ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

PARTIES

Consultation Memorandum No. 12.4

March 2003

THE RULES PROJECT CONSULTATION MEMORANDA

No.	Title	Date of Issue	Date for Comments
12.1	Commencement of Proceedings in Queen's Bench	October 2002	January 31, 2003
12.2	Document Discovery and Examination for Discovery	October 2002	January 31, 2003
12.3	Experts: Notice of Expert Evidence and Medical Examinations	February 2003	May 16, 2003
12.4	Parties	March 2003	June 2, 2003

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The Institute's office is located at:

402 Law Centre,

University of Alberta,
Edmonton, Alberta, T6G 2H5.
Phone: (780) 492-5291;

Fax: (780) 492-1790.

The Institute's electronic mail address is:

reform@alri.ualberta.ca

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ACKNOWLEDGMENTS

This Consultation Memorandum sets out the proposals of the Working Committee with responsibility for the topic of General Rules Rewrite. The Committee's views are communicated in this paper which was written by Debra Hathaway, one of the Institute's counsel. She was greatly assisted by the members of the Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the General Rewrite 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
James T. Eamon; Code Hunter LLP
Alan D. Fielding, Q.C.; Fielding Syed Smith & Throndson
The Hon. Judge Allan A. Fradsham; Provincial Court of Alberta
Debra W. Hathaway; Counsel, Alberta Law Reform Institute
The Hon. Justice Eric F. Macklin; Court of Queen's Bench of Alberta
Alan D. Macleod, Q.C.; Macleod Dixon
June M. Ross, Q.C.; Special Counsel, Alberta Law Reform Institute
Wayne Samis; Clerk, Court of Queen's Bench of Alberta

Research assistance was provided by law students Jeremiah Kowalchuk and Jason Golbey.

PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute on or before June 2, 2003.

This consultation memorandum addresses issues concerning parties whose legal ability to conduct litigation can be problematic, including deceased persons without a personal representative, unincorporated entities, interveners and persons under disability. Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the Committee has identified a number of issues and made preliminary proposals. These proposals are not final recommendations, but proposals which are being put to the legal community for further comment. These proposals will be reviewed once comments on the issues raised in the consultation memorandum are received, and may be revised accordingly. While this consultation memorandum attempts to include a comprehensive list of issues in the areas covered, there may be other issues which have not been, but should be, addressed. Please feel free to provide comments regarding other issues which should be addressed.

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

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 can 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 (by not identifying yourself), or request confidentiality by indicating this in your response, ALRI assumes that all ***written comments are not confidential***. ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although usually we will discuss comments generally and without specific attributions.

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BACKGROUND

A. The Rules Project

The Alberta Rules of Court govern practice and procedure in the Alberta Court of Queen's Bench and the Alberta Court of Appeal. They may also apply to the Provincial Court of Alberta whenever the *Provincial Court Act* or regulations do not provide for a specific practice or procedure. The Alberta Rules of Court Project (the Rules Project) is a 3-year project which has undertaken a major review of the rules with a view to producing recommendations for a new set of rules by 2004. The Project is funded by the Alberta Law Reform Institute (ALRI), the Alberta Department of Justice, the Law Society of Alberta and the Alberta Law Foundation, and is managed by ALRI. Overall leadership and direction of the Rules Project is the responsibility of the Steering Committee, whose members are:

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

B. Project Objectives

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

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

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

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

Objective # 1: Maximize the Rules' Clarity
Results will include:

- simplifying complex language
- revising unclear language
- consolidating repetitive provisions
- removing obsolete or spent provisions
- shortening Rules where possible

Objective # 2: Maximize the Rules' Useability
Results will include:

- reorganizing the rules according to conceptual categories within a coherent whole
- restructuring the rules so that it is easier to locate relevant provisions on any given topic

Objective # 3: Maximize the Rules' Effectiveness
Results will include:

- updating the rules to reflect modern practices
- pragmatic reforms to enhance the courts' process of justice delivery

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

- designing the rules so they facilitate the courts' present and future responsiveness to ongoing technological change, foreseeable systems change and user needs

Objective # 4: Maximize the Rules' Advancement of Justice System Objectives
Results will include:

- pragmatic reforms to advance justice system objectives for civil procedure such as fairness, accessibility, timeliness and cost effectiveness

C. Purpose Clause

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

D. Legal Community Consultation

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

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

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

E. Legal Community Comments

1. Objectives and approach of the Rules Project

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

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

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

2. Models from other jurisdictions

Some recommended looking to the British Columbia Rules of Court as a model–the comments reflected the view that these rules are short, effective, well-organized and generally user-friendly. Others thought that the Ontario Rules are a model of good organization. Another model suggested for consideration in framing the new rules was the Code of Professional Conduct. The new rules could be fixed, kept fairly short and simple, and be amplified by commentaries and rulings which could change from time to time. Finally, some commented that the Federal Court Rules are not a good model.

3. Uniformity

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

4. Regional concerns

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

5. Application and enforcement of the rules

A frequently expressed concern was that the rules are not being consistently applied and enforced. Respondents pointed out that people need to know that the rules will be applied in a predictable manner, that they will be enforced, and that judges will not impose steps not contemplated by the standard rules. Some also commented on the differences in application by clerks in Edmonton and Calgary. There were concerns that

clerks are making policy, for example, the "docketing statement" which is required in the Calgary Court of Appeal.

F. Public Consultation

A Public Consultation Paper and Questionnaire was prepared and distributed to organizations with interests that relate to the civil justice system and to the general public. Despite extensive circulation of the Questionnaire, the return rate was disappointing. A total of 98 questionnaires were received by the cutoff date of June 30, 2002. A Public Consultation Paper has been prepared and is available on our website <http://law.ualberta.ca/alri/>. Copies of the Report will also be provided to Rules Project committees and other interested persons. An excerpt from the Report's Conclusions is set out below.

G. Public Consultation Report: Conclusions

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

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

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

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

- court forms;
- information available through the court;
- ease of understanding of the legal process;
- the trial;

- the discovery stage; and
- interlocutory hearing(s).

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

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

H. Working Committees

Over the course of the Rules Project, working committees have been and will be established to examine particular areas of the rules. The committee structure reflects the "rewriting" and "rethinking" objectives of the Rules Project, and ensures that specialized topics will be reviewed by persons with relevant experience. The General Rewrite Committee and the "Rethink" Committees dealing with Early Resolution of Disputes, Management of Litigation, and Discovery and Evidence were the first to commence. Specialized areas of practice will be dealt with by committees dealing with rules relating to the Enforcement of Judgments, Appeals, Costs and other matters. Family law rules and practice are also the subject of a specialized legal community consultation, now underway with the issuance of an Issues Paper: Family Law Rules, available on our website <http://law.ualberta.ca/alri/>.

I. Process for Developing Policy Proposals

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

J. The General Rewrite Committee

The General Rewrite Committee has the task of providing comprehensive consideration of all areas in the Rules of Court. The Committee is charged with reviewing the large number of rules not allocated to a specialized committee. The Committee members are:

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

The Committee meets monthly and, in addition to other areas under review, has completed its preliminary examination of the rules addressed in this consultation memorandum.

K. Consultation Memorandum

This consultation memorandum addresses issues concerning parties whose legal ability to conduct litigation can be problematic, including deceased persons without a personal representative, unincorporated entities, interveners and persons under disability. The Committee has identified a number of issues relating to these topics and made proposals regarding them. As noted above, the proposals are concerned with issues of policy, not drafting. At a later stage in the Rules Project, draft rules will be circulated for comment.

These proposals are not final recommendations, but preliminary proposals being put to the legal community for further comment. The proposals will be reviewed once comments are received, and may be revised accordingly. While this consultation

memorandum attempts to include a comprehensive list of issues relating to parties, there may be other issues which should be addressed. Please feel free to provide comments regarding other issues relating to parties.

EXECUTIVE SUMMARY

A. Deceased Person Without a Personal Representative

If a deceased person has no executor or administrator, litigation involving the estate can only occur if the court has appointed an administrator *ad litem* or other representative to act for the estate.

The court can appoint an administrator *ad litem* under certain statutes or the Surrogate Rules. Queen's Bench Rule 50(1) allows a court to appoint a representative for a deceased person who was interested in an existing or intended action or proceeding but who has no personal representative. However, Alberta case law interpreted this rule extremely narrowly by holding that it did not authorize the appointment of an administrator *ad litem*, i.e., a representative could not commence or carry on litigation on behalf of the estate. After the Alberta Court of Appeal noted in a recent case that Rule 50's wide wording was a trap for the unwary and should be clarified, the rule was amended in 2002 to provide explicitly that a representative could represent an estate for all purposes of an action or proceeding.

The General Rewrite Committee agrees with this amendment and believes that Rule 50 has ongoing usefulness in the rules. However, it proposes a further clarification be made to the general notice provision of Rule 384(1). Notice of an application to appoint a representative under Rule 50 should be given to the beneficiaries of the estate or the heirs on intestacy if there is no will. These people are not parties and so the wording of Rule 384(1) needs to be broadened to include the giving of notice to any person or party who will be affected by the order sought.

B. Unincorporated Entities

1. Partnerships

Rules 80-82 govern when litigation may be carried on using a partnership's firm name, rather than having to litigate using the name of every partner. The General Rewrite Committee proposes a number of reforms in this area:

- A partnership should not have to carry on business within Alberta in order to sue or be sued in its firm name.

- Rule 80 should not specify the material date for determining who is a partner. Like its equivalent Ontario rule, it should be silent on this issue of substantive law and no longer refer to the relevant date as being when the cause of action accrued.

- Our rule should allow disclosure of partners' identities to be sought concerning any material time specified in the notice. If the partnership disputes the relevance of the date(s), it could dispute production by showing cause why the identities need not be produced.

- Our rules should also follow the Ontario model about how to sue individual partners separately. The partner (or former partner) should be served with the originating process and a notice alleging partnership at the material time. However (unlike Ontario), the partner should be able to defend separately in all circumstances, without leave, unless otherwise ordered by the court.

- Our rules should explicitly allow use of the firm name in litigation between partnerships with common partners and between a partnership and its partners (this is currently implicit in our rules).

2. Sole Proprietorships Operating Under a Trade Name

Where an individual carries on business in Alberta under a trade name, Rule 83 allows a plaintiff to use that trade name when suing the individual. The General Rewrite Committee proposes a few changes to this rule:

- It should also apply to corporations who operate under a trade name.

