claims and third party claims require that allegations of material fact be preceded by a claim for relief, which specifies the nature of the relief sought, and, where damages are claimed, amounts for each claim and particulars of special damages to the extent known.[56] British Columbia, on the other hand, provides that "the amount of general damages claimed shall not be stated" in any pleading.[57]

[43] The Woolf reforms in England opted for more detail in the pleading of remedies. The Civil Procedure Rules require that a claim specify the remedy sought, including the amount of any money claim, and that in claims for interest, or for aggravated, exemplary or provisional damages, the grounds for the claim and particulars of the calculation of interest be provided. However, the court can grant remedies not specified.[58] The Queensland rules also require a specific statement of relief claimed,

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[55] *Stoner*, *supra* note 39.

[56] Ontario, r. 25.06(9) and Forms 14A, 14B, 27A, 27B, 28A, 29A, discussed in Perell, *supra* note 8 at 215. Similar provisions are found in Manitoba, r. 25.06(13) and New Brunswick, r. 27.06(12)(11) (amount of general damages need not be stated), Newfoundland, *Supreme Court Rules* [Newfoundland] and Nova Scotia, *Civil Procedure Rules* [Nova Scotia], rr. 14.12 and 14.13, respectively (particulars of general and special damages, and amounts for those "capable of being calculated in terms of money", but not for other general damages), Prince Edward Island, *Rules of Civil Procedure*, r. 25.06(9) [Prince Edward Island]; Federal Court, *Federal Court Rules, 1998*, r.182 [Federal]. Other jurisdictions do not expressly require a claim or prayer for relief.

[57] British Columbia, r. 19(29).

[58] United Kingdom, rr. 16.2 and 16.3 (claim must specify the remedy sought and amount of any money claim); r. 16.4 (all claims for interest and how it was calculated must be provided); r. 16.2(5) (the court can grant remedies not specified).

including every type of damage claimed and interest (including rate and method of calculation). However, the rules also allow the court to grant unpleaded relief.[59]

POSITION OF THE GENERAL REWRITE COMMITTEE

[44] The Committee was of the view that remedies should be specifically pleaded, including:

(a) type of remedy sought, including type of damages;

(b) amount of damages; and

(c) in a claim for interest, the basis for the claim and the calculation of the interest should be specified.[60]

The Committee favoured the Ontario model, specifying the requirement for a "claim," rather than a "prayer" for relief.

[45] Notwithstanding this, the rules should continue to provide that general and unpleaded relief may be granted. A recognition in the Rules of the court's authority to grant such relief is consistent with the court's duty under s. 8 of the *Judicature Act*.

D. Particulars

ISSUE No. 6

Should any changes be made to the rules regarding the pleading of particulars, such as:

(a) including a general statement of the requirement to provide particulars in pleadings; or,

(b) adding to the list of specified matters for which particulars are required; or,

(c) changing the nature of particulars required regarding mental states?

[46] Particulars are details specifying the nature of certain alleged facts. They provide a degree of specificity to the allegation, but do not reach the level of indicating how

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[59] Queensland, r.149 (specific statement of relief claimed is required); r.150(b) (specific statement of every type of damage claimed is required); r.150(h) (interest rate and method of calculation required); r.156 (the court can grant unpleaded relief).

[60] See the reference to interest claims under Issue 3.

the allegations will be proved, which would require the pleading of evidence. The functions of particulars are to permit the other party to plead in response, to narrow issues for trial and to save time and expense in the trial process.[61]

[47] It has been argued that particulars are not of great significance in a system that provides a full discovery process:

> ...the rule [regarding particulars] represents a further extension of the concept of 'fact pleading' and raises most sharply the issue of how the functions of notice giving, issue definition and mutual disclosure should be allocated as between pleadings and discovery. In England, where examination for discovery is nonexistent, obviously great weight must be placed on particulars to achieve these functions. However, in Canada, with examination for discovery available as of right, the need for particulars is generally less compelling....
>
> In the final analysis a question remains as to whether particulars really can effectively achieve the functions often assigned to them. Consideration of two examples – the ability of particulars to clarify the issues, or to prohibit "fishing" expeditions – illustrate this point.
>
> Often particulars are ordered of a pleading that is said to be too general. ... However, a party ordered to give particulars can respond simply by "shotgun pleading," *i.e.*, providing the opponent with a mass of particulars, covering all possible contingencies. Now, instead of being faced with bald generalizations, the opponent is faced with an array of detailed allegations, but he or she may be no better off. The opponent knows that almost certainly the pleader will not rely on all of the particulars, but does not know which ones he or she will rely on. A mass of particulars may be just as uninformative and as potentially surprising as a general allegation....
>
> That particulars can really prevent a "fishing expedition" becomes a myth when the pleader is an able one.... He simply lays the foundation for his "fishing" by providing particulars of all the areas he wishes to explore.
>
> When such tactics are resorted to, one cannot help but wonder whether the process really represents very much of an advance over general pleadings without particulars.[62]

[48] The following Alberta rules specify particulars that are required and those that are not:

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[61] *Canadian Commercial Bank v. McLaughlan* (1988), 62 Alta. L.R. (2d) 362 (Q.B.) at 365-66, per Wachowich J.

[62] Holmested and Watson, *supra* note 8, vol. 3 at 25-61.

> 113: Whenever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it is sufficient to allege it as a fact without setting out the circumstances from which it is to be inferred.
>
> 114: Whenever it is material to allege notice to any person of any fact, matter or thing, it is sufficient to allege the notice as a fact, unless the form or the precise terms of the notice or the circumstances from which the notice is to be inferred are material.
>
> 115: In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, particulars (with dates and items, if necessary) shall be stated in the pleading.
>
> 116: Where it is necessary to give particulars of a debt, expenses or damages and those particulars exceed 200 words, they may be set out in a separate document referred to in the pleading and the pleading shall state whether the document has already been delivered and if so, when, or is to be served with the pleading.

[49] Rule 116 acknowledges, at least implicitly, the necessity of giving particulars of a debt, expenses or damages. It also provides that, as a matter of form, lengthy particulars may be set out in a separate document rather than in the pleading itself. Some other jurisdictions have a similar rule; others do not.[63]

[50] Comments received in the legal consultation supported the need for particulars, and called on the Rules Project to:

- encourage better particulars in the first instance;
- clarify the need for particulars and right to demand particulars in actions (e.g., defamation) where particulars are essential;
- deal with a perceived inconsistency between r. 113 (no need to particularize mental state) and r. 115 (particulars of fraud required);
- specify the need for particulars of bad faith.[64]

1. Particulars of Mental States

[51] As noted above, one of our commentators suggested that Alberta Rules 113 and 115 are in conflict. However, the rules *can* be reconciled:

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[63] British Columbia, r. 19(11) indicates that "lengthy" particulars of debt, expenses or damages may be provided in a separate document. Ontario and Federal rules have no such provision.

[64] As noted in *Dechant v. Stevens* (2001), 281 A.R 1 (C.A.) at para. 61.

> On the one hand, one should not plead evidence, i.e., how one will prove something, and R. 113 expressly reiterates that for fraud, malice, knowledge, and other states of mind. However, R. 115 says that one must give particulars with dates and items. For example, to plead fraudulent misrepresentation, a statement of claim should give the gist of what the defendant stated to be true, and the intent that the plaintiff act on it, and that he did, and with what result. It should state what the truth was in fact, and state that the defendant knew what he said was untrue, or that he was reckless whether it was true and it should state when and where the fraudulent statement was made and how (in a letter, by telephone call, etc.), and by whom (the defendant personally, or its manager Mr. Jones, etc.).[65]

[52] But there is the additional question of whether particulars of at least certain mental states *should* be required. The Alberta Court of Appeal has suggested that permitting the allegation of bad faith without particulars is problematic:

> ...[S]ome of these issues are exacerbated by the rules governing how malice must be pled. In particular, one of the problems in this jurisdiction stems from the rules of Court which do not require particulars of an allegation of malicious acts. Thus, while the protection offered by s. 112(1) and (2) of the *Legal Profession Act* is broad and covers acts done in good faith, a defendant may be forced to a summary judgment application or trial of an issue. Those arguing in support of absolute privilege say they should not be subject to suit and further note that they cannot readily apply to strike because of the malice assumed to be proven, even without particulars.... Perhaps an amendment to the rules providing for particulars of bad faith in defamation actions would be helpful.[66]

[53] While a number of provinces retain rules to the same effect as Rule 113,[67] the rules have been amended in Ontario and several other provinces to require particulars of malice or intent.[68] The reasons for the 1996 Ontario amendment are described below:

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[65] Stevenson & Côté, *Handbook 2003*, *supra* note 53 at 91.

