ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

REPORT ON REFEREES

Research Paper No. 18

February 1990

ALBERTA LAW REFORM INSTITUTE

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

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ACKNOWLEDGEMENTS

The Report on Referees represents one of a number of initiatives taken by the Institute in the area of improvement in the process and methods by which disputes are resolved.

The Institute commissioned Mr. John Côté to prepare a report on the actual and potential use of referees under the Alberta system. Mr. Côté was appointed to the Court of Appeal of Alberta, but, despite his new workload, consented to complete the report which forms the subject matter of this Research Paper. The Institute is grateful to Mr. Justice Côté for his work, and the special skills which he has brought to this particular subject matter.

REPORT ON REFEREES

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PART I - EXECUTIVE SUMMARY

Introduction

In England, referees try all exceptionally lengthy, complicated or technical civil cases. Ontario (with legislation similar to Alberta's) makes extensive use of referees to hear builders' lien and other matters, and in family law. Referees are used, although less widely, in British Columbia, Manitoba and Saskatchewan. Although Alberta law permits the use of referees for a variety of court proceedings, they are very seldom used in this province.

The Alberta Law Reform Institute has asked Justice J.A. Coté to investigate whether the referee process could, and should, be used more often in Alberta.

The Alberta Law

In general, Alberta law says that any question of fact may be sent to a referee. The referee considers the evidence and reports back to the judge, who will decide whether to accept the report. If the report is accepted, it becomes the final judgment of the court.

(a) Who may be a referee?

Under Alberta Rules, all Masters in Chambers, clerks and deputy clerks of the court are official referees. Under the *Court of Queen's Bench Act*, Masters in Chambers are official referees, while clerks and deputy clerks may act as referees when required. The Lieutenant Governor in Council may name other referees, either on a standing basis or ad hoc. The court may direct an inquiry or account. It is not clear whether this may be to a referee other than to an official referee, although the *Administration of Estates Act* allows the Queen's Bench or Surrogate Court to appoint "an accountant or other skilled person" to assist the court in auditing complicated estate accounts. The Court of Appeal has referred to someone to be chosen by agreement of the parties or to be named by the court to determine damages.

(b) What work may they do?

Alberta statutes and Rules say little about what inquiries or accounts may be performed by referees (except in section 48(3)). Among the matters a judge could ask a referee to do, are:

- sorting out complicated accounts in a mortgage or partnership case; or
- investigating deficiencies or delays, and resulting damages in a construction case; or

- investigating and reporting on the damages in a personal injury suit; or
- investigating the worth of loss of a going business; or
- determining whether a vendor can make good title; or
- looking into the means and needs of a spouse seeking maintenance; or
- computing the lien fund and precise entitlement in a builders' lien action.

(c) How may they do their work?

The Alberta Rules are not very specific about the procedures to be followed by referees, which allows them to select the most suitable procedure in each case. Proceedings before a referee are to be conducted in much the same manner as those before a judge, while the referee is allowed to get advice or directions from the court on a point of law. Under both general Rules and the Surrogate Rules the referee is to report to the court, which may confirm or vary the report, send it back to the referee, ask for explanations or may decide the question itself. Other Rules and the case law have established the final decision of the referee takes the form of a recommendation or report to the court, which will be accepted (and binding on the parties) unless a good reason is found to set it aside. Acceptance by the court produces a final judgment.

Advantages of Using Referees

Referees can be used in matters involving little dispute of law, or principle, or credibility, for small lawsuits or small fact issues of relatively little value, allowing judges to concentrate on work they alone may do.

The use of referees has great potential for improving the efficiency of the administration of justice. As in other jurisdictions, referees free the time of judges by taking on lengthy cases involving the review of many transactions. The use of referees allows greater freedom to schedule cases that involve frequent adjournments or extend for many weeks. This flexibility should help to eliminate backlogs and delays in the court.

Expertise is the other compelling reason for the use of referees. Using the same referee for similar types of cases (builders' liens, for example) has obvious advantages in allowing individuals to build expertise in one area. While there is little precedent for using referees with technical backgrounds, accountants are widely used in other jurisdictions. For particular types of cases, the court may refer to accountants with experience in valuation, receiverships, or forensic accounting.

The Institute proposes a pilot project to experiment with using referees with technical qualifications (in engineering or medicine as well as accounting) to hear cases in their own fields.

Cost saving is further reason for expanding the use of referees. Referees with expertise, whether from their professional background or from familiarity with the type of action, may be able to save time, and therefore, costs.

While the report considered several possible disadvantages to the expanded use of references in Alberta, none was seen as a significant barrier to expanding the use of referees. Some parties may expect their case to be heard by a judge. Constitutional objections under Section 96 of the constitution are not likely to be upheld; the referee only investigates and reports, while the court makes the actual judgment.

Legislative Change

Only one legislative change will be needed to permit more extensive use of referees in Alberta. Even if the parties agree on a certain individual as referee and are willing to pay his fees, it takes an Order in Council to name him as an official referee, unless he is a clerk or Master. A Rule of Court is needed to say a reference or accounting may be to an official referee or to anyone else agreed on by the parties.

Conclusion

The report concludes that there is merit in wider use of referees by the court in Alberta and recommends the legislative change necessary to allow the court to refer without Order in Council. A pilot project should be conducted on the use of technically trained referees.

PART II - REPORT ON REFEREES

A. The Task

The Institute of Law Research and Reform has asked me to investigate references and referees and similar proceedings such as taking accounts. Alberta makes very little use of such court proceedings, even though our law allows them and though some other jurisdictions described below make much more use of those procedures.

B. Steps Taken to Investigate the Question

See Appendix D.

C. Alberta's Situation Compared With That in Other Jurisdictions

The situation prompting this report is as follows. In Alberta Masters in Chambers ordinarily cannot and do not hear live evidence. Indeed they ordinarily cannot and do not have much to do with any contested evidence, even conflicting facts in affidavits. Aside from cases of summary judgment, almost all decisions involving points of substance in litigation are made by the judges of the Court of Queen's Bench after hearing oral evidence. All the others are heard by the same judges in their capacity as judges of the Surrogate Court of Alberta. (Only cases involving under $2,000 are heard in Provincial Court.) Those things are so whether the question is the trial of a lawsuit, or merely determining some factual question which is necessary at an early stage in a lawsuit. If conflicting facts arise at an early stage in the lawsuit, the court usually orders a special trial before the trial to be held before a Queen's Bench judge, or finds some manner of obviating the issue entirely, or postpones the issue so that it can be heard as part of the trial.

The judge who hears a lawsuit in Alberta is usually drawn at random from the whole body of judges, so the subject matter of the lawsuit usually has no bearing on which judge will hear the case. In theory, the courts could use persons with technical expertise in some other capacity: as a court-appointed expert, or as an assessor sitting with the judge, or as an official referee. But in practice that occurs extremely rarely, if ever. Expertise usually comes before the court only when the parties choose voluntarily to produce their own hired experts to testify before the court.

There have been infrequent exceptions where Alberta courts have referred out factual inquiries to non-judges: see Appendix E.

But those are isolated examples. Things are very different in many other jurisdictions.

For over a century, the ordinary English judges have not tried exceptionally lengthy or complicated or technical cases. They are tried by a special set of officials called official referees, who now appear to be full-fledged judges. Those officials have devised special procedures and gathered expertise and experience in these technical areas. So they are well equipped to sort through (say) a technical building dispute involving a host of issues and a large number of particular topics. In Ontario, a considerable proportion of the work of the Masters is not Chambers work at all, but trial work. For example, recently a Master decided the worth of valuable shares: *Mason* v. *Intercity Props.*[1] Indeed, virtually everything relating to builders' lien matters, including their trial, is heard by Masters. What is more startling, Ontario also uses Family Law Commissioners who are not judges. They do both a great deal of matrimonial pre-trial conference and conciliation work, and also hear almost as many divorce trials in Toronto as do judges of the High Court.

Manitoba appears to be using references too: *Arndt* v. *Arndt.*[2] They have been used from time to time in Saskatchewan. For example, there was a reference to a Master to find the amount due under an Agreement for Sale, where a receiver got in a large amount after the Order Nisi: *Milos* v. *Schmidt.*[3] Or to take partnership accounts: *Hagarty* v. *Goetz.*[4] Many other examples of references actually directed in Saskatchewan are given in McKeague and Voroney, *Q.B. Rules of Sask. Annotated* 247-8 (1985-7) under R. 251n. A number of reports and cases from the Federal Court of Canada in the last few years speak of references; their use in that court sounds common. See for example *Gastlebled* v. *Stuyck*;[5] *Reading & Bates Constr. Co.* v. *Baker Energy Resources Corp.*;[6] *Beloit Can.* v. *Valmet Oy.*[7]

British Columbia as long ago as 1967 was evidently using court registrars to make recommendations as to the quantum of maintenance in matrimonial cases: *Hoff* v. *Hoff*;[8] *Murray* v. *Murray.*[9] That is very instructive, for in Alberta details of maintenance occupy

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1 (1988) 66 O.R. (2d) 8.

2 (1987) 48 Man. R. (2d) 156.

3 [1923] 1 W.W.R. 1444 (Sask. C.A.).

4 (Sask. C.A.) [1921] 3 W.W.R. 517, 62 D.L.R. 220.

5 (C.A.) [1974] 1 F.C. 429.

6 (F.C. 1986) 10 C.P.R. (3d) 259.

7 (C.A.) [1987] 3 F.C. 171.

8 (B.C. 1967) 62 W.W.R. 767.

9 (B.C. 1979) 13 R.F.L. (2d) 294, 296.

a good deal of time of Queen's Bench judges sitting in Chambers. British Columbia now sees quite a few references, especially in family or construction litigation. Most are to accountants or engineers, though a few are to retired judges. That is partly because British Columbia has no provision for court-appointed experts.

Where the British Columbia Court of Appeal found one issue (pension rights) had been overlooked in a wrongful dismissal action and no evidence on it, they directed a reference to the Registrar to see what entitlement there was in *Poole* v. *Tomenson etc.*[10] Speakers at the Institute's November 15, 1986 conference on collections and execution indicated that British Columbia handles sale of land under execution through a reference.

The practice of using referees is very old, older even than official referees. One can trace this scheme of common law references to the English *Common Law Procedure Act 1854*: *A-G. Ont.* v. *Victoria Medical Building.*[11] A reference by consent was ordered in *Nicholson* v. *Sykes Est.*[12] *Murphy* v. *Cotton*[13] has to do with a reference to "arbitrators", so obviously the procedure was known by that point in Ontario. See also *Proctor* v. *Jarvis.*[14] See further on the history *Longman* v. *East.*[15] References were in full flight in New South Wales by the 1860s, as can be seen by the decision of the Privy Council in *Hosking* v. *Terry.*[16] That was a common law (i.e. non-statutory) procedure, copied from the English practice, with which the Privy Council then appeared well familiar. The common law history is described in Fay, *Official Referees' Business* 9-21 (1983). The history of the Alberta Rules on references is sketched in *Mainfroid* v. *Mainfroid.*[17]

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10 [1988] 4 W.W.R. 300 (B.C.C.A.).

11 [1960] S.C.R. 32, 21 D.L.R. (2d) 97.

12 (1854) 9 Ex. 357, 156 E.R. 152, 23 L.J. Ex. 193.

13 (1857) 14 U.C.Q.B. 426.

14 (1857) 15 U.C.Q.B. 187.

15 (C.A. 1877) 3 C.P.D. 142, 47 L.J.C.P. 211, esp. at 218 ff.

16 (1862) 15 Moo. P.C. 493, 15 E.R. 581.

17 (Alta. C.A.) [1926] 3 W.W.R. 617, D.L.R. 1060.

D. Existing Law in Alberta

(1) Enabling Law

(a) Introduction

One might assume that the very different practices found in Alberta (on the one hand) and Ontario and England (on the other) reflect very different laws; but that is far from true.

While the Ontario legislation and Rules of Court governing references are lengthier and fuller than those in Alberta, there is no essential difference between the two. What Alberta lacks and Ontario possesses are merely details, not real powers of any importance. The Ontario Rules in force until 1985 were in all essential respects very close to the present Alberta Rules. (For the Ontario Rules before 1985, see Appendix F.) There is a detailed comparison in Appendix H. And references were then and are now a daily occurrence in Ontario. (For the current Ontario Rules, see Appendix G.)

The Alberta Rules and statutes on the subject of references are very scattered and hard to find, let alone to notice. That may be why they have been overlooked. Therefore I shall begin with the law of Alberta on the subject of referees and inquiries. The sections and Rules referred to below are reproduced in full in Appendix A, so it is convenient to give here merely their highlights or thrust.

(b) Who

Alberta Rule 403 says that all the Masters in Chambers and clerks of the court and deputy clerks of the court are official referees. Section 11 of the *Court of Queen's Bench Act* now parallels this Rule by repeating that Masters in Chambers are official referees. Rule 719(k) says clerks and deputy clerks shall act as referees when required. Rule 403 also permits the Lieutenant Governor in Council to name other official referees. Presumably the Lieutenant Governor in Council could do that either on a standing basis, or *ad hoc*.

Alberta legislation does not provide expressly who must be the referee in most cases. Rule 418 merely says that the court generally may direct an inquiry or account. It does not say to whom that inquiry may be directed, but by inference it may be to an official referee. Whether it can be to anyone else is not clear.