- While the sole proprietorship must carry on business, it should not need to do so within Alberta for its trade name to be used in litigation.

- A sole proprietorship who is a plaintiff should also be able to sue using its trade name (not just be sued as a defendant). This would make explicit in our rules what is already implicit due to a recent Alberta Court of Appeal ruling.

3. Other Unincorporated Associations

Unlike some Canadian jurisdictions, our rules currently do not allow unincorporated associations not engaged in business (like clubs, not-for-profit groups, activist groups, etc.) to engage in litigation in the association's name. The General Rewrite Committee recommends that this continue to be the case and sees no need for change in this area.

C. Interveners

Public interest intervention allows non-parties to intervene in litigation, typically in *Charter*-related cases or other cases involving public issues. Many Canadian jurisdictions explicitly address intervention in their rules of court but Alberta is one of the jurisdictions that does not, relying instead on the courts' inherent jurisdiction over practice and procedure to formulate our approach to public interest intervention.

Although Alberta courts function well in this area using inherent jurisdiction, the General Rewrite Committee believes that our written rules should reflect current practice by having an explicit intervention rule. The rule should facilitate the continued use by our courts of the common law test used in this area, without codification or alteration. Accordingly, the rule should provide that a court may grant leave to intervene to any person and that the proposed intervener must provide the kinds of information needed by the court to make its decision about whether to allow intervention. The rule should also expressly provide that intervener status may be granted subject to such terms and conditions, and with such rights and privileges, as the court directs. But the rule should not list the types of procedural terms to be set, so that a court will have as much flexibility as possible in crafting each intervener's participation to suit the needs of the case.

D. Persons Under Disability

Concerning parties who are under a legal disability and therefore cannot personally commence or defend litigation, the General Rewrite Committee makes the following proposals:

- Our rules should use the defined collective term "person under disability", meaning a minor or 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. But the definition should not be expanded to include missing persons (unlike the equivalent Ontario rule).

- There should continue to be no requirement for a court to adjudicate mental competence under the *Dependent Adults Act* before a litigation representative can act.

Concerning the people who litigate on behalf of the person under disability, the Committee's proposals are:

- A single descriptive term should be used, perhaps something like "litigation representative", rather than distinguishing between a "next friend" (plaintiff) and a "guardian *ad litem*" (defendant).

- Our rules should adopt the British Columbia approach of allowing a litigation representative of a minor or mentally incompetent person to serve without court appointment, regardless of whether the representative will act as plaintiff or defendant, unless a court orders otherwise, an enactment provides otherwise or the representative is a non-resident.

- The rules should require the representative to file an affidavit demonstrating his or her fitness to act, including evidence of the representative's relationship to the person under disability, a disclaimer of adverse interest and acknowledgement of liability for costs.

- Subject to a contrary court order, priority of acting as a litigation representative should belong to a trustee or guardian appointed under the *Dependent Adults Act* or an attorney under an enduring power of attorney who has authority to act in the litigation.

- Our rules should also specifically acknowledge the court's power to remove or replace a litigation representative.

Certain issues about the conduct of litigation can arise concerning persons under disability. The Committee has the following proposals in this area:

- When a defendant under disability has no litigation representative and the plaintiff knows it, the plaintiff should be required to apply to court for the appointment of a litigation representative.

- The litigation representative should be responsible for preparing the affidavit of records, without the need to obtain a court order under Rule 187.1. As for discovery, the person under disability should be examined if competent to give evidence, but otherwise the litigation representative should be examined and should have the same duty as a corporate representative to inform him/herself prior to the examination. The evidence could be read in at trial as evidence of the party.

- Our rules should provide that all settlements affecting a person under a disability must be approved by a court, unless a court order under the *Dependent Adults Act* has previously authorized a guardian or trustee to settle litigation or an enduring power of attorney has previously authorized an attorney to settle litigation.

- Currently our rules provide that default judgment cannot be entered against a party under disability without court permission. Ontario's rules also provide similar protective measures for other ways of ending litigation (discontinuance, abandonment, dismissal for delay). The Committee wants to know whether the profession believes such protections are needed in our province?

- We should continue to have Rule 344 that requires payment into court of money recovered on behalf of a person under disability, unless the law otherwise provides or the court otherwise orders. Another similar provision, Rule 182(1), can be deleted as superfluous.

E. Special Rules for Disposition of Minors' Property

Rules 581-583 (Part 45) are specialized rules concerning applications under the *Minors' Property Act*. The General Rewrite Committee concludes that these rules are entirely superfluous and should be deleted. Their effect would be produced anyway from the general rules of court, other statutory requirements and legal practice.

LIST OF ISSUES

DECEASED PERSONS

UNINCORPORATED ENTITIES

INTERVENERS

PERSONS UNDER DISABILITY

CHAPTER 1. DECEASED PERSONS

A. Introduction

[1] Neither a deceased person nor the estate of a deceased person is a legal entity capable of suing and being sued as a party to litigation. A legal entity is required to represent the estate in any litigation. A trustee or executor appointed under the will or an administrator appointed by the court to administer the estate are such legal entities with full authority both to sue and be sued on behalf of the estate.[2]

B. Deceased Person Without a Personal Representative

ISSUE No. 1
Are the rules of court sufficient concerning representation of a deceased person without a personal representative or is change required?

[2] If a deceased person has no executor or administrator, litigation involving the estate can only occur in certain circumstances (usually where the court has appointed an administrator *ad litem* or other representative to act for the estate).

[3] Under the *Survival of Actions Act*[3] and the *Fatal Accidents Act*,[4] the Queen's Bench can (on the application of a plaintiff) appoint an administrator *ad litem* to act on behalf of an estate that is a defendant in the suit. Such an administrator *ad litem* has no authority to sue on behalf of the estate (although, as defendant, the administrator *ad litem* can institute third party proceedings or start a counterclaim).[5]

[4] If a deceased's estate has a cause of action for wrongful death under the *Fatal Accidents Act* but has no executor or administrator (or the estate's personal

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[2] Queen's Bench rr. 43-45 apply to a trustee, executor or administrator who represents an estate. The General Rewrite Committee is not proposing any changes to these rules.

[3] R.S.A. 2000, c. S-27, s. 8.

[4] R.S.A. 2000, c. F-8, s. 5(2).

[5] *Public Trustee (Alberta) v. Larsen* (1964), 47 D.L.R. (2d) 184 (Alta. C.A.); *Crothers (Next friend of) v. Campbell Estate,* 1999 ABQB 329.

representative does not bring suit within one year of death), then litigation can be brought "by and in the name of all or any" of the beneficiaries of the action (spouse, cohabitant, child, sibling or parent of the deceased).[6] This does not authorize the beneficiaries to sue on behalf of the estate, but to sue directly in their own right.

[5] Rule 10(1)(d)(ii) of the Surrogate Rules provides that one of the grants for which application may be made to the court is for a limited grant of administration "for the purpose of litigation (*ad litem*)".[7] This provision is meant to allow the appointment of administrators *ad litem* who are empowered to sue or be sued on behalf of an estate in any kind of litigation.

[6] Queen's Bench Rule 50(1) allows a court to appoint a representative for a deceased person who was interested in an existing or intended action or proceeding but who has no personal representative. Rule 50(1) also provides, in the alternative, that a court may proceed in the absence of any person representing such a deceased person's estate.

[7] Alberta case law consistently interpreted Rule 50(1) extremely narrowly by holding that it did not authorize the appointment of an administrator *ad litem*.[8] The rights of a representative appointed under this Rule did not extend to "commencing or carrying on an action"[9] on behalf of the estate. There is "little doubt that in Alberta Rule [50] will not authorize that an action be brought by or against a person appointed to represent the estate of a deceased person pursuant to the Rule."[10]

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[6] *Supra* note 4, s. 3(2).

[7] Formerly the application would have been to the Surrogate Court but now would be to the Queen's Bench.

[8] *Bodnaruk v. Canadian Pacific Railway*, [1947] 1 W.W.R. 279 (Alta. S.C. (A.D.)), citing Bora Laskin, "Administrator *ad litem* – Appointment for Purpose of Defending a Proposed Action – Practice in Ontario" (1939), 17 Can. Bar Rev. 677.

[9] *Joncas v. Pennock* (1959), 17 D.L.R. (2d) 60 at 66 (Alta. S.C. (A.D.)).

[10] Howard L. Irving, "Administrator *ad Litem* – Traps and Pitfalls – Rule 63 of the Consolidated Rules of Court" (1967-68), 6 Alta. L. Rev. 306 at 307.

[8] Given that Rule 50(1) conferred such extremely limited authority on a representative despite its apparently wide wording, it clearly constituted a trap for the unwary. The usual unfortunate scenario was that someone appointed under Rule 50(1) would bring a suit on behalf of the estate and only later discover, after the limitation period had expired, that the rule did not confer the authority to do so. The person would then obtain proper authorization as an administrator and apply to amend the original statement of claim in a bid to retroactively "cure" the invalid proceedings. But such attempts were never successful.[11]

[9] The standard narrow interpretation of Rule 50(1) was most recently expressed by the Alberta Queen's Bench in *Stout Estate v. Golinowski Estate*.[12] On appeal,[13] the Court of Appeal expressly declined to interpret Rule 50 since doing so was not necessary to reaching its decision. For the purposes of this case the Court simply assumed, "without deciding, that an administrator *ad litem* or rule 50 appointee is unable to initiate a claim on behalf of an estate."[14] But the Court did review the history and interpretation of Rule 50 and suggested that it was (at the very least) unclear whether an administrator *ad litem* under Rule 50 could initiate a claim on behalf of an estate. The Court of Appeal noted that after the trial decision in *Golinowski*, a different Queen's Bench judge in *Plett v. Blackrabbit*[15] held that an administrator *ad litem* appointed under Rule 50 could indeed sue on behalf of the estate.

[10] The Court of Appeal stated that, if Rule 50 did not provide the authority to sue on behalf of an estate, "it should be amended to clarify its scope and intent, as the current wording suggests a broad authority that could be a trap for the unwary."[16]

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[11] *Bodnaruk v. Canadian Pacific Railway*, *supra* note 8; *Public Trustee (Alberta) v. Larsen*, *supra* note 5; *Crothers (Next friend of) v. Campbell Estate*, *supra* note 5.

[12] (1999), 251 A.R. 20, 1999 ABQB 971.

[13] (2002), 299 A.R. 13, 2002 ABCA 49.

[14] *Ibid*. at 28 (cited to A.R.).