[66] *Dechant v. Stevens*, *supra* note 64 at para. 61.

[67] British Columbia, r. 19(23); Manitoba, r. 25.06(11); New Brunswick, r. 27.06(9); Northwest Territories, *Rules of the Supreme Court*, r. 115 [Northwest Territories] and Saskatchewan, r. 148.

[68] Ontario, r. 25.06(8)); Newfoundland, r. 14.11; Nova Scotia, r. 14.12 and Prince Edward Island, r. 25.06(8)). Federal, r. 181 requires particulars of any alleged state of mind of a person including mental disorder or disability, malice or fraudulent intention. Knowledge is not specifically mentioned.

> Two factors led to this amendment: First, the English rule, which used to be the same as the Ontario rule prior to this amendment [and the present Alberta rule], has been amended to require particulars of malice, fraudulent intention or other condition of mind.... Second, the Civil Rules Committee received a submission from the Crown Law Office, Civil, that the rule be amended. The particular concern of that office is the defence of claims for malicious prosecution. It was pointed out ... that malice is considered by defendants against whom it is alleged to be very serious as it attacks their integrity and professionalism and hence they should have the right to know the particulars.... [T]he amendment requires plaintiffs to consider the claim more carefully.... [W]ithout particulars, it is very difficult for a defendant to investigate an allegation of malice.[69]

2. Particulars: Defamation

[54] Some of the comments received during our consultation suggested that more particularized pleading of defamation should be required. As noted above, the Alberta Court of Appeal has suggested that a requirement to plead particulars of bad faith in defamation actions would be advisable.

[55] Although it is not explicit in the rules, defamation already requires specific pleading and particulars, in that it is generally required that the exact words complained of be pleaded.[70]

[56] As to pleadings rules in other provinces, British Columbia Rule 19(12) provides as follows:

> (1) In an action for libel or slander,
>
> (a) where the plaintiff alleges that the words or matter complained of were used in a derogatory sense other than their ordinary meaning, the plaintiff shall give particulars of the facts and matters on which the plaintiff relies in support of that sense....[71]

[57] However, section 3 of the Alberta *Defamation Act* indicates that particulars of this nature are not necessary:

> (1) In an action for defamation, the plaintiff may allege that the matter complained of was used in a defamatory sense, specifying the

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[69] Holmested & Watson, *supra* note 8, vol. 6, AR-230.

[70] Stevenson & Côté, *Encyclopedia*, *supra* note 33, vol. 1 at 12-9.

[71] British Columbia, r .19(12) also deals with the pleading of certain defences to defamation.

> defamatory sense without alleging how the matter was used in that sense.
>
> (2) The pleading shall be put in issue by the denial of the alleged defamation, and if the matter set out, with or without the alleged meaning, shows a cause of action, the pleading is sufficient.[72]

POSITION OF THE GENERAL REWRITE COMMITTEE

[58] The General Rewrite Committee decided not to recommend the inclusion in the rules of a general statement of the requirement to provide particulars. It was thought that a general statement would not clarify the circumstances in which particulars are required or the type of particulars necessary in a specific case. A demand for further particulars best clarifies when and what particulars are needed. However, the Committee did agree that the rules should continue to require particulars of the matters referred to in Rule 115, and that defamation should be added to this list.

[59] As to Rule 116's provision that long particulars may be set out in a separate document, the Committee saw no need to retain this. The rule seems to be seldom used, and no particular benefit was seen in setting out particulars in a separate document rather than in the pleading itself.

[60] As to the pleading of mental states, the Committee was persuaded by the comments of the Alberta Court of Appeal and by the reasons cited in support of the amended Ontario rule, and therefore proposes that particulars should be required for exceptional mental states such as malice, fraudulent intention or bad faith. On the other hand, no need has been shown to require particularization of knowledge or other states of mind.

E. Demanding Further Particulars

ISSUE No. 7

What changes, if any, should be made to the rules regarding obtaining further and better particulars:

(a) express provision for demand;

(b) timing of demand;

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[72] *Defamation Act*, R.S.A. 2000, c. D-7, s. 3.

(c) time for response to demand;
(d) impact of making demand on pleading time limits for demanding party?

[61] Alberta Rule 117 provides for an order for "a further and better statement of the nature of the claim or defence or further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars." The statement is to be delivered within 8 days or other period set by order, and is to be filed and "attached to the pleading, notice or writing to which it refers." Rule 118 gives the other party 8 days to plead in response.

[62] Alberta rules do not refer to the standard practice of filing and serving a formal demand for particulars before seeking a court order.[73]

[63] All Canadian jurisdictions provide court authority to order further particulars. All jurisdictions other than Alberta make express reference to a demand for particulars. The time periods set for response vary from 7 to 15 days.[74] Some rules address details such as when a demand may be made (before the action is set down for trial) and the impact of making the demand on pleading time limits for the demanding party. In Manitoba, Saskatchewan and the Northwest Territories, the obligation to plead is delayed until after the time set for a response to the demand.[75] In British Columbia, the demand does not act as a stay, but the demanding party can apply for an extension of time to plead.[76] This reflects the current Alberta practice, in which demands for particulars are not expressly dealt with in the rules, but extensions of pleadings time limits can be sought upon application under Rule 548.

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[73] Discussed in Stevenson & Côté, *Handbook 2003*, *supra* note 53 at 92.

[74] Ontario, r. 25.10 indicates that where a party demands particulars and they are not supplied within 7 days, the court may order that particulars be delivered within a set time (also Prince Edward Island, r. 25.10). Other jurisdictions refer to a notice in writing or a form of Demand for Particulars, and provide various response periods that may be extended by order (Saskatchewan, r. 164: 8 days; Nova Scotia, r. 14.24, New Brunswick, r. 27.08; Manitoba, r. 25.10: 10 days; Northwest Territories, r. 119: 15 days).

[75] Northwest Territories, r. 119(4); Manitoba, r. 25.10(4)(4.1); Saskatchewan, r. 164(3).

[76] British Columbia, r. 19(18).

POSITION OF THE GENERAL REWRITE COMMITTEE

[64] Generally, the Committee felt that the current system works well, and there are no problems that would require making the rules more cumbersome. However, it was agreed that the rules should reflect the practice by explicitly providing that a demand for particulars must precede the bringing of a motion for particulars.

[65] As to the timing of a demand for particulars, it was noted that normally demands should be made before pleadings close to fulfill the function of enabling the opposite party to plead in response.[77] However, there can also be circumstances in which particulars are needed for trial.[78] The Committee concluded that the ability to demand particulars should be kept open and flexible. If particulars are demanded late in the proceedings, the responding party can refuse to provide them and force a motion to be brought. The court will consider the timing of the demand when determining the right to particulars.[79]

[66] As noted above, the practice as to whether a demand for particulars stays the demanding party's obligation to file pleadings varies across Canadian jurisdictions. In favour of the stay approach, it was noted that it is inefficient to plead and then have to amend following receipt of particulars. On the other hand, the Committee feared that an automatic stay might cause more problems than it would resolve. A demand for particulars that is without merit should not result in an automatic stay. Further, an automatic stay could be abused. The demanding party could issue a series of demands for particulars simply in order to postpone the obligation to file pleadings. On balance, the Committee did not favour an automatic stay.

