ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Motions and Orders

- **Motions and Applications**
- **Evidence on Motions and Applications**
- **Variation, Setting Aside and Correction of Orders and Judgments**
- **Entry of Orders and Judgments**

Consultation Memorandum No. 12.10

July 2004

Deadline for Comments: September 30, 2004

ALBERTA RULES OF COURT PROJECT

The Alberta Rules of Court Project is a 3-year project which has undertaken a major review of the rules with a view to producing recommendations for a new set of rules by 2004. The Project is funded by the Alberta Law Reform Institute (ALRI), the Alberta Department of Justice, the Law Society of Alberta and the Alberta Law Foundation, and is managed by ALRI.

This consultation memorandum is issued as part of the Project. It has been prepared with the assistance of the members of the Rules Project General Rewrite Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the committee are:

The Hon. Justice Brian R. Burrows (Co-Chair), Court of Queen's Bench of Alberta
The Hon. Justice Terrence F. McMahon (Co-Chair), Court of Queen's Bench of Alberta
The Hon. Judge Allan A. Fradsham, Provincial Court of Alberta
The Hon. Justice Eric F. Macklin, Court of Queen's Bench of Alberta
The Hon. Justice June M. Ross, Court of Queen's Bench of Alberta
James T. Eamon, Code Hunter LLP
Alan D. Fielding, Q.C., Fielding Syed Smith & Throndson
Debra W. Hathaway, Counsel, Alberta Law Reform Institute
William H. Hurlburt, Q.C., Alberta Law Reform Institute
Alan D. Macleod, Q.C., Macleod Dixon
Sheryl Pearson, Alberta Law Reform Institute
Wayne Samis, Deputy Clerk, Court of Queen's Bench of Alberta

This consultation memorandum was written by Debra Hathaway, based on research prepared by counsel Sheryl Pearson and student Jeff Fixsen.

A reader who wishes to have more information about the Alberta Rules of Court Project may consult the background material included in each of the Consultation Memoranda 12.1 to 12.9. More complete information, including reports about the

Project and particulars of previous Consultation Memoranda, may also be found at, and downloaded from, the ALRI website:

http://www.law.ualberta.ca/alri

The Institute's office is located at:

402 Law Centre
University of Alberta
Edmonton AB T6G 2H5
Phone: (780) 492-5291
Fax: (780) 492-1790

The Institute's electronic mail address is:

reform@alri.ualberta.ca

THE RULES PROJECT CONSULTATION MEMORANDA

No.	Title	Date of Issue	Date for Comments
12.1	Commencement of Proceedings in Queen's Bench	October 2002	January 31, 2003
12.2	Document Discovery and Examination for Discovery	October 2002	January 31, 2003
12.3	Expert Evidence and "Independent" Medical Examinations	February 2003	May 16, 2003
12.4	Parties	February 2003	June 2, 2003
12.5	Management of Litigation	March 2003	June 30, 2003
12.6	Promoting Early Resolution of Disputes by Settlement	July 2003	November 14, 2003
12.7	Discovery and Evidence Issues: Commission Evidence, Admissions, Pierrringer Agreements and Innovative Procedures	July 2003	November 14, 2003
12.8	Pleadings	October 2003	January 31, 2004
12.9	Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions	February 2004	April 30, 2004
12.10	Motions and Orders	July 2004	September 30, 2004

Available to view or download at the ALRI website: *http://www.law.ualberta.ca/alri/*

ALBERTA LAW REFORM INSTITUTE

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

The members of the Institute's Board are A. de Villars, Q.C.; A.D. Fielding, Q.C.; The Hon. Judge N.A. Flatters; P.M. Hartman, Q.C.; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C.; P.J.M. Lown, Q.C. (Director); A.D. Macleod, Q.C.; The Hon. Madam Justice B.L. Rawlins; W.N. Renke; D.R. Stollery, Q.C.; The Hon. Mr. Justice N.C. Wittmann (Chairman) and K.D. Yamauchi.

The Institute's legal staff consists of P.J.M. Lown, Q.C. (Director); T.L. Archibald; D.W. Hathaway; C.L. Martens; S. Pearson; S. Petersson; M.A. Shone, Q.C. and H.L. Stout. C.R.B. Dunlop; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C. and D.I. Wilson, Q.C. are consultants to the Institute.

PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute by September 30, 2004.

This consultation memorandum addresses the procedural rules governing motions and applications (Chapter 1), the evidentiary rules concerning motions and applications (Chapter 2), the rules governing variation, setting aside and correction of orders and judgments (Chapter 3) and the rules dealing with entry of orders and judgments (Chapter 4).

Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the General Rewrite Committee has identified a number of issues arising from these procedures and has made preliminary proposals. These proposals are not final recommendations, but proposals which are being put to the legal community for further comment. These proposals will be reviewed once comments on the issues raised in the consultation memorandum are received, and may be revised accordingly. While this consultation memorandum attempts to include a comprehensive list of issues in the areas covered, there may be other issues which have not been, but should be, addressed. Please feel free to provide comments regarding other issues which should be addressed.

We encourage your comments on the issues and the proposals contained herein. You may respond to one, a few or many of the issues addressed. You can reach us with your comments or with questions about this consultation memorandum or the Rules Project on our website, by fax, mail or e-mail to:

Alberta Law Reform Institute
402 Law Centre
University of Alberta
Edmonton AB T6G 2H5
Phone: (780) 492-5291
Fax: (780) 492-1790
E-mail: *reform@alri.ualberta.ca*
Website: http://www.law.ualberta.ca./alri/

The process of law reform is essentially public. Even so, you may provide anonymous written comments, if you prefer. Or you may identify yourself, but request that your comments be treated confidentially (i.e., your name will not be publicly linked to your comments). Unless you choose anonymity, or request confidentiality by indicating this in your response, ALRI assumes that all ***written comments are not confidential***, in which case ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although usually we will discuss comments generally and without specific attributions.

Table of Contents

EXECUTIVE SUMMARY

A. Introduction

This consultation memorandum addresses the procedural rules governing motions and applications (Chapter 1), the evidentiary rules concerning motions and applications (Chapter 2), the rules governing variation, setting aside and correction of orders and judgments (Chapter 3) and the rules dealing with entry of orders and judgments (Chapter 4). The following summary will briefly highlight some of the General Rewrite Committee's main proposals in those areas.

The consultation memorandum sets out the initial views of the General Rewrite Committee, but it does so for the purpose of inviting comment and discussion, which will be considered and taken into account before final recommendations are formulated and put into the form of a set of draft Rules of Court.

B. Motions and Applications

The Committee does not propose any changes to the materials to be filed for General Chambers or to the time limits which determine whether a motion is to be heard in General Chambers or Special Chambers. The Committee recommends that Civil Practice Note 6 governing Special Chambers be kept as a practice note, rather than being moved into the Rules. However, several problems with Civil Practice Note 6 are brought to the attention of the judiciary who create practice notes. Civil Practice Note 5 concerning desk applications, on the other hand, should be brought into the Rules because these long-standing and well-established provisions would benefit from greater visibility and use.

The Committee recommends that all provisions concerning telephone applications be contained in the Rules. Several proposals aim to make telephone applications more widely available. For example, the geographical limit for telephone applications based on the location of a participant's residence or place of business should be reduced to 50 kilometres from the Queen's Bench location where the application is brought. The availability of a telephone application will still be at the court's discretion, but unanimous consent of the other participants should no longer be a prerequisite. The court must retain its ability to give directions about how a

telephone application is to be heard and should have full discretion to dispense with any requirements, whether an emergency exists or not.

The Committee proposes to delete specialized Rule 387.1 concerning directions about notice requirements in multi-party actions. But this should be offset by an explicit general rule authorizing parties to seek procedural direction from the court at any time. The Committee also proposes to delete as unnecessary Rule 392 concerning leave to serve a notice of motion in the time period between service of a statement of claim and the deadline for filing the statement of defence. Rule 499 concerning appeals from a referee's certificate can also be deleted as unnecessary and obsolete.

On the issue of whether all motions, including *ex parte* motions, should be recorded, the opinions and input of the legal profession are sought concerning various options. The Committee also examines whether appeals from a master should continue to be conducted as hearings *de novo* rather than as appeals on the record and concludes that the *status quo* should remain.

C. Evidence on Motions and Applications

The Committee recommends that an affidavit based on facts within the deponent's personal knowledge should also be able to contain any other evidence which the deponent could give in court. This would explicitly allow exceptions to the hearsay rule. But the Committee rejects a wider use of affidavits based on information and belief and affirms that their use should continue to be restricted to interlocutory motions.

The Committee also rejects proposals to extend fax filing to lawyers resident at a judicial centre and to allow service of unfiled affidavits in any circumstances. The Committee does recommend deletion of Rule 314.1 concerning late filing of affidavits in reply because courts will adequately deal with that situation on an *ad hoc* basis.

The Committee seeks the opinions and input of the legal profession about whether restrictions should be placed on the right to cross-examine on an affidavit. Two models are discussed as options – the British Columbia model of requiring leave to cross-examine in all cases and the Ontario model of requiring all affidavits from

both parties to be filed before any cross-examinations can occur, with leave being required to file any further affidavits following cross-examination.

The Committee proposes to streamline and clarify Rules 266, 267 and 268 concerning oral examination of witnesses before the hearing of a motion and at the motion. Overlap between those Rules should be eliminated. When a witness is examined in front of an official other than a judge or master before the hearing of the motion, the party who calls the witness should be able to cross-examine that witness without need for court leave, which is a change from our current practice. Other parties should be able to cross-examine that witness as well. Hostility can be presumed in that situation because the only reason to orally examine a witness before the hearing is where the witness refuses to swear an affidavit voluntarily.

D. Variation, Setting Aside and Correction of Orders and Judgments

Rather than having many different rules for variation, setting aside and discharge of orders and judgments scattered throughout the Rules, the Committee proposes the adoption of a single general rule to deal with this area. The new rule will be authority for both masters and judges to vary and set aside orders, although a master would have no authority to set aside or vary an order originally made by a judge.

The first subsection of the single general rule will allow a court to set aside or vary any final order, judgment or interlocutory order that was made

- *ex parte*,
- in default of defence, or
- in the absence of a party who failed to appear at trial or at a motion by accident or mistake or by reason of insufficient notice of the proceeding.

Subject to an order for enlarged or abridged time under Rule 548, there will be a deadline of 20 days (unless otherwise provided) to bring an application under the first subsection of the single general rule, except for applications to vary or set aside default judgment. In order that this deadline be workable for *ex parte* orders, the deadline cannot commence running from the date of trial or motion but must commence from the date the judgment or order is served or is brought to the attention of the non-attending party.

The second subsection of the single general rule will allow a court to set aside or vary any interlocutory order

- by reason of a matter that arose or was discovered subsequent to the making of the order, or
- on such other grounds as the court considers just.

This provision will replace the current general power to set aside or vary an interlocutory order under Rule 390(1), as well as various other such rules addressing specific types of interlocutory orders.

The single general rule concerns procedure alone and will not change any of the substantive law governing when variation or setting aside will be granted. There will be no requirement under the single general rule that the matter must be heard by the judge or master who originally granted the order or judgment now sought to be varied or set aside. But if the court suspects that a party is trying to abuse the rule by "judge shopping" or attempting to re-litigate, the court can order the application to be heard by the original decision-maker.

There are currently two Rules which provide for the correction of orders and judgments. Rule 330 enables a judge to make further directions following entry of an order or judgment so that a party can receive the relief to which the party is entitled, provided there is no variation of the substance of the original judgment or order. Rule 339 allows a court to correct a judgment or order containing an error made by accident, slip or omission. The Committee recommends that these two Rules should be merged as two subsections in a single rule. There should be a requirement, in the Rule 330 situation, to return to the judge who originally made the order, but this requirement would not apply to the Rule 339 situation. In neither case would there be a time limit placed on when such applications may be brought. The wording of Rule 339 should also be clarified.

E. Entry of Orders and Judgments

To expedite the preparation and approval of draft orders and judgments, the Committee proposes the adoption of a default entry system with specified time limits. If the court does not direct who is responsible for preparing an order, the rule will

provide that the successful party will draft and serve the form of order on all other parties in attendance within 10 days of the order being pronounced. Those parties have 10 days to approve and return the draft order or to object to the form of the draft order by obtaining an appointment to settle its terms. If no response is received, acceptance of the form of order is deemed and the order may be entered.

If the responsible party fails to draft and serve the order, any other party will be entitled to do so. Then the same 10-day response period will apply, with deemed acceptance in the absence of a response. Rule 327 will be amended to allow only three months for entry of an order or judgment before leave of the court is needed to enter it.

The Rules are currently confused and contradictory about the circumstances in which a judge, master or clerk can sign an order or judgment which was not signed forthwith on pronouncement. The Committee proposes to repeal Rule 321(2), (3) and (4) because those provisions are unnecessary or unclear, but to retain and revise Rule 323.1 to govern this area. The clerk will have authority to sign an order only where its form has been approved by the parties and it otherwise accords with the clerk's notes. But in all other cases, and in the case of disputes, orders must go to the judge or master for signature. The Committee also recommends that clerks should no longer have the authority to settle the minutes of orders.

The Committee proposes to delete various Rules that are unnecessary, self-evident, obsolete or superfluous, such as Rules 324, 325 and 328 concerning judgments obtained on condition, Rules 332 and 334 concerning judgments which direct an accounting of debts, claims or liabilities or an inquiry for heirs and Rule 336 concerning motions for judgment.

LIST OF ISSUES

MOTIONS AND APPLICATIONS IN CHAMBERS

EVIDENCE ON MOTIONS AND APPLICATIONS

VARIATION, SETTING ASIDE AND CORRECTION OF ORDERS AND JUDGMENTS

ENTRY OF ORDERS AND JUDGMENTS

CHAPTER 1. MOTIONS AND APPLICATIONS IN CHAMBERS

A. Introduction

[1] Part 29 of the Alberta Rules of Court (Rules 384 to 393) sets out the procedures to be followed when making a motion or application in Chambers. These rules are supplemented by the directions found in Civil Practice Note 5 (*Applications Without Personal Appearance*) and Civil Practice Note 6 (*Special Chambers Applications*). Motions are heard either by a master in chambers,[1] a judge in General Chambers or a judge in Special Chambers.

[2] Part 38 (Rules 499 and 500) deals with one kind of Chambers application – appeals from a master in chambers or referee. Civil Practice Note 6 provides that appeals from a master are heard by a judge in Special Chambers.[2]

B. Documents and Supporting Materials

1. General Chambers

ISSUE No. 1
Should any changes be made to the materials required to be filed in support of or in response to a motion in General Chambers?

[3] The default rule in Alberta is that all applications in an action shall be made by notice of motion served on all affected parties.[3] The motion may be disposed of by a judge or master in chambers.[4] To be valid, the Notice of Motion must

- state the relief sought,

---

[1] *Court of Queen's Bench Act,* R.S.A. 2000, c. C-31, s. 9 specifies the jurisdiction of masters that determines which types of motions can be heard by a master in chambers [*Court of Queen's Bench Act*].

[2] Court of Queen's Bench of Alberta, *Special Chambers Applications* (Civil Practice Note No. 6), art. A.1(b) [Civil Practice Note 6].

[3] Alberta, *Alberta Rules of Court*, r. 384 [Alberta].

[4] *Ibid.*, r. 385.

- state briefly the grounds and material or evidence intended to be relied on, including any reference to any statutory provision or Rule sought to be invoked, and
- specify any irregularities complained of or objection relied on.

As well, a respondent who wishes to contest the application must provide at least 24 hours notice of any material upon which the respondent intends to rely.

[4] Civil Practice Note 6 contains some further provisions that are stated to apply to all chambers applications made to judges (but not to chambers applications made to masters). In reality, though, most of the provisions relate only to applications in Special Chambers.

[5] The rules of Ontario, British Columbia and the Federal Court expressly require what is only implicit in our Rule 384, namely, that the notice of motion must state the date, time and place the application will be made. Ontario also requires a listing in the notice of all documentary evidence that will be submitted.

[6] Ontario and the Federal Court require an applicant to file a "motion record" that contains a table of contents, a copy of the notice of motion, a copy of all affidavits and documents and any other material to be relied upon. The respondent has two days to challenge the completeness of the motion record.

POSITION OF THE GENERAL REWRITE COMMITTEE

[7] The Committee considered the use of a motion record in General Chambers and rejected this approach, because there is no good reason to justify the work and expense that producing a motion record would require. The Committee felt that no changes are required to our current rules regarding the materials to be filed for General Chambers.

