(Seal)

INSTITUTE OF LAW RESEARCH AND REFORM

The University of Alberta
Edmonton, Alberta

Report No. 15

# VALIDITY OF THE ALBERTA RULES OF COURT

December, 1974

TABLE OF CONTENTS

# VALIDITY OF THE ALBERTA RULES OF COURT

## I. INTRODUCTION

The Alberta Rules of Court were promulgated by order in Council 2208/68 and have been amended from time to time. Doubts exist as to whether all the Rules are valid. As a result of discussions initiated by the Honourable Mr. Justice G. H. Allen, Chairman of the Rules of Court Advisory Committee, we made the study on which this Report is based and have formulated recommendations to rectify the situation.

We have addressed ourselves to two questions. The first, which we will deal with only in general terms, is what Rules can plausibly be argued to have been promulgated without authority. The second is how any doubts can best be settled for the present and for the future. We have not undertaken a study of the content of the Rules.

## II. HISTORY OF THE RULES OF COURT

The Rules of Court which were in force when Alberta became a province were those contained in the Judicature Ordinance, 1898. They were confirmed by S.A. 1907, c. 3. The Consolidated Rules of Court were promulgated in 1914 and were given statutory confirmation by S.A. 1918, c. 4, s. 5. It seems that the Rules contained in the Judicature Ordinance were not effectively repealed until the proclamation on August 15th, 1921, of the Judicature Act, S.A. 1919, c. 3, and that there were therefore two sets of Rules of Court in existence from 1914 to 1921: Smith v. Christie et al, [1920] 3 W.W.R. 585 (App. Div.). The Consolidated Rules as amended and consolidated remained in force until they were repealed by Order in Council

2208/68 and replaced by the Alberta Rules of Court, with effect from January 1st, 1969. The new Rules were in the main a revision and re-enactment of the Consolidated Rules, but they were redrafted and substantial changes and innovations were made. They were drafted by a committee appointed by the Attorney General and composed of members of the bench and bar of the province.

The Alberta Rules of Court have been amended from time to time. Some of the amendments were originally made by the judges of the Supreme Court under a procedure which is provided for in Rule 934. The Attorney General later established a Rules of Court Advisory Committee the voting members of which are appointed by the Chief Justices and Chief Judges and by the Law Society; and amendments are now in practice made by the Lieutenant Governor in Council upon the advice of the Committee. The Rules apply to the Supreme and District Courts. Along with special additional Rules they apply to the Surrogate Court which is outside our study.

We address ourselves only to certain parts of the Alberta Rules of Court, namely, Parts 1 to 43 inclusive, 45 to 56 inclusive, and 63 and 64, and Schedules A and C. Other Rules which are printed for convenience with the Alberta Rules of Court are outside the purview of our study.

## III. VALIDITY OF THE RULES OF COURT

### 1. General

In 1968, when the Alberta Rules of Court were promulgated, section 38 of the Judicature Act, R.S.A. 1955, c. 164, which is set out in Appendix 1, conferred on the Lieutenant

Governor in Council power to "make and authorize the promulgation of" rules governing "the practice and procedure in the [Supreme] Court." The power is continued by section 39 of the Judicature Act, R.S.A. 1970, c. 193, and section 23 of that Act requires the court to exercise its jurisdiction "with regard to practice and procedure" in the manner provided by the Act and the rules and orders made under it. Both sections appear in Appendix 2. We do not think it necessary to make recommendations about the other statutory provisions relating to the making of Rules of Court. These include the District Courts Act, the Surrogate Courts Act, the Municipal Election Act, the Execution Creditors Act, the Builders' Lien Act, and the Reciprocal Enforcement of Judgments Act. Some of these Acts refer back to Rules made under the Judicature Act. Others provide for Rules of practice and procedure.

The first question is whether it is beyond reasonable argument that section 39 of the present Judicature Act and section 38 of its predecessor empowered the Lieutenant Governor in Council to promulgate the Alberta Rules of Court. That is, are the Rules clearly rules governing "the practice and procedure in the Court?" If the answer is in doubt, the doubt should be resolved.