[67] In summary, the Committee proposes:

(a) The rules should make express provision for a demand for particulars, and require that a demand for particulars must precede the bringing of a motion for particulars.

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[77] *Riske v. Kittlitz*, [1943] 1 W.W.R. 251 (Alta. S.C.T.D.).

[78] *Ibid*.

[79] *Tomkow v. Oldale* (1980), 118 D.L.R. (3d) 755, 22 C.P.C. 1 (Alta. Q.B.).

(b) The rules should not specify the timing of the demand. The current practice, under which the timing of the demand may be considered by the court in determining the right to particulars, is a workable approach.

(c) As to the time period for a response to a demand for particulars, the Committee proposes to adopt 10 days as a simple and consistent filing time for this and other responses under the rules. The time to plead in response to particulars should be changed from 8 days under the current Rule 118 to 10 days.

(d) A demand for particulars should not act as an automatic stay of the obligation to file pleadings.

F. Alternative Pleas

ISSUE No. 8
Should any changes be made to the rules regarding alternative or inconsistent pleadings?

[68] Rule 111:

> Notwithstanding anything contained herein a party may plead claims or defences in the alternative.

[69] Rule 110(2):

> No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading it.

[70] Rule 110(1) and (3) relate to a different matter that will be addressed under issue 10, the pleading of matters arising after the commencement of an action. Rule 110(2) actually qualifies Rule 111, although the placement in the Alberta rules does not make this clear. In rules from several other jurisdictions, the interrelationship of these two provisions is made clearer. For example, Ontario Rule 25.06(4) and (5) provide:

> (4) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative.
>
> (5) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made

> in a subsequent pleading but by way of amendment to the previous pleading.[80]

[71] All Canadian rules of court permit alternative pleas in one document, but prohibit inconsistent allegations in subsequent pleadings. As noted under Issue 2,there has been some move away from inconsistent alternative pleas in the United Kingdom and Australia through the adoption of systems for the verification or certification of pleadings.

POSITION OF THE GENERAL REWRITE COMMITTEE

[72] The Committee proposes no change in practice as to alternative pleas. However, rules 111 and 110(2) are related and should be brought together.

G. Rules to Simplify Pleading

ISSUE No. 9

Should rules for the simplifying of pleadings in regards to the following matters be retained, modified or dispensed with:

(a) notice;
(b) documents or conversations;
(c) mental states;
(d) contract or relation;
(e) presumed facts; and,
(f) conditions precedent?

[73] A number of rules are designed to simplify pleading.[81] Alberta Rules 114 (notice), 106 (documents and conversations), 113 (mental states), 107 (presumptions of law) and 108 (conditions precedent) are to this effect. A similar rule in other Canadian jurisdictions relates to the pleading of a contract or relation.

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[80] In some jurisdictions (e.g., New Brunswick, r. 27.06(5)) the two provisions are combined in one rule.

[81] Perell, *supra* note 8 at 217 makes this point and includes in this category, Ontario, r. 25.06(3) (Condition Precedent), r. 25.06(6) (Notice), and r. 25.06(7) (Documents or Conversations).

1. Notice

[74] Rule 114:

> Whenever it is material to allege notice to any person of any fact, matter or thing, it is sufficient to allege the notice as a fact, unless the form or the precise terms of the notice or the circumstances from which the notice is to be inferred are material.

[75] Rule 114 is essentially an application of the basic rule that only material facts need be pleaded. Canadian rules vary as to whether or not they include such a provision.[82]

2. Documents or Conversations

[76] Rule 106:

> The effect of any document or the purport of any conversation referred to in the pleadings shall, if material, be briefly stated and the precise words of the document or conversation need not be stated except insofar as the words are themselves material.

[77] Again, this is an application of the general rule requiring a summary statement of material facts. Virtually identical rules are found in all Canadian jurisdictions.[83]

3. Mental States

[78] Rule 113:

> Whenever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it is sufficient to allege it as a fact without setting out the circumstances from which it is to be inferred.

[79] The issue of requiring particulars for allegations of malice or fraudulent intention was dealt with earlier (Issue 6). The rule is referred to here for its other

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[82] Ontario, r. 25.06(6); Manitoba, r. 25.06(8); New Brunswick, r. 27.06(6); Northwest Territories, r. 116; Prince Edward Island, r. 25.06(6) and Saskatchewan, r. 116 are similar to r. 114. The following jurisdictions have no specific rule relating to notice: British Columbia, Newfoundland, Nova Scotia, Federal.

[83] British Columbia, r. 19(2); Saskatchewan, r. 145; Manitoba, r. 25.06(9); Ontario, r. 25.06(7); New Brunswick, r. 27.06(8); Newfoundland, r. 14.07; Nova Scotia, r. 14.08; Prince Edward Island, r. 25.06(7); Northwest Territories, r. 108; Federal, r. 177.

aspect, simplifying the pleading of mental states. The rules of other Canadian jurisdictions vary.[84]

4. Contract or Relation

[80] Manitoba Rule 25.06(10):

> Where a contract or relation between persons does not arise from an express agreement, but is to be implied from a series of letters, communications, or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege the contract or relation as a fact.

[81] Saskatchewan and New Brunswick have similar rules.[85] Other Canadian jurisdictions do not.

5. Presumed Facts

[82] Rule 107:

> A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party.

[83] Virtually identical rules are found in a majority of Canadian jurisdictions.[86] However, the rules of Ontario, Prince Edward Island and the Federal Court do not contain an equivalent provision. Even without an express rule, case law indicates that it is unnecessary to plead facts presumed by law.[87]

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[84] Rules similar to Alberta, r. 113 are found in British Columbia, r. 19(23); Manitoba, r. 25.06)(11); New Brunswick, r. 27.06(9); Northwest Territories, r. 115 and Saskatchewan, r. 148. Ontario, r. 25.06(8) is a similar provision, but requires particulars of malice or intent. The Ontario approach is taken in Newfoundland, r. 14.11; Nova Scotia, r. 14.12 and Prince Edward Island, r. 25.06(8). Federal. r. 181 requires particulars of any alleged state of mind of a person including mental disorder or disability, malice or fraudulent intention. Knowledge is not specifically referred to.

[85] Saskatchewan, r. 146; New Brunswick, r. 27.06(7).

[86] British Columbia, r. 19(3); Manitoba, r. 25.06(12); New Brunswick, r. 27.06(3); Newfoundland, r. 14.05; Northwest Territories, r. 109; Nova Scotia, r. 14.06 and Saskatchewan, r. 143.

[87] Nonetheless, Holmested & Watson, *supra* note 8 at 25-23, cite authority to the effect that it is unnecessary to plead facts presumed by law in favour of the party pleading, although facts that place the onus on the other party must be plead (*Clement v. Luesby*, [1944] O.W.N. 103 (Ont. H.C.J.).

6. Conditions Precedent

[84] Rule 108:

> A statement of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading and when any party intends to contest the performance of any condition precedent he shall specify the condition and its non performance.

[85] This rule has the effect of requiring the express pleading of the non-satisfaction of a condition precedent. This aspect of the rule is discussed under Issues 3 and 16. However, the rule also means that it is not necessary to plead the satisfaction of conditions precedent.[88] All Canadian rules contain a similar provision.[89]

POSITION OF THE GENERAL REWRITE COMMITTEE

[86] Rules regarding the pleading of notice, documents and conversations, mental states and contracts and relations, are simply examples of the general rule that only material facts are to be pleaded, as briefly as possible. Dispensing with these rules is consistent with Rules Project objectives of shortening and simplifying the rules, and favouring general over specific rules. This approach should therefore be followed unless the specific examples clarify the general rule and provide useful guidance.