ISSUE No. 2
What should be the time limit to determine when a motion will be heard in General Chambers or Special Chambers?

[8] Currently, General Chambers is for motions that require less than 20 minutes to argue. Special Chambers is for motions that require longer than 20 minutes to argue

but not longer than half a day. If a motion requires more time than half a day, it is put on the Civil Trial List.[5]

POSITION OF THE GENERAL REWRITE COMMITTEE

[9] Committee members all agreed that these time limits are fine and should be maintained without change. The real problem that faces the Bar in this area is not the time limit but the long wait to get a hearing in Special Chambers (about one month in Edmonton and three months in Calgary). If that wait could be shortened, the Bar would no longer have complaints about the two types of Chambers.

2. Special Chambers

ISSUE No. 3
Should the provisions governing Special Chambers remain in Civil Practice Note 6 or be moved into the Rules?

POSITION OF THE GENERAL REWRITE COMMITTEE

[10] The Committee decided that it is appropriate to keep the provisions governing Special Chambers in practice note form because that form is quicker and easier to modify than the Rules, which is important when dealing with such highly detailed provisions.

ISSUE No. 4
What should be the guidelines for written briefs in Special Chambers?

[11] In Special Chambers, the parties must file "short and concise written briefs"[6] in addition to the notice of motion and other standard documents. These briefs must summarize the relevant facts and main points of law to be argued and contain highlighted copies of all authorities relied upon.[7] Failure of an applicant to file briefs on time will result in the application being struck automatically. Similar failure by a respondent may result in an order of costs against the respondent or other penalty as

---

[5] Civil Practice Note 6, *supra* note 2, art. A.1(b).

[6] *Ibid.*, art. B.8(a).

[7] *Ibid.*, art. B.8(b).

the court determines. Late filers may apply for leave to reinstate the application or to file late.[8]

[12] The Rules Project received complaints from lawyers who are concerned that the length of these briefs is getting out of hand. Some briefs are apparently becoming longer than facta in the Court of Appeal. Even if the brief itself is short, the appendices to the brief can often be huge. Sometimes the briefs are both long and poorly organized. Members of the Bar recommended that limits should be placed on the length of these briefs and that costs consequences should be awarded against lawyers who produce briefs of unreasonable length.

POSITION OF THE GENERAL REWRITE COMMITTEE

[13] For the benefit of the judiciary who create practice notes, the Committee notes the concerns and recommendations of the Bar in this area and leaves it up to the judiciary to remedy the identified problems.

ISSUE No. 5
In Special Chambers applications, should the deadline to file evidence coincide with the deadline to file briefs?

[14] The General Rewrite Committee received a complaint from the legal profession that the deadline to file briefs in Special Chambers malfunctions because there is no corresponding deadline to file evidence. If a counsel files a further affidavit or cross-examines on an affidavit after the briefs are filed, then the briefs must be revised and refiled so that the judge has the most up-to-date information. This can produce long delays and does not make any sense.

POSITION OF THE GENERAL REWRITE COMMITTEE

[15] For the benefit of the judiciary who create practice notes, the Committee notes the concern raised by the member of the legal profession and leaves it up to the judiciary to remedy the identified problem.

---

[8] *Ibid.*, art. A.6.

ISSUE No. 6
In Special Chambers applications, is the deadline for filing briefs too far in advance of the hearing?

[16] Other complaints were received from the legal profession that the deadline for filing briefs is too far in advance of the hearing. Because a judge is not assigned to the application until the Friday before the hearing, the briefs "just collect dust" between the date they are filed and the date they are actually given to a judge to read. The complaint concludes that such an early deadline for filing therefore puts an unnecessary burden on lawyers.

POSITION OF THE GENERAL REWRITE COMMITTEE

[17] The purpose of the filing deadline is not simply to get the materials to the judge but to the opposing party as well. However, there may be some basis for the concern that the filing deadline is earlier than it really needs to be. The Committee would suggest a deadline of two weeks before the hearing for filing the applicant's brief and one week before the hearing for filing the respondent's brief. However, some members of the bar might not like the pressure of those later deadlines either. The Committee notes the concerns and leaves it up to the judiciary who make the practice notes to deal with the identified problem.

C. Applications without Personal Appearance

[18] Rule 385 states that, unless otherwise provided, all motions, applications and hearings other than trials may be heard in chambers. There are, however, two kinds of applications that are conducted in chambers without the necessity of personal appearances by the parties or counsel: desk applications and telephone applications.

1. Desk Applications

ISSUE No. 7
Should any changes be made to the procedure for desk applications?

[19] Civil Practice Note 5 allows counsel to apply for an *ex parte* order or a consent order without making a personal appearance. The matter is handled entirely by way of written materials.[9]

[20] Desk applications are more widely available in Ontario and the Federal Court. Ontario allows for desk applications where a motion is on consent, unopposed or made without notice, unless the court orders otherwise. However, either the applicant or the respondent may, with notice, give oral argument in the usual way. The other party may then also present oral argument or simply continue to rely on the written material that was filed. In the Federal Court, a party can request that any motion be decided on the basis of written applications instead of the normal practice in open chambers.

POSITION OF THE GENERAL REWRITE COMMITTEE

[21] The Committee does not recommend making any changes to the procedures for, or availability of, desk applications. However, the Committee does recommend that the procedures governing desk applications should be moved from Civil Practice Note 5 and placed directly in the Rules. These procedures have not changed much over time and are well-established. More people might be aware of the availability of desk applications if the procedures were contained in the Rules.

2. Telephone Applications

[22] Rule 385.1 provides that a participant (defined as a counsel or self-represented litigant) can apply to hear an application or motion by telephone conference if

- the judge or master consents,
- all the participants consent, and either
- the nearest Queen's Bench court is over 100 kilometres from where the participant resides or has an office, whichever is closest, or
- the matter is urgent and there is no resident Queen's Bench judge or master sitting in the nearest Queen's Bench court.

---

[9] Court of Queen's Bench of Alberta, *Applications Without Personal Appearance* (Civil Practice Note No. 5), art. A [Civil Practice Note 5].

[23] A participant who cannot or is unlikely to be able to obtain consent from all the participants is allowed to seek the court's permission (by telephone conference call) to hear the main application by telephone conference.

[24] A participant who lives less than 100 kilometres from the nearest Queen's Bench court must attend at the clerk's office for any telephone conference application. A participant who lives farther than 100 kilometres from the nearest Queen's Bench court may participate in the telephone conference at the clerk's office or at some other location that is connected to the court, but in all cases a telephone conference is deemed to have been made from the Queen's Bench court.

[25] Despite these rules the judge or master hearing the application for a telephone conference may direct that the application be done in person in chambers. Normal filing requirements apply but the court may direct a participant to provide copies of materials to the other participants and the court prior to the telephone conference. The court clerk is to arrange the telephone conference and may participate in it unless the court otherwise orders. The participant who requests the telephone conference must pay for it unless the court otherwise orders.

[26] Notwithstanding anything in Rule 385.1, the court may dispense with or alter the requirements under that Rule. In addition, Rule 385.2 allows the court, on its own motion, to hear an application by telephone conference notwithstanding that the requirements in Rule 385.1 have not been met.

[27] Civil Practice Note 5[10] supplements Rule 385.1 with additional directions concerning contested telephone applications, some of which conflict with the Rules. For example, the Practice Note states that the court clerk "shall participate" in the call, rather than "may participate" as provided in the Rules. There is a prohibition on solicitors who practice in the same city as one another from applying for a telephone conference if there are Queen's Bench justices resident in that city. While the Rules allow recourse for a participant who is unable to obtain consent from all the other participants to apply nevertheless for a telephone conference application, the Practice

---

[10] *Ibid.*, art. B.

Note states that a participant must obtain unanimous consent among the participants without listing exceptions.

[28] Perhaps the most striking difference between the Rules and the Practice Note is the conditions under which a court can exercise its discretion to alter or dispense with any of the requirements for a telephone application. The Rules provide that the court can exercise its discretion if it is satisfied that "circumstances warrant it." But the Practice Note only allows a court to exercise its discretion where "emergency conditions" exist. Even under emergency conditions, however, the court cannot alter the requirement that a clerk must be a party to the telephone call.

ISSUE No. 8

Should the provisions of Civil Practice Note 5 concerning contested telephone applications be incorporated into the Rules? If so, what about the contradictions between them?

POSITION OF THE GENERAL REWRITE COMMITTEE

[29] It was noted that Civil Practice Note 5 has existed for quite a few years. The Committee recommends that its provisions concerning contested telephone applications should be incorporated into the Rules. Contradictions between the two should be eliminated. These contradictions are addressed and resolved among the various issues contained in the proposals which follow.

ISSUE No. 9

Should consent to hearing an application by telephone be required from all participants or should a court be able to hear the application by telephone without the consent of one or more participants?

ISSUE No. 10

Should the court's consent to hearing an application by telephone always be required or should the participants' consent be sufficient?

POSITION OF THE GENERAL REWRITE COMMITTEE

[30] A court should be able to order a telephone application without any or all of the participants' consent, in addition to its current ability to order a telephone application

with the consent of all the participants and the court. But a telephone application should never be available only on the participants' consent – the court's consent must always be required. The court's ability to give or withhold consent exists in the court's discretion whether to allow the telephone application to occur. If not all the participants consent, the one seeking the telephone application could try to persuade the court to order a telephone hearing despite the lack of unanimous consent.

ISSUE No. 11
Should the geographical limit be changed?

ISSUE No. 12
If one or more, but not all, of the participants live or work outside the geographical limit, should a telephone application be available?

POSITION OF THE GENERAL REWRITE COMMITTEE

[31] Telephone applications can be particularly convenient, cost-effective and suitable for many types of motions and applications, including foreclosure applications. Telephone applications should be more widely available. To this end, the Committee proposes that the geographical limit for telephone applications based on the location of a participant's residence or place of business be reduced to 50 kilometres from the Queen's Bench location where the application is brought. As is the case now, the limit would be measured from where the counsel or self-represented party resides or has an office, whichever is closer to the Queen's Bench location.

[32] If the applicant for a telephone application lives or works outside the geographical limit, that should be sufficient for the court to allow a telephone application. The consent of other participants, whether they live or work within or outside the geographical limit, will not be necessary if the court agrees that a telephone application is appropriate. However, a participant who lives or works within the geographical limit will not be able to apply for a telephone application just because some other participant lives or works outside the limit. The application must be made by a participant who personally lives or works outside the limit.

ISSUE No. 13
How should these Rules apply to self-represented litigants?

POSITION OF THE GENERAL REWRITE COMMITTEE

[33] The Steering Committee of the Rules Project is dealing with how the Rules should apply to self-represented litigants generally. But on this particular issue, the General Rewrite Committee believes that the rules regarding telephone applications should continue to apply equally to self-represented litigants. On prior consent of the court, any party should be able to appear at an application by telephone.

ISSUE No. 14
Concerning the mechanics of a telephone application:

- **who should set up and coordinate the call?**
- **must the clerk participate?**
- **is a special rule needed to address costs?**

POSITION OF THE GENERAL REWRITE COMMITTEE

[34] The Rules should not deal with administrative matters such as who should set up and coordinate the telephone application. It should be decided on a case-by-case basis whether the party, counsel, clerk or judge's secretary should be responsible.

[35] Currently, Civil Practice Note 5 states that the clerk must always participate in the call, but Rule 385.1 says the clerk "may" participate. The Committee proposes that the clerk's participation should be discretionary. The court can determine on a case-by-case basis whether it is important for the clerk to participate.

[36] On the issue of costs, Rule 385.1(10) is ambiguous about whether the party who initiates the telephone application must pay the entire cost of the application or only the excess costs beyond those involved in a regular chambers application (i.e. the telephone charges for the conference call). In practice, the costs of a telephone application are often allocated in various ways among the participants and the court. It is necessary to retain Rule 385.1(10) so that there is a default rule regarding costs where no other specific arrangements are made, but it should be clarified that the rule refers only to the excess costs beyond those involved in a regular chambers application.

ISSUE No. 15

When a telephone application is held,

- **can the judge or master order it to be completed by personal appearance in chambers?**
- **must everyone appear by telephone or could some appear in chambers while others are on the phone?**
- **if both or all parties live in the same city, must they appear personally in court even in an emergency or where everyone consents to the telephone application?**

ISSUE No. 16

Should a telephone application be allowed if all counsel practice in the same city and there is a Queen's Bench judge in that city?

POSITION OF THE GENERAL REWRITE COMMITTEE

[37] The judge or master must retain the ability to give directions about how the telephone application is to be heard, including the ability to direct that the application be "heard or completed"[11] by personal appearance in chambers. The Committee did not think there is any unfair advantage if some participants appear in person while others are on the phone, so a mixture of both types of appearances in the same application should remain acceptable. As for the situation when both or all parties live in the same city, this will be handled by the geographical limit. If the participants are outside the limit, a telephone application can be made. If they are within the limit, a personal appearance must be made.

[38] There should be an explicit ban on telephone applications where all counsel practice in the same city and there is a Queen's Bench judge in that city. Civil Practice Note 5 currently contains this ban and it should be moved over to the Rules.

ISSUE No. 17

Should the court have full discretion to dispense with any of the requirements for a telephone application or should the court be able to do so only in an emergency?

---

[11] Alberta, r. 385.1(7).

[39] As already noted, one of the most striking contradictions between Rule 385.1 and Civil Practice Note 5 is the conditions under which a court can exercise its discretion to alter or dispense with any of the requirements for a telephone application. The Rules provide that the court can exercise its discretion if it is satisfied that "circumstances warrant it."[12] But the Practice Note only allows a court to exercise its discretion where "emergency conditions exist."[13]

POSITION OF THE GENERAL REWRITE COMMITTEE

[40] It is better to give the court full discretion to alter or dispense with any of the requirements for a telephone application. The restriction in the Practice Note should not be placed in the Rules.

ISSUE No. 18
Should the Rules deal specifically with applications by video conference or other forms of technology? If so, when should such applications be allowed?

[41] The General Rewrite Committee received comments from the legal profession concerning applications by video conference that were both in favour of and opposed to this idea. In some situations, practitioners thought it could be quite valuable but some questioned its expense and effectiveness.

POSITION OF THE GENERAL REWRITE COMMITTEE

[42] Telephone applications are effective because telephones are widespread, easily accessible and inexpensive. Video conferencing facilities are not. Even in court houses which now have video conferencing facilities, they are often booked solid and difficult to access quickly. Whatever the merits of video conference applications, such a rule change must wait until adequate facilities are available and cost-effective.

---

[12] *Ibid.*, r. 385.1(11).

[13] Civil Practice Note 5, *supra* note 9, art. C.10.

D. Notice Requirements

1. Generally

ISSUE No. 19
Should the notice period for motions be changed?

[43] Rule 386 mandates that, except where otherwise provided or unless leave is granted, at least two days notice must be given between service of a motion and the day of the hearing. Ontario gives at least four days notice. The federal rules give two days notice but allow for motions to be brought on less time if all parties consent or the matter is urgent. British Columbia requires two days notice but motions which will require more than 30 minutes to hear require seven days notice.

[44] Other Alberta Rules also contain provisions regarding notice. Part 40 (Rules 544 to 550) explains how to calculate notice and service periods. Special note should be taken of Rule 548, which allows the court to enlarge or abridge times set in the Rules, unless there is an express provision that this Rule does not apply.

POSITION OF THE GENERAL REWRITE COMMITTEE

[45] In a future consultation memorandum, the Committee will consider standardizing notice periods throughout the Rules. Depending on what standard will be chosen for "short" time periods, Rule 386 may or may not require revision to match that standard.

2. In Multi-Party Actions

ISSUE No. 20
Should any changes be made to Rule 387.1 concerning directions about notice requirements in multi-party actions?

[46] Alberta is alone among Canadian jurisdictions in having a rule regarding notice provisions in multi-party actions. Rule 387.1 allows a party to apply *ex parte* to the court to seek direction on exactly which parties must be served with notice of a motion where there are multiple parties, not all of whom would be affected or prejudiced by not receiving notice of the particular motion. The court has discretion to direct that

certain parties not receive notice or that such notice be delayed, that service of some or all evidence not be required, that evidence may be sealed, etc. This discretion is limited to the extent that the court must not deprive a party of notice who has or would likely have a legitimate interest in the motion. The judge or master who hears such applications should not preside over the rest of the proceedings unless the parties consent or the contemplated motion was unsuccessful or was ultimately never brought.