> The word 'procedure' denotes the mode by which a legal right is enforced; it is akin to the word 'practice', and means the rules that are made to regulate the classes of litigation within the Court itself. . . ."
>
> (McKee v. Lavary, [1923] 3 W.W.R. 727, 734, per Martin J.A.)

However, doubts and differences of opinion arise in distinguishing procedure from substantive law (Upper Canada College

v. Smith (1920), 61 S.C.R. 413, 423, per Duff J.) and provide a foundation for arguments against the validity of many Rules and groups of Rules. We will discuss some cases of particular difficulty.

## 2. Rules of Evidence

"Procedure" is often defined to include evidence as well as pleading and practice. That view was adopted by the Supreme Court of Canada in a case involving the conflict of laws: Livesley v. Horst Co., [1924] S.C.R. 605. It was adopted by the Appellate Division of the Supreme Court of New Brunswick in a case in which the court held that the language in which court proceedings is conducted is not part of the law of evidence: Reg. v. Murphy, (1968) 4 C.C.C. 229. The Manitoba Court of Appeal has held that legislation changing the onus of proof was procedural and was therefore to be interpreted as being applicable to proceedings commenced before the date of the legislation: Brown v. Keele, [1934] 4 D.L.R. 508. On the other hand, however, the Saskatchewan Court of Appeal has held that the rules of evidence are distinct from Rules concerning practice and procedure which "cannot avail to limit the jurisdiction" to determine questions respecting the competency or admissibility of evidence "or to alter its extent or nature": Andrews v. Andrews and Roberts, [1945] 1 D.L.R. 595. And in Re Grosvenor Hotel, London, [1964] 3 All E.R. 354, Denning L.J. considered a rule to the effect that a Minister could resist production of a document by saying that production was injurious to the public interest. He said:

> What then are the powers of the Rules Committee? They can make rules for regulating and prescribing the procedure and practice of the Court, but they cannot alter the rules of evidence.

It appears that it is possible to make some case for the proposition that rules of evidence are not matters of procedure for the purposes of Rules of Court. If that case should prove valid, doubt is cast upon Rule 214 providing for the use of examinations for discovery in evidence, and upon Rule 190 relating to the binding effect of an affidavit on production and failure to dispute the authenticity of documents listed in it. If a Rule in Part 26 relating to evidence is inconsistent with the common law it might be subject to attack, and so might Rules 65 (evidence taken in a mode consented to by next friend, etc.); 218(4) (admissibility of the report of an expert nominated by the court); and 254 (exclusion of evidence of plaintiff's character in certain defamation actions unless notice given); and so might Part 20 (Admissions).

## 3. Rules Permitting Service Outside the Jurisdiction

Although there are exceptions to the rule,

> . . . jurisdiction . . . normally depends upon the presence of the defendant within the territorial limits of the court or upon the voluntary submission of the defendant to the authority of the court.
>
> (Moran et al v. Pyle National (Canada) Ltd. [1974], 2 W.W.R. 586, 589 (S.C.C.))

A strong argument can be made for the proposition that rules permitting service outside the territorial jurisdiction

of the court are a means of asserting jurisdiction in cases where the court would not otherwise have jurisdiction and that they therefore affect substantive rights. "The ordinary principles of international comity are invaded by permitting it" (Vitkovice Horni etc. v. Korner, [1951] 2 All E.R. 334, per Lord Radcliffe at 339); and it "entails an encroachment on the sovereignty of the jurisdiction where service is to be effected" (Canadian Westinghouse Co. Ltd. v. Davey et al (1964), 45 D.L.R. (2d) 321, per Kelly J.A. at 323). There is therefore doubt as to the present validity of Part 4 of the Rules (Service Outside of Alberta) and as to the validity of Rules 661 and 662 insofar as they permit service of a small claim summons outside Alberta. The doubt is strengthened by analogy with decisions that a rule goes beyond practice and procedure if it alters the monetary jurisdiction of the court (McKee v. Lavary, [1923] 3 W.W.R. 727 (Sask. C.A.)) or its jurisdiction to determine the admissibility of evidence (Andrews v. Andrews & Roberts [1945] 1 D.L.R. 595 (Sask. C.A.)).