In narrower situations the rule is clearer. Section 48(3) of the *Administration of Estates Act* allows the Queen's Bench or the Surrogate Court to appoint "an accountant or other skilled person" to investigate and to assist the court in auditing intricate or

complicated estate accounts requiring expert investigation. In a winding-up (probably now only a federal one), *any* of the powers of the court may be referred *or* delegated to a Master or Court official: R. 808. That power was exercised, under a similar provision of the *Winding-Up Act*, in *Re Cornwall Furniture Co.*[18]

Damages were referred by the Court of Appeal to someone to be chosen by agreement of the parties or to be named by the court, in *Ferguson* v. *N.W. Brick.*[19]

(c) What

The Alberta statutes and Rules say little or nothing on the subject of what the inquiries or accounts may be *about* (except in section 48(3)), unless that be implied in the word "necessary" in Rule 418. Rule 337 also allows a court which is asked to give judgment to order a reference if it feels that it lacks material to give judgment. Rule 159(5) is similar. To much the same effect is Rule 161(3), where there is an urgent motion for judgment. Rule 332(1) seems to assume that a reference may be about "an account of debts, claims or liabilities or an inquiry for heirs, next of kin or other unascertained persons" (among other things). See further Part (f) below for some principles which the courts seem to have worked out on their own.

(d) How

The Alberta Rules are very brief and vague about procedure on references, but that is an advantage, letting the referee select the most suitable procedure in each case: Peppiatt and Linton 77.

Rule 425 says that proceedings before a referee shall be conducted in like manner as the like proceedings before a judge so nearly as circumstances may permit. Probably that means that the referee should hold a trial. Rules 419 to 422 set very briefly the procedure to follow on a reference but do not say very much. Rule 37 of the Surrogate Rules lets a referee get advice or directions from the court on a point of law.

Rule 426 (of the general Rules) and Rule 38(2) of the Surrogate Rules call for a report by the referee to the court. And they allow the court to confirm or vary the report, or to send it back to the referee, or to have it explained or that the court may decide the question itself. Rules 334-337 allow the plaintiff to move for full or partial judgment "as soon as the issues or questions have been determined". These Rules go into some detail and allow the court to draw inferences of fact.

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18 (C.A. 1908) 18 O.L.R. 101, 13 O.W.R. 137.

19 *Supra.*

Rule 499 allows an appeal from an official referee to a judge of the Court of Queen's Bench. As the final decision by the referee merely takes the form of a recommendation or report, it is not clear what anyone would want to appeal, unless possibly it is appeals with respect to procedure during the reference. Maybe R. 499(1) was enacted as a precaution to make it clear that the court retains full control to upset the referee. As is pointed out by Brett L.J. in *Longman* v. *East*,[20] at one time the English legislation said that the report of the referee on a fact question was equivalent to a jury verdict (unless set aside by the court). Taylor and Ewart point out that at one time the court could refer a matter to a referee for trial (as distinct from inquiry and report). Alberta has no such provisions. See the discussion of the *Mainfraid* case in Part G.7 below. Ontario law on such appeals is discussed in Marriott and Dunn, *Practice in Mortgage Actions in Ontario*.[21] Where due notice of a reference was given to defendants and they did not get ready or send any witnesses or their lawyer and so the referee ("arbitrator") proceeded in the absence of the defendants, the court later would not set aside this award even though the one defendant who was in the province claimed that he had been ill at the time. The absence was specifically dealt with, as the arbitrator left the matter open and named a date three weeks later when he would hear evidence from the defendants if they chose to lead any, and even allowed them to bring back the plaintiff's witnesses to be cross-examined then if they wished. But the defendants did nothing about it: *Proctor* v. *Jarvis*.[22]

The Federal Court, on the other hand, has held that a judge should set aside a referee's decision only for obvious error or on a matter of principle: *Domco Inds.* v. *Armstrong Cork Can.*[23] That sounds surprising, but many cases are cited. The results of a reference were said binding upon the parties unless good reason to set them aside is shown, in *Hosking* v. *Terry*;[24] *Parry* v. *Duncan*;[25] *cf. Jamieson* v. *Jamieson*,[26] and *Colchester* v. *Valad*.[27] Questions of credibility are for the referee: *Booth* v. *Ratté*.[28] His factual conclusions should not be upset just because they are said to be against the weight of

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20 *Supra.*

21 141-42 (4th ed. 1982).

22 *Supra.*

23 (1986) 3 F.T.R. 289, 291-93, 10 C.P.R. (3d) 53, 9 C.I.P.R. 139.

24 *Supra.*

25 (#2) (Sask. C.A.) [1924] 2 W.W.R. 1189.

26 (Alta.) [1921] 1 W.W.R. 63.

27 *Infra.*

28 (1892) 21 S.C.R. 637, 643.

evidence: *Newman* v. *Niagara Dist. Mutual etc.*[29] *Re Solloway Mills & Co.*[30] stresses the expeditious nature of a reference and says that interlocutory steps or appeals are to be discouraged.

Confirmation of the referee's report, whether by express order or by failure to challenge it (under Ontario Rules), produces a final judgment: *Baker* v. *Dumaresq*.[31]

(e) Analysis of Alberta Legislation

What then does Alberta law say about referees? Ignoring for now any constitutional limitations, Alberta law says that judges do not have to try questions themselves. A judge may instead ask a referee to decide a question provisionally. By implication that must be a question of fact, but may be almost any factual question. The law gives examples such as inquiring into debts or accounts or claims against an estate, or inquiring into who are the heirs or beneficiaries of an estate. But those are only examples and the legislation sets no limit whatever. Alberta legislation says that any question of fact whatever could be sent to a referee upon which to decide and report back to the judge.

So the only restriction in the legislation (ignoring the constitution), is that the referee cannot make the final decision. He cannot produce a judgment which binds the parties. Instead he produces a report to the court. It is for the court to decide whether or not to adopt that report as its own judgment, either as it stands or with amendments. Parties have the full right to argue before the court what changes (if any) should be made in the report, or whether the report should be completely rejected by the court. And the court can send the matter back to the referee in part or in whole, and probably the referee can send parts back and report on other parts.

(f) Judicial Rulings on Scope of References

At one time the criteria for a reference were very similar to those for a judge without a jury: see *Longman* v. *East*,[32] (and Taylor and Ewart at 93-4); but even those limits are now lifted. As we saw above, Alberta legislation no longer sets any limits. Nor do the more modern cases set many limits, as the following paragraphs show.

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29 (1866) 25 U.C.Q.B. 435, 439.

30 [1935] O.R. 275.

31 [1934] S.C.R. 665, 675.

32 *Supra.*

Where matters of account are involved, the whole thing may be referred to a referee, even if some of the items are disputed: *Browne* v. *Emerson*.[33] It is not just the matters of account which can be referred: *Knight* v. *Coales*[34] (possibly overruling *Rogers* v. *Kearns*.[35] But the tail should not wag the dog: *Knight* v. *Coales*. So the referee can go beyond mere calculation; he can rule on disputed facts (as to liability or otherwise): *Re Cornwall Furniture Co.*[36] For example, dilapidations were held to be matters of account, in *Knight* v. *Coales*,[37] for account goes far beyond figures and calculations and extends to assessing admitted liability.[38] Similarly referred out was the worth or agreed price (if any) of a number of pieces of art supplied to the deceased and billed to his estate, in *Re Leigh*.[39] How much income a widow needed beyond estate income, so as to allow encroachment on capital, was referred in *Baker* v. *Dumaresq*.[40] In *Brown* v. *Girard*[41] the court set aside a compulsory order for reference under section 3 of the *Common Law Procedure Act 1854* on the grounds that the facts were not in contest.

It is significant that the legislation no longer confines references to *mere* matters of account which cannot be tried in the usual way: *Hurlbatt* v. *Barnett & Co.*[42] Taking accounts allows a reference of any question of amount or quantity: *Oshawa Water Comm.* v. *Robson Leather Co.*[43]

It was formerly held that a referee should not be asked to try a case involving the personal reputation of a professional person, such as an allegation of his gross neglect or shoddy quality of his products: *Charles Osenton & Co.* v. *Johnston*.[44] The English White Book 36/1-9/4 says that the more recent addition of a right to appeal (which Alberta has)

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33 (1855) 17 C.B. 361, 84 E.C.L.R. 361, 139 E.R. 1112.

34 (C.A. 1887) 19 Q.B.D. 296, 300.

35 (1860) 29 L.J.Ex. 328.

36 (C.A. 1908) 18 O.L.R. 101, 13 O.W.R. 137.

37 *Supra.*

38 *Ibid.*

39 (1876) 3 Ch.D. 292.

40 [1934] S.C.R. 665.

41 (D.C. 1868) 19 L.T. 324.

42 (C.A.) [1893] 1 Q.B. 77, 79.

43 (C.A. 1918) 42 O.L.R. 635, 43 D.L.R. 89.

44 (H.L.(E)) [1942] A.C. 130, [1941] 2 All E.R. 245.

reverses the *Osenton* case, citing *Scarborough R.D.C.* v. *Moore.*[45] *Simplicity Products Co.* v. *Domestic Installations Co.*[46] reinforces that, for it stresses the narrow scope of appeal from a referee in England, whereas in Alberta there is more power to question a referee's decision than anyone else's. And the *Osenton* case points out the convenience of the reference system where:

(a) the case is too long for a judge who has to go off on circuit from time to time (p. 135), or

(b) many inquiries or investigations must be made or many witnesses heard, at a place where no judges reside (p. 135), or

(c) experiments must be conducted in the presence of the court (pp. 135-6).

Knight v. *Coales*[47] also says there should be a reference where there are a large number of items to be tried, many of a small size (p. 301). The *Osenton* case puts other limits on the power to order a reference, but they appear to be based solely on specific words in the English statute, and have no counterpart in the much more general Alberta legislation above described. Indeed Viscount Simon says in the *Osenton* case that:

> "It is most undesirable to limit by unnecessary rulings the reasonable ambit of the work which official referees undertake and discharge so greatly to the public benefit and to the advantage of the administration of justice."[48]

Where there was a contract for a lease, the court directed a reference, with evidence of facts and conveyancing practice, to settle the terms of the lease, in *Re C.P.R. and Toronto.*[49]

In a builder's lien action the Saskatchewan Court of Queen's Bench would refer to the Registrar only matters of calculation, or at most strict proof of documents on narrow factual issues: *Haid Const.* v. *Tisdale Farm Eq.*[50] The *Haid* case suggests that the authorities on whether the referee (registrar) can be directed to hear oral evidence are inconclusive. But that decision is questionable. It relies upon Saskatchewan cases from

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45 (C.A. 1968) 112 S.J. 986.

46 (C.A.) [1973] 1 W.L.R. 837.

47 *Supra.*

48 P. 137 A.C.

49 (1899) 27 O.A.R. 54.

50 (1985) 45 Sask. R. 117.

the 1920s saying that conflicting evidence should not be referred. But they cite Chitty's Archbold 14th ed. on English *common law* procedure. *Cf. Qualley* v. *Day*.[51] So they may ignore the modern legislation. The modern English practice is far broader, as a host of English cases show. Indeed the old English Chancery practice must have been broader, for *Terry* v. *Hosking*,[52] held that the test for admitting new evidence to upset a fact finding by a referee was as strict as that on appeal from a judge. And of course *Osenton* v. *Johnson*,[53] takes for granted a much broader scope for references.

A reference to an engineer as to facts arising after trial was directed by the Court of Appeal and upheld by the House of Lords, in *A.-G.* v. *Birmingham etc. D.D.B.*[54] It is wrong to direct a big reference where it may prove irrelevant because liability may not be found: *Weed* v. *Ward*.[55]

Participating in the reference does not bar one from later attacking the order to refer: *Mainfroid* v. *Mainfroid*.[56]

(2) Constitutional Restrictions

(a) The Basic Rule

The only serious limitations on the power to refer a question lie outside of Alberta law. They are imposed by section 96 of the *Constitution Act*, 1867 (born as the *British North America Act*). That section says that only the Governor General in Council can appoint the judges of the Superior Courts. Long ago the judges in Canada deduced a corollary of section 96, that persons who are not federally-appointed judges cannot be given powers which are analogous to those powers which the judges of the Superior Courts exercised in Canada in 1867. But matters which were not exercised by anybody in 1867 can freely be given to non-judges. And matters which in 1867 were handled by persons who were not Superior Court judges, such as Magistrates, may also be given to persons who are not federally-appointed judges. The general rules in this area are reviewed in *Smale* v.

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51 (Sask. C.A.) [1929] 1 W.W.R. 200, 205-6.

52 *Supra.*

53 *Supra.*

54 [1912] A.C. 788, 802-03, 82 L.J. Ch. 45.

55 (C.A. 1889) 40 Ch.D. 555, 560, 58 L.J. Ch. 455

56 *Supra.*

Wintermute;[57] *Re Residential Tenancies Act*;[58] *Kapoor* v. *Sask. Rental App. Comm.*;[59] *cf. R.* v. *Trimarchi*.[60]

The courts have repeatedly held that the powers of Masters in Chambers to hear motions are constitutionally valid and do not violate the provisions of section 96 of the *Constitution Act, 1867*. The cases on that are numerous; they are listed in 2 Holmested and Gale 1431-38 (on 1960 Ont. R. 210 Ss. 2-29), and in Stevenson and Côté.[61] Masters can decide purely interlocutory questions, such as amending pleadings or regulating examinations for discovery. The courts have also held that Masters in Chambers can grant summary judgment because that involves a finding that there is no real issue to be determined and therefore nothing left for a judge to decide.