POSITION OF THE GENERAL REWRITE COMMITTEE

[47] Essentially, this rule just allows a litigant to make an *ex parte* motion for directions from the court concerning a particular matter – notice requirements for motions in multi-party proceedings. The Committee was doubtful that the inclusion in our Rules of such a specialized provision is warranted. There is always a general ability to seek directions from the court, although currently Alberta has no explicit rule to that effect. And there is also a general ability to proceed *ex parte* where appropriate. Since these general abilities exist and would serve the purpose, a specialized rule for one specific situation seems unnecessary. The Committee proposes to delete Rule 387.1 as superfluous. However, it would be a good idea for our Rules to have an explicit general rule about the ability to seek directions. The Committee proposes that such a provision be modelled on Federal Court Rule 54, which provides that "[a] person may at any time bring a motion for directions concerning the procedure to be followed under these Rules."

3. Adjournment for Notice

[48] All Canadian jurisdictions have a rule similar to Rule 388. If, on the hearing of a motion, it becomes apparent that someone has not been given notice who should have been, the court may either dismiss the motion or adjourn it for the purpose of giving such notice. The General Rewrite Committee does not propose any change to this rule.

E. *Ex Parte* Applications

1. General Requirements

ISSUE No. 21

Should the Rules provide more clarity concerning when an application may be brought for an *ex parte* order?

[49] Rule 387 provides that a court may grant an order without notice to all parties if the court is satisfied that no notice is necessary or that the delay caused by giving notice "might entail serious mischief." The Rule further provides that such an *ex parte* order may be varied or discharged by any judge on notice given to all affected parties. An *ex parte* order may also be sought by desk application. Article A of Civil Practice Note 5 (*Applications Without Personal Appearance*) requires that, in addition to filing the usual motion materials, applicants must also file a simple, standardized application form for this procedure.

[50] A court will permit an *ex parte* application to be made when it is satisfied that no notice is necessary or when

> . . . there is an urgency to the matter such that the object of the plaintiff's litigation would be unfairly and improperly frustrated, or where the plaintiff would be deprived of a remedy, by the very giving of notice, not just by the delay occasioned by notice.[14]

[51] Counsel in an *ex parte* situation are under a duty to act with "utmost good faith" by disclosing all material facts to the court.[15]

[52] As for *ex parte* applications involving self-represented litigants, the Steering Committee of the Rules Project will be making recommendations concerning self-represented litigants and so the General Rewrite Committee will not deal with that area.

POSITION OF THE GENERAL REWRITE COMMITTEE

[53] The Committee believes that Rule 387 is sufficiently clear and requires no change. In Part C.1 of this chapter, the Committee has already proposed that article A of Civil Practice Note 5 concerning desk applications for *ex parte* orders be moved into the body of the Rules.

---

[14] *Alberta (Treasury Branches) v. Leahy* (2000), 270 A.R. 1 at para. 171, 2000 ABQB 575, aff'd (2002), 303 A.R. 63, 2002 ABCA 101, leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 235.

[15] *Duke Energy Corp. v. Duke/Louis Dreyfus Canada Corp.* (1998), 219 A.R. 38 at para. 4, 1998 ABCA 196.

2. Recording motions

ISSUE No. 22
Should the hearing of an *ex parte* motion (or any motion) always be recorded?

[54] This issue was raised in comments from legal practitioners who complain that, when challenging an *ex parte* order, it can be hard to determine what the reasons were for granting it. Although the motion evidence is contained in affidavits and therefore available, there is often no transcript of the representations made to the court concerning the issues and, in particular, no record of the representations made by the applicant in support of the right to proceed without notice.

[55] The current practice is that a decision whether to record a chambers motion is made on an individual case-by-case basis by the chambers judge and counsel. Often recording is done when the application is controversial or there is a self-represented litigant involved. But requiring recording in all cases could involve several practical problems of logistics. Clerks and courtrooms where recording equipment is located may not be immediately or even quickly available (especially in rural areas) to record a motion on short or no notice. Recording in private chambers is difficult and expensive. Another problem with recording all motions (not just *ex parte* motions) is that motions often arise in the course of case management conferences and it would be onerous to record all such conferences just in case a motion is made.

[56] On the other hand, the Law Society of Alberta has recommended that all *ex parte* motions should be recorded when a lawyer is known to be acting for the party who did not receive notice.[16] This is so it can be assessed whether the applicant's counsel fulfilled his or her duty of utmost good faith by revealing all material facts to the court. Failure to do so would invite professional discipline.

---

[16] Law Society of Alberta, *Rules of Court Update* (Bencher's Advisory, Issue 64) (April 2000), item 3 at 5, online: <http://www.lawsocietyofalberta.com/files/benchersadvisory/;64_apr00.pdf>.

POSITION OF THE GENERAL REWRITE COMMITTEE

[57] The Committee favours retaining the *status quo*, but seeks the opinions and input of the legal profession on the following options in case the profession feels strongly otherwise.

1. Concerning *ex parte* motions, which of the following options is preferable?
   (a) Retain the *status quo* so that judges and counsel will continue to decide in each individual case whether or not to record an *ex parte* motion;
   (b) Make it mandatory to record all *ex parte* motions;
   (c) Require *ex parte* motions to be recorded unless the judge otherwise orders.
2. Should all motions be recorded (whether *ex parte* or on notice)? If so, should recording be mandatory, without exception, or should it be required unless a judge otherwise orders?

F. Variation and Setting Aside of Orders

[58] Variation and setting aside of orders (including *ex parte* orders) will be dealt with in Chapter 3, which will address Rules 387(2), 389 and 390.

G. Service of Notice of Motion in Time Period Between Statement of Claim and Statement of Defence

ISSUE No. 23
Does Rule 392 serve any valid purpose?

[59] Rule 392(1) has two effects. Without leave, a plaintiff can serve a notice of motion for an injunction in the period between service of a statement of claim and the deadline for filing the statement of defence. To serve any other kind of notice of motion within that time period, a plaintiff requires leave (by *ex parte* order). Rule 392(2) provides that a defendant has an unlimited ability at any time to serve a notice of motion on the plaintiff.

> This R. 392 applies where final judgment is not urgent, but interlocutory relief such as an injunction is urgent. This R. 392 hints that without leave, one could not have such a motion heard before the time to defend the suit (normally 15 days) had expired.[17]

---

[17] The Honourable W.A. Stevenson & The Honourable J.E. Côté, *Alberta Civil Procedure Handbook 2004* (Edmonton, Alberta: Juriliber, 2004) vol. 1 at 341 [*Civil Procedure Handbook*].

[60] Other Canadian jurisdictions do not have a rule to implicitly or explicitly prevent the early filing of motions other than injunctions.

POSITION OF THE GENERAL REWRITE COMMITTEE

[61] The Committee cannot see any need for Rule 392 and proposes that it be eliminated. If interlocutory relief is urgently needed, there should be no hurdles in its way. If relief is not urgent and a party brings a notice of motion prematurely, the applicant would be subject to costs. The general provisions of the Rules should make it clear that notices of motion can be filed at any time concurrently with or after filing of the statement of claim.

H. Remaining Rules in Part 29

[62] Rule 391 authorizes another judge to deal with an application if the judge who started to handle it dies, ceases to be a judge or cannot act through impossibility or inconvenience. Rule 393 supports the common practice of authorizing certain acts by judicial fiat. The General Rewrite Committee proposes that both of these Rules should be retained without change.

I. Appeals from a Referee or Master

1. Appeal from a Referee's Certificate

ISSUE No. 24
Is there really a need for an appeal from a referee's certificate? Can Rule 499 be deleted?

[63] In the Rules, the term and concept "referee's certificate" appear only in Rule 499 (and a consequential reference in Rule 500). Nowhere do the rules authorize a referee to give a "certificate" – the rules speak only of a referee giving a "report." As stated by Stevenson and Côté, "[t]he Rules speak of references, inquiries, and taking accounts. But the concept and procedure is basically the same."[18] After being

[18] *Ibid.* at 354.

appointed as referee in a matter,[19] the referee holds a hearing, hears evidence and then makes a report to the court. The report contains recommendations (not final decisions) about "what fact findings should be made, and maybe what legal results should flow from them. Any party can then move to have the court adopt the report and make it the court's judgment, or to vary the report, or to reject the report."[20] In other words, the final decision is made by the court. Since a referee's report has no legal effect without confirmation by the court, it is hard to see why a right of appeal from a "referee's certificate" needs to be created (assuming that "certificate" here means the same as "report.")

[64] Rule 499 originated in Victorian-era English law.[21] The Canadian approach to referees (recommendations only, not final decisions) contrasts with the situation in England, "where a referee appears to be a form of judge with power to make final judgments."[22] This difference may be why an appeal from a referee's certificate was needed in the original English law but now seems illogical in our rules of court.

[65] Alberta Rule 426(3) sets out the powers of the court hearing a motion to confirm a referee's report. In addition to the power to adopt, vary, require an explanation from the referee or remit the matter, Rule 426(3)(e) provides that the court can also "decide the question referred to the referee on the evidence taken before him either with or without additional evidence." This is essentially a description of a hearing *de novo*, which is all that Rule 499's "appeal" from a referee's certificate creates anyway, according to the case law interpreting Rule 500 (see the discussion which follows in the next part of this consultation memorandum). So it would seem that, if nothing else, Rule 499 is redundant in any event in the face of Rule 426(3)(e).

---

[19] Alberta, r. 403 provides that official referees are masters in chambers, clerks, persons appointed as referees by the provincial cabinet, and persons appointed as referees by the court with the consent of all parties.

[20] *Civil Procedure Handbook*, *supra* note 17 at 354.

[21] The Honourable W.A. Stevenson & The Honourable J.E. Côté, *Civil Procedure Guide 1996* (Edmonton, Alberta: Juriliber, 1996) vol. 2 at 1598 [*Civil Procedure Guide*].

[22] *Ibid*.

[66] Stevenson and Côté acknowledge that a referee's report has no legal effect without confirmation (thus obliquely questioning the need for Rule 499), but speculate that this right of appeal might be designed for appeal of procedural rulings made by a referee.[23]

POSITION OF THE GENERAL REWRITE COMMITTEE

[67] Rule 499 should be deleted. It appears to be unnecessary and obsolete. Nor is it really needed for appeal of procedural rulings made by a referee, because if a party does not like what a referee has done procedurally during the course of hearing a reference, the party can use that irregularity to argue against the confirmation of the report and the issue could be dealt with that way.

2. Appeal from Master in Chambers

[68] In our initial consultation with the legal profession, ALRI received a number of comments concerning appeals from masters. Firstly, it was said that having to hear appeals from masters in Special Chambers is a major source of delay because it takes so long to get a hearing date. The General Rewrite Committee does not recommend altering this procedure but recognizes that, if the judiciary could shorten the wait to get a hearing in Special Chambers, this complaint would be resolved. Secondly, some commentators advocated that some appeals from masters should go straight to the Court of Appeal, eliminating the first level of appeal to a Queen's Bench judge. The Committee has referred this issue to the Appeals Committee of the Rules Project. Thirdly, some practitioners suggested that appeals from masters should no longer be heard *de novo* by the judge, but should be restricted to the record and perhaps even to points of law alone.

ISSUE No. 25
Should all appeals from a master to a Queen's Bench judge continue to be conducted as hearings *de novo*, with new or additional evidence allowed as of right?

---

[23] *Civil Practice Handbook*, *supra* note 17 at 392.

[69] Alberta,[24] British Columbia,[25] Ontario[26] and the Federal Court[27] all provide that a master's decision can be appealed to a judge of the court. These provisions use typical appellate language when creating the right or process of appeal, without further elaboration. However in case law, Canadian courts have taken one of two different approaches to the issue of how appeals from masters should be heard – the "Alberta approach" or the "Ontario approach."

[70] Stevenson and Côté summarize the case law of the "Alberta approach" as follows:

> An appeal from a master to a judge is really a rehearing, not a true appeal, and so any discretion is exercised *de novo* by the judge without deferring to the master's exercise of it ...[28]
>
> New affidavits may be used on appeal, and they can cure any defect in the master's ruling....[29]
>
> ... In Alberta, an appeal from a master to a justice is *de novo*. That means two things. First, new evidence or cross-examination is possible, and new grounds may be raised.... And second, the justice exercises any discretion afresh and substitutes his or her views for the master's.[30]

[71] Basically, it appears that in Alberta, every single appeal from a master is heard *de novo* by the Queen's Bench judge. New or additional evidence that was not before the master is freely admissible as of right in the hearing before the judge. All matters are essentially reheard anew by the judge.

---

[24] *Court of Queen's Bench Act*, *supra* note 1, s. 12(1) and Alberta, r. 500.

[25] British Columbia, *Supreme Court Rules*, r. 53(6) [British Columbia].

[26] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 17(a) and Ontario, *Rules of Civil Procedure*, r. 62.01 [Ontario].

[27] Canada, *Federal Court Rules, 1998*, r. 51(1) [Federal]. The Federal Court calls its officials "prothonotaries" instead of "masters."

[28] *Civil Procedure Guide*, *supra* note 21, vol. 2 at 1600.

[29] *Ibid*. at 1601.

[30] *Civil Procedure Handbook*, *supra* note 17 at 392.

[72] British Columbia, Ontario and the Federal Court all take the "Ontario approach" to the conduct of appeals from a master. The Ontario approach restricts hearings *de novo*. If deciding a matter requires the exercise of judicial discretion and the question is vital to the final issue of the case, then the appellate judge will exercise that discretion *de novo* and substitute his or her discretion for the master's.[31] Because the question is vital to the final issue of the case, the litigant is entitled to have a judge's discretion exercised to decide it, rather than simply that of a master. The appellate judge will rehear the matter – but based only on the evidence that was before the master.[32] Further evidence is not automatically admissible, but must meet the same test for the admission of fresh evidence on appeal (although that test may not always be applied with the same stringency as in an appeal from a trial decision).[33]

[73] The Federal Court of Appeal has theorized that the difference between the Alberta and Ontario approaches is due to different constitutional attitudes to the office of master. Ontario does not see s. 96 of the *Constitution Act*[34] as prohibiting the province from appointing an officer of the court who may exercise some judicial functions. Thus, Ontario is more willing to give greater deference to a master's decisions by using hearings *de novo* more sparingly. But Alberta characterizes any deference to the decisions of provincially-appointed masters as fettering the discretionary jurisdiction of (and diminishing the status of) federally-appointed s. 96 judges. So judges must hear everything *de novo*.[35]

---

[31] Professor Garry D. Watson & Mr. Justice Craig Perkins, *Holmested and Watson Ontario Civil Procedure*, looseleaf (Toronto: Carswell, 1984) vol. 5 at 62-13 to 62-14 [Holmested and Watson]; *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.); *Scott Steel Ltd. v. The Alarissa (The)* (1997), 125 F.T.R. 284 (T.D.).

[32] *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.).

[33] Holmested and Watson, *supra* note 31, vol. 5 at 62-11 to 62-12, citing British Columbia cases *Culbert v. Agosti* (1993), 20 C.P.C. (3d) 349 (B.C.S.C.) and *MacMillan Bloedel Ltd. v. Mullin* (1985), 66 B.C.L.R. 258 (C.A.).

[34] 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[35] *Canada v. Aqua-Gem Investments Ltd.*, *supra* note 31 at paras. 51-52, citing *Re Solloway Mills & Co. Ltd.*, [1935] O.R. 37 at 43 (C.A.) and *Wright v. Disposal Services Ltd. and Marsh* (1977), 8 A.R. 394 at 398 (S.C.). The reasoning in *Wright* was adopted with approval by the Alberta Court of Appeal in *Willman v. Coreman* (1979), 11 Alta. L.R. (2d) 110 at 114.