[87] The Committee saw no need to retain Rule 114 regarding notice, as the same result would flow from an application of the general rule. The lack of a specific rule has not caused apparent difficulties in those jurisdictions without it.

[88] As to documents and conversations, all Canadian provinces have an equivalent of Rule 106. However, the Committee came to the conclusion that it is a superfluous rule because the same result would flow from the application of the general pleading rule. The Committee proposes that Alberta should "lead the pack" in this area and repeal Rule 106.

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[88] Stevenson & Côté, *Handbook 2003*, *supra* note 53 at 87.

[89] British Columbia, r. 19(4); Saskatchewan, r. 144; Manitoba, r. 25.06(5); Ontario, r. 25.06(3); New Brunswick, r. 27.06(4); Newfoundland, r. 14.06; Prince Edward Island, r. 25.06(3); Nova Scotia, r. 14.07; Northwest Territories, r. 110; Federal, r. 176.

[89] Regarding mental states, the Committee has already recommended that particulars be required for malice, fraudulent intention and bad faith (Issue 6). It was felt that other states of mind, including knowledge, need not be particularized. Accordingly, the latter would not require specific mention in the rules.

[90] Following the same approach, it was felt that there is no need for Alberta to adopt a rule concerning the pleading of implied contracts and relations.

[91] Rule 107 regarding presumed facts may be characterized more as a modification of the requirement to plead material facts, stipulating that it does not apply to facts presumed in favour of the pleading party. While Ontario's lack of a similar rule apparently has not caused problems, it is still plausible that Rule 107 serves an educative purpose, and that, without it, there would be an increase in the pleading of presumed facts "just to be safe". The Committee concluded that it would be advisable to retain Rule 107. However, because it essentially modifies Rule 104 (the general fact pleadings rule), it should be included as a part of that rule, rather than keeping it as a separate rule. (The Committee has also recommended that the components of Rule 104 be clarified by being set out separately: see Issue 3).

[92] The Committee concluded that Rule 108 regarding conditions precedent should be retained. It modifies the application of the fact pleadings rule in a sensible and useful manner. It simplifies pleadings (by not requiring a listing of satisfied conditions precedent), and gives notice of matters in issue (by requiring express pleading on conditions allegedly not performed – this aspect is dealt with in Issues 3 and 16).

[93] In summary, the Committee proposes to:

(a) repeal Rule 114 about notice because it is superfluous;
(b) repeal Rule 106 about documents and conversations because it is superfluous;
(c) require particulars for malice, fraudulent intention and bad faith (see Issue 6), and repeal other aspects of Rule 113 about mental states;
(d) not adopt a rule requiring the pleading of implied contracts or relations;
(e) retain Rule 107, but roll this provision into the general pleadings rule rather than keeping it as a separate rule; and,

(f) retain Rule 108, although aspects of it may be dealt with in general pleadings rules (Issues 3 and 16).

H. Pleading Matters Arising After an Action has Started

ISSUE No. 10
Should the rule regarding pleading matters subsequently arising be retained or modified?

[94] Rule 110:

> (1) A party may plead any matter which has arisen since the action was commenced except that if by reason of that new matter it becomes necessary to amend any pleading already delivered the amendment may only be made with the leave of the court.
>
> (3) Where a defendant alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of that defence and either party may apply to a judge to dispose of the costs of the action or such portion thereof as pertains to the defence so confessed.

[95] Other jurisdictions have similar rules, though in many cases there is no special procedure for the amendment of pleadings or for the admission of a defence and disposition of the action or a part of it.[90]

POSITION OF THE GENERAL REWRITE COMMITTEE

[96] The Committee proposes to retain Rule 110(1), but suggests that there is no need to have special procedures about amendment in these circumstances. The general rules about amendment will apply and should suffice. Rule 110(3) is dealt with in Issue 17.

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[90] Newfoundland, r. 14.09; Nova Scotia, r. 14.10; Saskatchewan, r. 151; Federal, r. 179; Ontario, r. 14.01(4).

CHAPTER 3. RULES APPLICABLE TO DEFENCES

[97] A review of the objectives of fact pleading provides an indication of what the pleading of defences should achieve: to "define with clarity and precision the question in controversy between litigants" and to "give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issues."[91]

[98] Defences are categorized as follows:

1. Denial (traverse): the defendant denies or refuses to admit all or some facts pleaded by plaintiff, thus requiring the plaintiff to prove all his allegations, or some of them.
2. Affirmative defences (confession and avoidance): the defendant admits facts and avoids their effect by asserting fresh facts which afford a defence.
3. Objection in point of law (demurrer).[92]

[99] The rules discussed below deal with denials and affirmative defences.

[100] As to objections in point of law, the pleadings rules permit the raising of a point of law. This can be dealt with at trial, or in a hearing before trial. Alternatively, application may be made to the court to strike out a claim on this ground.[93]

A. Silence and General Denials

ISSUE No. 11
How should the rules treat silence and general denials:
(a) should silence be deemed to be a denial; and,
(b) should a general denial be permitted, or should specific denials be required in all cases?

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[91] Williston and Rolls, *supra* note 8.

[92] Côté, *supra* note 31 at 539; Holmested & Watson, *supra* note 8 at 25-34 - 25-35; Perell, *supra* note 8 at 218-19 (also referring to a plea in abatement, raising capacity to sue, adequacy of joinder of parties, or the existence of another pending action).

[93] A point of law can be raised (Alberta, r. 112); the point of law can be dealt with at trial or in separate hearing before trial (Alberta, r. 220); an application can be made to strike out a claim on an objection in point of law (Alberta, r. 129).

[101] A particular issue that arises relating to denials, and regarding which Canadian rules vary, is whether silence in a pleading presumes a denial or an admission. A related issue is the permissibility of a "general denial" form of defence. Alberta presumes a denial, and permits "general denial" defences in most cases (Rule 119).

[102] A case that describes both the criticisms of, and the justification for, the general denial is *Richard v. Hall* (1928), 62 O.L.R. 212. First, the criticism by Middleton J.A.:

> Instead of putting before the court the defendant's real intention, the defendant seeks to place himself in the position of a person accused of crime and to plead not guilty, leaving the plaintiff to prove the case as best as he can, and leaving it open to the defendant to take advantage of anything that may develop. To such the endeavour is not to 'aid' in administering justice....

Therefore, he suggested, the defendant should not stop at denying, but should go on to "add his own version of the matter."

[103] However, Meredith J.A. supported the defendant's entitlement to plead in a general denial without setting up a separate version of events:

> A plaintiff must at the trial prove the cause of action which he has alleged, or is there permitted to allege, or fail; and a defendant ... can give evidence to disprove it....
>
> These defendants do not propose meeting the claim by way of confession and avoidance, or by way of anything that would be likely to take the plaintiff by surprise, or that would raise any issue of fact not arising out of the plaintiff's statement of claim....
>
> On the contrary, they meet the plaintiff on his own ground entirely....

[104] In approving the general denial, Meredith J.A. relied on the Ontario rule (since changed) which equated silence with denial, saying that the general denial "if it offends any rule of practice, offends in giving too much rather than too little information" and that it was merely a substitute for the (impractical) delivery of a blank statement of defence which would put the plaintiff to the proof of his allegations.

[105] Meredith J.A.'s approach is the present Alberta approach, unless the exceptions found in Rules 122 through 127 apply, and require specific denials which must not be "evasive", but "answer the point of substance".[94]

[106] As elaborated by Middleton J.A., in the above excerpt, requiring a substantive defence may be seen as in keeping with the objectives of identifying the issues between the parties and giving fair notice of the case to be met. The few comments that the Rules Project received from the Alberta Bar on this point support an approach that would put an obligation on a defendant to respond to a claim in a substantive way. One lawyer commented that denials should address facts in a substantive way; another suggested that the general denial has been effectively eliminated in any event by the short time limit for an affidavit of records.