(b) Constitutional Cases on References

It is thus not surprising that the courts have upheld references. Merely referring a question to a referee who is not federally appointed does not violate section 96 of the *Constitution Act*. Canadian courts have so concluded because the referee's decision is not final; he only investigates and makes a report back to the court, which is free to disregard it or substitute its own opinion. (Indeed the English courts had held that a referee does not decide issues between the parties, but only facts: *Longman* v. *East*.[62]

The cases on point which bind the Alberta courts are decisions of the Supreme Court of Canada. An appeal from a referee's report on amount of damages (and its confirmation) was dismissed, and credibility was said to be for the referee alone, in *Booth* v. *Ratté*.[63] The second case is *Colchester S. (Twp.)* v. *Valad*.[64] There the report of a referee was not appealed in time. That not only barred the appeal, but also meant that the report was deemed by the Rules to be absolutely confirmed by failure to object. The court was bound by the fact findings of the referee and could not go behind them and examine the evidence leading to them; it could only see what legal result would flow from the fact

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57 (Alta. C.A.) [1986] 1 W.W.R. 268, 277 ff.

58 [1981] 1 S.C.R. 714.

59 (Sask. C.A.) [1988] 5 W.W.R. 273.

60 (C.A. 1987) 24 O.A.C. 379, 63 O.R. (2d) 515.

61 1st ed. R. 402 n; 2d ed., Pt. 29n.

62 (1877) 3 C.P.D. 142, 47 L.J.C.P. 211, esp. at 217, *per* Bramwell L.J.

63 (1892) 21 S.C.R. 637, 643.

64 (1895) 24 S.C.R. 622.

findings. The English cases to the contrary were held to be mistaken (pp. 624-6). This case seems to be little known. (Only one later case mentions it: *Stevenson* v. *Parks*.)[65] *Booth* and *Colchester* do not expressly discuss the constitutional point. The final binding authority (not mentioning *Colchester* v. *Valad*) is *A.-G. Ont.* v. *Victoria Medical Bldg.*[66] Its *dicta* confirm the validity of the reference procedure. However the case concluded that, because of section 96 of the *Constitution Act*, a referee can act only under a reference by a judge and must make a mere report subject to variation by a judge. A referee cannot give a final judgment exercising original jurisdiction. This decision of the Supreme Court of Canada is convincing and binding. See also *dicta* in *Godbout* v. *Lisson*.[67] The older cases are reviewed in Macklem & Bristow, *Mechanics' Liens in Canada*.[68] They are superseded.

On the role of an inspector under the *Business Corporations Act*, *cf. Re First Investors Corp.*[69] While he cannot make a final decision, he is not confined to finding facts. He can identify relevant issues and say whether there is evidence tending to show certain things.

The Newfoundland Court of Appeal held that a referee could not decide central issues in a suit, and that he is restricted to deciding side issues or matters of calculation, except where he merely reports back: *McGrath* v. *St. Phillip's*.[70] That case involved proper notice to dismiss an employee. The Newfoundland decision does not bind Alberta courts; and if it lays down a general proposition, it may well go a little too far. Moreover, the Newfoundland case appears distinguishable. In that case apparently the Master was not merely to suggest damages (i.e. the notice period) by report to the court; he was to settle the damages finally. Newfoundland Rule 40 seems to allow that in a case where "the amount of damages sought to be recovered is substantially a matter of calculation". The court's conclusion (para. 17, p. 279) was that the question "ought not to have been referred to a Master for his *final* determination" (emphasis added). So if he had merely been ordered to report back and let the judge make final decision, that would presumably have been acceptable. That point is dealt with little if at all in the *McGrath* decision. In Alberta (unlike many other jurisdictions), no statutes or Rules limit references to what is "substantially a matter of calculation".

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65 (1903) 10 B.C.R. 396.

66 [1960] S.C.R. 32, 21 D.L.R. (2d) 97.

67 (1987) 18 B.C.L.R. (2d) 156.

68 15-16 and 308 (4th ed. 1978).

69 [1988] 4 W.W.R. 22, 58 Alta. L.R. (2d) 38, affd. (C.A. 1988) 59 Alta. L.R. (2d) 334.

70 (1985) 51 N. & P.E.I.R. 276, 278.

The Supreme Court of Canada also upheld the power of a province to enact a Rule of Court allowing a judge to refer maintenance in a divorce suit to the Registrar to investigate and report, as he does not finally decide: *Zacks* v. *Zacks*.[71]

(c) Conclusion

It seems unlikely that the Supreme Court of Canada would generally eviscerate the reference procedure, given Ontario's heavy reliance upon it. It is most unlikely that any court would strike down vast hosts of proceedings carried on in Ontario for many generations. Nor is there any logical reason to do so.

Ontario's procedure deems the report of the referee to be automatically confirmed by the court without change unless one of the parties takes active steps to ask the court to change the report (Marriott and Dunn, Chap. 12, section 137). There is neither any such provision in the Alberta statutes or Rules, nor any good reason for one. Indeed the absence of such a provision and the need for an actual motion before the court to have a federally-appointed judge confirm and bring into force any report of a referee, goes a long way to removing any constitutional objections to any Alberta references, whatever their topic.

Therefore, the Alberta Rules and statutes on references appear to be constitutional.

(3) When to Order a Reference

Even the most timid view of the subject, taking the narrowest view of referees' powers outlined above, would leave plenty of work which a judge could validly give to a referee. A referee for example might:

(a) compute all the debits and credits, and sort out conflicting methods of computing interest and rebates, under a mortgage or partnership or any other complicated account (as is often done in Ontario: Marriott and Dunn, *Mortgage Actions in Ontario*, Chap. 10; Peppiatt and Linton 85-86); or

(b) determine who are subsequent encumbrancers or otherwise interested in the equity of redemption of mortgaged land (as used to be done in Ontario all the time: Marriott and Dunn, Chap. 5, and ss. 80-84); or

(c) investigate (maybe in the field) a large number of deficiencies or delays, and resulting damages, in a construction case; or

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[71] [1973] S.C.R. 891, 35 D.L.R. (3d) 420, 430-32, 10 R.F.L. 53.

(d) investigate and report on the pecuniary aspect of damages in a personal injury suit involving loss of wages, pensions, insurance, out-of-pocket expenses, and life expectancy; or

(e) investigate and report on the worth of loss of a going business (which has been done recently in *Mr. Broadloom (1968)* v. *Bank of Montreal*);[72] or

(f) determine whether a vendor can make good title; or

(g) look into the means and needs of a spouse seeking maintenance; or

(h) compute the lien fund and precise entitlements in a builders' lien action; or

(i) determine whether a party had retained a solicitor, and on what terms; or

(j) conduct a complicated judicial sale (as is very common in Ontario: Peppiatt and Linton 87-88); or

(k) try questions of exemptions from execution; or

(l) settle the list of creditors or claimants to the estate of a person or company being liquidated.

See other examples of actual English cases in Fay, 111 (para. 153).

E. The English Use of Referees

The English White Book[73] describes the work of English Official Referees as follows:

> "Without in any way being exhaustive it may be said that proceedings in the High Court which are usually regarded as official referees' business include the classes of actions which are concerned with the following matters, namely:
>
> (a) civil or mechanical engineering;
>
> (b) building and other construction work generally;
>
> (c) claims by and against engineers, architects, surveyors, accountants and other such specialised professional persons or bodies;
>
> (d) claims by and against local authorities relating to their statutory duties concerning the development of land or the construction of buildings;
>
> (e) claims between neighbouring owners and occupiers of land in trespass, nuisance and liability under *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330;

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72 (Ont. M. 1987) 66 C.B.R. (ns) 182.

73 para. 36/1-9/4.

(f) claims between landlord and tenant for breaches of repairing covenants;
(g) claims relating to the quality of goods sold or hired;
(h) claims relating to work done and materials supplied or services rendered; and
(i) claims involving the taking of accounts especially where these are complicated."

In para. 36/1-9/5 it says that many damage assessments are also referred to Official Referees.

F. Ontario's Use of Referees

There is a brief summary in Peppiatt and Linton 73.

(1) Builders' Liens

Ontario's use of referees in builders' lien suits is total and vast; but it is something of a polite fiction. In practice everything to do with a builders' lien matter is entirely in the hands of Masters in Chambers, whether it be motions, or a trial of a contested fact issue for a large sum of money, or deciding whether the work done on a particular building is defective or not. The only difference between judges and Masters is that Masters deal at the end with the substantive issues by a paper called a "report" not a "judgment". But as it is very rare for counsel to ask the court to modify it, in most cases it simply becomes the judgment.[74]

One Master hears all the Toronto builders' lien cases and so builds up some expertise in construction and its accounting.

(2) Divorces

Ontario has appointed two Family Law Commissioners who sit in Toronto. They act as mediators, and hold compulsory pre-trial conferences in divorce and matrimonial cases, and attempt to secure settlements out of court instead of trials. If the parties will not compromise and insist on going to trial, then the parties are given their choice of trial before a federally-appointed High Court judge or of trial before one of the two Family Law Commissioners. In practice many parties select trial before a Commissioner as it is likely to be heard much sooner than trial before a judge. Many of these trials before Family Law Commissioners are themselves settled out of court at some stage, but if the parties go the full route presumably the Family Law Commissioner will issue a report subject to confirmation by the court.

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[74] See an article by Harvey Kirsh in (1983) 4 Adv. Q. 479.

(3) Damages

In Ontario the trial judges do not like to get into complicated or difficult or lengthy damage assessments involving no particular point of law or principle. Indeed they seem to be willing to run the risk that some point of law or principle will later turn up in assessing damages, hoping that it will not. It is therefore extremely common for a judge in Ontario merely to find liability for the plaintiff and then direct a reference to a Master to assess damages. In many cases the parties simply agree that if the plaintiff should win, damages will be referred to a Master for assessment, and the judges routinely agree to that request. Indeed where the whole dispute consists of complicated accounts, the pre-trial judge may order a reference of the whole suit: *Canada Perm. Trust Co.* v. *Wortsman*.[75]

There is a second trial later before a Master in Chambers on the subject of damages. He follows much the same procedure as does a judge, but with more frequent adjournments and selection of trial times which are more convenient to all concerned. Because a Master in Chambers sits in one city and does not move around, he is readily available and counsel do not have to wait months until the same judicial officer is again available to hear something. Modern travel and communications still do not remove this judicial problem. A judge on circuit must be away many weeks a year, yet even a reference must be held live. So short adjournments and splitting trials pose a problem for judges, but not for referees.

(4) Mortgage Foreclosures

In the present economy, mortgage foreclosures are uncommon in Ontario. However, a few years ago when they were common, most such cases were heard by Masters. For some reason truly disputed facts are uncommon in Alberta foreclosures, but they were very common in Ontario foreclosures. That may be because more attention is paid in Ontario to the question of a mortgagee in possession. Very often Ontario parties would dispute the interests in the property or the precise amount owing, and so there would be a reference to the Master to find the amount owing.[76] That of course dovetailed nicely with the other obvious Chambers work involved with foreclosures.

G. Procedure Before Referees

The information available on the mechanics of finding disputed facts on references comes mostly from England.

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[75] (1978) 21 O.R. (2d) 846.

[76] See Chapters 7-12 of Marriott and Dunn, *Practice in Mortgage Actions in Ontario* (4th ed. 1982).

The *powers* of English referees are not instructive, as the English have no constitutional limits and have therefore made their referees judges and no longer bother with a reference or a report or its confirmation.[77] An English referee just gives a judgment.

The English *procedure* is more instructive. The English have developed some well thought-out procedures for determining complex matters, which are described below. We may note who are referees and what sort of work they do. It is significant precisely what procedure they follow so as to be able to achieve things and to get a decision more quickly and inexpensively, than is the case in ordinary litigation. That is covered in H below.

(1) Summons for Directions

This is a hearing at an early stage in a suit to plan and schedule the procedure in the suit.

In ordinary lawsuits this procedure used to be notoriously unproductive. Alberta abolished it 50 years ago, then smuggled back a remnant 20 years ago under the name of a pre-trial conference. But where the referee who will try the case holds the hearing and where the actual trial counsel attend, it has much more promise. English official referees find it advantageous to hold it four to six weeks before hearing, not just on the eve of trial.[78] Fay[79] discusses the procedure further and makes it appear that the procedure is still used by English referees, especially to inform themselves of the case before hearing, and to sort out issues and the order in which they should be heard and decided. The Ontario Master hearing general references also makes use of this procedure: Peppiatt and Linton 78-80 suggest a number of useful details in using this procedure.

Most matters heard by referees will be complex and so involve a host of papers and other records. Building disputes can be very voluminous. Fay points out (pp. 80 ff.) how important it is that the referee be selected before the hearing, and that he meet with the parties beforehand and induce them to agree on and organize their papers. That will eliminate proof of what is not disputed, duplication of papers, duplication of numbering or indexes, delay in finding papers, and lost or overlooked papers.

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77 Fay, *op. cit., supra*, at 30-33; White Book 36/9.

78 Fay, pp. 80-81.

79 Chap 8. (pp. 52-58).

(2) Scott Schedules

Pleadings in a complex case are often insufficient, or difficult to collate mentally. They often highlight minor or nonexistent disputes and tend to conceal the real fact disputes. Some cases have many issues, e.g. in a building dispute, or claim for a running account of goods or services. Then it is almost essential to bring together in one place a summary of the pleadings about each issue (such as each alleged building defect or shipment of goods) and the amount involved. That process will reveal whether the pleadings are inadequate, and give a framework into which to insert more particulars. It may even accommodate (with extra columns) multiple parties' pleadings. This will be of far more use if it reflects the parties' real arguments, and not *pro forma* pleadings filed at an early stage without any later revision. Overall defences such as limitations or lack of liability in contract, are not inserted. The amounts involved are without prejudice to the denial of liability. This is usefully put together in a chart or grid called a Scott Schedule. A simple example is given in Appendix C.