[74] Many courts have also commented that a practical reason exists to adopt the Ontario approach rather than the Alberta approach. The purpose of using masters to decide many interlocutory matters at first instance is to conserve judges' time and effort for more important work, thus making the system more efficient.[36] But if all appeals from masters are heard *de novo* regardless of the nature of the issues, it defeats that efficiency and "reduce[s] the office of a ... [master] to that of a preliminary 'rest stop' along the procedural route to a motions judge."[37]

POSITION OF THE GENERAL REWRITE COMMITTEE

[75] It is a common perception that hearings *de novo* must, by their very nature, waste judicial resources. To test the accuracy of that assumption, the General Rewrite Committee obtained and considered some statistics from the Court of Queen's Bench in Edmonton.[38] In a one year period (2003) in Edmonton, the total number of motions filed before masters was 6932 and before judges was 2731. (Clearly, masters hear many more motions than do judges and, on that aspect alone, do save judicial time and court resources). But the most significant statistic showed that the number of appeals from masters was very small (138) and comprised only 5.1% of all the motions heard by judges. So, contrary to popular perception, it appears that *de novo* hearings are in fact a very small part of the judicial workload. Hearing such a small number of appeals *de novo* should not divert any significant amount of judicial resources from other duties. Moreover, the *de novo* appeals do not frequently result in an overturned decision – about 20% of appeals from masters (28 out of 138) were successful in 2003 and about 40% were dismissed. The remaining 40% were withdrawn, adjourned, struck, transferred or reserved.

[76] After much discussion and consideration, the General Rewrite Committee does not propose to change the "Alberta approach" on appeals from masters under Rule 500. Not only does the Committee question the view that in practice such appeals must surely be a waste of judicial resources, the Committee is also reluctant to displace the constitutional perspective that underlies the Alberta approach. So,

---

[36] *Canada v. Aqua-Gem Investments Ltd.*, *ibid.* at para. 54.

[37] *Ibid.* at para. 68.

[38] Facsimile from Wayne Samis, Senior Manager, Court of Queen's Bench, Edmonton, Alberta (17 March 2004) to Debra Hathaway, Alberta Law Reform Institute.

although the Committee recognizes that there are arguments to the contrary, it recommends that appeals from masters continue to be heard on a *de novo* basis, with new or additional evidence allowed as of right.

CHAPTER 2. EVIDENCE ON MOTIONS AND APPLICATIONS

A. Introduction

[77] Part 26 of the *Alberta Rules of Court* addresses various kinds of evidence, including Rules 298 to 314.1 concerning affidavits, the usual form of evidence in motions and applications. This chapter examines several specific issues about affidavits. If one of those rules or a characteristic of an affidavit is not addressed in this chapter, it means the General Rewrite Committee affirms the current practice and provisions of the Rules. This chapter also examines Rules 266, 267 and 268 concerning the examination of witnesses before and at a motion.

B. Affidavits and Persons Under Disability

ISSUE No. 26
Should Alberta create a Rule regarding the swearing of an affidavit by a litigation representative on behalf of a party under disability?

[78] The General Rewrite Committee has already recommended that, in regard to who should swear an affidavit of records, Rule 187.1 should be amended to provide that a litigation representative[39] of a person under disability[40] is responsible for preparing and swearing that affidavit, without need for court order.[41] Do we need a general rule to address the same situation concerning any type of affidavit?

[79] In British Columbia, if the proposed deponent of an affidavit is a patient as defined in the *Patients' Property Act*,[42] the rules allow the affidavit to be sworn

---

[39] The current terms used in the Rules for a litigation representative are "next friend" and "guardian *ad litem*," depending on whether the representative acts for a plaintiff or defendant person under disability. The General Rewrite Committee has recommended that a single term be used, such as "litigation representative": Alberta Law Reform Institute, *Parties* (The Rules Project: Consultation Memorandum No. 12.4) (Edmonton: Alberta Law Reform Institute, 2003) at 28 [ALRI CM 12.4].

[40] A person under disability includes a minor and a person who is unable to make reasonable judgments in respect of matters relating to a claim, including a person declared by a court to be a dependent adult.

[41] ALRI CM 12.4, *supra* note 39 at 37.

[42] R.S.B.C. 1996, c. 349.

instead by the guardian *ad litem* of the patient.[43] The guardian *ad litem* is allowed to swear the affidavit on his or her information and belief. Alberta does not have a rule that corresponds specifically to this situation, although Rule 65 allows a next friend or guardian (with the approval of the court) to consent to any mode of taking evidence or to any procedure, and such consent has the same effect as if the party were not under a disability and had consented.

POSITION OF THE GENERAL REWRITE COMMITTEE

[80] With the exception of an affidavit of records, there is no general requirement that only a party can swear an affidavit in a motion or application. Anyone can give evidence. Where necessary, that evidence will be on information and belief. The Committee believes a litigation representative could swear any affidavit (except an affidavit of records) needed under the current Rules and so there is no need for a special Rule on this point.

C. Personal Knowledge, Information and Belief

ISSUE No. 27
Should any changes be made regarding the forms of evidence that can be included in an affidavit, including the circumstances in which statements of belief can be used?

[81] Rule 305(1) provides that an affidavit may only contain statements of facts within the deponent's knowledge. British Columbia, Ontario and Federal Court rules are very similar, but add that an affidavit may also contain "other evidence that the deponent could give if testifying as a witness in court."[44]

[82] Where interlocutory motions are concerned, Rule 305(3) provides that an affidavit may contain statements as to the belief of the deponent if the source and grounds for the belief are given. Case law provides that if the grounds of belief are not

---

[43] British Columbia, r. 51(13).

[44] Ontario, r. 4.06(2).

given, "the affidavit will be disregarded (at least as to that part)."[45] The source and grounds of a deponent's belief are also required in the British Columbia, Ontario and Federal Court rules. However, Ontario's rules are more liberal regarding the use of affidavits based on information and belief. Such affidavits are allowed in all "motions" (not just interlocutory motions).[46] They are also allowed in applications, provided the facts are not contentious.[47]

POSITION OF THE GENERAL REWRITE COMMITTEE

[83] Concerning Rule 305(1), the Committee proposes that it should be expanded to permit an affidavit to contain not only statements of facts within the deponent's personal knowledge, but also any other evidence that the deponent could give in court. This will explicitly allow exceptions to the hearsay rule to be contained in the affidavit, which is currently only implicit in the Rule. The Committee further proposes that Rule 305(2) be clarified regarding this aspect as well, so that it does not set a higher standard for a corporation than for an individual.

[84] But the Committee does not agree with the Ontario model allowing the general use of affidavits based on information and belief in motions and applications. Such affidavits should be used only in interlocutory motions, as is the current practice under our Rule 305(3). In matters where final relief is sought, trial standards for reliable evidence should be used because they provide a better process and more assurance that the final decision will be properly established and just.

D. Filing and Service of Affidavits

ISSUE No. 28
Should it ever be permissible to serve an unfiled affidavit?

---

[45] *Civil Procedure Guide*, *supra* note 21, vol. 1 at 1215.

[46] Ontario, r. 39.01(4).

[47] Ontario, r. 39.01(5).

ISSUE No. 29
Should fax filing be available to lawyers resident at a judicial centre as well as to those at a distance?

[85] Rule 310 provides that affidavits upon which an application is founded shall be filed before the service of the notice of motion or petition and shall be served with that notice or petition. However, a breach of Rule 310 is not fatal because the court can cure it under Rule 558.[48]

[86] An example of a situation where someone might want to serve an unfiled affidavit would be where a counsel who is not resident at the judicial centre files an affidavit by faxing it to the court, but needs to serve it before the official "court copy" is received back with proof of filing. In our initial consultation with the legal profession, the suggestion was also made that fax filing should be opened up to lawyers resident at a judicial centre as well, so that affidavits could be faxed with a proviso that the original be filed within a reasonable time.

POSITION OF THE GENERAL REWRITE COMMITTEE

[87] Firstly, the Committee is opposed to extending fax filing to lawyers resident at a judicial centre. Unless more resources are made available to courts, it would create a great strain on the courts' equipment and personnel required to check the faxed documents, establish accounts and bill firms for filing in this manner. Secondly, the Committee is also opposed to allowing unfiled documents to be served because the potential for problems is too great – the original document may never in fact be filed or, if filed, there may be variations and gaps between the court copy and the served copy.

ISSUE No. 30
Is Rule 314.1 really needed to regulate late filing of affidavits in reply?

[88] Rule 314.1 provides that an affidavit in opposition to a motion or in reply must be filed with the court no later than 24 hours before the hearing of a motion or application made in respect of proceedings that have been commenced, and 3 days

---

[48] *Civil Procedure Handbook*, *supra* note 17 at 279.

before the hearing of a motion or application not made in respect of proceedings that have been commenced. The court has a discretion to extend the time period for filing or serving, subject to conditions, including costs.

POSITION OF THE GENERAL REWRITE COMMITTEE

[89] The Committee questions the need for Rule 314.1, which is designed to prevent filing of reply affidavits at the last minute. This rule only applies in General Chambers, not in Special Chambers. The Committee believes this rule to be unnecessary, because any injury caused by late delivery of an affidavit would be adequately dealt with by the court in an *ad hoc* way, either by granting an adjournment or by disregarding the late affidavit. The Committee proposes to delete Rule 314.1.

E. Format of Affidavits

ISSUE No. 31
Should it be necessary to tab and number exhibits to affidavits if it creates hardship for the party preparing the affidavit?

[90] Rule 311 provides that, if the total number of pages in an affidavit and exhibits exceeds 25 pages, the exhibits must be separated by tabs and the pages within each tab must be numbered consecutively. Alternatively, the pages of the affidavit and all the exhibits may be numbered consecutively using a single series of numbers.

[91] In our initial consultation with the profession, a practitioner from outside Edmonton and Calgary noted that this requirement greatly increases the work involved in preparing an affidavit. He complained that the cost of such preparation puts smaller law practices at a disadvantage compared to larger urban practices.

POSITION OF THE GENERAL REWRITE COMMITTEE

[92] The Committee approves of and affirms Rule 311. It is a very recent requirement (dating only from 2001) and, in the opinion of the Committee, the real problem is that many counsel are not following it. The advantages of the rule are self-evident.

F. Cross-examination on an Affidavit

ISSUE No. 32
Should any restrictions be placed on the right to cross-examine on an affidavit?

[93] Rule 314 governs cross-examinations on affidavits. No order is needed for such cross-examination. However, some lawyers responding to our public consultation have advocated that this right to cross-examine on an affidavit should not be automatic and that leave should be required in all cases. They said the right to cross-examine is sometimes used as a delay tactic, but agree that a balance must be struck between no right to cross-examine and an absolute right to cross-examine.

[94] Currently, Alberta case law upholds an almost absolute right to cross-examine on an opponent's affidavit –

> I can foresee some extreme sets of facts which would still give a court the discretion to refuse the right to cross-examine on an affidavit but I accept the proposition that this discretion should be exercised sparingly and only in clearest of situations. In the case at bar I am not prepared to hold, at this stage of the proceedings, that the defendant's requested examination on the affidavit is totally frivolous or designed only to stall the resolution of the matter.[49]

[95] In British Columbia, evidence on applications (including interlocutory motions) is given by affidavit but there is no automatic right to cross-examine. The court may order the deponent to attend for cross-examination on the affidavit before the court or before another person, as the court directs.[50] The Alberta practitioners who are in favour of limiting the right to cross-examine on an affidavit suggested that British Columbia's approach be adopted here.

[96] Ontario rules contain a number of restrictions on the right to cross-examine, short of initially requiring leave in all cases. Before any cross-examination can occur,

---

[49] *Canada (Attorney-General) v. Sandford* (1995), 175 A.R. 118 at para. 17 (Q.B.).

[50] British Columbia, r. 52(8)(a).

a party must have "served every affidavit on which the party intends to rely"[51] and completed all examinations under the Ontario equivalent to Alberta Rule 266. Because both sides' affidavits must be filed before cross-examination can occur, this rule results in a single round of cross-examinations by the parties, rather than two rounds. This approach admittedly deviates from standard trial practice (where a defendant does not have to put in his or her evidence before cross-examining the plaintiff's witnesses), but Ontario justifies it by noting that different evidence-taking rules are acceptable for motions and applications (such as the use of affidavit evidence rather than *viva voce* evidence).[52]

[97] In addition, the Ontario rule provides that "the right to cross-examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of cross-examination where the party has failed to act with reasonable diligence."[53] On motions other than summary judgment, the party who cross-examines must cover the expense of providing transcripts to all adverse parties and is also liable for costs regarding the cross-examination, unless the court orders otherwise.[54]

[98] If a party wants to file another affidavit following cross-examination, leave of the court or consent of the other parties is required.[55]

[99] In our public consultation, one lawyer advocated adoption of the Ontario model in order to end what he sees as the unnecessary delay and expense caused by the current Rule 314.

POSITION OF THE GENERAL REWRITE COMMITTEE

[100] The General Rewrite Committee's initial position is that it is not in favour of restricting the right to cross-examine on affidavits. The Committee does not like either

---

[51] Ontario, r. 39.02(1).

[52] *Holmested and Watson*, *supra* note 31, vol. 4 at 39-30.

[53] Ontario, r. 39.02(3).

[54] Ontario, r. 39.02(4).

[55] Ontario, r. 39.02(2).

of the alternatives found in British Columbia or Ontario. In particular, the Committee disagrees with the Ontario approach that respondents should have to file their own affidavits before being able to cross-examine. Respondents should be able to hear all the evidence against them before responding. Also, the Committee doubts if leave to cross-examine (British Columbia) or leave to file a further affidavit (Ontario) would often be refused by a court and suspects the current situation would continue despite any ostensible rule change.

[101] However, the Committee notes that both models have received some support in our initial public consultation. Therefore, the Committee asks for input on this issue from the legal profession before making its final proposals concerning Rule 314.

ISSUE No. 33
Does Rule 314(2)'s equation of cross-examination on an affidavit with examination for discovery cause problems in practice?

[102] Rule 314(2) provides that a deponent may be required to attend an examination on an affidavit in the same manner as a person being examined for discovery. This is a useful provision. But then Rule 314(2) goes on to state that the same procedural rules which govern an examination for discover apply, so far as applicable, to a cross-examination on an affidavit. These other procedural rules for examinations for discovery cover matters such as the examined party's duty to inform himself or herself prior to the examination and the giving of undertakings during the examination. Concerns were raised about making these rules applicable because a cross-examination on an affidavit is quite different in nature from an examination for discovery. At the subsequent hearing or trial, the use which may be made of cross-examination evidence is significantly different than the use which may be made of discovery evidence –

> Despite physical appearances, in law . . . [a cross-examination on an affidavit] is much like a cross-examination at a trial, and very different from an examination for discovery. Most important, R. 214 does not apply, and in theory every answer is automatically evidence before the court. So no one has to 'read in' an answer, and in argument any party can rely on any answer. The judge or master can read the whole cross-examination transcript and act on it. Therefore, cross-examining on an affidavit is as dangerous as cross-examining at trial. So it is dangerous for counsel to ask a question if not sure what answer will come. It is dangerous to cross-examine if the affidavit is weak or has gaps, for the

> answers may plug them. Cross-examination should be brief. There is no need to cross-examine where there is a total absence of evidence on a key fact.[56]

In contrast, an examination for discovery is often wide-ranging and exploratory in order to determine the amount and strength of the evidence available to the examined party. Unlike the transcript of a cross-examination on an affidavit (which automatically and in its entirety becomes evidence at the hearing), discovery evidence is usable at trial only if deliberately selected and "read in" to the trial transcript. The court may never hear most of the answers given at discovery. Undertakings to provide further evidence following the examination for discovery are common.

[103] Should the duty to inform and the giving of undertakings apply to cross-examinations on an affidavit? These procedures do not apply to cross-examination of a witness at trial. Conceptually, it would seem that both types of cross-examination should be treated similarly. Yet there is some limited case law suggesting that a deponent of an affidavit may be ordered to inform himself or herself and re-attend for further cross-examination if the questions, although outside the four corners of the affidavit, are material to the application.[57]

POSITION OF THE GENERAL REWRITE COMMITTEE

[104] Rule 314(2) should continue to provide that a deponent may be required to attend in the same manner as a party being examined for discovery, but the Rule should stop there. The general procedural equation of cross-examination on an affidavit with examination for discovery should be deleted, because it is misleading and confusing. The Rule's silence would not prevent a court from devising (if it is really required) an appropriate procedure for undertakings and a duty to inform in the context of a cross-examination on an affidavit.

ISSUE No. 34
Should the Rules make it clear who may cross-examine on an affidavit?

---

[56] *Civil Procedure Handbook*, *supra* note 17 at 282.

[57] *Ethicon Inc. v. Cyanamid of Canada Ltd.* (1977), 35 C.P.R. (2d) 126 (F.C.T.D.); cited with approval in *155569 Canada Ltd. v. 248524 Alberta Ltd.* (1989), 99 A.R. 100 at 103 (Q.B. M.).