[107] Reversing the Rule 119 presumption (making silence an admission) may encourage a more substantive approach to defences, but not necessarily so, if silence is simply replaced by a general denial. As a matter of practice, it is the general denial, not silence, that creates the situation described by Middleton J.A.

[108] The majority of Canadian jurisdictions provide that silence is an admission rather than a denial. For example, in Ontario,"all allegations of fact that are not denied ... shall be deemed to be admitted unless the party pleads having no knowledge in respect of the fact".[95] But the change in presumption does not eliminate the general denial:

> [A] bare or general denial ... will prevent the admission implied by rule 25.07(2). Because of the latter rule, when pleading, the defendant should make sure that in the first three paragraphs of his defence he specifically addresses all the paragraphs of the statement of claim he does not intend to admit. Indeed it may be wise to include as paragraph 4 an allegation to the effect that "except as already stated or as hereinafter

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[94] Alberta, r. 126.

[95] Ontario, r. 25.07(2). An exception is damages, which are "deemed to be in issue unless specifically admitted" (Ontario, r. 25.07(6)). Silence is also an admission in Prince Edward Island, r. 25.07(2); New Brunswick, r. 27.07(1); Saskatchewan, r. 156; British Columbia, r. 19(19 (except as regards an infant or mentally incompetent person), and Manitoba, r. 25.07(2).

> provided, the defendant denies each allegation of the plaintiff's statement of claim.[96]

[109] Alberta may be in the minority, but it is not alone in treating silence as a denial. The Northwest Territories, Newfoundland, Nova Scotia and the Federal Rules also provide that silence is a denial.[97]

POSITION OF THE GENERAL REWRITE COMMITTEE

[110] On the issue of whether silence should be deemed to be a denial or an admission, this is a matter on which there is variance in Canadian practice and there do not seem to be problems associated with Alberta's current approach. Changing the presumption as to denial or admission would not effect substantive changes in litigation practice, because proper pleading ensures that all facts not explicitly admitted are denied. However, maintaining the presumption of denial may assist self-represented litigants. Experienced lawyers would not be affected, but self-represented litigants might be prejudiced by inadvertently making admissions against their interests.

[111] On the issue of whether a general denial should be permitted, the majority of the Committee members felt that allowing a general denial is entirely consistent with the onus being on the plaintiff to prove his or her case. The Committee did not see any real value in requiring specific, rather than general, denials. While early identification of the issues between the parties should be encouraged, it is unlikely that something as formalistic as requiring a list of specific denials would change a defendant's reluctance to make admissions at this stage of an action. Requiring specific denials is more likely to result in longer statements of defence than to change practice regarding the making of admissions.

[112] In summary, the Committee proposes that:

(a) Silence should continue to constitute a denial.

(b) The Alberta rules should continue to permit a general denial. Specific denials should not be required in all cases.

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[96] Holmested & Watson, *supra* note 8 at 25-37 - 25-38; British Columbia, r. 19(20) and Saskatchewan, r. 157 specifically permit general denials.

[97] Northwest Territories, r. 120; Newfoundland, r. 14.13; Nova Scotia, r. 14.14; Federal, r. 184.

B. Admissions

ISSUE No. 12
How should the rules deal with admissions:
(a) should the requirement to admit undisputed facts be made express; and,
(b) should the provision for costs for failure to admit be retained, moved or dispensed with?

[113] The early admission of undisputed facts advances the objective of identifying the real issues between the parties. The rules of most Canadian jurisdictions deal explicitly with the requirement to make admissions in pleadings. For example, Ontario provides that "in a defence, a party shall admit every allegation of fact in the opposite party's pleading that the party does not dispute."[98]

[114] The obligation to admit undisputed facts in a defence is not express in Alberta rules, but may be inferred from Rule 128:

> Where the court is of opinion that any allegations of facts denied or not admitted, ought to have been admitted, the court may make an order with respect to any extra costs occasioned by their having been denied or not admitted.

Stevenson & Côté note that this is "an important Rule almost always neglected."[99]

POSITION OF THE GENERAL REWRITE COMMITTEE

[115] The early admission of undisputed facts should be encouraged. Some move in this direction might be achieved by making explicit the requirement to admit undisputed facts. Making clear the potential for costs consequences for failure to comply with this requirement could also have a salutary effect. The Committee agrees with the observation that Rule 128 is generally neglected, but, nonetheless, does not wish to eliminate what is potentially a useful and educative provision. The Committee

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[98] Ontario, r. 25.07(1). Most jurisdictions have a similar provision: Prince Edward Island, Manitoba, r. 25.07(1); New Brunswick, r. 27.07(1); Newfoundland, r. 14.13(a); Nova Scotia, r. 14.14(a); Federal, r. 183(a).

[99] Stevenson & Côté, *Handbook 2003*, *supra* note 53 at 96. In jurisdictions with rules similar to the Ontario, r. 25.07(1), a failure to admit undisputed facts would violate the rule, so presumably general provisions permitting costs arising out of such irregularities would apply. However, most jurisdictions do not include special costs provisions with their pleadings rules. Only Nova Scotia, r. 14.21; Northwest Territories, r. 128 and Newfoundland, r. 14.20 do so.

is of the view that Rule 128 might receive more attention if it were included with other costs rules, rather than with the pleadings rules.

[116] The Committee proposes to add to the pleadings rules an explicit duty to admit undisputed facts. Rule 128's provision for costs for failure to admit should be referred to the Rules Project Costs Committee, with a recommendation that it be retained and moved to the costs area of the rules.

C. Specific Denials

1. Actions on Bills of Exchange and Money Demands

ISSUE No. 13
Should specific denials continue to be required for actions on bills of exchange and money demands?

[117] Rule 119 does not apply in actions on bills of exchange and money demands. Under Rules 124 and 125, a defence must deny some "matter of fact." Various examples of facts are given. Rule 126 elaborates upon the requirement by adding that when an allegation of fact is denied, the defendant "shall not do so evasively but shall answer the point of substance."

[118] Canadian practice on this point is divided. Some jurisdictions have equivalent rules; others do not.[100]

POSITION OF THE GENERAL REWRITE COMMITTEE

[119] The Committee could not determine why a special rule was needed for actions on bills of exchange and money demands. These cases may be more likely to go to summary judgment, but that does not necessitate a specific denial. A general denial doesn't make it easier for the debtor to escape liability. If the debtor denies and loses, he or she will pay costs. Eliminating these special rules would help to keep the rules simple and consistent. Therefore, the Committee proposes that specific denials should

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[100] Equivalent rules to Alberta, rr. 124-126 are found in British Columbia, r. 21(2)(3) and 19(21); Nova Scotia, r. 14.17; Northwest Territories, rr. 125, 126 and Saskatchewan, rr. 159, 154. Nova Scotia, r. 14.18 and Newfoundland, r. 14.17 also have similar provisions regarding claims for possession of land. There are no equivalent rules in Ontario, Manitoba, New Brunswick, Prince Edward Island or the Federal Court.

not be required in actions on bills of exchange and money demands. Rules 124, 125 and 126 should be deleted.

2. Exceptions: Incorporation and Status

ISSUE No. 14
Should specific denials continue to be required respecting incorporation, capacity or constitution of a partnership?

[120] If silence is treated as a denial, or if general denials are permissible, the question of exceptions to these rules arises.[101]

[121] Rule 122:

> Unless the incorporation of a corporate party is specifically denied, it is not necessary to prove it.

[122] A general denial is not sufficient.[102]

[123] Rule 127:

> If either party wishes to deny the right of any other party to claim as executor or as trustee (whether for the benefit of creditors or otherwise), or in any representative or other capacity, or the alleged constitution of any partnership firm, he shall deny it specifically.

[124] These two rules tend to be combined in other jurisdictions.[103]

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[101] Note that equating silence with an admission may also call for exceptions, for example as regards damages: Ontario, r. 25.07(6); British Columbia, r. 21(4).

[102] Fradsham, *supra* note 6 at 179-180.