The Scott Schedule is used to make the parties address the specific issues, and to give a framework to run the hearing.

(3) Evidence

A referee may take a view. (In Alberta, see R. 424.) An inquiry need not be by the referee's taking a view; he may hear evidence: *Baroness Wenlock* v. *R. Dee Co.*[80] Indeed a referee must hold a formal hearing with evidence: *A.-G.* v. *Birmingham etc. D.D.B.*;[81] *Norton* v. *Norton*.[82] It may be different if the parties consent to the expert's taking a view and making his own investigations and experiments: *A.-G.* v. *Birmingham*; but *cf. Norton* v. *Norton* (not citing *A.-G.* v. *Birmingham*). Alberta Rule 425 seems to confirm that.

If the evidence on one side is affidavits (proving accounts), the other side has a right to cross-examine upon the affidavits: *Horlick* v. *Eschweiler*;[83] *Townend* v. *Hunter*.[84]

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80 (C.A. 1887) 19 Q.B.D. 155, 158.

81 (H.L.(E)) [1912] A.C. 788, 803-04, 810-11, 82 L.J. Ch. 45.

82 (B.C.C.A. 2 Feb. 1989) [1989] B.C.J. #127, at 49, 63.

83 (1906) 11 O.L.R. 140, 7 O.W.R. 43.

84 (Ont. 1883) 3 Can. L.T. 310.

There is no need for the referee to hear evidence whose admissibility is disputed; he may rule on its admissibility and hear only what he considers admissible.[85]

In Ontario the Master who hears most of the damage references says that he has tried hearing references using a procedure which separates individual issues, hearing all the evidence on one issue before going on with another. (So do the English referees where there are many items: Fay, p. 87.) He says that he does that a fair amount of the time, but probably somewhat more of his references are conducted under the usual court system. The usual system is to exhaust all the evidence on all issues with one witness before the court goes on to the next witness, and so forth. In cases where that is done, it would appear that the Ontario procedure on references is identical to the procedure in an orthodox trial except for the fact that it is often broken up into blocks of a few days each.

Fay points out how often a reference involves expert evidence. At times (he says) it is useful for the competing experts to stage a joint inspection of the place or thing in issue, e.g. in a defective construction case (p. 61, para. 79).

Fay also points out (pp. 62 ff.) that at one time much use was made of an official court expert (as Alberta's R. 218 allows) and it gave satisfaction, but the practice disappeared for reasons unknown.

(4) Discovery

The judge may order discovery of documents ancillary to the reference, before or after the reference is ordered: *Re Leigh Est.*[86] At one time the referee himself could not order discovery: *Dauvilliez* v. *Myers*.[87] Often an English referee sets a specific timetable for discovery of papers: Fay 55.

(5) Accounts

There is an extremely valuable account of different methods which the English courts have used to take accounts, formal or informal, and of the accounting staffs which chief clerks acting as referees have used, in *Re Taylor*.[88] It distinguishes between cases where exact records have been kept by one party so that a proper account can be drawn up, and cases where proper records have not. It describes how to collate oral evidence

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[85] Cf. *Re C.P.R. and Toronto* (1899) 27 O.A.R. 54, 63.

[86] (1876) 4 Ch. D. 661, 46 L.J. Ch. 60.

[87] (1881) 17 Ch.D. 346.

[88] (1890) 44 Ch.D. 128, 59 L.J. Ch. 803, at 805 ff.

with incomplete records, sitting continuously, and so to produce an account. The court affirmed this procedure. It was said superior for a long complicated account, in *Rochefoucauld* v. *Boustead*.[89]

Other clues as to how to examine accounts are given in Peppiatt and Linton, 85-87.

(6) Adjournments

Trial judges are extremely reluctant to split or postpone a trial; they like to keep it moving. So a long trial will go on for weeks, breaking only for weekends. But references often go for a few days at a time and are then adjourned for a couple of weeks. That does not seem to bother anybody concerned, it obviously is easier to schedule, and has still more advantages for counsel and witnesses.

(7) Inquiry and Report

In a complex case argument by all counsel is very valuable, and cannot be avoided. If there are no pleadings to frame issues properly, evidence which may harm a party should be put to him, but it is sufficient to do so during his evidence (even recalling him if need be). Tentative findings are unwise: *Re First Investor's Corp.*[90]

The referee must ordinarily decide the question put to him, not a different question which he thinks that the law and the evidence he has heard make more useful or legally relevant: *Baker* v. *Dumaresq*.[91]

Apparently at one time English legislation contemplated a very brief certificate by the referee, much like a jury's verdict. It would only give the result, without reasons: *Walker* v. *Brenkell*.[92] Little is given in the *Walker* case by way of reasons, and it is hard to see the rationale for that. Surely reasons let counsel and the judge see whether to accept the report or not. A reference *ex hypothesi* involves a matter which is not self-evident. A much less categorical view was taken by one member of the C.A. in *Miller* v. *Pilling*.[93] If a matter of account is referred to a referee, it is not sufficient for him merely to state the

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[89] (C.A.) [1897] 1 Ch. 196, 213.

[90] (C.A. 1988) 63 Alta. L.R. (2d) 69.

[91] *Supra* at 672.

[92] (C.A. 1883) 22 Ch.D. 722, 52 L.J. Ch. 596.

[93] (C.A. 1882) 9 Q.B.D. 736, 51 L.J.Q.B. 481.

result; he must set out the account showing what items he allowed and what items he disallowed. It all depends on the wording of the order and one cannot lay down a hard and fast rule, but merely referring an account calls for information for the court and just a net sum would be of little assistance: *Burrard* v. *Calisher*.[94] The referee need not give detailed reasons if he does not want to: *Booth* v. *Ratté*.[95]

By the 1930s, Ontario referees were giving full reasons in their reports: *Baker* v. *Dumaresq*.[96] The present Ontario practice in mortgage foreclosure references is described in Marriott and Dunn at the beginning of Chapter 12.

On a reference to a valuator, he must strictly find what is left to him and it is not enough for him merely to say that there is no damage beyond the amount which had been paid into court. However though he did not dispose of all the matters laid before him (the question of exactly what the damage was), nevertheless his certificate was good and valid as far as it sent and allowed the court to enter a verdict for the plaintiff with nominal damages (previously the jury having been instructed to find for the plaintiff subject to a reference to a valuator to find the amount of the damage): *Sowdon* v. *Mills*.[97]

It may well be that the explanation lies in the difference between sending a matter away for final decision (which can be done in England but not Canada), and merely asking for a report which the court need not accept; *cf. Cruikshank* v. *Floating Swimming Bath Co.*[98]

Though a referee may submit questions of law back to the court for it to decide, he need not do so: *Kesteven* v. *Gooderham*.[99]

If the court sends a matter out for inquiry and report back for confirmation, there is no question of appeal; that would arise only where after formal judgment the court asks the referee finally to settle the amount: *Mainfroid* v. *Mainfroid*.[100] It was held in *Dunkirk*

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94 (1882) 51 L.J.Ch. 223.

95 (1892) 21 S.C.R. 637, 643.

96 *Supra.*

97 (1861) 30 L.J.Q.B. 175.

98 (D.C. 1876) 1 C.P.D. 260, 45 L.J. C.P. 684.

99 (1861) 20 U.C.Q.B. 500.

100 (Alta. C.A.) [1926] 3 W.W.R. 617, 4 D.L.R. 1060.

Colliery Co. v. *Lever*[101] that if the judge thinks the referee proceeded on a mistaken principle, he must send the matter back or try it on fresh evidence, and he cannot look at the transcript of evidence before the referee and vary it. That is surprising, but it may well be a case on the other type of procedure: to get a verdict, not for reference and report subject to confirmation. The allusions there to juries and criticism of giving reasons confirm that. So the *Dunkirk* case is not really on point. The Court of Appeal later held that the court may look at the evidence to see whether or not they should confirm the report of the referee: *Walmsley* v. *Mundy*.[102]

Where there is a motion to confirm the report of a Master (finding value of shares) and confirmation is opposed, an Ontario judge recently held that it should be treated as being substantially an appeal from the report and he should not rehear the matter or interfere with the result, unless there was an error in principle or an absence or excessive jurisdiction or some patent misapprehension of the evidence. Indeed the award should not be disturbed unless it appeared to be unsatisfactory on all of the evidence, he said. It was open to the referee to find a figure between the figures chosen by the rival experts: *Jordan* v. *McKenzie*.[103]

Once the court feels that the referee's answers have laid enough of a factual foundation, then it may give judgment: Rr. 334, 335.

(8) Appeal

This is covered in part D.(1).(d) above. For reasons there given, such appeals are likely to be rare.

H. Suitable Referees

(1) As Things Now Stand

(a) A Master in Chambers

This is discussed above in D.(1)(b).

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101 (C.A. 1878) 9 Ch. D. 20.

102 (C.A. 1884) 13 Q.B.D. 807, 813, 814.

103 (1987) 26 C.P.C. (2d) 193.

(b) Clerk or Deputy Clerk of the Court

See D.(1)(b) above. A deputy clerk or taxing officer used to taxing costs or passing accounts in Surrogate Court might be well suited to certain very detailed but otherwise straightforward specific cases. If a taxing officer is a deputy clerk, he might be appropriate, but in general this is not a preferable alternative.

(c) Federal Winding Up Cases

Rule 808 refers to "an officer of the court". That would cover a taxing officer or a sheriff or deputy sheriff or a clerical official in the court. It would cover accounting staff in the court. There would not be much scope for this but a certain individual might have particular skills. To remove any doubt, this would cover a Master.

(d) Surrogate Matters

In surrogate matters, "an accountant or other skilled person" would be very suitable to investigate accounts. The *Administration of Estates Act* section 48(3) permits such an appointment.

(2) With an Order in Council by the Province

(a) Provincial Court Judge

Using a provincial court judge might have advantages in a smaller centre where there is no resident Queen's Bench justice, especially those centres where the Queen's Bench sits infrequently or never. Some Provincial Court judges might like a chance for some more civil litigation. Provincial Court Judges are official referees in British Columbia: *Supreme Court Act*, section 47(1). England has some "part-time provincial official referees". Such a step might be better implemented on an *ad hoc* basis rather than as a blanket matter. But a blanket Order in Council *permitting* it might be a good idea. Then it would be left to the discretion of the Court of Queen's Bench in individual cases when or to whom they directed references.

(b) Engineer or Physician

The use of specially-trained experts such as engineers or scientists or physicians is largely an unexplored question in Alberta, though it is done from time to time in British Columbia.

There are some lawyers with P.Eng. or B.Sc. or M.Sc. qualifications. One of them might accept a permanent appointment. Part-time referees who are practising lawyers

(especially those in partnerships) could generate difficulties for a number of reasons, such as friendships with other practising lawyers or conflicts of interest. But that has apparently worked successfully without such problems in the *Principal Group* inquiry. And commission counsel to various judicial inquiries have always been lawyers in private practice. It is easier to recruit individuals specifically for their background.

An engineer would much more readily understand any kind of scientific evidence than would someone with only legal training. But presumably few engineers are familiar with the litigation process. One might find an engineer or chartered accountant or other expert non-legal professionals who had sat for some time on a discipline tribunal. It would be worth trying to train such experts in litigation. One need not offer such a person tenure, so one could experiment.

Any part-time referee might fear suits for negligence, given the recent Supreme Court of Canada decision from Quebec in *Sport Maska* v. *Zittrer*.[104] But that was a case of a valuator appointed to fix an inventory before any dispute arose. Arbitration of an existing dispute was specifically distinguished. *Romaniuk* v. *R.*[105] should also go a long way to remove that danger.

(c) Chartered Accountant

(i) Accounting background

There are many advantages to giving accounting questions to a trained accountant; not all are obvious. Such a professional may well be able to streamline the gathering and arrangement of evidence, suggesting easier, more efficient methods of computation and more effective testing methods.

One national firm of chartered accountants stated in a private letter on this topic that chartered accountants' training and experience would help them as referees in a suit "involving financial transactions, business or asset valuations, interpretation of accounting rules, financial disclosure, business interruption claims, income tax, bankruptcy and insolvency, receiverships or areas where specific industry accounting expertise is required".

On the other hand, a trained accountant would probably bring with him no familiarity with the litigation process unless he happened to have been previously involved with a number of discipline hearings or lawsuits in some capacity, e.g. sitting on a discipline tribunal.

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104 [1988] 1 S.C.R. 564.

105 (Alta.) [1988] 4 W.W.R. 107.

A lawyer with accounting qualifications might be suitable for certain references.

(ii) Valuation background

One should probably not refer valuation questions to someone trained merely as an accountant, unaided by expert testimony. But many big accounting firms include professional valuators of various kinds who might be used as referees. They would not only readily understand expert testimony, but could give useful pre-hearing instruction on the most efficient way to frame the evidence, winnowing down the facts and issues to what is really material and disputed.

(iii) Insolvency background

In Alberta many chartered accountants have gained considerable exposure to the litigation process by acting as trustees in bankruptcy or as receivers. Such persons combine knowledge of accounting and of legal procedure. They are accustomed to the different ways that chartered accountants and lawyers and business people think and talk. They are used to dealing with complex and disorganized or unreliable financial records. Some have particular training and experience in investigation. Such a person might become a very good referee, especially after he handled a few references.

(iv) Litigation support background

The same might be true of members of accounting firms' litigation support departments as those in (iii) above, but they may be fewer in number. Some chartered accountants work in "forensic accounting" and are used to being expert witnesses in criminal and civil courts. Some of them might also become good referees.