4. Rules Affecting Rights of Appeal

Some authorities say that Rules relating to appeals are matters of practice and procedure: see In Re Oddy, [1895] 1 Q.B. 392, per Lindley L.J.; Hockley v. Ansah, [1895] 44 W.R. 666 (Q.B. Div.). However, there is much authority for the proposition that a right of appeal is a substantive right: Colonial Sugar Refining Co. v. Irving, [1905] A.C. 369 (P.C.); Upper Canada College v. Smith (1920), 61 S.C.R. 413; Bilsland v. Bilsland, [1922] 1 W.W.R. 718 (Man. C.A.); R. v. Rivet, [1944] 2 W.W.R. 132 per Harvey C.J.A. (App. Div.). The latter authorities suggest that a power to make Rules of practice and procedure does not include the power to take away a right of appeal. Section 26(b)

of the Judicature Act clothes the Appellate Division with "jurisdiction and power, subject to the provisions of the Rules of Court, to hear and determine" appeals. A court might hold that the section authorizes rules which regulate the way in which appeals are to be conducted but that it does not authorize rules which limit the right to appeal. That interpretation would cast doubt upon several rules which impose limitations, including Rules 451 (appeal in interpleader); 592 and 655 (appeals from taxation); 704(5) (appeal in civil contempt matters); and 740 (appeal in civil Crown practice matters).

5. Rules Imposing Limitation Periods

Procedure includes rules of limitation for the purposes of conflicts of laws (Livesley v. Horst Co., [1924] S.C.R. 605, 608, per Duff J.; Brown v. Keele, [1934] 4 D.L.R. 508, 512, per Trueman J.A.) but it does not necessarily do so for the purpose of deciding whether a Rule of Court relates to procedure. In Paitson v. Rowan (1919), 15 Alta. L.R. 74, Stuart J., speaking for the Appellate Division, held that a rule which would deprive a party of costs if he did not bring in his bill at the right time "comes very close to, if it does not entirely reach, the nature of substantive legislation and not that of procedure at all." In Smith v. Christie et al, [1920] 3 W.W.R. 585 Beck J. said that the Lieutenant Governor in Council, acting under a power to make Rules of practice and procedure, could not impose time limitations on the bringing of actions; statutes of limitation "are undoubtedly considered matters of procedure in private international law, but not matters of practice and procedure of or in Court." Stuart J., with whom Harvey C.J. and Ives J. concurred, had

little doubt that the Legislature had never intended to delegate power to impose a limitation of time.

There are Rules which might be attacked on the grounds that they impose limitations on substantive rights, for example, Rules 243 and 244 (effect of delay in prosecution); 327 (failure to enter judgment); 355 (time for issuing execution); 638(2)(b) (failure to bring in bill of costs); and 647 (time for taxation).

6. Other Rules Infringing upon Substantive Rights

In Bell v. Klein (1954), 12 W.W.R. (N.S.) 273 (B.C.C.A.), reversed, [1955] S.C.R. 309, Sloan C.J.B.C., dissenting, held that a rule which he interpreted as compelling a person being examined on discovery to answer incriminating questions affected substantive rights; though Sydney Smith J.A. held the contrary and the other members of the court held that the Rule did not compel the witness to answer questions which he was not otherwise bound to answer. In Montreal Trust Company v. Pelkey & Lusty (1970), 73 W.W.R. 7 (Man. C.A.) two of the five members of the court considered the validity of a Rule which, upon motion to dismiss for want of prosecution, required the plaintiff to establish that there was no unreasonable delay or that there was an excuse. They held that the rule substantially affected substantive rights and was beyond the rule-making power of the judges. It therefore appears that a rule which is or appears to be one of procedure may come into conflict with substantive rights and be ultra vires.

The Rules relating to garnishment confer a legal right or remedy; and in MacCharles v. Jones, [1939] 1 W.W.R. 133, the Manitoba Court of Appeal held garnishment Rules

to be ultra vires for that reason. The court's reasoning casts doubt upon the garnishee provisions found in Alberta Rules 470 to 484.