[103] For example, Saskatchewan, r. 158 provides:

> Unless a party specifically denies:
> (a) the right of any party to claim as executor, or as trustee, (whether for the benefit of creditors or otherwise) or in any representative capacity;
> (b) the constitution of a partnership or firm;
> (c) the incorporation of a corporate party;
> it shall be deemed to be admitted.

The Federal, r. 184(2)(a) and (b); Newfoundland, r. 14.14 and Nova Scotia, r. 14.15 rules are similar to Saskatchewan's. British Columbia, r. 19(10) is to similar effect. Northwest Territories, rr. 123

(continued...)

POSITION OF THE GENERAL REWRITE COMMITTEE

[125] The Committee approves of the requirement for specific pleading of the matters dealt with in Rules 122 and 127, but as a matter of form would prefer to list these matters with the others requiring specific pleading (see Issue 4).

3. Contracts

ISSUE No. 15
Should a qualification as to the effect of silence or a bare denial regarding a contract be retained?

[126] Rule 123:

> When a contract, promise or agreement is alleged in any pleading, a bare denial of it by the opposite party or silence with respect thereto in his pleading shall be construed only as a denial in fact of the express contract, promise or agreement alleged or of the matters of fact from which it may be implied by law, and not as a denial of the legality or sufficiency in law of the contract, promise or agreement, whether with reference to the Statute of Frauds or otherwise.

[127] This is consistent with Rule 109, which treats the latter as affirmative defences, requiring specific pleading. There are equivalent rules in all Canadian jurisdictions.[104]

POSITION OF THE GENERAL REWRITE COMMITTEE

[128] The Committee approves of the requirement for specific pleading of "the [il]legality or [in]sufficiency in law of [a] contract ... whether with reference to the Statute of Frauds or otherwise," but as a matter of form would prefer to list these matters with the others requiring specific pleading (see Issue 4). The rules should also make it clear that a general denial is insufficient to raise these issues.

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[103] (...continued)
and 127 are like Alberta's. Ontario, Manitoba, New Brunswick. and Prince Edward Island have no equivalent rules. Silence would, of course, amount to an admission in those jurisdictions. Whether a general denial would include issues of incorporation and status is not clear.

[104] British Columbia, r. 19(22); Saskatchewan, r. 160; Manitoba, r. 25.07(6); Ontario, r. 25.07(5); New Brunswick, r. 27.07(5)(6); Newfoundland, r. 14.15; Prince Edward Island, r. 25.07(5); Nova Scotia, r. 14.16; Northwest Territories, r. 124; Federal, r. 185.

D. Affirmative Defences

ISSUE No. 16
What approach should the rules take to affirmative defences?

[129] Several rules deal with affirmative defences. Some relate to the pleading of material facts not raised in the statement of claim. Defences (or replies) that raise "issues of fact not arising out of the preceding pleading" must be specifically pleaded (Rule 109(c)). Further, where a defendant wishes to prove "a different version of the transaction or occurrence or series of transactions or occurrences relied upon by the plaintiff...a mere denial ... or silence ... is not sufficient ... the defendant shall set up his version in his defence" (Rule 121).

[130] There are equivalent rules in all Canadian jurisdictions, though they tend to refer simply to a different "version of the facts." Most of the rules apply to replies as well as defences.[105]

[131] The rules also characterize as affirmative defences, requiring specific pleading, legal objections which might otherwise take the plaintiff by surprise (Rules 108, 109, 123).

[132] Rule 109:

> A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, payment, any statute of limitation, statute of frauds, fraud or any fact showing illegality
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable, or
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise, or
>
> (c) which raises issues of fact not arising out of the preceding pleading.

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[105] Equivalents to Alberta, r. 121 are Federal, r. 183(b); Ontario, r. 25.07(3); Manitoba, r. 25.07(4); New Brunswick, r. 27.07(3); Prince Edward Island, r. 25.07 (3); Saskatchewan, r. 155; Newfoundland, r. 14.13(b); Nova Scotia, r. 14.14(b) (referring to a different "version of the facts"); British Columbia, r. 19(15) and (20) (referring to different "material facts"). Northwest Territories, r. 122 is virtually identical to Alberta, r. 121. Only the Alberta and Northwest Territories rules are specifically related to defences, including defences to counterclaims. Others apply more generally to allegations in preceding pleadings, or by the opposite party.

[133] While there are equivalents to Rule 109 in all Canadian jurisdictions, most do not contain a list of examples.[106]

[134] As discussed under Issue 15, Rule 109 is complemented by Rule 123, which stipulates that a "bare denial" of a contract is not a denial of its "legality or sufficiency in law ... whether with reference to the Statute of Frauds or otherwise." All Canadian jurisdictions have equivalents, but most do not refer specifically to the Statute of Frauds.[107] Similarly, Rule 108 indicates that non-performance of conditions precedent must be specifically pleaded.

POSITION OF THE GENERAL REWRITE COMMITTEE

[135] It is clear that matters likely to cause surprise, and the facts supporting them, should be specifically pleaded. The Committee has already recommended that these matters be elaborated as aspects of a basic fact pleading rule, modelled on Queensland Rule 149 (see Issue 3). However, the rules should also make it clear that a general denial is not sufficient to raise such issues.

[136] As to the Rule 109's list of examples, the Committee notes that while removing the list would shorten the rule, it might also make it more difficult to apply. The examples provide useful guidance as to what matters "might take the opposite party by surprise." Therefore, while the Committee suggests retaining the elements of Rule 109, it proposes to include them in the general list of matters requiring specific pleading (see Issue 4). Again, though, the rules should also make it clear that a general denial is not sufficient to raise these issues.

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[106] For example, Ontario, r. 25.07(4) provides:

> In a defence, a party shall plead any matter on which the party intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party's pleading.

See also Prince Edward Island, r. 25.07(4); Manitoba, r. 25.07(5) and New Brunswick, r. 27.07(4); Saskatchewan, r. 153; British Columbia, r. 19(15); Federal, r. 183(c). A list of examples similar to Alberta's is used in Nova Scotia, r. 14.14; Northwest Territories, r. 111 and Newfoundland, r. 14.13(c).

[107] See British Columbia, r. 19(22); Saskatchewan, r. 160; Manitoba, r. 25.07(6); Ontario, r. 25.07(5); New Brunswick, r. 27.07(5); Prince Edward Island, r. 25.07(5); Federal, r. 185 and Northwest Territories, r. 124; Nova Scotia, r. 14.16 and Newfoundland, r. 14.15 expressly refer to the statute of frauds.

E. Confession

ISSUE No. 17
What approach should the rules take to confession of a defence?

[137] Rule 110(3):

> Where a defendant alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of that defence and either party may apply to a judge to dispose of the costs of the action or such portion thereof as pertains to the defence so confessed.

[138] Only the Northwest Territories has an equivalent provision specifically related to the pleading of defences which have arisen after the commencement of an action.[108] Allegations in a statement of defence may be admitted in a reply, and Rules 159 and 162 provide for judgments based on admissions, so the need for a special rule is not apparent.

POSITION OF THE GENERAL REWRITE COMMITTEE

[139] The Committee recommends the repeal of Rule 110(3).

F. Defence of Tender

ISSUE No. 18
What approach should the rules take to the defence of tender?

[140] Rule 92:

> Where in any action a defence of tender before action is pleaded, the defendant shall pay into court the amount alleged to have been tendered, and the tender is not available as a defence unless and until payment into court has been made.

[141] Rule 165 provides that Part 12 – Compromise Using Court Process – does not apply where the defence of tender before action is pleaded. Rule 173 provides:

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[108] Northwest Territories, r. 112(3).

> Except in an action to which is pleaded a defence of tender before action or in which a plea has been filed under section 5 of the *Defamation Act*, no statement that a party has employed these Rules shall be inserted in the pleadings. . .