I. Advantages and Disadvantages of References

This part deals with when a reference to a referee of part or all of a case, from a motion or trial would or would not produce real practical benefits.

(1) Preliminary

Some topics are disliked by judges, e.g. many amounts and calculations, especially in small cases. Judges may dislike ongoing or continued cases or being saddled for a long time with one case. Yet some cases cannot be heard consecutively, at least without great expense and inconvenience.

References would allow one to eliminate from the rota judges who dislike the topic or the process or its size or feel that they are unsuited to it. In theory this could be done

instead by someone's picking and choosing judges, or establishing specialized divisions in the court, but those would involve serious practical problems, including scheduling; see below.

(2) Referee is More Suitable to Hear Such an Issue

Expertise can be built up on the job when there is some specialization. That can be accomplished by use of the same legally-trained referee (e.g. a Master) for similar types of cases, e.g. builders' liens. Some expertise would come rapidly, especially if the area was congenial to the individual. The related law would become familiar. One need not offer tenure as a referee, so one could experiment. There is a body of Masters to draw from and so it is likely one would by experiment or volunteering find one suitable for and happy with the work. Some brief training might be possible.

(3) A Referee Does not go on Circuit and Can Keep Charge of a Case and Hear it in Stages

Greater freedom to schedule seems to be preferred by lawyers, and is a legitimate and sufficient ground for holding references. What are some specifics of that?

(a) Less waiting time than trials

This is not a real problem in Alberta today, though it may be in a few years if the economy booms again.

(i) If a backlog of cases awaiting trial were a chronic situation, and if it is possible to name more judges, then this would be a poor reason for having references; one should appoint more judges instead. If more judges cannot be appointed, then one must confine judges to more important things, or to things which only they can do, and references would be an important part of that solution.

(ii) If a backlog is an intermittent situation, e.g. based on the economic cycle, or seasonal (so long as the cycle is not very short and predictable), then it would be a good reason to use referees. There is more scope to expand and contract the number of referees, e.g. part-time ones, sharing duties, use of retired people, etc.

(b) One referee can follow the same matter over months or years

If one Master heard all the motions in a complex suit, there could be efficiency in having him available to hear a reference in the same case. Note part G(1) above on the summons for directions (or pre-trial conference) and its advantage in a complex case with continuity of supervision.

Since trial judges often go on circuit or often switch duties, this is a good reason to have references.

(c) One referee can hear a matter intermittently, i.e. in installments with gaps.

(d) Once a judge is seized with a trial even if he wants to send part or all to someone else for any reason, it is unheard of to send it to another judge. But a reference to a non-judge is permissible.

(e) A referee may live or commonly sit in a smaller centre.

Note that courts can only sit at times and places set in advance by the Cabinet, whereas R. 424 lets a referee sit anywhere.

(4) Are Referees Cheaper and Faster in Small or Interlocutory Contests?

Referees are probably not cheaper in big trials for many reasons. An expert would have to be paid, whereas a judge is already funded (by the Federal Crown).

But one must not ignore the potential for referees in interlocutory motions or small lawsuits! This is the important overlooked issue. Contested facts in motions and small lawsuits are a dilemma. At the present the parties will beg the Master to decide a small factual dispute because it is uneconomical to send it to trial. The solution is to have him hear it as a referee. A reference order could legitimize many present summary dispositions of them, e.g. in smaller builders' lien cases.

Some matters take too much of the time of judges who should be doing work which requires a judge; it would be better to have them heard by a Master or other referee. For example, even if one could have a large number of additional Queen's Bench judges appointed, one would not use them for all routine tasks, e.g. to tax costs. That problem is admitted; the issue is where to draw the line.

(i) procedural or administrative matters not having much ultimate effect (motions);

(ii) small lawsuits: or small clearly severable fact issues worth under (say) $2,500;

(iii) matters or issues which would take too much time of a judge relative to the amount (or the issues?) in question. E.g. an accounting of transactions occurring over many years, which might take days and days to hear;

(iv) matters involving little dispute of law, or principle, or credibility.

We have Masters to hear most types of motions, thus solving problem (i). But the only solution to problems (ii), (iii), and (iv) is a reference to a Master or referee.

This is a very important way to legitimize fact finding in smaller suits either on motion or by summary or truncated trials.

(5) Give Variety

Giving Masters or even taxing officers who are clerks or deputy clerks some references would give them a more rounded diet and valuable experience.

(6) Give Judicial Training to Certain Engineers, Accountants, Etc.?

Some experience of the litigation process and of judging would make them better expert witnesses. They would then be available to act on public inquiries and make them better disciplinary judges within their own professional bodies.

J. Conclusions

(1) Motions or Taxations

The Courts should use references to get prompt findings on contested facts arising on an interlocutory motion, especially smaller suits or smaller fact issues. If the motion is before a Master, the parties should be told to get a quick consent order for a reference. If it is before a judge, he should make such an order. Then the Master can hear all of the motion or taxation, even if contested facts or oral evidence are involved.

(2) (Parts of) Trials

(a) Damages

It is doubtful that there is ordinarily much advantage to having a referee (not the trial judge) try damages. But in certain individual cases it could be handy where expense or expertise is involved, or scheduling or place of hearing or inspection is a real factor.

(b) Technical areas

Where contested expert evidence is involved but credibility or principle is not involved, there is great potential benefit in a reference to a referee with appropriate technical training. But this is an unknown area outside British Columbia. It would depend a lot on the individuals to be used, and how well they could handle litigation. One should go slowly step by step on an experimental basis. One should start a pilot project to do that

and to give the experience of being a referee to a few technically skilled people. They might be willing to reduce their normal charges for the first few references while they built up experience.

(c) Other cases

In theory, a reference offers much scope for improved or adapted procedure. In England that is apparently done. In Ontario there seems to be little improvement in procedure in general references (except for flexible sittings), though Ontario matrimonial cases certainly assume a much more mediative and conciliatory role than a fact-finding one.

So improved procedure seems to be more a potential than an existing reason for references.

(3) Other

There is only one legislative change which Alberta really needs. Even if the parties agree on a certain individual as referee, and are willing to pay his fees, it takes an Order in Council to name him as an official referee (unless he is a Clerk or a Master). Whether there can be a reference in ordinary litigation (involving no estate or winding up) to one who is not an official referee is unclear. There should be a Rule of Court saying a reference or accounting may be to an official referee or to anyone else agreed on by the parties. One might use as a precedent sections 71, 72 of the Ontario *Judicature Act* (as set out in Appendix F).

(4) Summary of Conclusions

(a) Alberta courts need not use a judge or jury to decide everything. They now can have questions decided tentatively by someone else.

(b) More use should be made of that existing power in selected suitable cases.

(c) The courts should experiment with the use of technically-trained referees such as chartered accountants.

APPENDIX A

ALBERTA RULES AND STATUTES ON REFERENCES AND ACCOUNTS

The British North America Act, 1867

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,--

. . .

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Court of Queen's Bench Act

11 A master in chambers is an official referee for the purposes of a reference by a judge.

Administration of Estates Act

48(3) If accounts submitted to the court are intricate or complicated and, in the opinion of the court, require expert investigation, the court may appoint an accountant or other skilled person to investigate and to assist it in auditing the accounts, and the costs thereof shall be borne by the estate or by the person that the court directs.

SURROGATE RULES

37. (1) Whenever during proceedings leading to or incidental to an accounting it appears to a judge, having regard to the whole or any part of the proceedings, that the interests of any parties can be classified, the judge may require the parties constituting each or any class to be represented by the same solicitor and direct which parties may attend all or any part of the proceedings.

(2) Whenever the parties constituting any class cannot agree upon the solicitor to represent them and whenever any one of the parties constituting a class declines to authorize the solicitor so nominated to act for him and insists upon being represented by a different solicitor that party shall personally pay the costs of his own solicitor unless otherwise ordered.

(3) Whenever in any proceeding incident to an accounting the same solicitor is employed for two or more parties the judge may at his discretion require that any of those parties shall be represented by a different solicitor and whenever in any such proceeding any party is unrepresented the judge may at his discretion nominate a solicitor to represent that party to the end that all parties are, in the opinion of the judge, satisfactorily represented.

(4) During any accounting before the clerk of the court or before any other person to whom the audit has been referred by a judge,

(a) any party interested may require the auditing officer to refer any disputed point to the judge for a ruling and direction and the auditing officer shall forthwith obtain a ruling and direction, or

(b) the auditing officer may of his own initiative obtain the judge's ruling and direction with respect to any point in doubt or dispute.

38. (1) Upon the completion of the audit, if before the clerk of the court or before any other designated person other than the judge, the clerk of the court or other person shall in writing report to the judge and thereupon in such cases and in all cases in which the audit has been made by the judge himself the accounting party or any party interested may after notice (satisfactory to the judge) to all interested parties apply to the judge for an order allowing and passing the accounts in whole or in part.

(2) The judge may

(a) confirm in whole or in part or vary or amend or refer back the report to the clerk of the court or other auditing officer, giving such further directions as appear necessary;

(b) decide any matters still in dispute or direct any issue respecting them;

(c) fix and give directions respecting remuneration and compensation to any executor, administrator, guardian or trustee;

(d) direct payment of debts or charges, determine beneficiaries and their several interests and direct distribution;

(e) direct the substitution for or reduction of any bond;

(f) direct payment to the Public Trustee of any moneys to which a minor, missing person or person outside Alberta is entitled;

(g) direct payment to the Public Trustee or to a committee of any moneys to which a mentally incompetent person is entitled;

(h) allow and direct payment of costs and generally dispose of all matters incidental to the administration down to a date to be stated in the order.

[Alta. Reg. 185/83]

82.(7) The court hearing an application under this Rule may give directions, including directions as to the taking of accounts and the making of inquiries.

152. If a sole defendant has, or all the defendants have, been noted in default, the plaintiff may

(a) apply *ex parte* to the court for judgment, and the judge hearing the application may
  (i) upon proof of the plaintiff's claim by affidavit or otherwise, give final judgment or direct an accounting, or
  (ii) set the matter over for a hearing on notice, and notice shall be given to a defendant in the same manner as hereinafter provided on assessment.

or

(b) set the matter down for assessment, giving at least 10 days notice of the date set for assessment.

[Alta. Reg. 124/73]

159(5) Where the court is satisfied that the only genuine issue is as to amount, it may direct that the action proceed only to assess the amount or may direct a reference or accounting.

161.(1) At any time after the issue of the statement of claim, on special reason for urgency being shown, the plaintiff may, by leave obtained, ex parte, serve a notice of motion for judgment.

(2) The court giving leave may give special directions as to the service of the notice of motion.

(3) Upon the hearing of the motion the court, instead of either granting or refusing the application, may give such directions for the examination of either parties or witnesses, or for the making of further inquiries, or with respect to the further prosecution of the suit or otherwise as the case may require, and upon terms as to costs.

332. (1) Where a judgment or order is made directing an account of debts, claims or liabilities or an inquiry for heirs, next of kin or other unascertained persons, unless otherwise ordered, all persons who do not come in and prove their claims within the time fixed for that purpose by the

court, shall be excluded from the benefit of the judgment or order.

(2) The court may direct that notice of the time so fixed be given by publication in a newspaper or newspapers to be specified by him and unless otherwise directed no other notice is required.

334. (1) Where accounts, inquiries or issues have been directed or issues or questions of fact are to be determined, the plaintiff may apply, on notice, for judgment as soon as the issues or questions have been determined.

(2) If he does not so apply within 10 days after his right to do so has arisen, then any defendant may apply, on notice, for judgment.

335. Where issues have been ordered to be tried or issues or questions of fact to be determined and some only of the issues or questions of fact have been tried or determined any party who considers that the result of the trial or determination

(a) renders the trial or determination of the others of them unnecessary, or

(b) renders it desirable that the trial or determination thereof should be postponed,

may apply, on notice, for judgment or for a postponement or for other directions.

336. Except where it is provided that judgment may be obtained in any other manner, judgment may be obtained by motion for judgment.

337. Upon a motion for judgment the court may draw all inferences of fact not inconsistent with the finding of the jury and, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute or any of them or for awarding any relief sought may give judgment accordingly, or may, if it is of the opinion that it has not sufficient material before it to enable it to give judgment direct issues or questions to be tried or accounts and inquiries to be taken.

403. All masters in chambers, clerks or deputy clerks of the Court of Queen's Bench and such other persons as are appointed by the Lieutenant Governor in Council are official referees for the purposes of references by the Court.

[Alta. Reg. 338/83]

418. The court may at any stage in an action direct that necessary accounts or inquiries be taken or made.

419. If it appears to the court that there is undue delay in the prosecution of any accounts or inquiries, the court may require the party having the conduct of the proceedings or any other party to explain the delay and may then make such order for staying the proceedings or for expediting them or for the conduct thereof and for costs as the circumstances require.

420. Where the court orders an account to be taken it may by the same or a subsequent order give directions with regard to the manner in which the account is to be taken or vouched.

421. (1) Where an account has been ordered to be taken, the accounting party shall make out his account and, unless the court otherwise directs, verify it by an affidavit to which the account must be exhibited.

(2) The items on each side of the account shall be numbered consecutively.

(3) Unless the order for the taking of the account otherwise directs, the accounting party shall lodge the account with the court.

(4) A copy of all affidavits filed and a copy of the account shall be furnished to the opposite party within five days of the filing of the documents.

(5) The court may direct that vouchers be produced at the office of the solicitor of the accounting party or at any other convenient place and the opposite party and his solicitor may examine and make copies of them.

422. Any party seeking to charge an accounting party beyond what he has by his account admitted to have received shall give notice thereof to the accounting party, stating, so

far as he is able, the amount sought to be charged and the particulars thereof.