In Re Grosvenor Hotel, London, [1964] 3 All E.R. 354, Lord Denning said that he would rank the law as to Crown privilege higher than a rule of evidence and as a principle of constitutional law. In Schanz and Schanz v. Richards (1970), 72 W.W.R. 401, Master Quigley, applying Circosta v. Lilly (1967), 61 D.L.R. (2d) 12 (Ont. C.A.) held that Rule 217(7)(b), which provides for disclosure of medical reports under certain circumstances, is ultra vires because it affects a litigant's common law privilege which is a substantive right. Similar arguments may be raised with regard to Rule 217(6) under which the court can require a "person" to submit to various tests, including blood tests, x-rays, electro-cardiograms and electro-encephalograms. These provisions therefore are in jeopardy.

Paitson v. Rowan ((1919), 15 Alta. L.R. 74 (App. Div.)) suggests that a right to costs is a substantive right (though cf. Elmy et al v. Yorkton, [1974] 5 W.W.R. 14 (Sask. Q.B.)). Rules legislating about costs may therefore be subject to attack. Rules 613, 605 and Schedule C for example, confer upon barristers and solicitors a right to compensation and prescribe criteria by which the amount is to be determined; and Rule 622 deals with their costs in certain trust situations. Rule 620 makes void certain provisions in agreements between solicitor and client. Rule 625 empowers the court to declare that a barrister and solicitor is entitled to have and enforce a charge upon property recovered or preserved through his instrumentality. Rules 616 to 620 dealing with agreements for contingent fees, however, are specially authorized by section 40 of the Judicature Act and appear to be valid.

Rules 701 to 704 affect the substantive law of civil contempt. Apart from Rule 703(e), for example, it is unlikely that a lawyer who does not carry out his undertaking to file a statement of defence or demand of notice could be held to be in contempt. Rule 704 prescribes sanctions and provides for bail and for appeals. The authority for Rules 701 to 704 is open to serious question.

Some or all of the Rules relating to security for costs may be open to question. In Brown v. Keele, [1934] 4 D.L.R. 508 Trueman J.A. said at page 512 that there was a

> . . . fixed principle in the administration of justice that any person who is a resident of the province may bring an action without regard to his ability to pay costs in case they are awarded against him.

Such a principle would affect Rules 594 to 599, except as regards non-resident plaintiffs, and it might affect Rule 159(5) relating to summary judgment and 524 relating to security on appeals. However, Brown v. Keele is equivocal. Trueman J.A. says at page 513 that a Rule requiring security in an informer's action,

> . . . so far as an action brought under a penal statute of the province is concerned . . . can be regarded as procedure and, if one wills, it can be so classified had it application here.

but says earlier at pages 511-12

> I see no way of regarding the Rule to be procedure here. Effect cannot be given to it without depriving the plaintiff of his right of action under the Code.

The argument is not a strong one, but the basis for it should be removed.

It may be argued that a rule which, though designed to regulate the enforcement of legal rights, has the effect of doing away with them, is invalid. An example is Rule 23 which allows service of originating process to be dispensed with or to be made substitutionally. Others are Rules allowing service on persons other than the party, including Rule 15(2)(b) which permits service on corporations through employees. Problems might also arise with regard to Rules 17 and 19 relating to service on infants and persons of unsound mind, and Rule 41 providing for one person to sue on behalf of all those interested in an action for waste and Rule 42 providing for one of numerous persons having a common interest to bring or defend an action.

## 7. Statutory Confirmation

Section 38 of the Judicature Act, R.S.A. 1955, c. 164 declared the Consolidated Rules of Court to be in full force and effect and to be continued as the Rules of practice and procedure of the Supreme Court and empowered the Lieutenant Governor in Council to amend them. That section was in force when the Alberta Rules of Court were promulgated and it might be argued that the new Rules constituted an amendment or continuation of the Consolidated Rules and were therefore authorized by section 38. In Osachuk v. Osachuk, [1971] 2 W.W.R. 481, the Manitoba Court of Appeal went so far as to hold that a Rule continued by the judges was

valid following the disappearance of the previous statutory authority for it.