[105] Rule 314 is silent on the issue of who may cross-examine on an affidavit, but Alberta case law suggests that "even if there was no decision from any Court on this matter ... anyone having an immediate interest in the outcome of the litigation would be entitled to cross-examine on an affidavit."[58] Ontario provides that a party who is adverse in interest on the motion or application may cross-examine.[59]

POSITION OF THE GENERAL REWRITE COMMITTEE

[106] Our Rules should state explicitly that the right to cross-examine on an affidavit is restricted to a party who is adverse in interest on that particular application.

ISSUE No. 35
Should the Rules describe the scope of cross-examination on an affidavit?

[107] Rule 314 does not address the scope of a cross-examination on an affidavit. Alberta case law suggests that the scope is very wide.

> It is clear to me that the examination [on an affidavit] may be as searching and thorough as the party's cross-examination of the witness at the discovery could be. However, it must not extend to matters wholly immaterial or irrelevant to the affidavit. This does not mean to say that the examiner is limited to the four corners of the affidavit but that the questions must be relevant and material to the issues arising from the affidavit.[60]

[108] British Columbia provides that, at trial, cross-examination on an affidavit is not limited to matters in the affidavit,[61] but has no corresponding rule regarding the scope of cross-examination on an affidavit in support of a motion or an application.

POSITION OF THE GENERAL REWRITE COMMITTEE

[109] The Rules should continue to be silent on this issue and should not attempt to codify the case law. This issue is not merely procedural and the test would be extremely difficult to codify.

---

[58] *Brown v. Ludwig* (1998), 235 A.R. 150 at 151 (Q.B. M.).

[59] Ontario, r. 39.02(1).

[60] *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, [1981] 4 W.W.R. 760 at 762 (Alta. Q.B.).

[61] British Columbia, r. 40(49).

G. Examination of a Witness under Rule 266

ISSUE No. 36
Should Rule 266 permit an examining party to cross-examine a witness called under that rule, rather than being limited to direct examination?

ISSUE No. 37
Should Rule 266 allow other parties to cross-examine a witness and should re-examination be allowed?

[110] Rule 266 allows a party to require the attendance of a witness to be examined in the presence of a court officer for the purpose of using that witness's evidence on any motion or other proceeding. In other words, this procedure occurs *before* the hearing of the motion. The whole transcript goes into evidence and may be used by any party at the subsequent hearing of the motion.[62] The attendance and examination of the witness may be procured and conducted in the same manner as a witness at a trial.

[111] Rule 266 is useful but it has an important limitation – "[w]hile the Rule permits the examination of a non-party, the examination is in the nature of an examination-in-chief, and not a cross-examination."[63]

[112] By contrast, the equivalent Ontario rule does not have this limitation and in fact explicitly provides that such a witness "may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination."[64]

[113] Alberta Rule 266 is parallel to trial procedure, where a party can subpoena any witness the party wants, but can only conduct a direct examination unless, on application, the court declares the witness to be hostile. Similarly, if a witness

---

[62] *Civil Procedure Handbook*, *supra* note 17 at 261.

[63] Allan A. Fradsham, *Alberta Rules of Court Annotated 2004* (Toronto: Carswell, 2003) at 700.

[64] Ontario, r. 39.03(2).

examined under Rule 266 is uncooperative, the party would have to adjourn and seek a court declaration of hostility so cross-examination could occur. The Ontario rule basically presumes hostility and allows the party to cross-examine immediately. Plus any other party can also cross-examine that witness. Why does the Ontario rule do this?

> ... It permits the examining party to cross-examine the witness because typically the party will resort to examining a witness, as opposed to filing his or her affidavit, only where the witness declines to voluntarily make an affidavit, hence such witnesses will usually not be friendly to or co-operative with the examining party. There is little danger that a party will resort to the rule in order to cross-examine a friendly witness on a motion or application....
>
> The rule permits any other party present on the examination to also cross-examine.... It permits cross-examination because in some cases the witness may also be unfriendly towards the other party. If in a particular case the witness is friendly to the other party and is cross-examined by that party by leading questions, then on the hearing the court can and should give reduced weight to any testimony so adduced.[65]

POSITION OF THE GENERAL REWRITE COMMITTEE

[114] Although this would be a major change in our practice, the Committee is persuaded by the Ontario rationale and proposes that Alberta should adopt the Ontario approach. Rule 266 should allow a party to cross-examine a witness whom that party has called for examination before the hearing of the motion. Any other party should also be able to cross-examine the witness and then the first party should be able to re-examine by cross-examination.

H. Examination of a Witness under Rules 267 and 268

[115] Rule 267(1) provides that "for the purpose of a motion," a court can order documents to be produced and witnesses to appear for oral examination "before the court or before any other person and at any place." Clearly this would allow *viva voce* evidence to be given at the motion if required, but it is also broader and could allow examination and production before the hearing and before officials other than the hearing judge. Rules 267(2) and 268 provide that trial procedure applies to such production and examination.

---

[65] *Holmested and Watson*, *supra* note 31, vol. 4 at 39-50.

[116] Apparently, Rule 267 "is rarely used"[66] in Alberta. The Queen's Bench has held that Rule 267 "should apply to extraordinary circumstances and unless there are such extraordinary circumstances, the Applicant should be confined to providing affidavit evidence."[67] The nature and effect of Rule 267 has been summarized as follows:

> The rule does not give the Court power to order inspection of documents (discovery) before trial in the hands of persons not parties to the action. The object of the rule is to obtain the attendance of witnesses to produce documents and give testimony with respect to those documents. The application may be made prior to, at or after trial. It is open to the witness to make legitimate objections to the requested production. The rule does not permit a fishing expedition. The party applying for the attendance of the witness is bound by his testimony and the party may not cross-examine the witness. An opposite party may be called in this fashion, but becomes the witness of the party who called him or her with the same restrictions respecting cross-examination or the declaration of a hostile witness.[68]

[117] Rule 267 does cover some different ground than Rule 266, which was examined in the preceding part of this consultation memorandum. Besides the fact that Rule 267 can be used to allow *viva voce* evidence at the hearing of the motion before the court, the main difference is that Rule 267 explicitly concerns production of documents as well as examination of witnesses, while Rule 266 is seemingly limited to oral examination of a witness.

ISSUE No. 38
Should the overlap between Rules 266 and 267 be eliminated?

[118] Although Rules 266 and 267 serve different purposes in some respects, there is one area of significant overlap – both Rules could be used to orally examine a witness before someone other than a judge prior to the hearing of a motion. Is this overlap really needed or useful?

[119] Ontario Rule 39.03 is the counterpart to our Rules 266, 267 and 268. Rule 39.03(1) and (2) governs the oral examination of witnesses *before the hearing* of a

---

[66] *Civil Procedure Handbook*, *supra* note 17 at 261.

[67] *Mr. K. v. Kover* (2003), 333 A.R. 241 at para. 11, 2003 ABQB 500.

[68] *Alberta (Treasury Branches) v. Leahy* (1999), 254 A.R. 280 at para. 22, 1999 ABQB 842.

motion. It explicitly authorizes the person who examines the witness to cross-examine. This is the part of Rule 39.03 which the General Rewrite Committee has just recommended for adoption in Alberta in place of Rule 266.

[120] Rule 39.03(4) and (5) governs the oral examination of witnesses *at the hearing* of a motion. "In practice, leave to examine a witness at the hearing of a motion or application is rarely requested. Situations where it may occur are motions for an urgent interim injunction or for interim custody."[69] Rule 39.03(5) incorporates by reference the procedure to compel production of documents. So Rule 39.03(4) and (5) is the equivalent of Alberta Rules 267 and 268 if the current overlap with Rule 266 were eliminated.

POSITION OF THE GENERAL REWRITE COMMITTEE

[121] The overlap between Rules 266 and 267 should be eliminated by adopting the model found in Ontario Rule 39.03.

ISSUE No. 39
Should a person who calls a witness under Rule 267 be allowed to cross-examine that witness without a court order?

[122] Rule 267 does not allow the person who calls a witness to cross-examine that witness. If the witness is hostile, a court order would be necessary to allow such cross-examination.

[123] As already discussed, the Ontario model allows automatic cross-examination to occur in an examination *before the hearing* and the Committee has recommended that Rule 266 be changed to follow the Ontario model. As for examination of a witness *at the hearing* of the motion, the Ontario model does not explicitly authorize the examining party to cross-examine, but simply provides that the person may be examined "in the same manner as at a trial."[70] However, Ontario has some special rules about examining witnesses at trial that Alberta does not have. In Ontario, if a witness comes within the statutory definition of an "adverse party," the person calling

---

[69] *Holmested and Watson*, *supra* note 31, vol. 4 at 39-51.

[70] Ontario, r. 39.03(4).

them as a witness can cross-examine them without needing a court order to do so.[71] Hostility of an "adverse party" is essentially presumed. So in some circumstances at the hearing of a motion, an examining party might be able to automatically cross-examine as well.

POSITION OF THE GENERAL REWRITE COMMITTEE

[124] Although the Committee recommends use of Ontario Rule 39.03 as the model to replace Rules 266, 267 and 268, it does not propose adopting any system to allow automatic cross-examination by a party who calls a witness *at the hearing* of a motion. As is now the case under Rule 267, the party would be subject to standard trial procedure and would have to obtain the court's permission to cross-examine a witness called by that party. However, since the hearing is already being held before a judge, no adjournment of proceedings would be necessary to obtain such an order to cross-examine and there would be no hardship or delay involved in obtaining that order.

---

[71] Ontario, r. 53.07(1) and (5).

CHAPTER 3. VARIATION, SETTING ASIDE AND CORRECTION OF ORDERS AND JUDGMENTS

A. Introduction

[125] Various rules exist in the *Alberta Rules of Court* under which a party can apply to have an order or judgment varied or set aside. Each rule is designed to deal with slightly different circumstances. These rules are found in several locations among the rules dealing with, for example, third party procedure, procedure on default, summary trial, trial, and motions and applications. The Rules also contain several other provisions dealing with inadvertent errors and omissions in orders and judgments that require correction, and with enlargement or abridgment of time.

B. Current Rules

1. Variation and Setting Aside of Judgments

[126] Four Rules deal with variation and setting aside of judgments (as differentiated from orders generally) and can be broken down into two main categories:

1. Judgments obtained by default of defence:
   (a) judgment has been obtained against a non-defending third party after default judgment has been entered against the defendant (Rule 73);
   (b) a default judgment has been entered in an amount in excess of the claim (Rule 157);
   (c) a judgment has been entered by default but the defendant wishes to defend (Rule 158); and
2. Judgments obtained following the defendant's accidental non-appearance at trial (Rule 257).

[127] Generally speaking, the rules governing variation and setting aside of judgments are limited to situations where the judgment was undefended or where the defendant accidentally failed to appear at the trial. Adjudication of a judgment usually results in the matter being *res judicata*, leaving appeal as the only remedy. The general rule is that a final judgment properly made and entered cannot be varied except on appeal, unless there is a special jurisdiction to do so.[72]

---

[72] *Morguard Mortgage Inv. Ltd. v. Faro Dev. Corp. Ltd.* (1974), 50 D.L.R. (3d) 426 at 431 (Alta. S.C.).
(continued...)

2. Variation and Setting Aside of Orders

[128] There are a number of rules dealing with variation and setting aside of orders. Generally speaking, these rules address situations where:

- an order has been granted *ex parte* or on insufficient notice (Rule 387(2));
- an order is granted after accidental non-appearance at a chambers motion (Rule 389);
- there is consent among all parties to change the order (Rule 390(2));
- new evidence arises subsequent to the making of an order, circumstances have changed or the order was obtained by fraud (Rule 390(1) as judicially interpreted or extrapolated);[73]
- an order is made that pertains to the time and evidence requirements of a summary trial (Rule 158.4(3)).

3. Correction of Orders and Judgments

[129] Finally, there are a few rules designed to allow correction of an order or judgment which contains an inadvertent error or omission. This includes situations where:

- further directions are necessary after an order or judgment has been entered, for the purpose of ensuring to any party the relief to which the party is entitled, provided the order does not necessitate any variation of the original judgment or order (Rule 330);
- it is necessary to correct a clerical mistake or error in an order or judgment (before or after entry) arising from any accident or slip (Rule 339);
- time specified in an order (or under a Rule) needs to be enlarged or abridged (Rule 548).

---

[72] (...continued)
Reference to "order" in this context means final order or judgment.

[73] Alberta, r. 390(1) allows for the setting aside, variation or discharge of an order, on notice, by the judge who granted the order. The application of this rule is not evident from the rule itself but case law suggests it applies to interlocutory orders where new evidence has arisen or circumstances have changed: *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)* (1995), 165 A.R. 155 at para. 8 (C.A.) [*Pocklington Foods*]. Presumably the Rule also applies to orders obtained by fraud. Combined with r. 391, the scope of r. 390(1) expands to permit any judge to set aside, vary or discharge an order, on notice, where it would be inconvenient or impossible for the original judge to do so.

C. Single General Rule

ISSUE No. 40
Should there be a single general rule governing variation, setting aside and discharge of orders and judgments?

[130] Rather than having all these different rules for variation, setting aside and discharge of orders and judgments scattered throughout the Rules, the Committee considered several models to condense and consolidate them. The Committee favoured the approach taken by Federal Court Rule 399. It lists in a single general rule all of the circumstances under which an order (which term includes a judgment) might be varied, set aside or discharged. Rule 399 provides as follows:

> **399. (1) Setting aside or variance** – On motion, the Court may set side or vary an order that was made
>
> (a) *ex parte*; or
>
> (b) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding,
>
> if the party against whom the order is made discloses a *prima facie* case why the order should not have been made.
>
> **(2) Setting aside or variance** – On motion, the Court may set aside or vary an order
>
> (a) by reason of a matter that arose or was discovered subsequent to the making of the order; or
>
> (b) where the order was obtained by fraud.
>
> **(3) Effect of order** – Unless the Court orders otherwise, the setting aside of variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.

[131] However, some modifications would have to be made to use the Federal Court model in Alberta because of differences in our practice. Firstly, the Federal Rule does not distinguish between orders and judgments; the single term "order" refers to both. Even so, it is unlikely that each of the listed circumstances in the rule applies equally to judgments and orders, given the principle of *res judicata* and the rule that a judge is *functus officio* once a judgment has been properly entered. The Alberta rule would need to specify that certain circumstances apply to all final orders, judgments and interlocutory orders, while some other circumstances apply only to interlocutory orders.

[132] Secondly, because default judgments are not entered administratively under the federal system, but rather proceed by way of an *ex parte* motion for judgment,[74] there is no specific provision in the Federal Court Rules to set aside judgments obtained by way of default. Instead, there is a general provision to set aside or vary orders obtained *ex parte* which is intended to include judgments made in default of a defence. The Alberta rule would have to explicitly address setting aside default judgments.

POSITION OF THE GENERAL REWRITE COMMITTEE

[133] The Committee proposes that we follow the basic Federal Court model and have a single Rule with two subsections governing this area. The first subsection should apply to setting aside or varying any final order, judgment or interlocutory order. The second subsection should apply only to setting aside or varying interlocutory orders. In the next part of this chapter, the Committee's proposals will flesh out the characteristics for each subsection of the single general rule concerning the various circumstances in which variation or setting aside may be sought.

ISSUE No. 41
Should the variation and setting aside powers to be found in the single general rule be exercised by masters (when appropriate) as well as by judges?

[134] Currently, most of the variation and setting aside rules may be exercised by "the court," the use of which terminology vests authority in both judges and masters. However, there are some rules where variation and setting aside powers are explicitly limited to judges. Sometimes it makes sense because the rule is dealing with trial matters only. But three rules dealing with interlocutory orders are also expressly limited to judges alone – Rule 387(2) concerning *ex parte* orders, Rule 389 concerning non-appearance on a motion and Rule 390(1) concerning the general power to set aside or vary interlocutory orders. Masters also make many interlocutory and *ex parte* orders, but under the Rules have no authority to vary them or set them aside in appropriate circumstances.

---

[74] Federal Court, r. 210.

POSITION OF THE GENERAL REWRITE COMMITTEE

[135] Both subsections of the single general rule should vest variation and setting aside authority in "the court." For the most efficient use of court time and resources, masters should also be able to vary and set aside orders made by masters in their areas of jurisdiction. However, a master would have no authority to set aside or vary an order originally made by a judge.[75]

D. Circumstances in Which Variation or Setting Aside May Be Sought

1. Circumstances Related to Default Judgment

[136] As previously mentioned, the Federal Court model does not refer specifically to default judgments because in that system, default judgments are not entered administratively. They proceed by way of *ex parte* motion for judgment and so are subsumed under the category of *ex parte* motions in Rule 399. The first subsection of Alberta's single general rule will have to explicitly address the variation and setting aside of default judgments.