[15] (2001), 297 A.R. 89, 2001 ABQB 843.

[16] *Supra* note 13 at 28.

[11] Following these obiter comments from the Court of Appeal, the government amended Rule 50 in May, 2002 at the behest of the Rules of Court Committee.[17] Rule 50 now clearly provides that a court may appoint a personal representative "to represent the estate for all purposes of the action or proceeding whether as plaintiff, defendant, plaintiff by counterclaim, defendant by counterclaim, third party or otherwise".

[12] With this amendment, it appears that a fully empowered administrator *ad litem* can now be appointed by the Queen's Bench both under Surrogate Rule 10(1)(d)(ii) and Queen's Bench Rule 50. Could Rule 50 be superfluous or does it have some separate utility? In the opinion of the General Rewrite Committee, there are three ways in which Rule 50 does have separate usefulness.

[13] Firstly, Rule 50 does expressly provide authority for a court to proceed in the absence of an estate representative.[18]

[14] Secondly, Rule 50 allows a court to appoint an estate representative quickly on two days' notice[19] in situations where speed may be important. For example, where a limitation period is about to expire, an order appointing an estate representative could quickly be obtained under Rule 50, action commenced and then the pleadings could be subsequently amended after the person has successfully obtained the more time-consuming appointment as administrator (if that were still felt to be necessary, now that Rule 50 has been amended to clearly confer the authority to act as a plaintiff).

[15] Could someone facing an imminent limitation period obtain a limited grant of administration *ad litem* under Surrogate Rule 10(1)(d)(ii) in a comparably short amount of time? Experienced estate practitioners to whom we spoke said such speed would be atypical and making such an application would not be simple. Ordinarily it

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[17] *Alberta Rules of Court Amendment Regulation,* Alta. Reg. 85/2002, s. 2.

[18] *Re Jackson, Houston v. Western Trust Co.*, [1940] 1 D.L.R. 283 (Sask. C.A.) is an example of when a court need not appoint a representative for an estate. In this case, the two beneficiaries of the estate were already represented before the court in other capacities. The only possible interest in the estate that was not represented was the creditors. The court held it was proper to proceed without estate representation in those circumstances.

[19] This time could be abridged under r. 548 if the situation were even more urgent.

requires ten days notice and then takes the clerk's office about two weeks following the chambers appearance to process the issuance of a grant. In an emergency situation, a chambers judge could be asked to abridge the time for service, on proper evidence showing why such urgency is required. The lawyer's level of experience would probably determine how quickly such an order could be obtained. All things considered, Queen's Bench Rule 50 would be easier to use in this situation.

[16] Thirdly, Rule 50 still allows the court to quickly appoint an estate representative to represent an estate "otherwise" than as a plaintiff, defendant, etc. One example might be where someone dies who has an interest in the proceedings but is not a party and the court simply wants someone to represent the estate's position so that all possible arguments are presented for the court's consideration. In those circumstances, it would not be worth the time and money required to appoint a formal administrator *ad litem* under the Surrogate Rules. However, whether such limited circumstances would arise all that often is probably debatable.[20]

POSITION OF THE GENERAL REWRITE COMMITTEE

[17] The Committee agrees with Rule 50 as amended and believes that it has ongoing utility in the rules. The Committee does have one small concern in this area. When an application is made to appoint an administrator *ad litem* for an otherwise unrepresented estate, notice of that application should be given to the beneficiaries of the estate or the heirs on intestacy if there is no will. Notice of an application to be appointed a representative under Rule 50(1) is governed by the general notice provision in Rule 384(1) which states that "An application in an action or proceeding shall be made by motion and, unless the Court otherwise orders, notice of the motion shall be given to all parties affected." This provision should more clearly provide that notice may also be given to interested non-parties where necessary (such as beneficiaries or heirs), perhaps by using a phrase like "notice . . . to any person or party who will be affected by the order sought".

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[20] One such case did arise in Saskatchewan, where the court appointed an estate representative under its equivalent to our r. 50 rather than an administrator *ad litem* under its special rules. In *Agricultural Credit Corp. of Saskatchewan v. Lapshinoff* (1997), 159 Sask. R. 310 (Q.B.), the plaintiff had a judgment against a defendant who then died. It was unclear if there was a will naming an executor because the uncooperative relatives passively neglected to produce any will that might exist. The relatives also took no steps to apply for administration. At the plaintiff's behest, the court appointed one relative as an estate representative against whom the writ of execution could be issued.

CHAPTER 2. UNINCORPORATED ENTITIES

A. Introduction

[18] Most parties to litigation will be either a natural person[21] or a statutory person,[22] such as a corporation,[23] society[24] or government.[25] However, some parties will be entities that are neither natural persons nor statutory persons, such as a partnership, a sole proprietorship operating under a trade name or an unincorporated association (like a club, trade union or advocacy group).

[19] In the absence of a legislated exception, the general rule is that these unincorporated entities lack the status to sue or be sued in their entity's name. Actions by or against such an entity must be brought in the name of every member of the entity (either personally or in a representative capacity).[26] This is often difficult, inconvenient and very cumbersome.[27] It can be a real barrier to litigation.

[20] Legislative provisions sometimes exist to provide exceptions to this general rule so that some unincorporated entities can sue and be sued in their own name. For example, trade unions in Alberta are capable of suing and being sued in their own names for the purposes of the *Labour Relations Code*.[28] Rules 80-82 of the Alberta Rules of Court allow partnerships carrying on business within the jurisdiction to sue

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[21] A natural person is a living human who is of full age and mentally competent (although minors and mentally incompetent persons can sue or be sued if there is someone acting for them in a representative capacity).

[22] Statutory persons are non-living entities recognized by law as possessing legal personalities separate and apart from those of their constituent members: *International Assn. of Science and Technology for Development v. Hamza* (1995), 162 A.R. 349, 6 W.W.R. 75 at 81 (C.A.).

[23] See *e.g. Business Corporations Act*, R.S.A. 2000, c. B-9, s. 16(1).

[24] See *e.g. Societies Act*, R.S.A. 2000, c. S-14, s. 14.

[25] The federal and provincial Crown, foreign sovereigns and states are statutorily recognized or juridical persons: *supra* note 22.

[26] *Supra* note 22 at 81-82.

[27] Garry D. Watson and Craig Perkins, eds., *Holmested and Watson: Ontario Civil Procedure*, vol. 2, looseleaf (Scarborough, Ont.: Carswell, 1993) at r. 8 para. 5 [Watson & Perkins].

[28] *Labour Relations Code*, R.S.A. 2000, c. L-1, s. 25(1).

and be sued in the partnership name. Rule 83 allows individuals carrying on business within the jurisdiction under a firm name to be sued in the firm name. Our Rules, however, do not make any exception to the general rule for unincorporated associations or clubs, nor for partnerships or sole proprietorships carrying on business outside Alberta.

B. Partnerships

1. Introduction

[21] Partnership is a popular way for two or more persons to carry on business together with a view to a profit. The *Partnership Act*[29] governs several types of partnerships:

- ordinary partnership – each partner is equally liable for the partnership's obligations and has unlimited personal liability;
- limited partnership – a general partner has unlimited liability but a limited partner has limited liability only. The statute provides that a limited partner is not generally a proper party to litigation against the limited partnership;[30]
- Alberta LLP (limited liability partnership available to certain professional partnerships) – liability is limited to partnership assets only, if certain criteria are met. The statute provides that such partners are not proper parties to litigation by or against the partnership if they meet certain criteria;[31]
- extra-provincial LLP – if unregistered, its partners have the same liability as an ordinary partnership.[32] If registered, its partners' liability is determined according to the law of the extra-provincial LLP's governing jurisdiction.[33]

[22] A partnership is not a legal entity apart from its partners. Therefore, when a partnership sues or is sued, all the individual partners must be named. When dealing with a large partnership, this can be difficult and cumbersome. Therefore, to ease this situation, Alberta Rule 80 (like other jurisdictions' rules of court) creates an

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[29] R.S.A. 2000, c. P-3.

[30] *Ibid*., s. 77.

[31] *Ibid*., s. 12(1), (2) and (3).

[32] *Ibid*., s. 93.

[33] *Ibid*., s. 104.

administratively easy way of collectively naming all the partners by citing the firm name. Using the partnership name does not deprive any partners of their rights or release them from their liabilities as partners.[34] Although the firm name is used, the lawsuit is still a lawsuit by or against all the partners. The firm name is just a convenient designation or label that is legally synonymous with individually naming each partner as a party.[35]

[23] Using Rule 80 is optional, not mandatory, and (subject to the *Partnership Act*) partners can still sue or be sued as individuals. But there are several advantages when an action is brought in the firm name, including:[36]

- Proof of the cause of action is usually easier.
- A partnership can be sued without first ascertaining who all the partners are.
- If a partner dies, the action in the partnership name still continues.
- If a partner is a minor, no litigation guardian need be appointed.
- If one or some of the partners live outside the jurisdiction, there is no need to get an order for service *ex juris* because the partnership can be served via a resident partner (provided that all that is sought is a judgment against the partnership assets).
- The rules provide a mechanism for obtaining disclosure of all the names and addresses of the partners at the relevant date for the litigation.

[24] For the purposes of litigation by and against partnerships, it is important that these rules be workable and convenient and so the General Rewrite Committee has considered several issues in this area.[37]

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[34] *Supra* note 22 at 82.

[35] *Bleau v. Michetti Pipe Stringing* (1994), 156 A.R. 76 at 77-78 (Q.B. Master).

[36] This list is taken from *supra* note 27 at r. 8 para. 5.

[37] For the General Rewrite Committee's recommendations concerning personal service on partnerships, see Alberta Law Reform Institute, *Commencement of Proceedings in Queen's Bench* (The Rules Project, Consultation Memorandum No. 12.1) (Edmonton: Alberta Law Reform Institute, 2002) at 37-38 [ALRI, *Commencement of Proceedings*].

2. Carrying on business within Alberta

ISSUE No. 2
Should a partnership have to carry on business within Alberta in order to sue or be sued in the partnership name?

[25] Currently, our Rule 80 allows partnerships to sue or be sued in their firm name if the partnership carries on business within the jurisdiction. If the partnership does not carry on business within Alberta, or has not in the past when the cause of action arose, Rule 80 does not permit actions by or against that partnership in the firm name.[38] Although the requirement of carrying on business within the jurisdiction was once a common provision in the rules across Canada, today virtually every other province has abolished this geographical prerequisite to the use of a partnership name in litigation.