[142] Not all Canadian jurisdictions have equivalent rules.[109] With the provisions for payment into court and offer of judgment, these rules are arguably no longer necessary. A defendant who "has consistently been willing to pay the debt demanded, has offered it to the plaintiff, and has brought the money into court ready to pay the plaintiff"[110] can make a payment into court or offer of judgment. If the payment or offer is accepted, the plaintiff will be entitled to taxed costs, but these can be kept to a minimum by early use of the settlement rules. If the payment or offer is not accepted, the plaintiff is put at risk of incurring liability for the defendant's costs, or even double costs.[111]

[143] However, repeal of Rule 92 could mean that there might be cases in which the defence of tender would have to be considered on its merits, despite the absence of a payment into court. This could conceivably lead to a situation in which a plaintiff is denied a judgment due to the defence, but does not have immediate access to the tendered amount.[112]

POSITION OF THE GENERAL REWRITE COMMITTEE

[144] The Committee has already recommended that the defence of tender be included in the general list of matters requiring specific pleading. Because of its concern that a plaintiff denied judgment due to the defence should have immediate access to the tendered amount, the Committee recommends retaining Rule 92's requirement for

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[109] Nova Scotia, r 14.19; Newfoundland, r. 14.18; Saskatchewan, r. 175; British Columbia, r. 21(16); Northwest Territories, r. 188 and Federal, r. 188 are like Alberta, r. 92. Saskatchewan, r. 161, British Columbia, r. 21(19) and Northwest Territories, r. 186 are similar to Alberta, r. 173. Ontario and jurisdictions whose rules are based on the Ontario model (Manitoba, New Brunswick and Prince Edward Island) do not have equivalent rules.

[110] *Black's Law Dictionary*, 7th ed., *s.v.* "plea of tender."

[111] Alberta, rr. 166, 167, 169 and 174.

[112] *Wilton v. Royal Bank of Canada* (1991), 122 A.R. 353.

payment into court. The Committee also recommends to the Costs Committee that it retain the related provisions in Rules 165 and 173.

CHAPTER 4. REPLY AND JOINDER OF ISSUE AND CLOSE OF PLEADINGS

A. Reply and Joinder of Issue

ISSUE No. 19
Should the filing of a joinder of issue no longer be permitted, and replies limited?

[145] It is not necessary to file a pleading to "join issue" by denying the allegations in a statement of defence (or defence to counterclaim), as joinder is implied by Rule 102. It is still permitted to do so in Alberta and North West Territories,[113] although this is seldom done in practice. Most jurisdictions provide only for a reply, and provide that the reply must be filed for some purpose other than the mere joinder of issue.[114]

POSITION OF THE GENERAL REWRITE COMMITTEE

[146] The Committee proposes that filing of a joinder of issue should no longer be permitted, and that replies should be employed only to plead new matters or make admissions.

ISSUE No. 20
Should there be any change to the time for filing a reply?

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[113] Alberta, rr. 99 and 101, see also definition r. 5(1)(h); Northwest Territories, rr. 101 and 103.

[114] See, for example, British Columbia, r. 23(7) ("no reply that is a simple joinder of issue shall be filed or delivered"), and Ontario, r. 25.08 (a reply shall be filed only when a party "intends to prove a version of the facts different from that pleaded in the ... defence. . . unless it has already been pleaded in the claim" or intends "to rely in response to a defence on any matter that might ... take the opposite party by surprise or raise an issue that has not been raised by a previous pleading"). The British Columbia and Ontario rules also prohibit the filing of a pleading after a reply (except with court leave) (rr. 23(3) and 25.01(5), respectively) while Alberta, r. 101 provides that no pleading "other than a joinder of issue" may be filed after a reply (except with court leave).

[147] The time for filing a reply is 8 days in Alberta.[115] The time periods in other jurisdictions vary from 7 to 10 days.[116]

POSITION OF THE GENERAL REWRITE COMMITTEE

[148] The Committee proposes to adopt 10 days as a simple and consistent filing time for this and other purposes.

B. Close of Pleadings

ISSUE No. 21
Should any changes be made to the provisions regarding closing of pleadings?

[149] If no reply is filed, a denial of the facts alleged in the defence is presumed.[117] Pleadings are "closed" with the filing of a reply or the expiry of the time for filing.[118] The close of pleadings rules are reflected in the separate rules that provide that no pleading shall be filed after a reply.[119] The closing rules for most jurisdictions refer to a reply to one defence, so that where there is more than one defendant, pleadings may close separately for each. Ontario, on the other hand, provides for one date of closing pleadings relating to all defendants in an action, when "the plaintiff has delivered a reply to every defence in the action or the time for delivery of a reply has expired". However, as an "action" includes a proceeding started by counterclaim, crossclaim or

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[115] This is implicit in Alberta, rr. 102, 103.

[116] 7 days in British Columbia, r. 23(2); 10 days in Ontario, r. 25.04(3) and in Federal Court, r. 205.

[117] Alberta, r. 100; Ontario, r. 25.08(4); British Columbia, r. 23(5). The Federal rules do not contain an express provision to this effect, but Federal, r. 184 (all allegations not admitted are deemed denied) would seem to lead to the same result.

[118] Most rules provide expressly that pleadings close with the filing of a reply or expiry of time for filing (e.g., British Columbia, r. 23(5); Ontario, r. 25.05; Federal, r. 202). Alberta, rr. 102 and 103 have the same effect.

[119] Alberta, r. 101; British Columbia, r. 23(3); Ontario, r. 25.01(5); Federal, r. 172.

third party claim, there could still be more than one date of closing pleadings in the overall action.[120]

[150] The Ontario collective closing rule has been considered in cases dealing with the timing of a jury notice[121] and exchange of documents.[122] One issue that has been addressed is whether the reference to "every defence" in Rule 25.05 (pleadings in an action are closed when the plaintiff has delivered a reply to every defence in the action or the time for delivery of a reply has expired) includes defences to the main action filed by third parties.[123] Another issue regarding the collective closing approach in the context of the exchange of documents was addressed in *Resch v. Hamilton Civic Hospitals*.[124] In this case there were numerous defendants, which the court noted would cause considerable delay for the exchange of documents due to the provision that pleadings are not closed, and document production is not required, until the last defendant has defended which "is likely to occur later rather than sooner."[125]

POSITION OF THE GENERAL REWRITE COMMITTEE

[151] The Committee was concerned that adoption of the Ontario collective closing model would cause difficulties and delay if collective closing is used as the starting point for other procedures. The current Alberta approach to closing does not give rise to these problems and should be retained.

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[120] Ontario, r. 25.05; see also definition of "action" in r. 1.03.

[121] Ontario, r. 47.01 requires a jury notice before the close of pleadings.

[122] Ontario, r. 30.03 states that the affidavit of documents must be served on every other party within ten days of the close of pleadings.

[123] *Schram v. Alexandra Marine and General Hospital*, 1994 Carswell Ont 2254 (Ont. Master) held that it does, but *Nelma Information Inc. v. Holt* (1985), 50 C.P.C. 116 (Ont. H.C.J.) came to the opposite conclusion.

[124] (1996) 2 O.T.C. 75 (Ont. Ct. J. (Gen. Div.)).

[125] *Ibid*. at para. 12 (QL).

CHAPTER 5. FORMALITIES OF PLEADINGS

[152] Alberta rules dealing with the form of pleadings[126] are in need of reorganization and rewriting. The rules are scattered and repetitive (e.g., requirements to provide name and address are included in Rules 5.12, 8 and 88). Some rules appear to set out duties of the clerk (Rule 8), but also include directions to the parties who are filing documents. This consultation memorandum will not deal with these organizational and drafting issues, but only with proposed changes in practice and proposals to delete rules.

ISSUE No. 22
Should the rules provide for a short style of cause on documents other than originating documents?