423. In taking any account all just allowances shall be made without any direction to that effect.

424. Where any question in an action is referred to a referee he may, subject to the order of the court, hold an inquiry at, or adjourn it to any convenient place, and have any inspection or view.

425. Proceedings before a referee shall, as nearly as circumstances admit, be conducted in like manner as the like proceedings before a judge.

426. (1) The report of the referee shall be made to the court and a copy thereof served on the parties to the reference.

(2) When the report of the referee has been made an application to accept or to vary the report or remit the whole or any part of the question may be made on 10 days' notice to all parties to the reference.

(3) On the return of the motion the court may
(a) adopt the report in whole or in part, or
(b) vary the report, or
(c) require an explanation from the referee, or
(d) remit the whole or any part of the question referred to the referee for further consideration by him or any other referee, or
(e) decide the question referred to the referee on the evidence taken before him either with or without additional evidence.

499. (1) Except in the case of interlocutory matters arising under the *Divorce Act*, a person affected by a certificate of a referee may appeal therefrom to a judge of the Court of Queen's Bench.

(2) Repealed by Alta. Reg. 338/83.
[Alta. Reg. 316/72; 124/73; 338/83]

500. (1) An appeal from a master in chambers or from a referee shall be by motion on notice setting out the grounds of appeal.

(2) The notice of motion shall be served within 7 days and returnable within 14 days after the judgment or order is entered and served or the certificate is given, except that if the party entitled to appeal has not appeared by a solicitor or filed his address for service with the clerk the notice of appeal shall be served within 7 days and returnable within 14 days after the judgment or order is entered.

[Alta. Reg. 338/83]

719. Every clerk and deputy clerk in addition to any other duties which he may be required by law to perform, shall:

. . .

(k) tax costs and act as examiner and as referee when required;

808. When a winding-up order has been made the court may by the said order or by subsequent order refer and delegate to a master in chambers or an officer of the court any of the powers conferred upon the court.

APPENDIX B

BIBLIOGRAPHY

Marriott and Dunn, *Practice in Mortgage Actions in Ontario* (4th ed. 1982)

Edgar Fay, *Official Referees' Business* (1983) (There is a second edition also.)

McKeague and Voroney, *Queen's Bench Rules of Sask. Annotated*

Peppiatt and Linton, *Practice on Motions and References* (1988)

(English) *Supreme Court Practice* (White Book)

Taylor and Ewart, *The Judicature Act and Rules ... with Notes* at pp. 97-97 and 292-4 (1881)

APPENDIX C

SCOTT SCHEDULE

Scott Schedule in claim by Building Owner against Main Contractor (First Defendant), Sub-Contractor (Second Defendant) and Architect (Third Defendant)

[Style of Cause]

1 Item no.	2 Para. no. in Specification	3 Plaintiff's case	4 Against which Def't	5 Plaintiff's damages	6 First Defendant's comments	7 Second Defendant's comments	8 Third Defendant's comments	9 For O.R.
1	100	Roof glazing to Bay 3 improperly sealed; roof leaks.	1st and 2nd	£5,000	Work done by Second Defendant, whose comments are adopted	Work was left watertight	N/A	
2	105	Doors from office 5 to offices 6 and 7 foul each other when opened; design defect.	3rd	£100	N/A	N/A	Denied: door from office 5 to office 6 was hung wrong way round	
3	110	1/2" subsidence in west wall of garage due to insufficient foundations	1st and 3rd	£1,250	Foundations as per drawings; design defect.	N/A	18" footings as designed were sufficient; inferior concrete mix used by 1st Defendant	
4	etc.							

APPENDIX D

RESEARCH DONE

(1) Reading

I examined the relevant Ontario statutes and rules (the old Ontario rules and the new ones). A number of decided Canadian cases on the subject have been read and they are further described in Part D. I have also read the books in the bibliography. In addition some miscellaneous material on referees, part of an article from Australia, has been kindly furnished by some of the Masters in Ontario and has been read. Many cases on references have been read, especially those cited by *Corpus Juris*. They are hard to find elsewhere, especially as the newer blue- and green-band editions of The Digest (formerly English and Empire Digest) now omit them, and the scarce first edition digests them under "Arbitration".

(2) Discussions

I had discussions with:

(a) the Chief Justice and the Associate Chief Justice of the Court of Queen's Bench of Alberta;

(b) several Alberta Queen's Bench justices;

(c) Master Funduk;

(d) (briefly by telephone) one of the judges of the High Court in Ontario;

(e) (at great length) several of the Masters in Ontario who act as referees;

(f) (at great length) the two Family Law Commissioners in Ontario;

(g) (both in person and over the telephone) a number of Ontario lawyers who have extensive practice with lengthy and complicated references in Ontario;

(h) (in person) several chartered accountants from Touche Ross and Price Waterhouse in Edmonton;

(i) the Chief of Justice of the Supreme Court of British Columbia.

(3) Correspondence

I have also carried on some correspondence with the above-mentioned people and others, and has received submissions from two national accounting firms.

(4) Observing

I have watched some hours of argument in the later stages of *Mr. Broadloom (1968)* v. *Bank of Montreal*,[106] and looked at transcripts of the evidence taken before the Master/referee in its earlier stages.

[106] (Ont. M. 1987) 66 C.B.R. (ns) 182.

APPENDIX E

PREVIOUS USES OF REFEREES IN ALBERTA

1. Account between solicitor and client: *Calvert* v. *Forbes* (#3) (1895) 3 Terr. L.R. 307.

2. Reference by Court of Appeal of damages in investment deceit case: *Ferguson* v. *N.W. Brick & Supply Co.* (Alta. C.A.) [1931] 2 D.L.R. 275, 281-82.

3. Accounts and inquiries after liability found: *Molchan* v. *Omega Oil & Gas* (1984) 30 Alta. L.R. (2d) 161, 172, 51 A.R. 54, 62.

4. Firm accounts: *Jamieson* v. *Jamieson* (Alta.) [1921] 1 W.W.R. 63; *Dlin* v. *Fedoration* (M. 16 Sep.) [1985] A.U.D. 751, JDE 8303 18171.

5. A Master said that he could direct an accounting of payments in a foreclosure case, under R. 159(6), in *Johnson* v. *Morrow* (M) [1982] A.U.D. 1096, 1100 (JDE 8103 17698).

6. Veit J. referred to Quinn M. the value of land being foreclosed, and he reported, in *Lutheran Life Ins. Socy.* v. *S.E. Ind. Rentals* (29 July, 4 Aug.) JDE 8703 21909.

7. On a suggested reference as to value of land being "foreclosed" under an agreement for sale, *cf. Geo. Wimpey Can.* v. *Groveridge Imp. Props.* (M. 3 June) [1986] A.U.D. 339, JDE 8203 31121.

8. Land value and manner of sale were referred in *Westlock Foods* v. *Bonel Props.* (1981) 33 A.R. 1, 10-11.

9. The Court of Appeal rejected a collateral attack on the court appointment of an independent appraiser to set the value of private company shares, in *Bain Insulation & Supply* v. *Ginther* (Nov. 1, 1988) Edm. 8703 0539 A.C.

10. 1988 saw a very lengthy hearing by William Code Q.C., a court-appointed inspector who was ordered to investigate and report back to the court on the affairs of First Investors' Corp. and related companies. In many respects it was a reference.

APPENDIX F

FORMER ONTARIO *JUDICATURE ACT* AND RULES

References to Referees

71. (1) Subject to the rules and to a right to have particular cases tried by a jury, a judge of the High Court may refer a question arising in an action for inquiry and report either to an official referee or to a special referee agreed upon by the parties.

(2) Subsection 1 does not, unless with the consent of the Crown, authorize the reference to an official referee of an action to which the Crown is a party or of a question or issue therein.

72. In an action,

(a) if all the parties interested who are not under disability consent, and, where there are parties under disability, the judge is of opinion that the reference should be made and the other parties interested consent; or

(b) where a prolonged examination of documents or a scientific or local investigation is required that cannot, in the opinion of a court or a judge, conveniently be made before a jury or conducted by the court directly; or

(c) where the question in dispute consists wholly or partly of matters of account,

a judge of the High Court may at any time refer the whole action or any question or issue of fact arising therein or question of account either to an official referee or to a special referee agreed upon by the parties.

73. (1) If it appears in any action that a material question to be determined is the true definition of a boundary line, the question may be referred to a special referee who is an Ontario land surveyor.

(2) The referee shall, by a proper survey as directed by *The Surveys Act*, and upon hearing the evidence adduced by the parties and their counsel, if any, define upon the ground by such posts and monuments as he considers sufficient the true boundary or division line so in dispute.

(3) The referee shall make a report to the court and shall therein set forth his mode of procedure and what he has done in the premises, and also such further or other facts and circumstances as are necessary to enable the court finally to determine the question and how the costs should be borne.

74. (1) In the case of a reference to a spcial referee, he shall be deemed to be an officer of the Supreme Court.

(2) The remuneration to be paid to a special referee may be determined by a judge of the High Court.

(3) The remuneration, fees, charges and disbursements payable to an official referee, and, in the absence of any special direction, to a special referee, shall be the same as are payable to a local master.

(4) Where the judge at the trial instead of trying an action refers the whole action under section 72 to an official referee who is a local registrar or deputy registrar, a local master or other officer of the court, paid wholly or partly by salary, no fees shall be charged by the referee.

75. The referee shall make his findings and embody his conclusions in the form of a report, and his report shall be subject to all the incidents of a report of a master on a reference as regards filing, confirmation, appealing therefrom, motions thereupon and otherwise, including appeals to the Court of Appeal, except that, where a whole action has been referred under section 72, the appeal from the report lies direct to the Court of Appeal.

76. The evidence of witnesses examined upon the reference and the exhibits shall forthwith after the making of the report be transmitted by the referee to the proper officer of the court.

Official References

97. (1) Judges of county courts, the Master of the Supreme Court, registrars, local masters, local registrars, and deputy registrars are official referees for the trial of such questions as are directed to be tried by an official referee.

(2) Where the business requires additional official referees, the Lieutenant Governor in Council may appoint them.

(3) Subject to subsection 4 of section 74, the fees on a reference or trial shall be paid in money.

REFERENCES

Referees

402. (1) In the event of the referee declining to act, a judge may appoint a new referee.

(2) Where a master or referee has ceased to hold office or become incapacitated prior to settling his report, an application may be made to the Chief Justice of the High Court for directions, whereupon rule 401 applies mutatis mutandis.

(3) Where a master or referee has ceased to hold office or become incapacitated after settling but prior to signing his report, any officer having jurisdiction to make such a report may sign the report.

(4) In the absence, or with the consent, of a master or referee who has entered upon the hearing of a reference, any interlocutory application in the reference may be made to any other master or referee and that other master or referee may deal with the application and make any order thereon which could have been made by the first-mentioned master or referee.

403. The practice and procedure on a reference to a referee shall be the same, as nearly as may be, as the practice and procedure in the Master's office.

404. The court may require explanations or reasons from a master or referee, and may remit the cause or matter, or any part thereof, for further consideration, to the same or any other master or referee.

Proceedings on References

405. Every order of reference shall be brought into the Master's office within ten days after it is issued by the party having the carriage of it, and, in default, any other party having an interest in the reference may assume the carriage of the order.

406. Unless otherwise directed by the Master, and subject to rules 477 and 478, notice of the reference before him shall be given to every party affected by or interested in the inquiry though any such party may not have appeared in the action, but, in the absence of special direction, when default in appearance is made to such notice, no further notice need be given unless the party in default files a written request for notice with an address for service.

407. Where in proceedings before the Master it appears to him that a person not already a party ought to be made a party and ought to be at liberty to attend the proceedings before him, he may make an order adding him as a party defendant and direct a copy of the order, endorsed with a notice (Form 44), and a copy of the judgment or order of reference endorsed with a notice in accordance with Form 43, to be served upon such person, who thereupon shall be treated and named as a party to the action and shall be bound as if he had been originally made a party.

408. A person so served may apply to the court at any time within ten days from the date of such service to discharge, add to, vary or set aside the order of reference or the order adding him as a party.

409. Where at any time during a reference it appears to the Master that the interests of the parties can be classified, he may require the parties constituting each or any class to be represented by the same solicitor and, where the parties constituting such class cannot agree upon the solicitor to represent them, the Master may nominate him.

410. Where a party prosecuting a reference does not proceed with due diligence, the Master may upon the application of any other person interested commit to him the prosecution of the reference.

411. A reference shall be proceeded with as far as possible de die in diem, and, when an adjournment is ordered, the Master shall note in his book the reason thereof and shall when practicable fix the time when it is to be resumed so as to avoid the service of a new appointment.

412. The Master shall, unless he dispenses with it, in the first instance issue an appointment to consider, and, upon the return of the appointment, he shall fix a time at which to

proceed with the reference and shall give any special direction he thinks fit, as to,

(a) the parties who are to attend on the several accounts and inquiries;

(b) the time when each proceeding is to be taken;

(c) the mode in which any accounts referred to him are to be taken or vouched;

(d) the evidence to be adduced in support thereof;

(e) the manner in which each of the accounts and inquiries is to be prosecuted,

and any such directions may be afterwards varied or added to, as are found necessary.

413. Under an order of reference the Master has power,

(a) to take the accounts with rests or otherwise;

(b) to take account of money, rents and profits received or which, but for wilful neglect or default, might have been received;

(c) to set occupation rent;

(d) to take into account necessary repairs, and lasting improvements, and costs and other expenses properly incurred otherwise, or claimed to be so;

(e) to make all just allowances;

(f) to report special circumstances;

(g) and generally, in taking the accounts, to inquire, adjudge and report as to all matters relating thereto, as fully as if they had been specifically referred.