[137] It is important to note that, in the following proposals concerning default judgment, the General Rewrite Committee does not propose any substantive changes relating to the law governing variation and setting aside of default judgments. All the current case law in this area will continue to apply.

a. Default Judgment Generally

ISSUE No. 42

Should our single general rule contain an express provision for varying or setting aside a default judgment generally? If so, should it specify the test or otherwise state criteria for setting aside?

[138] Rule 158 authorizes the variation or setting aside of a default judgment entered administratively in the absence of a defence or obtained *ex parte* in the absence of a

---

[75] *Court of Queen's Bench Act*, *supra* note 1, s. 9(1)(a)(i).

defence. It does not apply to a judgment granted by a judge or master after a motion in chambers or at trial.[76] Nor does it apply to summary judgments.[77]

[139] Generally speaking, under the case law there is a three part test for setting aside a default judgment or a noting in default, each part of which must be satisfied: 1) default in filing and serving a defence was unintentional; 2) the application to set aside was brought promptly; and 3) there is a good defence on the merits. This three part test can, effectively, be reduced to two parts: 1) Is there a valid defence? and 2) What is the reason for the failure to defend? When looking at both versions of the test, one thing is evident – regardless of whether the application to set aside was brought promptly and regardless of the reason for the failure to defend, if there is not a good defence on the merits, the application to set aside will not be successful. Thus, it can be stated that the existence of a defence on the merits is a prerequisite to setting aside a judgment obtained in default of defence.[78]

POSITION OF THE GENERAL REWRITE COMMITTEE

[140] Yes, setting aside a default judgment as provided in Rule 158 must be explicitly continued in the single general rule as one of the circumstances in which variation or setting aside can be sought. The new rule should retain the wording that the court may set aside or vary "upon such terms as it thinks just" to ensure that no adverse interpretation would follow from the absence of this phrase.

[141] However, the Committee did not favour having the Rule state the test for setting aside default judgment. This test should properly be left to case law, where it can evolve and change as needed, rather than being seen as immutable because it is in a rule.

---

[76] *Civil Procedure Handbook*, *supra* note 17 at 134.

[77] *CIBC v. Bury* (1979), 11 Alta. L.R. (2d) 93 at 94-95 (Q.B.).

[78] For a full discussion of default procedures, see the General Rewrite Committee's forthcoming consultation memorandum on summary disposition.

ISSUE No. 43
Must the single general rule make provision to vary or set aside a judgment where a defendant who has been noted in default wants to obtain judgment against a third party who has not defended?

[142] Rule 73 provides that, following entry of default judgment against a defendant, he or she may, with leave of the court, obtain judgment against a non-defending third party to the extent claimed in the third party notice. The Rule also provides that the court "may set aside or vary the judgment upon such terms as seem just."

POSITION OF THE GENERAL REWRITE COMMITTEE

[143] In its forthcoming consultation memorandum on summary disposition, the Committee will recommend that Rule 73 be repealed because rarely, if ever, could a defaulting defendant have issued a third party notice. Rule 66(4) has the effect of requiring a defendant to file a statement of defence or a demand of notice in order to issue a third party notice.

[144] In any case, the new general rule concerning variation and setting aside will state that the court may set aside or vary a default judgment "on such terms as seem just." This is sufficient to handle the scenario addressed by Rule 73, in the unlikely event that such a situation ever arises.

b. Default Judgment in Excess of Claim

ISSUE No. 44
Should the remedy in Rule 157 be continued in our single general rule governing variation and setting aside?

[145] Where default judgment is inadvertently entered for an amount greater than the claim, Rule 157 authorizes the court to amend the amount but otherwise let the judgment stand. This rule only applies to default judgments entered administratively in the absence of a statement of defence, not to default judgments granted by the court on motion, whether with or without notice.[79]

---

[79] *Civil Procedure Handbook*, *supra* note 17 at 134.

POSITION OF THE GENERAL REWRITE COMMITTEE

[146] The situation addressed by Rule 157 will be adequately covered by the new general rule's provision to vary or set aside a default judgment generally. It is not necessary to have a separate provision explicitly addressing this particular type of error.

2. *Ex Parte* Orders

[147] Rule 387(2) provides that any *ex parte* order "may be varied or discharged by any judge on notice given to every person affected." The first subsection of our single general rule will include the substance of this Rule as one of the circumstances in which variation and setting aside may be sought concerning final orders, judgments and interlocutory orders. Again, it is important to note that the General Rewrite Committee is not proposing any substantive changes relating to the law in this area. All the current case law will continue to apply.

ISSUE No. 45

When applying to vary or discharge an *ex parte* order, should the party be obliged to apply to the judge or master who originally granted the order? To appear before a different judge or master, should the party be obliged to demonstrate why it is not possible to go before the original one?

[148] As already noted, under Rule 387(2) a party may apply to "any judge" to have an *ex parte* order varied or discharged. The Supreme Court of Canada has held that a judge has inherent power to set aside his or her *ex parte* order[80] but, while it is preferable that the application be made to the same judge, if that is inconvenient, another judge of the same court can do it.[81] Rule 387(2) does not incorporate an express requirement that, where possible, the application to vary or discharge should be made to the judge who granted the order. Arguably, this means the applicant could go before any judge without first approaching the original judge.[82]

---

[80] *R. v. Wilson*, [1983] 2 S.C.R. 594.

[81] *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338.

[82] On applications to set aside an *ex parte* order, the court hears the motion *de novo* as to both the law and the facts: *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1993), 147 A.R. 113 (Q.B.). Where a

(continued...)

POSITION OF THE GENERAL REWRITE COMMITTEE

[149] The current protocol is that parties seeking to vary or set aside an order should return to the original judge when the order was made with notice, but no such protocol exists with *ex parte* orders. Where a judge has not heard both sides in the first place, there is less need to have the same judge hear the variation application. Returning to the same judge would not be necessary in order to ensure a proper hearing. Accordingly, the Rules should not specify that applications to vary or set aside an *ex parte* order must be made to the original judge (or master, as will now be the case).

3. Inadvertent Non-Appearance

ISSUE No. 46
Should the remedy available under Rule 257 be available for inadvertent non-appearance at a motion for summary judgment?

ISSUE No. 47
Should there be a deadline to bring an application to set aside or vary due to inadvertent non-appearance? If so, should it also apply to setting aside or varying *ex parte* orders or those granted on insufficient notice?

[150] Rule 257 enables a party, who has failed to attend a trial through inadvertence or mistake,[83] to apply to any judge[84] within 15 days of the trial, to have the judgment set aside. There is no hard and fast rule or test to set aside under Rule 257 – the granting of such an order is an exercise of discretion in all of the facts and circumstances.[85]

---

[82] (...continued)
different judge hears the motion, a hearing *de novo* is a necessity; the hearing cannot possibly be "on the record" because there is no appeal between judges of the same level of court.

[83] Alberta, r. 257 does not itself specify inadvertence or mistake as the only justifiable reasons for missing a trial, but case law limits the Rule to those circumstances.

[84] Ideally, an application under Alberta, r. 257 should be made to the judge whose judgment is sought to be set aside; however, the wording of the rule is sufficiently broad to allow an application to be made to any judge: *Raimundo v. Hoculak* (1979), 15 A.R. 352 (Dist. Ct.).

[85] *Dixon Real Estate Services Inc. v. Chin* (1994), 32 Alta LR (3d) 29 (C.A.).

[151] The remedy available under Rule 257 is limited to judgments granted after failure to appear at a trial. It does not apply to summary judgments granted on a motion in chambers where the opposing party accidentally fails to appear. Further, Rule 389 (motion to set aside or vary order due to inadvertent failure to appear on motion) is limited in application to mere orders and probably also does not apply to summary judgment granted in chambers.[86] The limited scope of both Rules 257 and 389 creates an anomalous situation where there is a remedy available to set aside default judgments (Rule 158) and a remedy available to set aside judgments granted on failure to appear at trial (Rule 257), yet there is no readily apparent remedy available to set aside a summary judgment, even if the defendant has a good reason for not appearing at the hearing for summary judgment.[87]

[152] Applications to set aside default judgments granted *ex parte* pursuant to Rule 152 are made under Rule 158. However, the same does not apply to judgments granted following notice being given under Rule 152. In those cases, the remedy to set aside those judgments is Rule 257 or an appeal. Unlike Rule 158, however, the application under Rule 257 must be made within 15 days.

POSITION OF THE GENERAL REWRITE COMMITTEE

[153] The Committee proposes the adoption of a general provision allowing for an application to set aside or vary orders and judgments granted following inadvertent failure to appear at a trial or a chambers motion. This provision would replace both Rules 257 and 389. It will also accommodate an application to set aside a summary judgment granted as a result of inadvertent failure to appear at the chambers motion.

[154] The new provision will be part of subsection (1) of the single general rule. To recap the elements of subsection (1), a court will be able to set aside or vary any final order, judgment or interlocutory order that was made

- *ex parte*,
- in default of defence, or

---

[86] *Civil Procedure Handbook, supra* note 17 at 336.

[87] Potential relief might be circuitously obtained by combining the effect of Alberta rr. 4, 389 and 548, according to Stevenson and Côté, *ibid*. However, the Rules should more explicitly accommodate a scenario that might arise with summary judgments.

- in the absence of a party who failed to appear at trial or at a motion by accident or mistake or by reason of insufficient notice of the proceeding.[88]

[155] The Committee proposes that there should be a deadline of 20 days to bring an application under subsection (1)[89] except for applications to vary or set aside default judgments. In order that the deadline be workable for *ex parte* orders, the deadline cannot commence running from the date of trial or motion but must commence from the date the judgment or order is served or is brought to the attention of the non-attending party. The Rule must, however, be clear that service (in whatever authorized manner) will always constitute notice, so that someone who is served substitutionally cannot argue that the order did not really come to his or her attention until later. Also, the Rule must provide that the deadline is 20 days "unless otherwise provided," because *ex parte* orders sometimes specify a time limit for an application to vary. The deadline would also be subject to an order for enlarged or abridged time under Rule 548.

ISSUE No. 48
Should an application to set aside or vary an order made following accidental failure to appear be made to the judge or master who made the original order or may it be made to another one?

POSITION OF THE GENERAL REWRITE COMMITTEE

[156] For the same reasons as discussed above when dealing with *ex parte* orders, there should be no express provision in the Rules requiring the matter to be heard by the original judge or master. It should be left to the informal practice protocol which governs such matters.

---

[88] Having a single general rule will not preclude, in an appropriate case, a defendant's use of Alberta, r. 558 to set aside a default judgment or judgment granted at trial where the defendant inadvertently failed to appear. R. 558 (setting aside a proceeding for non-compliance or irregularity) may be used to set aside a judgment where notice was not properly served due to a technicality or defect: *Rizzie v. J.H. Lilley & Associates Ltd.*, [1976] 2 W.W.R. 97, (1975), 63 D.L.R. (3d) 187 (Alta. Dist. Ct.). The General Rewrite Committee will examine r. 558 in a forthcoming consultation memorandum.

[89] This would replace both Alberta, r. 257's 15 day limit from the date of trial and r. 389's 7 day limit from the date the order "has come to the notice" of the party seeking to vary it or set it aside. The chosen time limit of 20 days is in accordance with a forthcoming consultation memorandum that will propose standardized notice periods throughout the Rules.

4. General Power to Set Aside or Vary an Interlocutory Order

ISSUE No. 49
In the single general rule that will incorporate the substance of Rule 390(1), what express limitations, if any, should be stated concerning the general power to set aside or vary an order?

[157] Rule 390(1) provides that "[a]ny order may be set aside, varied or discharged on notice by the judge who granted it." On the face of it, Rule 390(1) provides virtually no guidance or direction as to the circumstances to which it is intended to apply. It has (at least superficially) the appearance of being extremely wide in scope. However, despite its wording, case law has determined the scope of this rule to be actually quite limited. It does not apply to final orders, but only to interlocutory orders or ones which determine collateral or procedural matters.[90] It cannot be used by litigants simply to reargue applications where they do not like the original outcome.[91] Instead, it is to be used to vary or set aside interlocutory orders where there has been a material change of circumstances, where new evidence has arisen that could not have been discovered by reasonable diligence at the original hearing or, presumably, where the order was obtained by fraud.[92]

POSITION OF THE GENERAL REWRITE COMMITTEE

[158] The general power to set aside or vary an order will be contained in subsection (2) of the single general rule. The Committee has already proposed that its application will be expressly limited to interlocutory orders. The Committee favours the language used in the federal model, namely, that the court may set aside or vary an interlocutory order by reason of a matter that arose or was discovered subsequent to the making of the order. However, the Committee would also add a basket clause "or on such other grounds as the court considers just." The Committee saw no need to place a time limit on bringing such applications to vary or set aside.

---

[90] *P.M.M. v. R.W.M.* (2000), 279 A.R. 119 at para. 26; 2000 ABQB 846.

[91] *Pocklington Foods*, *supra* note 73 at para. 14.

[92] See the discussion, *supra* note 73.

[159] In addition to replacing Rule 390(1), the new single rule's general authority to set aside or vary interlocutory orders can also replace several other provisions in the current Rules, all of which concern setting aside or varying specific types of interlocutory orders:

- Rule 158.4(3) concerning summary trials;
- Rule 158.6(5) concerning directions about trial of a proceeding;
- Rule 269 concerning orders made under Part 26 (Evidence).

ISSUE No. 50
Must a motion to vary or set aside an interlocutory order be brought before the judge or master who originally made the order?

[160] Currently, Rule 390(1) expressly provides that an order may be set aside, varied or discharged "by the judge who granted it." Of course, where it would be inconvenient or impossible for the original judge to do so, Rule 391 provides that any judge could hear the motion. But clearly, the effect of Rule 390(1) is that the original judge should hear the matter if possible.

POSITION OF THE GENERAL REWRITE COMMITTEE

[161] This requirement should not be carried forward into the new single general rule, for the same reasons as already discussed under the topics of *ex parte* orders and inadvertent failure to appear. If a judge or master suspects that a party is trying to abuse the rule by "shopping around" or attempting to re-litigate, the court can order the application to be heard by the original decision-maker.

5. Consent of the Parties

ISSUE No. 51
Does there need to be an explicit provision in the single general rule that a court may set aside or vary an interlocutory order on consent of all the parties?

[162] Rule 390(2) provides that a court may set aside, vary or discharge an order "[o]n consent of all parties interested." Presumably this applies only to interlocutory orders,

just like Rule 390(1). It does not mean that the court may rehear an application where the parties consent.[93] Only Alberta has a provision like Rule 390(2).

POSITION OF THE GENERAL REWRITE COMMITTEE

[163] Other jurisdictions probably do not have an equivalent provision because it is always implicit that things may be done by consent. This rule need not be continued in the single general rule as one of the circumstances where variation or setting aside can occur.[94] If there is any doubt that parties can have an interlocutory order varied or set aside on consent, the basket clause of subsection (2) of the new general rule can be relied upon to authorize it.

6. Fraud

ISSUE No. 52
Does there need to be an explicit provision in the single general rule that a court may set aside an order or judgment obtained by fraud?

POSITION OF THE GENERAL REWRITE COMMITTEE

[164] The Committee believes that the single general rule need not explicitly provide for setting aside orders or judgments obtained by fraud. For interlocutory orders, the basket clause of subsection (2) of the new general rule is wide enough to encompass an application to set aside on the basis of fraud. For final orders and judgments, the party alleging fraud should bring a separate action by way of statement of claim to set it aside.

[165] To recap the elements of subsection (2) of the single general rule, a court will be able to set aside or vary any interlocutory order

- by reason of a matter that arose or was discovered subsequent to the making of the order, or
- on such other grounds as the court considers just.

---

[93] *Riviera Developments Inc. v. Midd Financial Corp.* (1995), 167 A.R. 69 (Q.B.).

[94] By making this proposal, the Committee does not intend to suggest that any changes should be made to Alberta, r. 529 concerning consent orders in the Court of Appeal.