There is a question whether statutory confirmation confirms rules only to the extent that they fall within the authority conferred upon the rule-making body. There is an apparent conflict of authority on the point in Alberta. In Paitson v. Rowan & Cuthill ((1919), 15 Alta. L.R. 74, 76), Stuart J., speaking for the Appellate Division, said that the statutory confirmation of the Consolidated Rules of Court was intended to confirm them "simply as rules of procedure", a statement which, in context, appears to mean that if a Rule affected substantive rights it was not confirmed. However, a year later, in Smith v. Christie et al ([1920] 3 W.W.R. 585), the same judge said:

> When the Legislature declares a Rule 'to have been in force' from a certain date it seems to me to be rather too refined a treatment of language to suggest that it was only intended that it should be in force qua Rule, and if it could validly have been originally enacted by the rule-making authority.

Later again, however, in Werley v. Rowe, [1936] 1 D.L.R. 653, Harvey C.J.A., speaking for the Appellate Division, strongly implied that if the Rule there in question had interfered with a substantive right it would have been ultra vires; and the predecessor of section 38 was then in effect. However, in Klein v. Bell, [1955] S.C.R. 309 the Supreme Court of Canada held that an enactment that a rule is a matter of practice and procedure makes it so.

Assuming for the purpose of this discussion that the section gave validity to the Consolidated Rules of

Court and to all amendments to those Rules before they were repealed, the question is whether it provides a statutory foundation for the Alberta Rules of Court. Can it be said that the new Rules are merely a restatement and continuation of the Consolidated Rules of Court? We think that an argument supporting an affirmative answer would be open to grave question, and that it would in any event not support amendments made to the Rules after the statutory confirmation was done away with by the 1970 revision of the statutes. Even with regard to the main body of the Rules we think the matter far too important to litigants to rely on an affirmative answer and leave the contrary arguments open. It was, we expect, to foreclose such technical arguments (which are often of last resort) that legislative sanction was given to the Consolidated Rules.

## 8. Conclusions

Important parts of the Alberta Rules of Court may be more than the rules of practice and procedure which the Lieutenant Governor in Council is now empowered to make. We doubt that the statutory authority for the Consolidated Rules of Court gives validity to the Rules, and we are satisfied that it does not give validity to amendments made after the 1970 Revision of the statutes. The Rules relating to guarnishees and service ex juris are in some jeopardy. So are some Rules relating to costs, Rules relating to the jurisdiction of the court, and Rules relating to rights of appeal. So are Rules imposing time limitations on substantive rights. So are Rules relating to evidence, including those about the use of examinations for discovery, disclosure of privilege materials, submission to blood and other tests. The ingenuity of counsel is

likely to find arguments to raise against many others. While many attacks may fail, we believe that the doubts and uncertainties surrounding the status of the Rules should be resolved.

## IV. RECOMMENDATIONS

We shall now consider how to remove the doubts and uncertainties.

It is not practicable to search out those Rules which may not be valid and to give them statutory confirmation. Nor is it enough, we think, to confirm the existing Rules, though such confirmation is necessary. Amendments and new rules will inevitably be needed. Under the present law their validity will also be subject to doubt and uncertainty unless they are individually confirmed by the Legislature; a procedure which may be expected to cause delay and which will waste the time of the Legislature.

We therefore think that the Lieutenant Governor in Council should be empowered to amend the Alberta Rules of Court and to make new rules of court whether or not substantive rights are affected. We are, however, concerned that legislation of that kind would be open to the possibility of abuse by a future administration in order to prevent access to the courts or to give the State an advantage in litigation, and we think that all amendments and new rules should be brought to the attention of the Legislature. We therefore propose that amendments and rules be tabled in the Legislature and provision be made for revocation if it so resolves.

Our specific recommendation, which leaves untouched the existing provision for the delegation of the rule-making power to the judges, is that a section be substituted for section 39 of the Judicature Act, R.S.A. 1970, c. 193, which, subject to drafting changes, would be to the following effect:

39.(1) In this section, "Alberta Rules of Court" means the rules promulgated by Order in Council 2208/68 and by Orders in Council which have from time to time purported to amend the same.

(2) A rule contained in the Alberta Rules of Court has had effect since it was promulgated, notwitnstanding that it affects substantive rights.