414. The Master may cause parties to be examined, and to produce books, papers and writings, as he thinks fit, and may determine what books, papers and writings are to be produced, and when and how long they are to be left in his office, or, in case he does not deem it necessary that such books, papers or writings be left or deposited in his office, he may give directions for their inspection by the parties requiring them at such time and in such manner as he deems expedient.

415. The Master may cause advertisements for creditors or for heirs or next of kin, or other unascertained persons, and the representatives of such as are dead, to be published as the circumstances of the case require, and in such advertisements he shall appoint a time within which such persons are to come in and prove their claims, and shall notify them that, unless they so come in, they are to be excluded from the benefit of the order, but a claim may nevertheless be received by the Master at any later time (Form 49).

416. The Master shall consider the claims brought in before him pursuant to such advertisement upon a day to be fixed by him when settling the advertisement, and the executor or person appointed to examine the claims may require the claimant to produce before him any document in his possession (Form 50), and, if any claim is to be contested, shall cause notice of contestation to be served upon the claimant, fixing a day when he will adjudicate upon the claim (Form 45), and, where a claim is not to be contested or is to be contested in part only, a notice shall be sent according to Form 52.

417. The executor or administrator, or such other person as the Master directs, shall examine the claims sent in pursuant to the advertisement and ascertain as far as he is able, which of them are just and proper.

418. The executor or administrator, or one of the executors or administrators, or such other person as the Master directs, shall, on or before the day appointed to consider the claims, file an affidavit, verifying a list of the claims sent in pursuant to the advertisement, and stating which of them are just and proper to be allowed, and the reasons for such belief.

419. Under every order whereby the delivery of deeds or execution of conveyances is directed or becomes necessary, the Master shall give directions as to delivery of such deeds, settle conveyances where the parties differ, and give directions to the parties as to the conveyances and as to the execution thereof.

420. Where an account is to be taken, the accounting party, unless the Master otherwise directs, shall bring in the account in debit and credit form, verified by affidavit, and the items on each side of the account shall be numbered

consecutively, and the account shall be referred to by the affidavit as an exhibit, and shall not be annexed thereto.

421. The Master may direct that in taking accounts the books of account in which the accounts required to be taken have been kept, or any of them be taken as prima facie evidence of the truth of the matters therein contained.

422. Before proceeding to the hearing and determining of a reference, the Master may appoint a day for the purpose of entering into the accounts and inquiries, and may direct the production and inspection of vouchers, and, if deemed proper, the cross-examination of the accounting party on his affidavit, with a view to ascertaining what is admitted and what is contested between the parties.

423. A party seeking to charge an accounting party beyond what he has in his account admitted to have received shall give notice thereof to the accounting party, stating as far as he is able the amount sought to be charged and the particulars thereof in a short and succinct manner, and the Master may direct any party who seeks to falsify an account to deliver particulars of the item objected to, and the particulars shall refer to the item by number.

424. The Master shall keep in his office a book in which he shall enter proceedings taken before him and the directions that he gives in relation to the prosecution of the reference, or otherwise, and it is not necessary to issue or serve any formal order or document embodying such directions to bind the parties attending the reference.

425. In giving directions and in regulating the manner of proceeding before him, the Master shall devise and adopt the simplest, most speedy and least expensive method of prosecuting the reference, and with that view may dispense with any proceeding ordinarily taken which he conceives to be unnecessary or substitute a different course of proceeding for that ordinarily taken.

426. Where the Master directs parties not in attendance before him to be notified to attend at some future day or for different purposes at different future days, it is not necessary to issue separate appointments, but the parties shall be notified by one appointment, signed by the Master, of the

proceedings to be taken, and of the times appointed by him for taking them.

427. As soon as the hearing of a matter pending before the Master is completed, he shall so inform the parties to the reference then in attendance and make a note to that effect in his book, and after such entry no further evidence shall be received or proceedings had without the special permission of the Master, and the Master shall then fix a day to settle his report and shall cause notice of such day to be given to all parties interested not then in attendance who have appeared upon the reference or requested notice under rule 406, unless for special reason such notice is dispensed with.

428. No part of any account, affidavit, deposition, examination or pleading used in the Master's office shall be stated or recited in the report, but the same may be referred to by date or otherwise.

429. Reports affecting money in court or to be paid into court shall set forth in figures in a schedule a brief summary of the sums found by the report and paid or payable into or out of court and the funds or shares to which the sums of money are respectively chargeable.

430. As soon as the Master's report is settled and signed, it shall be delivered to the party prosecuting the reference, or, in case he declines to take it, then, in the discretion of the Master, to any other party applying therefor.

431. Pending a reference to a master, all affidavits, papers and documents relating thereto required to be filed shall be filed with the Master, but every report or certificate of a master shall be filed in the office in which the proceedings were commenced, and, upon the completion of the reference, the papers shall be transferred to the office in which the proceedings were commenced.

432. Any party affected by a report may file it or a duplicate of it and shall forthwith serve notice of filing upon all parties appearing in the action or attending upon the reference.

433. (1) Where the Master is directed to appoint money to be paid at some time and place, he shall appoint it to be paid into a bank to the joint credit of the party to whom it is

made payable and the Accountant, and the party to whom it is made payable may name the bank into which he desires it to be paid.

(2) Where money is paid into a bank in pursuance of such appointment, the party paying may pay it either to the credit of the party to whom it is made payable to the joint credit of the party and the Accountant, and if it be paid to the sole credit of the party, such party is entitled to receive it without order.

(3) When money is paid to the joint credit of the Accountant and the party entitled, the Accountant shall sign the cheque for payment out upon the production of the consent of the party paying in, duly verified, or of his solicitor, or, in the absence of such consent upon the order of a judge.

434. Where by a report any money in court is found to belong to infants, the Master shall require proper evidence of the age of the infants to be given before him and shall in his report state the date of birth and age at the time of his report of each of such infants, or shall certify specially his reason for not so doing.

435. In administration suits, reports shall, as far as possible, be according to Form 54.

436. Every master has the same power, authority and jurisdiction as the Master at Toronto when sitting in chambers with respect to all matters referred to him or which arise in his office.

437. Where a master acts under rule 436, the fees shall, with respect to such business, be the same as are payable for the like business in chambers.

438. In taking accounts in administration proceedings, interest shall be computed on the deceased's debts from the date of the judgment or order, and, on legacies, from the end of one year after the deceased's death, unless another time of payment is directed by the will.

439. Where an order is made for payment of money out of court to creditors, the person whose duty it is to prosecute the order shall send each creditor, or his solicitor, if any, a

notice that the cheques may be obtained from the Accountant, and shall deposit with the Accountant any papers necessary to enable the creditors to receive their cheques (Form 53).

440. Every notice required to be given to a creditor or claimant shall, unless the Master otherwise directs, be transmitted by registered letter to the creditor or claimant at the address given in the claim sent in, or, in case the creditor or claimant has employed a solicitor, to such solicitor at the address given by him.

APPENDIX G

NEW ONTARIO RULES OF CIVIL PROCEDURE

REFERENCES

RULE 54 DIRECTING A REFERENCE

APPLICATION OF RULES 54 AND 55

54.01 Rules 54 and 55 apply to references directed,

(a) under rule 54.02 or any other rule; and

(b) under a statute, subject to the provisions of the statute.

WHERE REFERENCE MAY BE DIRECTED

Reference of Whole Proceeding or Issue

54.02 (1) Subject to any right to have an issue tried by a jury, a judge may at any time in a proceeding direct a reference of the whole proceeding or a reference to determine an issue where,

(a) all affected parties consent;

(b) a prolonged examination of documents or an investigation is required that, in the opinion of the judge, cannot conveniently be made at trial; or

(c) a substantial issue in dispute requires the taking of accounts.

Reference of Issue

(2) Subject to any right to have an issue tried by a jury, a judge may at any time in a proceeding direct a reference to determine an issue relating to,

(a) the taking of accounts;

(b) the conduct of a sale;

(c) the appointment of a committee, guardian or receiver;

(d) the conduct of a committeeship, guardianship, or receivership; or

(e) the enforcement of an order.

TO WHOM REFERENCE MAY BE DIRECTED

Supreme Court

54.03 (1) In a Supreme Court proceeding, a reference may be directed to,

(a) a local judge, master, local registrar or other officer;

(b) a person agreed on by the parties; or

(c) a family law commissioner, where the reference is directed under rule 70.22 or 71.06.

District Court

(2) In a District Court proceeding, a reference may be directed to the referring judge, a local registrar or a person agreed on by the parties.

Person Agreed on by Parties

(3) Where a reference is directed to a person agreed on by the parties, the person is, for the purposes of the reference, an officer of the court directing the reference.

(4) The judge directing a reference to a person agreed on by the parties may,

(a) determine his or her remuneration and the liability of the parties for its payment;

(b) refer that issue to the person to whom the reference is directed; or

(c) reserve that issue until the report on the reference is confirmed.

ORDER DIRECTING A REFERENCE

54.04 (1) An order directing a reference shall specify the nature and subject matter of the reference and who is to conduct it and may,

(a) direct in general terms that all necessary inquiries be made, accounts taken and costs assessed;

(b) contain directions for the conduct of the reference; and

(c) designate which party is to have carriage of the reference.

(2) An order of a master or registrar directing a reference shall not require a report back, and the report or an interim report on the reference shall be confirmed under rule 54.09 (confirmation by passage of time).

(3) A referee has, subject to the order directing the reference, all the powers these rules give to a referee.

MOTIONS ON A REFERENCE

54.05 (1) A referee shall hear and dispose of any motion made in connection with the reference, but in the absence of or with the consent of the referee, a motion may be heard and disposed of by a judge, local judge or master of the court in which the reference was directed.

(2) Rule 37.03 (place of hearing of motions) does not apply to a motion made in connection with a reference and heard by the referee.

(3) Where a referee has made an order on a motion in the reference, a person who is affected by the order may make a motion to a judge to set aside or vary the order by a notice of motion served within seven days after the order is made and naming the first available hearing date that is at least three days after service of the notice of motion.

REPORT ON REFERENCE

54.06 A referee shall make a report that contains his or her findings and conclusions.

REPORT MUST BE CONFIRMED

54.07 A report has no effect until it has been confirmed.

CONFIRMATION ON MOTION WHERE REPORT BACK REQUIRED

54.08 (1) Where the order directing a reference requires the referee to report back, the report or an interim report on the reference may be confirmed only on amotion to the judge who directed the reference, subject to subrule 70.22(3) (reference to family law commissioner), on notice to every party who appeared on the reference, and the judge may require the referee to give reasons for his or her findings and

conclusions and may confirm the report in whole or in part or make such other order as is just.

(2) Where the judge who directed the reference is unable for any reason to hear a motion for confirmation, the motion may be made to another judge.

CONFIRMATION BY PASSAGE OF TIME WHERE REPORT BACK NOT REQUIRED

Fifteen Day Period to Oppose Confirmation

54.09 (1) Where the order directing a reference does not require the referee to report back, the report or an interim report on the reference is confirmed on the expiration of fifteen days after a copy, with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced, unless a notice of motion to oppose confirmation of a report is served within that time.

To Whom Motion to Oppose Confirmation Made

(2) A motion to oppose confirmation of a report shall be made,

(a) in a Supreme Court proceeding in which the reference was directed by a High Court judge, to a High Court judge;

(b) in a Supreme Court proceeding in which the reference was directed by a local judge, to a local judge other than the one who conducted the reference;

(c) in a Supreme Court proceeding in which the reference was directed by a master or registrar, to a High Court judge or local judge; or

(d) in a District Court proceeding, to a judge other than the judge who conducted the reference.

Notice of Motion to Oppose Confirmation

(3) A notice of motion to oppose confirmation of a report shall,

(a) set out the grounds for opposing confirmation;

(b) be served within fifteen days after a copy of the report, with proof of service on every party who appeared on the reference, has been filed in the

office in which the proceeding was commenced; and

(c) name the first available hearing date that is at least three days after service of the notice of motion.

Motion for Immediate Confirmation

(4) A party who seeks confirmation before the expiration of the fifteen day period prescribed in subrule (1) may make a motion to a judge for confirmation.

Disposition of Motion

(5) A judge hearing a motion under subrule (2) or (4) may require the referee to give reasons for his or her findings and conclusions and may confirm the report in whole or in part or make such other order as is just.

REFEREE UNABLE TO CONTINUE OR COMPLETE REFERENCE

54.10 Where a referee is unable for any reason to continue or complete a reference, any party to the reference may make a motion to a judge for directions for continuation or completion of the reference.

RULE 55 PROCEDURE ON A REFERENCE

GENERAL PROVISIONS FOR CONDUCT OF REFERENCE

Simple Procedure to be Adopted

55.01 (1) A referee shall, subject to any directions contained in the order directing the reference, devise and adopt the simplest, least expensive and most expeditious manner of conducting the reference and may,

(a) give such directions as are necessary; and

(b) dispense with any procedure ordinarily taken that the referee considers to be unnecessary, or adopt a procedure different from that ordinarily taken.

Special Circumstances to be Reported

(2) A referee shall report on any special circumstances relating to the reference and shall generally inquire into,

decide and report on all matters relating to the reference as fully as if they had been specifically referred.

General Procedure

(3) Subject to subrule (1), a reference shall be conducted as far as possible in accordance with rules 55.01 to 55.07.