POSITION OF THE GENERAL REWRITE COMMITTEE

[26] The Committee sees no reason to treat a partnership differently than a corporation in this regard. Corporations need not carry on business within Alberta in order to be parties to litigation that is otherwise within the jurisdiction of our courts. A partnership (by definition) must carry on business,[39] but Rule 80's requirement that it must do so in Alberta should be removed.

3. Effect of change in firm membership

ISSUE No. 3
Should the rules specify the material date for determining who is a partner?

[27] Currently, Rule 80 allows partners to be sued in the name of the firm "of which they were partners at the time when the cause of action accrued." It is often the case that firm membership changes between the date the cause of action arose and the date litigation occurs. Unless otherwise agreed by the partners, some membership changes legally dissolve the old firm and create a new firm.

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[38] *Nova, an Alberta Corporation v. Grove* (1982), 22 Alta. L.R. (2d) 262 (C.A.).

[39] The *Partnership Act* defines "partnership" as "the relationship that subsists between persons carrying on a business in common with a view to profit": *supra* note 29, s. 1(g).

[28] Rule 80 creates a legislative assumption about which partners are entitled to benefit from and which partners are responsible for such litigation. This assumption is both unnecessary and sometimes wrong. For example, in limited partnerships,[40] it is not at all clear that the benefit accrues to the partners as at the date the cause of action accrues. In fact, it is probably not the case[41] and a limited partnership is only, as a rule, liable to the extent of its partnership assets at the date of recovery.

[29] In practice, partnership agreements usually provide mechanisms for the purchase and sale of partnership interests and accordingly, the litigation benefit may well accrue to the partnership in existence as of the date of the judgment. The burden will often fall on the existing partnership to the extent of the partnership assets. Furthermore, injunctive or declaratory relief and that related to specific performance will, as a practical matter, often benefit the existing partnership. If it is the existing partnership which is instructing counsel, an award of costs will either benefit or cost the existing partnership.

[30] Determining which partners or former partners are liable for a partnership's obligations is a question of substantive law. It is not the proper function of the Rules to purport to resolve that issue.

[31] The Ontario rule that authorizes litigation using a partnership name simply provides that a "proceeding by or against two or more persons as partners may be commenced using the firm name of the partnership".[42] It is silent about specifying a time. Elsewhere in the provision,[43] reference is made to someone being a partner at the "material time" but again, the rule does not specify when this time is.

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[40] Rule 80 applies both to general partnerships and limited partnerships: *155569 Canada Limited v. 248524 Alberta Ltd.* (2000), 255 A.R. 1 at 20, 2000 ABCA 41.

[41] *Marigold Holdings Ltd. v. Norem Construction Ltd.* (1988), 89 A.R. 81, 60 Alta. L.R. (2d) 289 (Q.B.).

[42] Ontario, *Rules of Civil Procedure*, r. 8.01(1) [Ontario].

[43] *Ibid*., rr. 8.03 and 8.05.

POSITION OF THE GENERAL REWRITE COMMITTEE

[32] Our rule should be silent on the substantive issue of identifying which partners should benefit from, or be liable for, the litigation. Like the Ontario rule, it should not specify the material time for determining this.

4. Disclosure of partners' identities

ISSUE No. 4
What should the rules provide about disclosure of partners' identities?

[33] When a firm name is used in an action, Rule 80(3)-(6) provides that the other party can serve notice on the partnership to disclose the names and addresses of all persons who were partners when the cause of action accrued. In Ontario, Rule 8.05(1) provides that a similar notice may be served "to disclose forthwith in writing the names and addresses of all the partners constituting the partnership at a time specified in the notice".

[34] The equivalent British Columbia[44] and Saskatchewan[45] rules require production of this information by a specified deadline (10 days and 8 days, respectively). Ontario provides that, if the information is not produced, the court may immediately proceed to dismiss the partnership's claim or strike out its defence.[46] In Alberta, typically, a court order to produce would first have to be obtained and then fail to be complied with before such sanctions could be imposed.[47]

POSITION OF THE GENERAL REWRITE COMMITTEE

[35] Our rule should allow disclosure to be sought concerning any material time specified in the notice. This is especially important if, as we have just recommended, our rule will no longer explicitly provide that the date when the cause of action

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[44] British Columbia, *Supreme Court Rules*, r. 7(4) [British Columbia].

[45] Saskatchewan, *Queen's Bench Rules*, r. 54(2).

[46] Ontario, *supra* note 42, r. 8.05(2).

[47] Alberta, *Rules of Court*, rr. 703(1)(a) and 704(1)(d) [Alberta]. However under Rule 599.1 costs could be imposed without this interim step.

accrued is the relevant date for determining who is a partner. But the rule governing disclosure should not be able to be used for a "fishing expedition". If the partnership disputes the relevance of the date(s) listed in the notice, it should be able to show cause why the information should not be provided. But the partnership would bear the burden of disputing production.

[36] As for the issue of mandating specific deadlines for disclosure or immediately proceeding to serious sanctions for failure to produce, the General Rewrite Committee is not making any recommendations at this time, because the Management of Litigation Committee will make recommendations regarding such issues in litigation generally, which may be sufficient for our purposes.

5. Suing individual partners

ISSUE No. 5
How should a person be sued and defend as a partner?

[37] When a partnership is sued in the firm name in Alberta, any resulting judgment may be executed against the partnership property in the jurisdiction.[48] But for a judgment to be executed against the property of the individual partners, that person must have

- entered a defence as a partner,
- been served as a partner with the statement of claim but not file a defence,
- admitted in his or her pleadings to being a partner, or
- been found by the court to be a partner.[49]

[38] Ontario provides that when a partnership is sued in the firm name and the plaintiff or applicant seeks "an order that will be enforceable personally against a person as a partner, the plaintiff or applicant may serve the person with the originating process, together with a notice . . . stating that the person was a partner at a material

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[48] *Ibid*., r. 82(1).

[49] *Ibid*., r. 82(2).

time specified in the notice."[50] Service results in the person being deemed to have been a partner at the material time, unless the person defends the proceeding separately and denies it.[51] If a partner wants to defend separately but does not deny the fact of partnership, the partner requires leave of the court.[52]

[39] Alberta Rule 81(1) also allows a person who is served individually as a partner to enter a defence denying the fact of partnership at the material time. Rule 81(2) provides that such a defence is treated as a defence for the firm.

POSITION OF THE GENERAL REWRITE COMMITTEE

[40] If our rules follow the Ontario approach of not specifying that partnership is determined at the date when the cause of action accrues, then our rules should also follow the Ontario model about how to sue individual partners separately. In other words, the partner (or former partner) should be served with the originating process and a notice alleging partnership at the material time. But the General Rewrite Committee feels that, contrary to the Ontario approach, an individual partner on whom such notice is served should be able to defend separately in all circumstances, without leave, unless otherwise ordered by the court. The Committee also does not think it makes sense to treat that defence as a firm defence.

6. Proceedings between partners

ISSUE No. 6
Should our rules expressly abrogate the common law rule preventing partnerships from suing partners, partners from suing partnerships and partnerships from suing other partnerships with a common partner?

[41] At common law, a partnership cannot sue a partner (or vice versa) because the partner cannot conceptually be both a plaintiff and a defendant in the same action. For

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[50] Ontario, *supra* note 42, r. 8.03(1).

[51] *Ibid*., r. 8.03(2).

[52] *Ibid*., rr. 8.04 and 8.02.

the same reason, one partnership cannot sue another partnership if they have one or more partners in common.[53]

[42] Rules of court address this issue in various ways. British Columbia is silent. Saskatchewan expressly abrogates both aspects of the common law rule so that firm names can be used in these types of proceedings.[54] Ontario expressly abrogates only one aspect and allows firm names to be used in proceedings between partnerships with common partners, but not where a partnership and its partner(s) are suing each other.[55]

[43] Alberta does not explicitly deal with either aspect of the common law rule, but by implication our Rules seem to treat both aspects as abrogated in practice. Rule 82(6) provides that a writ of execution shall not issue without the leave of the court where the action involves a suit between a firm and its partners or between firms with common members. This presupposes that litigation has already been conducted using the partnership name without hindrance.

POSITION OF THE GENERAL REWRITE COMMITTEE

[44] The Alberta rules should make explicit what is currently implicit in our rules. Being able to sue in the firm name would be an important convenience where large partnerships are involved. Our rules should explicitly abrogate both aspects of the common law rule so that firm names can be used in these types of proceedings. Partnership agreements can also address the issue of who is entitled to use the firm name in litigation between the partnership and its partners.

C. Sole Proprietorships Operating Under a Trade Name

1. Introduction

[45] Where an individual carries on business in Alberta under a different name (for example, Joe Smith carrying on business as Joe's Auto Body), our Rule 83 allows a plaintiff to sue that individual under his or her trade name. In such a case, Rule 83 makes applicable the partnership rules found in Rules 80-82.

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[53] Watson & Perkins, *supra* note 27 at r. 8 para 6[5].

[54] Saskatchewan, *supra* note 45, r. 56(3)(a).

[55] Ontario, *supra* note 42, r. 8.01(2).

[46] The ability to sue a sole proprietorship under its trade name is important because, before litigation is commenced and the discovery process occurs, it may be difficult to determine the identity of the individual who operates under the trade name.

2. Corporations operating under a trade name

ISSUE No. 7
Should Rule 83 also apply to corporations that carry on business under a different name?

[47] Because Rule 83 refers to an "individual" who carries on business under a trade name, it applies only to humans who do so, not to corporations which may carry on business under a different name. To apply to corporations, the word "person" would have to be used.[56] Equivalent provisions in other jurisdictions often use "person".[57]

POSITION OF THE GENERAL REWRITE COMMITTEE

[48] The Committee sees no reason why corporations should be treated differently. At the start of litigation, it can be equally difficult for a plaintiff to determine the identity of a corporation that operates a business using a trade name. Therefore, a corporation operating under a trade name should be able to be sued in its trade name.

3. Carrying on business within the jurisdiction

ISSUE No. 8
Should a sole proprietorship have to carry on business within Alberta in order to be sued under its trade name?

[49] Like the partnership rules, Rule 83 can be used only if the defendant carries on business in Alberta, or did so when the cause of action arose. Again, this qualification does not exist in the equivalent Ontario, British Columbia or Saskatchewan rules.

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[56] *Interpretation Act*, R.S.A. 2000, c. I-8, s. 28(1)(nn).

