ALBERTA LAW REFORM INSTITUTE

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REPORT ON REFEREES

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ALBERTA LAW REFORM INSTITUTE

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

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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.*