[153] Rule 5.12(b) provides that, other than counterclaims, "all documents filed or issued under these Rules shall contain ... a style of cause setting forth the names in full of the plaintiff and of the defendant." Most Canadian rules provide for a short title or style of proceeding or cause in documents other than an originating process "showing the names of the first party on each side followed by the words 'and others'."[127]

POSITION OF THE GENERAL REWRITE COMMITTEE

[154] The Committee agreed that this would be a useful and time-saving reform. The rules should provide for use of a short style of cause on subsequent documents.

ISSUE No. 23
Should we retain backers?

[155] Rule 5.12(c) refers to a backer (action number to appear at top of front page and backer). Ontario rules also refer to a backsheet,[128] but others, including the British Columbia and Federal rules, do not.

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[126] Alberta, rr. 5.1, 5.11, 5.12, 5.13, 7, 8, 9, 10, 87, 88, 90, 91.

[127] Ontario, r. 4.02(b). See also British Columbia, r. 4(4); Federal, r. 67(5).

[128] Ontario, r. 4.02(3).

POSITION OF THE GENERAL REWRITE COMMITTEE

[156] The Committee noted that notices on documents, such as the Notice to Defendant now found on the backer of a statement of claim, could appear in a document as the first paragraph after the style of cause, rather than on a backer. Backers are an anachronism and do not correspond to modern technology or modern filing methods. Certainly they will have to be dispensed with once electronic filing is a reality. However, some Committee members thought that, so long as paper filing continues, backers make the organization of documents easier.

[157] The Committee would be interested to receive the views of the legal community: "Are there any backers for backers?"

ISSUE No. 24
Do we need to retain a distinction between filing and issuance?

[158] Technically, under the current rules, an action is not commenced by the act of filing a document, but by the filed document being "issued" by the clerk under the court's seal.[129] On the other hand, documents following the commencement documents are simply filed, not issued. Several rules make provision*s* that apply to filed and/or issued documents.[130] Ontario rules also distinguish between issuing and filing documents. However, others, such as the British Columbia and Federal rules provide for filing of all documents including those commencing proceedings.[131]

POSITION OF THE GENERAL REWRITE COMMITTEE

[159] The Committee is of the view that the various concepts applied to the treatment of documents – "filing", "issuing" and "entering" – are confusing, and likely unnecessary.[132] To the average person on the street, "filing" the statement of claim

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[129] Alberta, rr. 6(1), 7.

[130] Alberta, rr. 5.1, 5.11, 5.12, 5.13, 8.

[131] British Columbia, r. 4(4) applies just to documents by which proceedings are commenced; r. 4(6) just to specified types of documents. Federal rules provide for filing of all documents including those commencing proceedings (Federal, rr. 71, 73).

[132] Consideration of the "entry" of orders is reserved for a later consultation memorandum.

would be the plain language term for what happens when an action is started. The Committee therefore proposes that the rules should speak simply of "filing" pleadings, and no longer distinguish between "filing" and "issuance".

ISSUE No. 25
Can Rules 9 and 10 be dispensed with?

[160] These rules deal with the replacement of lost documents, and the issuance of concurrent documents. They were necessary when original documents (i.e., statements of claim) were provided to the parties and had to be made available for inspection during personal service. Now that Rule 5.13 requires the clerk to keep original documents, and Rule 15(4) has been repealed, these provisions do not seem to be necessary.

POSITION OF THE GENERAL REWRITE COMMITTEE

[161] The Committee noted that there could be an ongoing need to provide for the replacement of documents in the event that the court itself loses an original document. It proposes that the rules be rewritten to authorize a judge to make an order concerning the replacement of an original document lost or destroyed by the court.

APPENDIX

SUPREME COURT OF QUEENSLAND
UNIFORM CIVIL PROCEDURE RULES 1999

PART 2—RULES OF PLEADING

Statements in pleadings

149.(1) Each pleading must—

(a) be as brief as the nature of the case permits; and

(b) contain a statement of all the material facts on which the party relies but not the evidence by which the facts are to be proved; and

(c) state specifically any matter that if not stated specifically may take another party by surprise; and

(d) subject to rule 156,[41] state specifically any relief the party claims; and

(e) if a claim or defence under an Act is relied on—identify the specific provision under the Act.

(2) In a pleading, a party may plead a conclusion of law or raise a point of law if the party also pleads the material facts in support of the conclusion or point.

Matters to be specifically pleaded

150.(1) Without limiting rule 149, the following matters must be specifically pleaded—

(a) breach of contract or trust;

(b) every type of damage claimed including, but not limited to, special and exemplary damages;[42]

(c) defence under the *Limitation of Actions Act 1974*;

(d) duress;

(e) estoppel;

(f) fraud;

(g) illegality;

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[41] Rule 156 (General relief).

[42] See also rule 155 (Damages).

(h) interest (including the rate of interest and method of calculation) claimed;
(i) malice or ill will;
(j) misrepresentation;
(k) motive, intention or other condition of mind, including knowledge or notice;
(l) negligence or contributory negligence;
(m) payment;
(n) performance;
(o) part performance;
(p) release;
(q) undue influence;
(r) voluntary assumption of risk;
(s) waiver;
(t) want of capacity, including disorder or disability of mind;
(u) that a testator did not know and approve of the contents of a will;
(v) that a will was not properly made;
(w) wilful default;
(x) anything else required by an approved form or practice direction to be specifically pleaded.

(2) Also, any fact from which any of the matters mentioned in subrule (1) is claimed to be an inference must be specifically pleaded.

(3) If the plaintiff's claim is for a debt or liquidated demand only (with or without a claim for interest), the plaintiff must state the following details in the statement of claim—

(a) particulars of the debt or liquidated demand;
(b) if interest is claimed—particulars as required by rule 159;40
(c) the amount claimed for the costs of issuing the claim and attached statement of claim;
(d) a statement that the proceeding ends if the defendant pays the debt or liquidated demand and interest and costs claimed before the time for filing notice of intention to defend ends;
(e) a statement of the additional costs of obtaining judgment in default of notice of intention to defend.

(4) In a defence or a pleading after a defence, a party must specifically plead a matter that—

(a) the party alleges makes a claim or defence of the opposite party not maintainable; or

(b) shows a transaction is void or voidable; or

(c) if not specifically pleaded might take the opposite parties by surprise; or

(d) raises a question of fact not arising out of a previous pleading.

Presumed facts

151.(1) A party is not required to plead a fact if—

(a) the law presumes the fact in the party's favour; or

(b) the burden of proving the fact does not lie with the party.

(2) Subrule (1) does not apply if it is necessary to plead the fact—

(a) to comply with rule 149;41 or

(b) to meet a denial pleaded by another party.

Spoken words and documents

152. Unless precise words are material, a pleading may state the effect of spoken words or a document as briefly as possible without setting out all of the spoken words or document.

Condition precedent

153.(1) An allegation of the performance or occurrence of a condition precedent necessary for the case of a party is implied in the party's pleading.

(2) A party who denies the performance or occurrence of a condition precedent must specifically plead the denial.

Inconsistent allegations or claims in pleadings

154.(1) A party may make inconsistent allegations or claims in a pleading only if they are pleaded as alternatives.

(2) However, a party must not make an allegation or new claim that is inconsistent with an allegation or claim made in another pleading of the party without amending the pleading.

Damages

155.(1) If damages are claimed in a pleading, the pleading must state the nature and amount of the damages claimed.

(2) Without limiting rule 150(1)(b),42 a party claiming general damages must include the following particulars in the party's pleading—

(a) the nature of the loss or damage suffered;

(b) the exact circumstances in which the loss or damage was suffered;

(c) the basis on which the amount claimed has been worked out or estimated.

(3) If practicable, the party must also plead each type of general damages and state the nature of the damages claimed for each type.

(4) In addition, a party claiming damages must specifically plead any matter relating to the assessment of damages that, if not pleaded, may take an opposing party by surprise.

General relief

156. The court may grant general relief or relief other than that specified in the pleadings irrespective of whether general or other relief is expressly claimed in the pleadings.