[57] *See, e.g.*, Ontario, *supra* note 42, r. 8.07(1), British Columbia, *supra* note 44, r. 7(10) and Saskatchewan, *supra* note 45, r. 57(1).

POSITION OF THE GENERAL REWRITE COMMITTEE

[50] While it must remain a requirement that the sole proprietorship carry on business, the Committee recommends removal of the requirement that it do so within the jurisdiction.

4. Sole proprietor cannot sue using trade name

ISSUE No. 9
Should Rule 83 expressly provide that a sole proprietor may both sue and be sued using the trade name?

[51] Rule 83 only allows a sole proprietor to be sued in his or her trade name; the sole proprietor cannot sue using the trade name. British Columbia's rule is to the same effect. However, Ontario and Saskatchewan do allow the sole proprietor to sue using the trade name.[58]

[52] Ontario's rule used to be like Alberta's. In *Kaltenback v. Frolic Industries Limited*, the Ontario Court of Appeal confirmed that a plaintiff sole proprietor could not sue using a trade name and held that doing so created a nullity that could not be cured by subsequent amendment of the pleadings.[59] Due to the "harsh and unnecessary result"[60] of that case and others that followed it, Ontario changed its rule to provide that a sole proprietor could both sue and be sued in the trade name.

[53] In *RC International Ltd. v. Brooks*,[61] the Alberta Court of Appeal refused to follow *Kaltenback*. The court said that, while Rule 83 does not authorize a sole proprietor to sue in the trade name, it does not expressly forbid it either and so therefore it is not impossible under Alberta procedure for a sole proprietor to do so. Even if it were expressly forbidden, the court said that the result would not be a nullity but a curable error.

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[58] *Ibid*.

[59] [1948] O.R. 116 (C.A.).

[60] Watson & Perkins, *supra* note 27 at r. 8 para 11[1].

[61] (2000), 261 A.R. 329, 2000 ABCA 204.

POSITION OF THE GENERAL REWRITE COMMITTEE

[54] While a sole proprietor plaintiff knows perfectly well what the sole proprietor's actual legal name is and could use it in the litigation, an unsophisticated sole proprietor who sues without using a lawyer might not know to do so. Moreover, to be consistent with the rules concerning partnerships, a sole proprietor should be able to sue using the trade name, as well as be sued under it. This ability would also be useful where a sole proprietor defendant who has been sued in the trade name wants to counterclaim. Therefore the Committee recommends making this change to Rule 83. It would also make explicit what is now implicitly the law in Alberta due to the Alberta Court of Appeal decision in *RC International Ltd. v. Brooks*.

[55] When a trade name is used in litigation by a party against whom a judgment or order for costs or other relief is made, the court can protect the successful party by directing that the judgment or order be issued in the actual legal name of the party bound by it so that it will be properly enforceable.

D. Other Unincorporated Associations

ISSUE No. 10
Should Alberta allow unincorporated associations to engage in litigation in their own names?

[56] The Alberta Rules do not allow unincorporated associations to engage in litigation in the association's name. In this, Alberta is similar to most Canadian jurisdictions. Our Rule 80 concerning partnerships cannot extend to entities like clubs, unincorporated associations and not-for-profit groups[62] because partnerships must "[carry] on a business in common with a view to profit" as provided in the *Partnership Act*.[63]

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[62] *Tel-Ad Advisors Ontario Ltd. v. Tele-Direct (Publications) Inc.* (1986), 8 C.P.C. (2d) 217 (Ont. H.C.J.); *Toronto and York County District Command of the Great War Veterans Association of Canada v. Globe Indemnity Co. of Canada* (1921), 20 O.W.N. 280 (H.C.).

[63] *Supra*, note 29, s. 1(g).

[57] The rules of three Canadian jurisdictions do allow unincorporated associations to both sue and be sued in their own name: Manitoba,[64] New Brunswick[65] and Federal Court.[66] Associations are typically defined in those rules as an unincorporated organization of two or more persons, other than a partnership, operating under the name of the association for a common purpose or undertaking.[67] There is no requirement for business activities or a profit motive.

[58] Unincorporated associations that have successfully sued or been sued in their own name under these rules include a council of trade unions[68] and small political parties.[69] The courts seem to approach activist groups with caution and scrutinize them closely to make sure they are legitimate pre-existing organizations and not merely shells set up for the sole purpose of obtaining standing to sue an opponent.[70]

POSITION OF THE GENERAL REWRITE COMMITTEE

[59] The Committee does not believe there is currently a need for a rule of this nature. Unincorporated associations can litigate using the representative approach available under Rule 42. Where there are numerous persons with a common interest in an action, Rule 42 allows one of them to litigate on behalf of all the others. The representative litigant is personally liable for costs so the other party has legal

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[64] Manitoba, *Court of Queen's Bench Rules*, r. 8.10 [Manitoba].

[65] New Brunswick, *Rules of Court of New Brunswick*, r. 9.02 [New Brunswick].

[66] *Federal Court Rules, 1998*, r. 111 [Federal].

[67] Manitoba, *supra* note 64, r. 8.09; New Brunswick, *supra* note 65, r. 9.01; *ibid*., r. 2.

[68] *Pridham v. Saint John Building and Construction Trades Council* (1986), 64 N.B.R. (2d) 361, 165 A.P.R. 361 (Q.B. (T.D.)).

[69] *LePage v. Communist Party of Canada* (1999), 209 N.B.R. (2d) 58, 535 A.P.R. 58 (Prob. Ct.).

[70] In *Citizens Against Amalgamation Committee v. New Brunswick (Minister of Municipalities, Culture and Housing)* (1998), 199 N.B.R. (2d) 184, 510 A.P.R. 184 at 188 (C.A.), the court found the association had "none of the trappings" of an unincorporated association. In *Caddy Lake Cottagers Assn. v. Florence-Nora Access Road Inc.*, [1998] 8 W.W.R. 514 (Man. C.A.), the Court of Appeal, in *obiter*, questioned the association's standing to sue. It had been formed solely for the purpose of bringing a court challenge of the validity of a licence issued before the association was formed. However, the trial court held that the association had standing and the matter was not appealed so the Court of Appeal did not decide the case on this basis.

recourse if needed. This works perfectly well for unincorporated associations and is sufficient in these circumstances.

[60] Later this year we will release a consultation memorandum on class actions, which may recommend deleting Rule 42 in favour of a new class actions regime. We will need to consider at that time whether unincorporated, non-business-related associations will still be able to litigate efficiently and cost-effectively under the new regime. We may need to revisit this issue of whether such associations need a special rule to litigate in their association's name.

[61] The Committee believes that, in accordance with the current approach of the Rules, an unincorporated entity should not be able to sue in its own name unless it is carrying on business. Those are the circumstances in which the need for convenient and economical forms of litigation is most likely to arise.

CHAPTER 3. INTERVENERS

A. Introduction

[62] "[I]ntervention is a procedural device which allows strangers to a judicial proceeding to participate in some fashion in that proceeding".[71] Historically, courts were very unwilling to allow any type of intervention but, over the past twenty years in Canada, this situation has changed. The advent of the *Charter* and its use to challenge statutes on constitutional grounds have caused increased demand for public interest intervention in such litigation. Canadian courts have responded to this increased demand through rules reform and case law development. While private interest intervention is still rare, public interest intervention is now an accepted fact both at trial[72] and appeal levels.

[63] Many Canadian jurisdictions explicitly address intervention in their rules of court[73] but some (like Alberta) do not,[74] relying instead on the courts' inherent jurisdiction over practice and procedure to formulate their approach to public interest intervention. Whether a jurisdiction has legislated rules or not (and despite some differences in detail between the legislated rules of various jurisdictions), courts appear to be basically consistent in the approach taken to public interest intervention in Canada.

B. Intervention in Alberta

ISSUE No. 11
Should Alberta legislate a rule addressing intervention?

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[71] Paul R. Muldoon, *Law of Intervention: Status and Practice* (Aurora: Canada Law Book, 1989) at 3.

[72] Intervention at trial level is important in *Charter* cases where evidence must be lead about a section 1 defence.

[73] See *e.g.*, Ontario, *supra* note 42, rr. 13.01-13.02; Saskatchewan, *supra* note 45, r. 39A; Federal, *supra* note 66, r. 109; *Rules of the Supreme Court of Canada*, rr. 55-59.

[74] See *e.g.*, British Columbia, *supra* note 44.

ISSUE No. 12
If so, what should the rule provide?

[64] Having no legislated intervention rule, Alberta courts use a test developed at common law for determining whether to grant or refuse intervention. The test is composed of two main issues, with various factors to be considered when assessing each main issue. According to this test, intervener status should be granted where ". . . [**1**] the party will be directly affected by the ultimate decision of the case ***and/or*** [**2**] where the presence of the party is necessary for the Court to properly decide the matter."[75]

[65] The first main issue requires the court to assess whether a proposed intervener has a direct or vital interest in the outcome of the case that is sufficient to justify intervention.[76] The second main issue requires the court to assess the value of the proposed intervener's participation, taking into account factors such as delay, prejudice, expansion of the proceedings,[77] duplication of arguments,[78] whether the intervener has special expertise or insight[79] or a unique perspective,[80] etc.

[66] The relationship between the two main issues can either be conjunctive or disjunctive ("and/or"). This means that both main issues of the test may or may not

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[75] *Ahyasou v. Alberta (Minister of Environmental Protection)* (1998), 235 A.R. 387 at 390, (*sub nom. Athabasca Tribal Council v. Alberta (Minister of Environmental Protection*), 26 C.P.C. (4th) 98 (Q.B.) (numbers and emphasis added) [*Ahyasou*]. The use of this test in Alberta was affirmed by the Court of Appeal in *Re Indian Residential Schools* (2000), 2 C.P.C. (5th) 243 at 246, (*John Doe 1 v. Canada*) 2000 ABCA 217.

[76] *Ahyasou*, *ibid*.; *R. v. Neuman* (1995), 173 A.R. 189, 32 Alta. L.R. (3d) 340 (Prov. Ct. (Crim. Div.)); *Alberta Sports and Recreation Association for the Blind v. Edmonton (City)* (1993), 146 A.R. 117, 20 C.P.C. (3d) 101 (Q.B.) [*Alberta Sports*]; *Mackie v. Wolfe* (1995), 169 A.R. 309, 31 Alta. L.R. (3d) 225 (C.A.); *R. v. Neve* (1996), 184 A.R. 359 (C.A.).