E. Correction Rules

[166] Rules which allow corrections to be made to post-entry judgments or orders are exceptions to the general rule that a judgment or final order cannot be varied once entered because the court is *functus officio*. Rules 330 and 339, for example, allow changes to be made in special, limited circumstances. Rule 548 allows a court to enlarge or abridge time limits expressed in an order (or in a Rule). Rule 316 deals with procedure for seeking post-order or post-judgment relief and so is included in this part as well, although its application would be broader than just motions for correction.

1. Rule 316

ISSUE No. 53
Is Rule 316 needed?

[167] Rule 316 provides that "[i]t is not necessary in any judgment or order to reserve liberty to apply, but any party may apply to the Court from time to time as he may be advised." The meaning and purpose of Rule 316 is obscure. It has received little attention in case law. Neither Ontario, British Columbia nor the Federal Court have an equivalent rule. On the face of it, Rule 316 appears to mean that any subsequent motion relating to a judgment or order (such as a motion for correction, variation or setting aside) can be brought without leave to do so having been expressed in the original judgment or order.[95]

POSITION OF THE GENERAL REWRITE COMMITTEE

[168] Given that none of the rules allowing correction, variation or setting aside of orders and judgments require leave to bring such a motion anyway, Rule 316 simply appears to state the obvious. It should be deleted from the Rules.

2. Rules 330 and 339

[169] Rule 330 enables a judge to make further directions after a final order or judgment has been entered so that a party can receive the relief to which the party is entitled, provided there is no variation of the original judgment or order "as to any

---

[95] Master Funduk mentioned this Rule when holding that leave is not required to set aside an attachment order: *854845 Alberta Ltd. v. 935143 Alberta Ltd.*, 2003 ABQB 448.

matter decided by it." In making an order under this Rule, the court is not really varying the judgment, but rather supplementing it or working it out.[96]

[170] Rule 339 gives a court the power to correct a judgment or order when, by "accident, slip or omission," it does not express what the court plainly intended to order.[97] There is no need to have the order or judgment corrected by the judge who originally made it. This rule may not be necessary to correct errors in interlocutory orders because the court has an inherent power to vary or revoke pre-trial orders.[98]

ISSUE No. 54
Should the grounds for revision listed in Rule 330 be made the same as the grounds listed in the equivalent Federal Court rule?

[171] In the Federal Court model, Rule 397(1) is the counterpart of our Rule 330 and provides for a "motion to reconsider" the terms of a final order. It does not authorize a judge to review, rescind or alter a judgment so as to simply reflect a change of mind as to what the judgment ought to have been,[99] nor does it provide a right of appeal.[100] Rule 397(2) is the counterpart of our Rule 339 concerning the rectification of clerical errors and mistakes. Rule 397 provides as follows:

> **397. (1) Motion to reconsider** – Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that
>
> (a) the order does not accord with any reasons given for it; or
>
> (b) a matter that should have been dealt with has been overlooked or accidentally omitted.

---

[96] *Civil Procedure Handbook*, *supra* note 17 at 296. For instance, where an important matter is omitted from a judgment, making it ambiguous, the court can amend it. An example would be where a judgment gives the plaintiff alternative remedies but does not specify which to pursue first: *Leaseconcept Ltd. v. French* (1976), 1 C.P.C. 160 (Ont. S.C.).

[97] For instance, if the reasons for judgment award special damages of $420 but the formal judgment says $4200, the court can correct the mistake: *Civil Procedure Handbook*, *ibid.* at 299.

[98] *Tremco Inc. v. Gienow Building Products Ltd.* (2000), 255 A.R. 273, 2000 ABCA 105.

[99] *Apotex Inc. v. Wellcome Foundation Ltd.* (1999), 182 F.T.R. 105, 3 C.P.R. (4th) 342 (T.D.).

[100] *Oduro c. Canada (ministre de la Citoyenneté et de l'Immigration)* (1999), 189 F.T.R. 161 (T.D.).

> **(2) Mistakes** – Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.

[172] Rather than simply saying a court may give further directions to ensure that any party gets the relief that party is entitled to (as our Alberta rule provides), Federal Rule 397(1)(a) and (b) specifies two types of circumstances in which clarification may be sought.

[173] In Chapter 4, the General Rewrite Committee recommends a default system for the preparation and entry of orders and judgments.[101] Where one party is responsible for preparing an order or judgment and the other party neglects to approve it within a stated time limit, approval will be deemed by the new default rule and the order or judgment can be entered. Since scrutiny of the terms of an order or judgment by both parties might not therefore occur in every case, theoretically there could be an increased danger that some final orders might not accord with the reasons given for them. The Committee considered whether Rule 330 should state explicitly that this is one ground supporting a motion to clarify the terms.

POSITION OF THE GENERAL REWRITE COMMITTEE

[174] The Committee rejected adopting the expanded grounds of Federal Rule 397(2) in substitution for the current wording of Rule 330. When counsel receives a draft order or judgment for approval, it is his or her responsibility to check it. If the terms do not correspond to the order as made, application can be made for further directions or clarification as already provided for in Rules 330 and 339.

ISSUE No. 55
Should Rules 330 and 339 be placed in a single rule?

POSITION OF THE GENERAL REWRITE COMMITTEE

[175] The Committee proposes that Rules 330 and 339 should form two subsections in a single rule.

---

[101] See the discussion below under Issue No. 60 at 64-66.

ISSUE No. 56
Should there be a time limit within which a motion for further directions must be made?

[176] Currently in Alberta, there is no time limit in Rule 330 governing when a motion for further directions can be made. In the Federal model, a motion to reconsider must be brought within 10 days of the making of the order or judgment about which reconsideration is now sought.

POSITION OF THE GENERAL REWRITE COMMITTEE

[177] The Committee does not agree with adopting the Federal model's requirement about time limits. A time limit serves no purpose in such circumstances and is not currently considered necessary in Rule 330. The Rule should continue to be silent on that point.

ISSUE No. 57
Must a motion for further directions be brought before the same judge who made the original judgment or order?

[178] Rule 330 does not currently require that a motion for further directions be brought before the same judge who made the original judgment or final order. As a practical matter, however, it would be best to have the terms of the judgment clarified by the original judge. Federal Court Rule 397(1) requires that a motion to reconsider must be made to "the Court, as constituted at the time the order was made."

POSITION OF THE GENERAL REWRITE COMMITTEE

[179] Unlike the circumstances of other applications to vary or set aside, the Committee feels it is genuinely important in this instance to require that the original judge hear the motion. The Committee therefore proposes that our rule should, like the Federal model, require that the original judge hear the motion for further directions. If that proves to be impossible or even merely "inconvenient" (as provided by Rule 391), another judge can then hear the matter.

ISSUE No. 58
How should the correction of accidental or clerical mistakes in a final order or judgment be handled?

[180] Rule 339 provides that "[c]lerical mistakes in judgments or orders, or errors therein arising from any accident, slip or omission may at any time be corrected by the court on motion." There is no time limit governing such corrections. Nor is there a need to return to the judge who originally made the final order or judgment. The situation is similar under Federal Court Rule 397(2).

[181] The exact scope of Rule 339 can be contentious. Some case law suggests that its scope may include rehearing and reconsideration. "[M]ost cases say that only slips or true errors can be corrected, yet many cases define those categories very broadly."[102] At the very least, it "seems clear that an entered order or judgment may be corrected when, by a slip, it does not express what the court plainly intended to order . . . ."[103]

POSITION OF THE GENERAL REWRITE COMMITTEE

[182] As noted above, Rules 339 and 330 will each be a subsection in a single rule dealing with clarification and correction of judgments and orders. The Committee affirms that Rule 339 should continue to have no time limit or obligation to return to the original judge. However, the phrase "clerical mistakes" should simply be termed "mistakes" and it should be made clear that "mistakes" are subject to the qualifier "arising from any accident, slip or omission."

3. Enlargement and Abridgement of Time

ISSUE No. 59
Should our new set of single general rules incorporate an enlargement or abridgement of time provision in relation to orders and judgments as is currently provided for more generally in Rule 548?

---

[102] *Civil Procedure Handbook*, *supra* note 17 at 299.

[103] *Ibid*.

[183] Rule 548 allows a court to extend or shorten any time limit set by

- the Rules of Court,
- court orders, or
- agreement of the parties.

[184] The scope of Rule 548 is very wide. It applies to many more situations than just time limits contained in orders and judgments.

POSITION OF THE GENERAL REWRITE COMMITTEE

[185] The Committee sees no need to have a special provision governing enlargement or abridgement of time just for orders and judgments. People can easily rely on Rule 548 as a separate general rule.

CHAPTER 4. ENTRY OF ORDERS AND JUDGMENTS

A. Introduction

[186] Part 27 (Rules 315 - 339) of the *Alberta Rules of Court* encompasses a broad spectrum of topics related to orders and judgments, including their form, effective date, and formal requirements for entry. This chapter will address such matters as:

- preparing and approving orders;
- signing orders;
- settling the minutes of orders;
- judgments obtained on condition;
- fiats;
- entering consent orders in certain circumstances;
- enforcement and satisfaction of orders;
- judgments directing accounts; and
- motions for judgment.[104]

[187] To avoid repetition, the term "order" will be used throughout this chapter to mean both an order and a judgment.

B. Preparing and Approving Orders

ISSUE No. 60
Should orders be prepared by the court or should they continue to be prepared by the parties?

ISSUE No. 61
How can the process of preparing draft orders be expedited?

ISSUE No. 62
Should the effective date of orders be changed from the date of pronouncement to the date of entry?

---

[104] Part 27 also has rules concerning correction of orders and judgments after entry, which were dealt with in c. 3 of this consultation memorandum.

ISSUE No. 63
Should the time period for entry without leave under Rule 327 be shortened?

[188] In Alberta, British Columbia and Ontario, drafts of the formal orders are drawn up by the parties. In the federal system, by contrast, the orders are recorded by the court administrator and mailed to the parties. The other jurisdictions' rules all make explicit reference to the procedure involved in preparing orders.[105] The Alberta Rules do not.

[189] In Alberta, several problems can arise when an order is not signed by the judge or master forthwith after it is granted:

> ...the process of later entering the formal judgment or order (i.e., drafting it and having it signed and filed) is often unnecessarily slow and frustrating. The clerk or master or judge should not usually sign it later without either a further hearing or an endorsement by the opposing lawyer: R.323. That signature often takes months to secure. If the opposing party has no lawyer or the matter is very simple, the winning lawyer may ask the judge or master at the time of pronouncement to dispense with the need for endorsement under R. 323. In other cases, if the losing lawyer is thought to be slow or difficult, the winning lawyer should not merely draft a formal judgment (or order) and ask the losing lawyer to approve its wording; the winner should also have the clerk issue a formal appointment to settle the minutes of the judgment (or order) and serve it along with the draft.[106]

[190] There are several factors contributing to the delays often associated with the preparation and entry of orders:

1. Orders take effect from the date of pronouncement, not from the date of entry. As a result, there may be no sense of urgency on the part of the winning party (or the losing party for that matter) to get the formal order drafted, unless it is needed for enforcement purposes.
2. Rule 327 allows a full year for entry of a judgment before leave of the court is required to enter it. This does not encourage the speedy drafting of orders. Lawyers with busy practices may relegate the non-urgent task of drafting or approving the order to the bottom of their priority list.

---

[105] Ontario, r. 59.03(1); British Columbia, r. 41(8); Federal, r. 394.(1).

[106] *Civil Procedure Handbook*, *supra* note 17 at 292.

3. The appeal period for orders does not start to run until the order has been entered and served (with the exception of some orders granted under federal legislation such as the *Divorce Act*). Any party considering whether to appeal an order may deliberately delay its entry to buy additional time to decide about the appeal or simply to postpone the day of reckoning.
4. A lawyer or party may intentionally delay approval of the form of order, or may reject the terms of the order altogether, with the sole intention of aggravating the opposing party.

[191] It is true that a party can overcome such "stall tactics" by obtaining an appointment to settle the minutes with the clerk. However, some lawyers may see this process as an unnecessary additional step or expense. Even more time and expense is involved in an appointment with the judge or master and parties may steer away from this option for the same reason.

[192] One-sided tactics are not necessarily the only source of delay. *Neither* lawyer may see any urgency in entering the order, resulting in the possibility that 10 to 12 months may pass before an appointment to settle the minutes is even obtained.

[193] In the Federal Court system, the court takes responsibility for preparing, or overseeing the preparation of, orders. The court administrator records all orders forthwith after they are made and copies are sent by registered mail to all parties.[107] When the court gives reasons, it may direct one of the parties to prepare a draft of the order to be approved as to form and content by the other parties.[108] Where the parties disagree about the draft, a motion for judgment will be brought for the court to settle it.[109] In the federal system, an order is not effective until it is endorsed in writing and signed by the judge or prothonotary who made it,[110] so there is great incentive to have the order entered as soon as possible.

---

[107] Federal, rr. 395 and 396.

[108] *Ibid.*, r. 394(1).

[109] *Ibid*.

[110] *Ibid.*, r. 392(2).

[194] Another way a court can take responsibility for the preparation of orders is to have clerks prepare them "on-site" immediately or soon after the order is pronounced, as is done in the Edmonton Court Generated Orders Program ("CGOP"). This program is limited to matters in Family Chambers which involve self-represented litigants. Where the order is straightforward, the clerk prepares the order on the spot, gives it to the judge to sign and gives a copy of the signed order to the self-represented litigant. Where the matter is more complicated, the clerk will take a day or so to prepare the order, send it up to the judge for approval and then send a copy out to the parties. This is similar to the process that is used in Family and Youth Provincial Court. The clerks have a database of boiler plate order provisions from which to choose. When the terms of an order are very complicated or specific, however, it becomes more difficult for the clerks to prepare it.

POSITION OF THE GENERAL REWRITE COMMITTEE

[195] The Committee does not think it is feasible for the court to prepare orders. Insofar as interlocutory orders are concerned, our Queen's Bench has a much heavier chambers workload than the Federal Court and fewer resources in terms of support staff. As well, the precise details of an order pronounced in general terms sometimes simply cannot be derived from the court transcript. Those details are clarified during the preparation and approval process of the order by the parties. This complexity would also prevent an expanded Court Generated Orders Program from being a workable option, even if resources were available for such an expansion.

[196] Instead, the General Rewrite Committee proposes the adoption of a default entry system with specified time limits.[111]

[197] The new rule would provide that the judge or master has the discretion (but not an obligation) to direct which party will be responsible for preparing the order. Where the court does not direct who is responsible for preparing the order, the rule will provide that the successful party must prepare the draft form of order. Where mixed success is involved, counsel should raise the issue with the court concerning who

---

[111] The Committee modelled its proposal on Alberta, r. 515(4) which creates a default approval system concerning appeal books in Court of Appeal proceedings. If a party does not respond within 15 days after service of the appeal book for his or her approval, the party is deemed to accept it.

should draft the order and seek direction. Where the successful party is a self-represented litigant, courts often direct that counsel for the other (unsuccessful) party should prepare the order. It is unlikely that a court would fail to give directions when a self-represented litigant is involved.

[198] The rule will create an explicit default system to ensure the timely entry of orders. The party who is responsible for preparing the draft form of order must draft and serve it on all other parties in attendance within 10 days of the order being pronounced. Within 10 days of being served with the draft form of order, each party may either approve and return the order to the drafting party, or object to the draft form of order by bringing a motion to settle the terms before a judge or master (as the case may be).[112]

[199] If a party does not respond within the 10 day limit, then acceptance of the form of order is deemed and the order may be entered on proof of service of the draft order. Where approval is deemed, the order shall be signed by the judge or master who granted it.

[200] If the party who is responsible for drafting the order fails to draft and serve the form of order within the 10 day time limit, then any other party will be entitled to draft it and serve it at any time within the time limits of Rule 327 (discussed below). On service of the draft form of order, the other parties will have 10 days to approve or reject it. In the absence of a response, acceptance will be deemed. Where a party other than the responsible party ends up preparing the order, it will be left to the court to assess the resulting costs consequences.

[201] There is no need for a provision allowing parties to opt out of the default entry rule. Rule 549 permits extensions by written consent for delivering, amending or filing any document and this suffices to address the situation.[113]

---

[112] See the discussion and proposals concerning settling the minutes of an order in Part D of this chapter.

[113] The Committee will recommend in a forthcoming consultation memorandum that Alberta, r. 549 be carried forward into the new Rules.

[202] The Committee considered and rejected some other ideas about how to expedite the preparation of orders, such as implementing an automatic appointment to settle the minutes following the passage of a certain amount of time. The Committee also rejected the incentive that would be created by changing the effective date of orders from the date of pronouncement to the date of entry. This would absolutely not work for urgent matters such as injunctions and orders protecting people or property.