PROCEDURE ON A REFERENCE GENERALLY

Hearing for Directions

55.02 (1) The party having carriage of the reference shall forthwith have the order directing the reference signed and entered and, within ten days after entry, request an appointment with the referee for a hearing to consider directions for the reference and, in default, any other party having an interest in the reference may assume carriage of it.

(2) A notice of hearing for directions (Form 55A) and a copy of the order directing the reference shall be served on every other party to the proceeding at least five days before the hearing unless the referee directs or these rules provide otherwise.

Directions

(3) At the hearing for directions, the referee shall give such directions for the conduct of the reference as are just, including,

(a) the time and place at which the reference is to proceed;

(b) any special directions concerning the parties who are to attend; and

(c) any special directions concerning what evidence is to be received and how documents are to be proved.

(4) The directions may be varied or supplemented during the course of the reference.

Adding Parties

(5) Where it appears to the referee that any person ought to be added as a party to the proceeding, the referee may make an order adding the person as a defendant or respondent and direct that the order, together with the order directing the reference and a notice to party added on

reference (Form 55B), be served on the person, and on being served the person becomes a party to the proceeding.

(6) A person served with a notice under subrule (5) may make a motion to a judge to set aside or vary the order directing the reference or the order adding the person as a party, by a notice of motion served within ten days after service of the notice under subrule (5), or where the person is served outside Ontario, within such further time as the referee directs, and naming the first available hearing date that is at least three days after service of the notice of motion.

Failure to Appear on Reference

(7) A party who is served with notice of a reference under subrule (2) or (5) and does not appear in response to the notice is not entitled to notice of any step in the reference and need not be served with any document in the reference, unless the referee orders otherwise.

Representation of Parties with Similar Interests

(8) Where it appears to the referee that two or more parties have substantially similar interests and can be adequately represented as a class, the referee may require them to be represented by the same solicitor and, where they cannot agree on a solicitor to represent them, the referee may designate a solicitor on such terms as are just.

(9) Where one of the parties referred to in subrule (8) insists on being represented by a different solicitor, he or she shall not recover the costs of his or her separate representation and, unless the referee orders otherwise, shall pay all costs incurred by the other parties as a result of his or her separate representation.

Amendment of Pleadings

(10) The referee may grant leave to make any necessary amendments to the pleadings that are not inconsistent with the order of reference.

Procedure Book

(11) The referee shall keep a procedure book in which he or she shall note all steps taken and all directions given in respect of the reference, and the directions need not be embodied in a formal order or report to bind the parties.

Transferring Carriage of Reference

(12) Where the party having carriage of the reference does not proceed with reasonable diligence, the referee may, on the motion of any other interested party, transfer carriage of the reference to another party.

Evidence of Witnesses

(13) Witnesses on a reference shall be examined orally unless the referee directs otherwise, and evidence taken orally shall be recorded.

(14) The attendance of a person to be examined on a reference may be compelled in the same manner as provided in Rule 53 for a witness at trial.

Examination of Party and Production of Documents

(15) The referee may require any party to be examined and to produce such documents as the referee thinks fit and may give directions for their inspection by any other party.

Filing of Documents

(16) While a reference is pending, all documents relating to it shall be filed with the referee and, on completion of the reference, the documents shall be returned to the office in which the proceeding was commenced.

Execution or Delivery of Instrument

(17) Where a person refuses or neglects to execute or deliver an instrument that becomes necessary under an order directing the reference, the referee may give directions for its execution or delivery.

Rulings

(18) Where the referee has made a ruling on the admissibility of evidence or any other matter relating to the conduct of the reference the referee shall, on the request of any party, set out the ruling and the reasons for it in the report or, in the discretion of the referee, in an interim report on the reference.

Preparation of Report

(19) When the hearing of the reference is completed, the referee shall fix a date to settle the report and the party having carriage of the reference shall serve notice of the date

on all parties who appeared on the reference unless the referee dispenses with notice.

(20) The party having carriage of the reference shall prepare a draft report and present it to the referee on the day fixed for settling the report.

(21) When the referee has settled and signed the report, the party having carriage of the reference shall forthwith serve it on all parties who appeared on the reference and file a copy with proof of service.

(22) In a proceeding for the administration of the estate of a deceased person, the report shall, as far as possible, be in Form 55C.

PROCEDURE TO ASCERTAIN INTERESTED PERSONS AND VERIFY CLAIMS

Publication of Advertisements

55.03 (1) The referee may direct the publication of advertisements for creditors or beneficiaries of an estate or trust, other unascertained persons, or their successors.

Filing of Claims

(2) The advertisement shall specify a date by which and a place where interested persons may file their claims and shall notify them that, unless their claims are so filed, they may be excluded from the benefit of the order, but the referee may nevertheless accept a claim at a later time.

Examination of Claims

(3) Before the date specified by the referee for the consideration of claims filed in response to the advertisement, the executor, administrator or trustee, or such other person as the referee directs, shall examine the claims and prepare an affidavit verifying a list of the claims filed in response to the advertisement and stating which claims he or she believes should be disallowed and the reasons for that belief.

Adjudication of Contested Claims

(4) If a claim is contested, the referee shall order that a notice of contested claim (Form 55D), fixing a date for adjudication of the claim, be served on the claimant.

PROCEDURE ON TAKING OF ACCOUNTS

Powers of Referee

55.04 (1) On the taking of accounts, the referee may,

(a) take the accounts with rests or otherwise;

(b) take account of money received or that might have been received but for wilful neglect or default;

(c) make allowance for occupation rent and determine the amount;

(d) take into account necessary repairs, lasting improvements, costs and other expenses properly incurred; and

(e) make all just allowances.

Preparation of Accounts

(2) Where an account is to be taken, the party required to account, unless the referee directs otherwise, shall prepare the account in debit and credit form, verified by affidavit.

(3) The items on each side of the account shall be numbered consecutively, and the account shall be referred to in the affidavit as an exhibit and shall not be attached to the affidavit.

Books of Accounts as Proof

(4) The referee may direct that the books in which the accounts have been kept be taken as *prima facie* proof of the matters contained in them.

Production of Vouchers

(5) Before hearing a reference, the referee may fix a date for the purpose of taking the accounts and may direct the production and inspection of vouchers and, where appropriate, cross-examination of the party required to account on his or her affidavit, with a view to ascertaining what is admitted and what is contested between the parties.

Questioning Accounts

(6) A party who questions an account shall give particulars of the objection, with specific reference by number to the item in question, to the party required to

account, and the referee may require the party to give further particulars of the objection.

DIRECTION FOR PAYMENT OF MONEY

Payment into Financial Institution

55.05 (1) Where under an order directing a reference the referee directs money to be paid at a specified time and place, the referee shall direct it to be paid into a financial institution to the credit of the party entitled or to the joint credit of the party entitled and the Accountant of the Supreme Court or local registrar.

Payment Out

(2) Where money is directed to be paid out of court to the credit of the party entitled, the party may name the financial institution into which he or she wishes it to be paid.

(3) Where money has been paid to the joint credit of the party and the Accountant or registrar, the Accountant or registrar shall sign the cheque or direction for payment out on the production of the consent of the party paying in, verified by affidavit, or of the party's solicitor, or, in the absence of the consent, on the order of the referee.

Money Belonging to Minor

(4) Where it appears that money in court belongs to a minor, the referee shall require evidence of the age of the minor and shall, in the report, state the minor's birth date and full address.

Money to be Paid to Creditors

(5) Where an order of reference or a report directs the payment of money out of court to creditors, the person having carriage of the reference shall deposit with the Accountant or registrar a copy of the order or report and shall serve a notice to creditor (Form 55E) on each creditor stating that payment of the creditor's claim, as allowed, may be obtained from the Accountant or registrar.

REFERENCE FOR CONDUCT OF SALE

Method of Sale

55.06 (1) Where a sale is ordered, the referee may cause the property to be sold by public auction, private contract or tender, or partly by one method and partly by another.

Advertisement

(2) Where property is directed to be sold by auction or tender, the party having carriage of the sale shall prepare a draft advertisement according to the instructions of the referee showing,

(a) the short title of the proceeding;

(b) that the sale is by order of the court;

(c) the time and place of the sale;

(d) a short description of the property to be sold;

(e) whether the property is to be sold in one lot or several and, if in several, in how many, and in what lots;

(f) the terms of payment;

(g) that the sale is subject to a reserve bid, if that is the case; and

(h) any conditions of sale different from those set out in Form 55F.

Conditions of Sale

(3) The conditions of sale by auction or tender shall be those set out in Form 55F, subject to such modifications as the referee directs.

Hearing for Directions

(4) At a hearing for directions under subrule 55.02(3), the referee shall,

(a) settle the form of the advertisement;

(b) fix the time and place of sale;

(c) name an auctioneer, where one is to be employed;

(d) give directions for publication of the advertisement;

(e) give directions for obtaining appraisals;

(f) fix a reserve bid, if any; and

(g) make all other arrangements necessary for the sale.

Who May Bid

(5) All parties may bid except the party having carriage of the sale and any trustee or agent for the party or other person in a fiduciary relationship to the party.

(6) Where the party having carriage of the sale wishes to bid, the referee may transfer carriage of the sale to another party or to any other person.

Who Conducts Sale

(7) Where no auctioneer is employed, the referee or a person designated by the referee shall conduct the sale.

Purchaser to Sign Agreement

(8) The purchaser shall enter into an agreement of purchase and sale at the time of sale.

Deposit

(9) The deposit required by the conditions of sale shall be paid to the party having carriage of the sale or his or her solicitor at the time of sale and the party or solicitor shall forthwith pay the money into court in the name of the purchaser.

Interim Report

(10) Where a sale is made through an auctioneer, the auctioneer shall make an affidavit concerning the result of the sale, and where no auctioneer is employed, the referee shall enter the result in the procedure book and, in either case, the referee may make an interim report on the sale (Form 55G).

Objection to Sale

(11) A party may object to a sale by making a motion to the referee to set it aside, and notice of the motion shall be served on all parties to the reference and on the purchaser, who shall be deemed to be a party for the purpose of the motion.

Completion of Sale

(12) The purchaser may pay the purchase money or the balance of it into court without order and, after the

confirmation of the report on the sale, on notice to the party having carriage of the sale, the purchaser may obtain a vesting order.

(13) Where possession is wrongfully withheld from the purchaser, either the purchaser or the party having carriage of the sale may move for a writ of possession.

(14) The purchaser money may be paid out of court in accordance with the report,

(a) on consent of the purchaser or his or her solicitor; or

(b) on proof to the Accountant or registrar that the purchaser has received a transfer or vesting order of the property for which the money in question was paid into court.

(15) No transfer shall be approved until the referee is satisfied that the purchase money has been paid into court and, where a mortgage is taken for part of the purchase money, that the mortgage has been registered and deposited with the Accountant or registrar.

REFERENCE TO APPOINT COMMITTEE, GUARDIAN OR RECEIVER

55.07 (1) Where, by an order directing a reference, a referee is directed to appoint a committee, guardian or receiver, the referee shall not report on the appointment until he or she has settled and approved any security required by the order and until the security has been filed with the Accountant or registrar.

(2) Where, by an order directing a reference or a report, the person so appointed is required to pass accounts or to pay money into court and has not done so, the referee may, on the passing of accounts, disallow any compensation and may charge the person with interest.

APPENDIX H

COMPARISON OF ALBERTA AND ONTARIO RULES

	Alberta Statutes and Rules	Pre 1985 Ontario Statutes and Rules
A. Who Can Be Referee?		
Who is an official referee?	Q.B. Act s. 11, R. 403, Rr. 719, 808	J.A. s. 97 (R. 402)
Accountant may be referee in some cases	A.O.E. Act s. 48(3)	
Clerk or any other person may audit?	Surr. Rr. 37(4), 38	
Reference may be to official referee or special referee		J.A. ss. 71, 72, 74
B. What Can Be Referred?		
Necessary inquiries	Rr. 159(5), 337, 418	J.A. ss. 71(1), 72
Intricate or complicated accounts	A.O.E. Act s. 48(3)	
Accounts	Surr. Rr. 37, 38; R. 152(a); R. 159(5); R. 332(1); R. 337; R. 418; *cf.* R. 159(5)	J.A. s. 72
Amount only in issue in liquidated claim	R. 159(5)	
Urgent motion for judgment	R. 161(3)	
Inquiry for heirs, etc.	R. 332(1)	
Any of the court's powers on a winding-up	R. 808	
Matters of execution against a firm	R. 82(7)	

C. Procedure Before Referee

Parties and their representation	Surr. R. 37	Rr. 406-09
Time limit to file claims	R. 332	Rr. 415-18; *cf.* R. 406?
Court may act when delay occurs	R. 419	R. 410; *cf.* R. 411
Directions as to manner of accounting	R. 420	
Form and proof of accounts	R. 421	R. 420
Notice of objections to accounts	R. 422	R. 423
Just allowances	R. 423	R. 413(e)
Place, and views	R. 424	
Procedure like that before a judge	R. 425	R. 403; *cf.* R. 414; *cf.* R. 425

D. Report, Confirmation, Remission, and Appeal

Questions may be referred to the court	Surr. R. 37(4)	
Report to the court	Surr. R. 38(1); R. 426(1)	J.A. s. 75, *cf.* s. 76; Rr. 427-32
Any party may move for confirmation	Surr. R. 38(1); Rr. 334, 335, 336, 426(2)	
Court may confirm or refer back or ask for explanation	Surr. R. 38(2); R. 426(3)	Rr. 404
Court may make incidental dispositions	Surr. R. 38(2); *cf.* R. 161(3); R. 420	
Appeals	R. 499(1), 500	J.A. s. 75