[77] *Re Indian Residential Schools*, *supra* note 75 at 246; *Mohr v. Scoffield* (1991), 80 Alta. L.R. (2d) 97 (C.A.).

[78] *Alberta Sports*, *supra* note 76 at 104.

[79] *Goudreau v. Falher Consolidated School District No. 69* (1993), 141 A.R. 21, 8 Alta. L.R. (3d) 205 (C.A.).

[80] *Ahyasou*, *supra* note 75 at 105.

have to be met, depending on the circumstances. For example, if a proposed intervener would not be directly affected by the outcome of the case (has insufficient interest), the proposed intervener might still be allowed to intervene if the court considers the proposed intervener's involvement to be valuable and necessary for a proper decision to be reached.[81] Yet in other cases, where the proposed intervener is directly affected by the outcome of the case (has sufficient interest), the court will also assess the value and necessity of the intervener's contribution, requiring both main issues of the test to be met before allowing intervention.

[67] When granting intervention, the court's discretion extends to specifying the exact parameters of the intervener's participation in the proceedings such as whether, at trial, the intervener can lead evidence, examine and cross-examine witnesses or appeal the decision.[82] For an intervention on appeal, the court can set terms such as specifying which issues the intervener can address, the length of the intervener's factum and the time allowed for oral argument.[83] It is a very good idea for a court to lay out such parameters of participation because they assist in minimizing problems that could arise from delay, prejudice, duplication of arguments, introduction of new issues, etc.

POSITION OF THE GENERAL REWRITE COMMITTEE

[68] Although Alberta courts function well in this area using inherent jurisdiction, the Committee believes that our written rules should reflect current practice by having an explicit intervention rule concerning intervention at trial. (Intervention on appeal will be dealt with later by the Court of Appeal Committee).

[69] The Committee proposes that the rule should facilitate the continued use by the courts of the common law approach, without codification or alteration. For that purpose, the rule should simply provide that a court may grant leave to intervene to any person. To assist the court with that decision, the proposed intervener would be obliged by the rule to provide information showing how the proposed intervener

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[81] *R. v. Trang*, [2002] 8 W.W.R. 755 at 761-762, 2002 ABQB 185.

[82] *Harper v. Canada (Attorney General)* (2001), 295 A.R. 1 at 11-12, 93 Alta. L.R. (3d) 281, 2001 ABQB 558.

[83] *Re Indian Residential Schools*, *supra* note 75 at 246.

would be directly affected by a decision in the case and why participation by the proposed intervener is necessary for a proper decision to be reached. While the proposed intervener must provide information addressing both main issues of the common law test, the court is still free to apply the test conjunctively or disjunctively as the circumstances require.

[70] The rule should also expressly state that intervener status may be granted subject to such terms and conditions, and with such rights and privileges, as the court directs. The rule should not attempt to list the kinds of procedural terms that can accompany intervention. It is preferable to give as much flexibility as possible to the court to craft the most appropriate set of procedural guidelines for each intervention.

CHAPTER 4. PERSONS UNDER DISABILITY

A. Introduction

[71] Minors and mentally incompetent people are under a legal disability and cannot personally commence or defend litigation. Proceedings by or against a person under disability must be handled by a representative. Part 6 of the Alberta Rules of Court (Rules 58-65) currently govern this representation for "infants" and "persons of unsound mind."

B. Who is a Person under Disability?

1. Terminology

ISSUE No. 13
How should the terminology of our rules in this area be updated?

[72] Words like "infant" and "person of unsound mind" are out of date, if not archaic.

POSITION OF THE GENERAL REWRITE COMMITTEE

[73] The Committee proposes that our rules should use the defined collective term "person under disability" to refer to those parties who require a litigation representative. A person under disability would include 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.

2. Missing persons

ISSUE No. 14
Should our rules governing representation of minors and mentally incompetent persons also apply to missing persons?

[74] As mentioned, minors and mentally incompetent persons are the usual groups identified as persons under disability. In Ontario, however, this defined category also

includes "absentees"[84] (called "missing persons" in Alberta). An absentee is a person who is usually resident or domiciled in Ontario but who "has disappeared, whose whereabouts is unknown and as to whom there is no knowledge as to whether he or she is alive or dead."[85] So if a party to a proceeding is or becomes an absentee, a litigation guardian can act for that party under Ontario Rule 7 just as if the party were a minor or mentally incompetent.

[75] In Alberta, if someone wants to sue a missing person or bring an action on behalf of a missing person, there seems to be only two options. If the case involves an estate, trust or interpretation of an instrument, Rule 51 allows a court to order representation of persons (including non-parties) who are interested in or affected by those proceedings but who "cannot be found". Perhaps a representation order under this rule could extend to initiating or defending litigation? If the case falls outside those limited categories, the Public Trustee would have to become involved. Under the *Public Trustee Act* [86] a court can declare someone to be a missing person and can appoint the Public Trustee (but not a private individual or trust corporation) as the trustee of that person's money and other property. The Public Trustee's statutory power to "manage, handle, administer, sell, dispose of or otherwise deal with any of the money and other property of the missing person"[87] is probably wide enough to allow the Public Trustee to conduct any necessary litigation.

POSITION OF THE GENERAL REWRITE COMMITTEE

[76] The Committee believes that the current options are sufficient to deal with the situation of missing persons and that the Alberta rules need not provide litigation representatives for missing persons under the same rules as for minors and mentally incompetent persons. (In other words, the definition of "person under disability" should not include a missing person).

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[84] Ontario, *supra* note 42, r. 1.03.

[85] *Absentees Act*, R.S.O. 1990, c. A.3, s. 1.

[86] R.S.A. 2000, c. P-44, s. 9.

[87] *Ibid*., s. 9(2)(a).

3. Assessment of mental incompetence

ISSUE No. 15
Must a court adjudicate mental incompetence under the *Dependent Adults Act* before a litigation representative can act in litigation?

[77] Under the current rules, there need not be a formal court adjudication of mental incompetence under the *Dependent Adults Act* before a representative can act for a "person of unsound mind." Under Alberta Rule 60, a next friend can act or a guardian *ad litem* can be appointed by a court without a court first having to make "a formal finding of unsoundness of mind . . . made pursuant to appropriate legislation."[88] Alberta reflects the standard Canadian approach to this issue.

[78] Even though a formal adjudication of incompetence under the *Dependent Adults Act* is not a prerequisite, a court that is asked to appoint a litigation representative must still be satisfied that the person requires such a representative. Using a common law test, the court will consider "whether the person by reason of mental illness is incapable of managing his affairs *in relation to the action* as a reasonable person would do".[89] The court will assess whether the person

- understands the cause of action,
- understands the nature and purpose of the proceedings,
- comprehends the personal consequences of winning or losing the proceedings, and
- is able to instruct counsel and make critical decisions.[90]

POSITION OF THE GENERAL REWRITE COMMITTEE

[79] There is no need to revise this approach. The rules should make it clear that a mentally incompetent person under a disability need not have first been declared a dependent adult under the *Dependent Adults Act*.

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[88] *Orser v. Cowles* (1987), 83 A.R. 274 at 275, 53 Alta. L.R. (2d) 82 (Q.B. (M.C.)). The court also noted that "there is legal authority going back to at least 1858 that a person of unsound mind, not so found by inquisition, may sue by his next friend".

[89] *Guimond v. Canada (T.D.)*, [1991] 3 F.C. 254 at 259 (T.D.) (emphasis added).

[90] *R. v. A.(W.)* (2000), 290 A.R. 380 at 383, 12 C.P.C. (5th) 123, 2000 ABQB 975.

C. Litigation Representatives

1. Distinction in terminology

ISSUE No. 16
Should our rules continue to distinguish between a "next friend" and a "guardian *ad litem*"?

[80] The Alberta rules maintain an old distinction in terminology between a litigation representative who commences an action on behalf of a plaintiff person under disability ("next friend") and one who defends an action brought against a defendant person under disability ("guardian *ad litem*"). Other Canadian jurisdictions such as Ontario and British Columbia use a single term that applies regardless of whether a proceeding is commenced, continued or defended (Ontario uses "litigation guardian" and British Columbia uses "guardian *ad litem*"). In Britain, the single term "litigation friend" is used.[91]

POSITION OF THE GENERAL REWRITE COMMITTEE

[81] The Committee recommends removing the distinction in terminology and instead using a single term, perhaps something like "litigation representative".

2. Obtaining status to act

ISSUE No. 17
How should a litigation representative obtain status to act on behalf of a person under disability?

[82] Currently in the Alberta rules, there is a distinction between how the two types of litigation representatives obtain their status to act on behalf of a person under disability. If the litigation representative acts as a plaintiff or applicant (i.e., as a next friend), there is no need for court appointment.[92] If the litigation representative acts as a defendant or respondent (i.e., as a guardian *ad litem*), he or she must be appointed by

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[91] *Civil Procedure Rules*, Part 21.

[92] Alberta, *supra* note 47, rr. 58 and 60.

the court.[93] Alberta's approach mirrors the approach taken by the majority of Canadian jurisdictions.[94]

[83] British Columbia and two other provinces[95] take a different approach and provide that a litigation representative of a minor or mentally incompetent person does not require court appointment, regardless of whether the representative will be acting as a plaintiff or defendant, unless a court orders otherwise or an enactment provides otherwise. Case law restricts this to resident litigation representatives, however, so that a non-resident litigation representative must be appointed by the court before acting.[96]

[84] One province[97] takes the approach that a minor's litigation representative does not require court appointment, regardless of whether the representative will be acting as a plaintiff or defendant. However, a mentally incompetent person's litigation representative always requires court appointment, regardless of whether the representative will be acting as a plaintiff or defendant.

POSITION OF THE GENERAL REWRITE COMMITTEE

[85] The Committee suggests adopting the British Columbia approach of allowing a litigation representative of a minor or mentally incompetent person to serve without court appointment, regardless of whether the representative will act as plaintiff or defendant, unless a court orders otherwise, an enactment provides otherwise or the representative is a non-resident. There does not seem to be any real reason to distinguish between a plaintiff representative and a defendant representative. There are other rules that protect a defendant under disability from judgment and the

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[93] *Ibid*, rr. 59 and 60. The guardian of a minor may defend on behalf of the minor without court appointment, but a guardian *ad litem* of a minor requires court appointment.

[94] Ontario, *supra* note 42, rr. 7.02-7.03; Manitoba, *supra* note 64, rr. 7.02-7.03; New Brunswick, *supra* note 65, rr. 7.02-7.03; Prince Edward Island, *Rules of Civil Procedure*, rr. 7.02-7.03; Northwest Territories, *Rules of the Supreme Court*, rr. 80-81.