[203] The Committee proposes that Rule 327 should be retained. However, the period during which leave to enter is not required should be reduced from one year to three months in order to encourage timely entry.

C. Signing Orders

ISSUE No. 64
When should an order require approval by all parties prior to signature and when can that requirement be waived?

ISSUE No. 65
When must an order be signed by the judge or master who granted it and when can it be signed by the clerk?

[204] Rules 321(2)-(4) and 323.1 both deal with the issue of who is authorized to sign Queen's Bench orders. These Rules purport to settle when an opposing party's approval of the form of an order is required, when it is not, when the judge or master must sign an order and when the clerk can sign it. However, these Rules directly contradict each other in several fundamental ways and also contain internal contradictions. These Rules cannot be reconciled and make it virtually impossible to determine what the practice is or should be in any given set of circumstances.

POSITION OF THE GENERAL REWRITE COMMITTEE

[205] The Committee proposes that the best way to settle these issues is to repeal Rule 321(2), (3) and (4)[114] because those provisions are unnecessary or unclear, and to retain and revise Rule 323.1 in the following manner.

[206] Rule 323.1(3) lists six circumstances in which the judge or master may subsequently sign an order which was not signed forthwith on pronouncement:

(a) on notice to all parties;
(b) in *ex parte* proceedings;
(c) in proceedings where the opposing lawyer or party did not attend;
(d) where the opposing lawyer or party has approved the form of order;
(e) where the court directs that approval of the form of order is not required;
(f) where the opposing lawyer or party waives approval of the form of order.

[207] The Committee does not propose any change to this list, except to delete item (d) concerning approval of the form of order by the opposing solicitor or party. Instead, there should be another Rule providing that, where the form of order has been approved by the parties (either personally or by counsel) and the order otherwise accords with the clerk's notes, the clerk shall sign the order. In all other cases and in the case of disputes, orders must go to the judge or master for signature.

D. Settling the Minutes of an Order

ISSUE No. 66
Should clerks continue to settle the minutes of orders?

[208] Rules 318(2)-(3), 319 and 320 set out a clerk's authority to settle the minutes of an order when the parties cannot agree on the wording of the order. The process is not clear, especially in disputed situations when a party disagrees with the clerk and the clerk's notes. Would the party bring a motion to vary the order under Rule 318(3) or would the party bring an application to correct the order under Rule 330? It is also not clear if the clerk who settles the minutes is entitled to sign and enter the order. Rule

---

[114] Alberta, r. 321(1) concerns signature of orders in the Court of Appeal. It will be addressed by the Appeals Committee of the Rules Project.

323.1(4) says that orders in many circumstances are to be signed by a judge or master "notwithstanding Rule 318(2)" which suggests that otherwise the clerk would sign following settlement of the minutes.

POSITION OF THE GENERAL REWRITE COMMITTEE

[209] Clerks should no longer have the authority to settle the minutes of orders. Rules 318(2)-(3), 319 and 320 should be repealed. As previously proposed, the Rules should provide that a clerk can sign an order only where its form has been approved by the parties (either personally or by counsel) and it accords with the clerk's notes. In all other cases and in the case of disputes, the order must go to the judge or master for signature. A concern was raised that, in judicial centres outside Edmonton and Calgary, clerks are more accessible for settling minutes than judges sometimes are. However, the Committee noted that a judge can usually be reached by telephone or fax and, if all else fails, Rule 391 can be used to have the minutes settled by another judge.

ISSUE No. 67
Is a rule needed to specify which version of a judgment is the official version – the oral pronouncement as recorded or transcribed in court, the clerk's notes or the form of order approved by the parties?

[210] The Rules Project received a comment from the judiciary noting that British judges, in the course of pronouncing a judgment, often direct that the sound-recorded version is the official version.[115] In Alberta, the *Mechanical Recording of Evidence Act* specifies that the sound-recorded version, once certified by the court official, is the record of evidence in the proceeding.[116] "Evidence" is defined to include

---

[115] For instance, The Honourable Mr. Justice Dyson in *New Islington and Hackney Housing Assn. Ltd. v. Pollard Thomas and Edwards Ltd.* directs that: "pursuant to CPR Part 39 PD 6.1 that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic." Online: <http://www.courtservice.gov.uk/view.do?id+396&searchTerm+%22new+islington%22+and+%22hackney+housing%22&ascending=false&index=0&maxIndex=0>. United Kingdom, *Rules of Procedure*, Part 39, r. 6.1 of the states: "At any hearing, the judgment (and any summing up given by the judge) will be recorded unless the judge directs otherwise. Oral evidence will normally be recorded also."

[116] R.S.A. 2000, c. M-10, s. 3(1).

judgments and decisions.[117] Until entry of the order, judges have the opportunity to make amendments and changes to the typewritten record. This does not offend the principle of *functus officio* because the court is not *functus* until the judgment has been entered.[118] The Supreme Court of Canada has confirmed that it can vary its pronounced judgment before formal judgment is entered,[119] and this power probably extends to other courts as well.[120]

POSITION OF THE GENERAL REWRITE COMMITTEE

[211] The Committee does not share the concern that a formal rule is needed in this area. While the transcript is the official record for the purposes of evidence, it does not constitute the official judgment. The official judgment is the form of order that is signed and entered.

E. Judgments Obtained on Condition

ISSUE No. 68
Should Rules 324, 325 and 328 be retained?

[212] Rule 324 provides that, where judgment may be signed upon filing an affidavit or producing a document, the "officer" (presumably the judge, master or clerk) shall examine the affidavit or document and, if it is in order, sign the judgment. Rule 325 provides that, where judgment may be signed pursuant to an order or certificate, production of that document is sufficient authority for the officer to sign the judgment according to any conditions specified in that document. These Rules have received no judicial or academic comment.

---

[117] *Ibid.*, s. 1(b).

[118] *Oppenheim v. Oppenheim* (1996), 194 A.R. 317 (Q.B.).

[119] *New Brunswick (Workers/Workmen's Compensation Board v. Greer*, [1975] 1 S.C.R. 359.

[120] *Civil Procedure Handbook*, *supra* note 17 at 300: "There seem to be no exceptions to the court's power to vary or revoke a judgment or order before it is formally entered (signed and filed) Until then, the judge has jurisdiction to decide that it was wrong, and pronounce one to the opposite effect. But he or she should not do so lightly." [emphasis in original].

[213] Rule 328 provides that, where a judgment or order is obtained on a condition and the condition is not complied with, the judgment is deemed to be waived or abandoned insofar as it is beneficial to the person obtaining it. Unless the court otherwise orders, any person interested in the matter may take such proceedings as warranted.

POSITION OF THE GENERAL REWRITE COMMITTEE

[214] The effect of all these Rules appears to be self-evident. The Committee questions whether anyone would ever need them. For example, if an order is granted conditionally, the order will say so and a special rule like Rule 328 is not necessary to provide for the same thing. The Committee proposes to delete Rules 324, 325 and 328 from the Rules.

F. Fiats

ISSUE No. 69
Are any changes needed to Rule 338 concerning fiats?

[215] Rule 338 requires all judicial fiats to be filed and entered by the clerk in the procedure book. Fiats may also be endorsed on court documents.

POSITION OF THE GENERAL REWRITE COMMITTEE

[216] Rule 338 should be retained. However, the redrafted Rules will use a more modern term than "procedure book" because fiats are now recorded electronically.

G. Entering Consent Orders in Certain Circumstances

[217] In regard to consent orders generally, the Committee notes that Civil Practice Note 5 allows counsel to apply for a consent order without making a personal appearance. The matter can be handled entirely by way of written materials (i.e. by way of a desk application). The Committee has already proposed that these provisions be moved from the Practice Note to the Rules, so that more people will be aware of the availability of this procedure.[121]

---

[121] See c. 1, Part C.1.

ISSUE No. 70
Is Rule 329(1) needed?

[218] Rule 329(1) provides that, where a defendant is represented by a solicitor, no consent order shall be made unless the consent of the defendant is given by his or her counsel or solicitor. This rule is designed to "prevent someone from going behind the back of a solicitor and making a deal directly with the solicitor's client."[122] Such behaviour is also forbidden for lawyers by the *Code of Professional Conduct*.[123] Is Rule 329(1) therefore superfluous?

POSITION OF THE GENERAL REWRITE COMMITTEE

[219] Rule 329(1) should be retained in the Rules of Court rather than just relying on an ethical code which binds lawyers only.

ISSUE No. 71
Should an affidavit of execution continue to be necessary when entering a consent order with a self-represented litigant?

[220] Rule 329(2) prevents a consent order with a self-represented litigant from being entered unless it is accompanied by an affidavit of execution by that litigant. The Ontario, British Columbia and the Federal Court Rules do not have equivalent counterparts, although British Columbia does require oral or written consent from a party not represented by counsel.[124]

POSITION OF THE GENERAL REWRITE COMMITTEE

[221] Rule 329(2) should remain without change. The affidavit is a small protection for an important matter. It is not inconvenient for the self-represented litigant because the affidavit can be sworn before the clerk at the court office.

---

[122] *Civil Procedure Handbook*, *supra* note 17 at 293.

[123] C. 4, Rule 6.

[124] British Columbia, r. 41(15)(b).

H. Enforcement and Satisfaction of Orders

1. Enforcement

ISSUE No. 72
Is a rule needed to specify that certain orders must be perfected before they can be enforced? Should the rule state how perfection is accomplished?

[222] An order or judgment is presumed to take effect as soon as it is pronounced, which refers to the time when the parties learn of the judgment. If the order is announced orally in open court, it is pronounced then. If judgment is reserved and written reasons are later filed, the order is pronounced when the parties have a reasonable chance to get a copy of the reasons.[125] Judgments and orders also become effective as of the date they are made in B.C. and Ontario.[126] Conversely, in the Federal system, an order is effective from the time that it is endorsed in writing and signed by the judge or prothonotary who pronounced it.[127]

[223] The Alberta case of *Mathews v. Mathews*[128] dealt with the issue of when a judgment or order is perfected for the purpose of enforcement. An order for access was granted orally in chambers and the form of order was approved by the parties before the access date, but the formal order was not signed and entered until after the access date had passed. Access was denied by the custodial parent on the access date. The custodial parent was held not to be in contempt of the court order for two reasons: (1) an order of this nature cannot be enforced until it has been perfected as a result of having been drawn and entered and (2) ordinarily, a person cannot be held in contempt until the order has been served on them.

---

[125] *Civil Procedure Handbook*, *supra* note 17 at 292.

[126] See Ontario, r. 59.01 and British Columbia, r. 41(14).

[127] Federal, r. 392(2):Effective time of order - Unless it provides otherwise, an order is effective from the time that it is endorsed in writing and signed by the presiding judge or prothonotary or, in the case of an order given orally from the bench in circumstances that render it impracticable to endorse a written copy of the order, at the time it is made.

[128] (1987) 79 A.R. 75 (Q.B.) [*Mathews*].

[224] At the time, Rule 322 read as follows:

> Every judgment or order shall be dated as of the day on which it is pronounced and takes effect from that date unless otherwise directed, or by leave of the court, may be ante-dated or post-dated.

[225] The court held that this rule does not mean that all orders become effective without entering. "The Rules, considered in their entirety, support the principle that an order must ordinarily be perfected before it can be enforced."[129] After this case, Rule 322 was rewritten and it now expressly provides that "[t]his Rule applies whether or not the judgment or order has been entered in accordance with these Rules" which "makes it clearer that an order or judgment is effective on pronouncement, before or without entry."[130]

[226] In spite of this amendment, practical problems remain concerning the enforcement of orders and judgments. The incongruent reality is that, although an order becomes effective from the time it is pronounced, it must nevertheless be perfected (by being signed and entered) before it can be effectively enforced.

POSITION OF THE GENERAL REWRITE COMMITTEE

[227] No special rules are needed in this area. There will, of necessity, always be a distinction between the date when an order has legal force (pronouncement) and the date when it has practical consequences (such as enforcement). Delaying legal effectiveness in certain cases is not the solution.

2. Satisfaction

[228] Rule 331 concerns unsatisfied judgments or orders. Rule 333 addresses memoranda of satisfaction. Both these rules will be addressed by the Enforcement of Judgments Committee in its forthcoming consultation memorandum on enforcement of judgments and orders.

---

[129] *Ibid.* at para. 7.

[130] *Civil Procedure Handbook*, *supra* note 17 at 288.

I. Judgments Directing Accounts

ISSUE No. 73
Should Rules 332 and 334 be retained?

[229] Where a judgment directs an accounting of debts, claims or liabilities or an inquiry for heirs, Rule 332 provides that all persons who do not prove their claims within the time specified by the court will be excluded from the benefit of the judgment. Rule 334 provides that, as soon as directed accounts, inquiries or issues have been determined, the plaintiff may apply, on notice, for judgment. These rules have attracted no recent judicial interpretation. No other Canadian jurisdiction has these rules, except for a counterpart to Rule 332 which exists in the Northwest Territories.

POSITION OF THE GENERAL REWRITE COMMITTEE

[230] Rules 332 and 334 appear to be arcane holdovers from a different era. To the extent that Rule 332 deals with estates and an inquiry for heirs, it would be covered under the *Administration of Estates Act* anyway.[131] In fact, these rules deal more with substantive law than anything else, which is another reason why they should not be in the Rules of Court. Rules 332 and 334 should be deleted.

J. Motions for Judgment

[231] Rule 335 provides that any party may make a motion for judgment, postponement or other directions where there has been a determination of only some issues or questions of fact. In its forthcoming consultation memorandum on summary disposition, the Committee will recommend that the characteristics of Rule 335 will be incorporated into a revised Rule 221 which will be crafted concerning separate trial of issues.

ISSUE No. 74
Is Rule 336 necessary?

---

[131] R.S.A. 2000, c. A-2.

[232] Rule 336 is a general provision which states that a judgment may be obtained by a motion for judgment except where another manner of obtaining judgment is specified. In Part 11 of the Rules concerning summary judgment, Rules 159, 161, 162 and 163 all specify circumstances where there may be a motion for judgment. Trial Rule 256 specifies that a judge may direct judgment to be entered without a motion for judgment. In its forthcoming consultation memorandum on summary disposition, the Committee will recommend the elimination of Rule 256 due to the obvious inherent jurisdiction of the court to give judgment without a motion for judgment. No other Canadian jurisdiction has a general motion for judgment rule, although British Columbia has a reverse rule that "no application for judgment is necessary except where an enactment or these rules otherwise provides."[132]

POSITION OF THE GENERAL REWRITE COMMITTEE

[233] The Committee does not see any real need to keep Rule 336. The Rules already specify when a party must move for judgment, so no general rule is needed. Even a reverse rule like British Columbia's is technically unnecessary. Therefore, the Committee proposes simply to delete Rule 336.

ISSUE No. 75
Does Rule 337 need clarification?

[234] Rule 337 is the sole reference to jury trials in Part 27 (Judgment). It is similar to (but goes further than) Rules 258 and 259 in Part 25 (Trials) which concern retrial of issues inadequately dealt with by a jury. Rule 337 provides that a court, upon a motion for judgment, may draw all inferences of fact not inconsistent with the jury's findings. Then the court may give judgment accordingly if it has all the materials before it necessary to do so or, if not, may direct further inquiry on some or all of the issues. Although Rule 337 allows a judge to draw inferences of fact, it does not allow the judge to set aside a jury verdict and enter judgment as the judge sees fit based on the whole of the evidence.[133]

---

[132] British Columbia, r. 41(1).

[133] *Goulbourne v. Buoy*, 2004 ABQB 70.

POSITION OF THE GENERAL REWRITE COMMITTEE

[235] The basic function of Rule 337 is relatively clear, although the rule would benefit from better drafting (for example, by sequentially paragraphing the court's powers). A jury finds facts; it does not give judgment. The successful party has to make a motion for judgment by the court, based on the jury's finding of facts. Rule 337 simply allows a judge to settle unclear or inconsistent issues by drawing inferences of fact not inconsistent with the jury's findings, which prevents having to recall the jury for minor matters that were overlooked or unclear. It is a kind of "slip rule" for jury trials and allows a judge to supplement the jury's role, but not usurp it.

[236] Rule 337 does not address who is supposed to make the motion for judgment and what would happen if no one remembers to. The Committee feels, however, that these issues need not be addressed in the Rules. It is sufficient simply to clarify the existing wording of Rule 337 without changing or revising its meaning.