(3) The Lieutenant Governor in Council may from time to time:

(i) amend or repeal any of the Alberta Rules of Court; and

(ii) make amend, and repeal additional rules governing:

(a) the practice and procedure in the court;

(b) the duties of the officers thereof;

(c) the cost of the proceedings therein;

(d) the fees to be taken by officers of the court; and

(iii) authorize the judges of the court to make, amend and repeal the Alberta Rules of Court and such additional rules.

(4) Every rule and amendment made under subsection (3) shall have effect notwithstanding that it affects substantive rights.

(5) Within fifteen (15) days after the start of each session of the Legislative Assembly the Attorney General shall lay before it a copy of every amendment or rule under subsection (3) and not previously laid before it.

(6) If the Legislative Assembly resolves that an amendment or a rule made under subsection (3) be annulled, the amendment or rule shall stand annulled and shall be conclusively deemed never to have had effect.

December, 1974

W. F. Bowker
R. P. Fraser
G. H. L. Fridman
Wm. Henkel
W. H. Hurlburt
H. Kreisel
Frederick Laux
W. A. Stevenson

NOTE: Dr. Kreisel is a member of the Institute but is not a lawyer and has no responsibility for the contents of this Report.

CHAIRMAN

W. F. Bowker

DIRECTOR

# APPENDIX 1

Judicature Act, R.S.A. 1955, c. 164

38. The Consolidated Rules of Court authorized and promulgated by order of the Lieutenant Governor in Council and dated the twelfth day of August, 1914, which came into force on the first day of September, 1914, are declared to be and to have been in full force and effect since the first day of September, 1914, and as altered and amended since that date are hereby continued as the rules of practice and procedure of the Court, but the Lieutenant Governor in Council from time to time

(a) may amend, alter or repeal the same or may make and authorize the promulgation of other rules governing

(i) the practice and procedure in the Court,

(ii) the duties of the officers thereof,

(iii) the cost of the proceedings therein, and

(iv) the fees to be taken by officers of the Court,

(b) may amend, alter or repeal any rules and make new rules instead thereof, and

(c) may authorize the judges of the Court to

(i) make and promulgate such rules,

(ii) amend, alter and repeal any of such rules, or

(iii) make additional or other rules.

APPENDIX 2

Judicature Act, R.S.A. 1970, c. 193

23. The jurisdiction of the Court with regard to procedure and practice shall be exercised in the manner provided by this Act or by the rules and orders of the Court made pursuant to this Act.

26. The Appellate Division

(a) has all the jurisdiction and powers possessed by the Supreme Court of the North-West Territories en banc immediately before the Court's organization, and

(b) has jurisdiction and power, subject to the provisions of the Rules of Court, to hear and determine

(i) all applications for new trials,

(ii) all questions or issues of law,

(iii) all questions or points in civil or criminal cases,

(iv) all appeals or motions in the nature of appeals respecting a judgment, order or decision of

(A) a judge of the Supreme Court, or

(B) a judge of a court of inferior jurisdiction where an appeal is given by any other Act,

and

(v) all other petitions, motions, matters or things whatsoever that might lawfully be brought in England before a Divisional Court of the High Court of Justice or before the Court of Appeal.

39. The Lieutenant Governor in Council

(a) may make rules governing

(i) the practice and procedure in the Court,

(ii) the duties of the officers thereof,

(iii) the cost of the proceedings therein, and

(iv) the fees to be taken by officers of the Court,

and

(b) may authorize the judges of the Court to

(i) make such rules, or

(ii) amend, alter and repeal any of such rules, or

(iii) make additional or other rules.

40.(1) No agreement between a barrister and solicitor and a client respecting the barrister's and solicitor's fees is invalid or unenforceable solely by reason of the fact that the amount of the fee is contingent or dependent, in whole or in part, upon the successful accomplishment or disposition of the matter to which the fee relates, if the agreement is made in compliance with the rules made under this section.

(2) The Lieutenant Governor in Council may by the Rules of Court make rules prescribing conditions, restrictions and prohibitions to which any such agreement shall be subject.

## ACKNOWLEDGEMENTS

The Alberta Law Foundation has made a grant to the Institute of Law Research and Reform for the purposes of this project.

We acknowledge the excellent research paper done for us by Douglas Stollery, a student in the Faculty of Law who served on our staff during the summer of 1974 from which we have derived much assistance.