[95] British Columbia, *supra* note 44, r. 6(5); Nova Scotia, *Civil Procedure Rules*, rr. 6.02(1) and 6.03(1); Newfoundland, *Rules of The Supreme Court, 1986*, r. 8.02(1).

[96] *O. (B.A.) (Guardian ad litem of) v. G. (J.M.)* (1994), 99 B.C.L.R. (2d) 305 at 308 (S.C.).

[97] Saskatchewan, *supra* note 45, rr. 42(3), 43(1) and 46(1)-(2).

Committee questions the usefulness for this purpose of requiring court appointment of defendant representatives. Eliminating this requirement saves the time and expense of obtaining a court order and has not apparently caused problems in British Columbia or the other jurisdictions.

3. Evidence of fitness to act in absence of court appointment

ISSUE No. 18
What kind of supporting material about a litigation representative's fitness to act should be filed in court when the representative does not need court appointment?

[86] When a litigation representative acts without court appointment, the rules will require the filing of certain supporting material about the representative's fitness to act. Its purpose is to protect against abuse of the process by an unappointed litigation representative. In Alberta, a next friend must simply provide written authorization for the use of his or her name in that capacity and this authorization must be filed in the court where the proceedings are commenced.[98] Other provinces have more stringent requirements.

[87] In Ontario, the litigation guardian must produce an affidavit with considerably more information about the basis for the representation. It must include the litigation guardian's consent to act, evidence of the nature and extent of the disability, statement of residence within the province, evidence of the litigation guardian's relationship to the person under disability, a disclaimer of adverse interest by the litigation guardian, and acknowledgement by the litigation guardian of his or her liability for costs.[99]

[88] In British Columbia, a guardian *ad litem* must file consent before acting.[100] The lawyer for the person under disability must also file a certificate of fitness concerning

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[98] Alberta, *supra* note 47, r. 62.

[99] Ontario, *supra* note 42, r. 7.02(2) and (3).

[100] British Columbia, *supra* note 44, r. 6(7).

the nature of the disability, the absence of a committee and a disclaimer of adverse interest on the part of the guardian *ad litem*.[101]

POSITION OF THE GENERAL REWRITE COMMITTEE

[89] Alberta's rules need to be strengthened in this area, especially if we adopt the approach of not generally requiring court appointment for any type of litigation representative. The Committee recommends that we adopt Ontario's approach, because it requires the most information and is sworn by the litigation representative.

4. Priority of representation

ISSUE No. 19
Should explicit priority of representation be granted to (a) trustees and guardians under the *Dependent Adults Act*, and (b) attorneys under an enduring power of attorney?

[90] The Ontario rules provide that, if a person under disability already has a representative appointed under a statute (a guardian or committee) or under an instrument (an attorney) who has the authority to act as a litigation guardian, then that representative has priority in representing the person under disability and shall act as the litigation guardian, unless the court orders otherwise.[102]

[91] Alberta gives a similar priority to an appropriately authorized trustee or guardian under the *Dependent Adults Act* when a person of unsound mind requires a next friend, but when a defence is required, the rules do not specify priority as between the trustee or guardian and a court-appointed guardian *ad litem*.[103] The rules are currently silent concerning any priority in any situation for an attorney under an enduring power of attorney.

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[101] *Ibid*., r. 6(8).

[102] Ontario, *supra* note 42, rr. 7.02(1.1) and 7.03(2.1).

[103] Alberta, *supra* note 47, r. 61.

POSITION OF THE GENERAL REWRITE COMMITTEE

[92] Subject to a contrary court order, our rules should explicitly provide that priority of acting as a litigation representative belongs to any trustee or guardian appointed under the *Dependent Adults Act* who has authority to act in the relevant type of litigation and to any attorney under an enduring power of attorney who is similarly authorized. This priority would not extend to any trustee, guardian or attorney who is not authorized by the order or instrument of appointment to handle litigation.

5. Removal or substitution of a litigation representative

ISSUE No. 20
Should Alberta have explicit rules concerning the removal or substitution of a litigation representative?

[93] Ontario and British Columbia have explicit rules addressing removal or substitution of a litigation representative in certain circumstances:

- removal where a minor reaches the age of majority;[104]
- removal where another kind of disability ceases (mental competency resumes or, in Ontario, an absentee reappears);[105]
- removal and substitution where other circumstances warrant. The test in Ontario[106] is that the litigation guardian is not acting in the best interests of the party under disability. The more broadly stated test in British Columbia[107]is that removal, appointment or substitution is in the interests of the party under disability.

[94] Alberta has no explicit rules in this area, although undoubtedly our courts could accomplish the same results using its inherent jurisdiction.

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[104] Ontario, *supra* note 42, r. 7.06(a); British Columbia, *supra* note 44, r. 6(10.1) and (10.2).

[105] Ontario, *ibid*., r. 7.06(b); British Columbia, *ibid*., r. 6(10).

[106] Ontario, *ibid*., r. 7.06(2).

[107] British Columbia, *supra* note 44, r. 6(10).

POSITION OF THE GENERAL REWRITE COMMITTEE

[95] If Alberta follows the British Columbia approach of not requiring court appointment of a litigation representative, it would be a sensible precaution to also follow the British Columbia approach of making specific provision in the rules for court removal or replacement of a representative. However, the Committee is of the opinion that our provision need not be as detailed as the British Columbia or Ontario provisions; a general provision acknowledging the court's power of removal and substitution in appropriate cases should suffice.

D. Litigation Issues Involving Persons under Disability

1. Obligation on plaintiff

ISSUE No. 21

Where a defendant under disability has no litigation representative and the plaintiff is aware of this situation, should the rules place a legal obligation on the plaintiff to apply to court for the appointment of a legal representative?

[96] Both Ontario[108] and British Columbia[109] have specific rules requiring a plaintiff to apply for court appointment of a litigation representative for an otherwise unrepresented defendant under disability. These rules ensure that a litigation representative will be appointed early in the proceedings if the plaintiff has knowledge of the defendant's incapacity.

[97] Alberta Rule 63 is probably meant to address this situation, but its wording is problematic: "When an infant or person of unsound mind has been served with notice of a judgment or order and is not represented, the Court may appoint a guardian *ad litem* for that person." Presumably it should read "served with notice of an application for a judgment or order" because otherwise its effect would not occur until the end of the proceedings, which seems unduly late and inefficient. Moreover, there is nothing in this rule that places a duty on an opposing plaintiff to seek an order of representation.

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[108] Ontario, *supra* note 42, r. 7.03(5)-(10).

[109] British Columbia, *supra* note 44, r. 6(13).

[98] Another rule that may be relevant to this situation is Rule 143, which provides that default judgment cannot be entered against an infant or person of unsound mind except with leave of the court. But for this rule to be effective when the person under disability has no litigation representative, it would have to be somehow apparent on the face of the pleadings that the defaulting defendant is under disability. Surely that would not often be the case. But if the pleadings did show the situation, presumably default judgment would be refused and the court would appoint a litigation representative at that point.

[99] It is also certainly arguable that there is an ethical duty on an opposing counsel who seeks default judgment to advise the court that leave is necessary because the other party is under disability (assuming that the opposing counsel has such knowledge). Yet the situation remains that Rule 143 operates later rather than sooner in the proceedings and is not the best protection for a party under a disability.

POSITION OF THE GENERAL REWRITE COMMITTEE

[100] Although our rules do offer some protection (especially if the wording of Rule 63 is clarified), the protection is indirect and somewhat haphazard. The Committee believes that this situation should be dealt with more directly by placing an obligation on a plaintiff who knows of the defendant's disability to bring that situation to the court's attention and seek appointment of a litigation representative.

2. Discovery issues

ISSUE No. 22
If a party under disability is not competent to give evidence, should the litigation representative be subject to discovery procedures instead?

[101] There can be practical and legal difficulties in compelling a minor or mentally incompetent party to produce an affidavit of documents or be examined for discovery, depending on the relative level of incapacity. If a judge determines that a minor is sufficiently competent to give evidence, Alberta courts have ordered examination for discovery of the minor and will direct whether the examination is to be conducted

under oath or not.[110] If the examination is under oath, it can be read in at trial like any other examination for discovery but if it is unsworn, it cannot.[111]

[102] However, in situations where a party clearly cannot personally undergo the discovery process, can the party's next friend or guardian *ad litem* be substituted? The common law is clear that this cannot occur. A next friend is not a party to the litigation and acts simply as an officer of the court.[112] A "[n]ext [f]riend's mandate is to merely oversee the process and assist the Court; it is not to legally represent the plaintiff in any capacity."[113] As a result, a next friend cannot be compelled to produce an affidavit of documents nor be examined for discovery.[114] Similarly, a guardian *ad litem* who acts for a defendant under a disability is also not a party.[115]

[103] By contrast to the non-party status of a litigation representative, a guardian or trustee under the *Dependent Adults Act* who is vested with the legal ability to commence, continue or defend litigation does conduct that litigation as a party, albeit on behalf of the dependent adult. The guardian or trustee legally stands in the shoes of the dependent adult and exercises all the dependent adult's rights and abilities. Thus a guardian or trustee could be compelled to produce an affidavit of documents or be examined for discovery.[116] The same result might follow for an attorney empowered under an enduring power of attorney to exercise all the donor's rights and abilities during any period that the donor is mentally incompetent.

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[110] *Watson v. Motor Livery Company*, [1926] 1 W.W.R. 652 (Alta. S.C.) (18 year old plaintiff), *Sagan v. Patan*, [1931] 3 W.W.R. 772 (Alta. S.C.) (6 year old plaintiff), *Hebert v. City of Calgary*, [1938] 2 W.W.R. 25 (Alta. S.C. (A.D.)) (7 year old plaintiff).

[111] Use at trial of examinations for discovery is governed by Alberta, *supra* note 47, r. 214, which applies to examinations conducted under r. 200. The latter rule defines examinations for discovery as oral examinations conducted under oath. Therefore, unsworn evidence cannot be read in at trial under r. 214: *Strehlke v. Camenzind*, [1980] 4 W.W.R. 464 (Alta. Q.B.).

[112] *Salamon v. Alberta (Minister of Education)* (1991), 120 A.R. 298 (C.A.).

[113] *Cisar v. Alberta* (1996), 25 C.P.C. (4th) 77 at 81 (Alta. Q.B.).

[114] *Ibid*. at 82-83.

[115] Jeffery Wilson, *Wilson on Children and the Law*, looseleaf (Toronto: Butterworths, 1994) at para. 6.5.

[116] *Supra* note 113 at 80.

[104] Alberta Rule 65 does allow a litigation representative to consent to any mode of taking evidence or to any procedure, but this does not allow the other party to compel anything. In any event, court approval is still required for the consent to be effective.[117]

[105] If neither the party nor the party's litigation representative can be compelled to produce or be examined for discovery, the other party is at an obvious disadvantage and is deprived of any means of effective discovery, as noted by the Alberta Queen's Bench in *Cisar v. Alberta*.[118]

[106] Shortly after the *Cisar* case, a 1999 amendment to the Rules of Court appears to address the issue for production of documents. While Rule 187 provides that "every party must . . . file and serve . . . an affidavit of records", Rule 187.1 states that the affidavit of records "must be made by the party to the proceedings . . . or by any other person directed by the Court." Presumably a court order could be obtained so that a next friend or guardian *ad litem* would have to produce the affidavit.

[107] When it comes to examination for discovery, however, Rule 200 clearly allows examination only of a party, a corporate officer or an employee.

[108] Both the Ontario and British Columbia rules address the issue of examination for discovery of a party under a disability. Ontario provides that the litigation guardian may be examined or, if competent to give evidence, the person under disability.[119] However, such evidence is usable at trial only with the trial judge's permission.[120] A court has allowed examination of both the litigation guardian and the minor party where there was no understanding or agreement that the litigation guardian was being examined in place of the minor.[121]

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[117] *Poirier v. Haduik* (1997), 209 A.R. 78, 15 C.P.C. (4th) 394 (C.A.).

[118] *Cisar*, *supra* note 113 at 82.

[119] Ontario, *supra* note 42, r. 31.03(5).

[120] *Ibid*., r. 31.11(5).

[121] *Davis (Litigation Guardian of) v. McFarlane* (1997), 14 C.P.C. (4th) 84 (Ont. Ct. J. (Gen. Div.)

[109] Where a party is a minor, British Columbia allows the minor, the guardian and the guardian *ad litem* all to be examined.[122] Where a party is mentally incompetent, both the guardian *ad litem* and the committee may be examined. However, Rule 27(11) provides that the mentally incompetent party cannot be examined without leave of the court.

[110] An examination for discovery of a minor or a mentally incompetent party cannot be used at trial, however, unless the trial judge determines, at the time the evidence is tendered, that the party was competent to give evidence at the time the examination occurred.[123] In regard to mentally incompetent parties, the question has arisen whether the court must determine competence at the earlier date of granting leave to examine under Rule 27(11) or whether that determination is only to be made after the fact at trial. A Supreme Court master has held that, when considering whether to grant leave under Rule 27(11), the court should determine "whether or not the examination would be harmful or futile as an entry level test."[124] If so, leave should be denied and, if not, then presumably the examination should proceed.

POSITION OF THE GENERAL REWRITE COMMITTEE

[111] Concerning the affidavit of records, the Committee believes that Rule 187.1 should provide that a litigation representative of a person under disability is responsible for preparing the affidavit, without the need to obtain a court order.

[112] Concerning examinations for discovery, the Committee believes that the failure to address who is subject to discovery when a party is not competent to testify is a gap in the current Rules. The British Columbia approach of providing for discovery of multiple individuals (party, guardian and guardian *ad litem*) seems excessive. The Committee prefers the Ontario approach of providing that the party is, if competent to give evidence, subject to discovery, but otherwise the litigation representative is

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[121] (...continued)
(M.C.)).

[122] British Columbia, *supra* note 44, r. 27(10).

[123] *Ibid*., r. 40(28).

[124] *Morrison (Committee of) v. Cormier Vegetation Control Ltd.* (1995), 21 B.C.L.R. (3d) 311 at 314 (S.C. (M.C.)).

subject to examination. This rule would apply to any litigation representative, whether he or she is also a guardian or trustee under the *Dependent Adults Act*, an attorney under an enduring power of attorney or acting as litigation representative solely under the rules of court.

[113] The Discovery and Evidence Committee of the Rules Project has recommended a rule that a corporate representative has a duty to inform him/herself of material and relevant information prior to being examined for discovery.[125] A litigation representative should be treated consistently in the rules and made subject to this duty as well.

[114] As for use at trial of the discovery transcripts, the Committee rejects both the Ontario and British Columbia approach. The Committee proposes that these transcripts be treated like any other discovery evidence. The examination of the person under disability or litigation representative (as the case may be) should be able to be read in at trial, without court permission, unless the court orders otherwise. If the person under disability is examined, the Committee affirms the current Alberta law that competence is to be determined as of the date of examination.

3. Court approval of settlements

ISSUE No. 23
Should the Rules address when court approval of settlements involving a person under disability is required?

[115] The rules of both Ontario[126] and British Columbia[127] provide that all settlements of claims made by or on behalf of a person under disability must be approved by the court (regardless of whether a proceeding in respect of the claim has been commenced). Ontario also requires that settlements of claims made against a person under a disability be approved by the court.

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[125] Alberta Law Reform Institute, *Document Discovery and Examination for Discovery* (The Rules Project, Consultation Memorandum No. 12.2) (Edmonton: Alberta Law Reform Institute, 2002) at 51-52.

[126] Ontario, *supra* note 42, r. 7.08.

[127] British Columbia, *supra* note 44, r. 6(14) and (15).

[116] The Alberta Rules of Court contain no explicit rules addressing whether court approval is needed of settlements affecting minors and persons of unsound mind. The situation is currently governed by the common law and a couple of relevant statutes.[128]

[117] In the case of minors, s. 15(1) of the *Minors Property Act*[129] provides that, for injury claims on behalf of a minor, the guardian, parent or next friend "may . . . apply" to the Queen's Bench for an order confirming the settlement. Approval can be sought whether the settlement is reached before or after action is commenced.[130] Although the *Minors' Property Act* provides that seeking court approval is discretionary, the incentive for a defendant to insist on doing so is found in s. 15(3), which provides that confirmation of the settlement discharges the liable party from all further claims arising out of or in respect of the injury to the minor.

[118] At common law, court approval of infant settlements is necessary because a next friend is not legally a party to an action and therefore cannot make a binding settlement on behalf of a minor.[131] Alberta courts use their inherent jurisdiction to approve infant settlements when required.

[119] The legal situation would be similar in Alberta when a next friend is acting for a mentally incompetent person who is otherwise unrepresented. But if the person has a guardian or trustee appointed under the *Dependent Adults Act* who is authorized to

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[128] The Office of the Public Trustee has recently issued a discussion paper addressing potential statutory reform in the area of minors' settlements, including the issue of whether court approval should always be needed, whether the Public Trustee should be authorized to approve settlements or whether the minor's representative should ever be able to settle without any approval if the minor's lawyer recommends the settlement: Alberta Office of the Public Trustee, *Public Trustee Act Review Consultation Document* (Edmonton: Alberta Office of the Public Trustee, 2002) at 12-22. If the Public Trustee's review process ultimately results in legislative change, the rules of court governing minors' settlements would of course have to be consistent with any new statutory law in this area.

[129] R.S.A. 2000, c. M-18.

[130] If the settlement occurs before action is commenced, s. 15(1) of the *Minors' Property Act*, *ibid*. requires that the application for court approval of the settlement be brought by originating notice on 10 days' notice to the opposite party and the Public Trustee. For the General Rewrite Committee's proposals about commencement documents, please see: ALRI, *Commencement of Proceedings*, *supra* note 37 at 1-22.

[131] *Salamon v. Alberta (Minister of Education)*, *supra* note 112 at 299. As noted above, a guardian *ad litem* is not a party either.

settle litigation, then no court approval would be needed.[132] Such a guardian or trustee has the full powers that the dependent adult would have, if competent.[133] The same result would likely follow in the case of an attorney under an enduring power of attorney, who is vested with the full powers of the mentally incompetent donor (subject to the terms of the enduring power of attorney).[134]

POSITION OF THE GENERAL REWRITE COMMITTEE

[120] The Rules should express the current practice and not simply be silent on this important point. The Rules should say that all settlements on behalf of a person under disability must be approved by a court, unless a court order under the *Dependent Adults Act* has previously authorized a guardian or trustee to settle litigation[135] or an enduring power of attorney has previously authorized an attorney to settle litigation.

[121] In addition, the Committee will urge the government to amend s. 15 of the *Minors Property Act* to make court approval mandatory in all cases of injury to a minor.

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[132] *Allen v. Allen* (1995), 177 A.R. at 108-109 105, 36 Alta. L.R. (3d) 142 (Q.B.). The trustee of a dependent adult has the authority to sign minutes of settlement concerning rights under the *Matrimonial Property Act*, R.S.A. 2000, c. M-8, without seeking court approval of the settlement. This case also follows prior Alberta case law in holding that the proper party to the divorce action is the trustee, not the dependent adult personally.

[133] When a court appoints a guardian under the *Dependent Adults Act*, R.S.A. 2000, c. D-11, it must specify in the guardianship order whether the guardian has the power and authority to "commence, compromise or settle any legal proceeding that does not relate to the estate of the dependent adult and to compromise or settle any proceeding taken against the dependent adult that does not relate to the dependent adult's estate" (s. 10(3)(g)). But a trustee appointed under the Act automatically has the power and authority to "commence, compromise or settle a claim or court action that relates to the estate" without obtaining the authorization or direction of the court, unless the court restricts that ability in the trusteeship order (s. 39(j)).

[134] *Powers of Attorney Act*, R.S.A. 2000, c. P-20 , s. 7(a).

[135] The Rules cannot legally override or contradict the *Dependent Adults Act* in this regard. If it is felt that even trustees and guardians should have to seek court approval of settlements, then the *Dependent Adults Act* would have to be amended by the Legislature.

4. Special protection when ending litigation

ISSUE No. 24
Should the Rules require the court's permission or other protection concerning every way of ending litigation involving a person under disability?

[122] Alberta and British Columbia both provide that default judgment cannot be entered against a party under a disability without court permission.[136] Ontario's rules are much more detailed in offering similar protective measures for other ways of ending litigation as well. Leave of the court is needed, not only for default judgment,[137] but also to discontinue an action by or against a party under a disability[138] or to abandon an action by or against a party under a disability.[139] When bringing a motion against a party under a disability to dismiss an action for delay, notice must be given to specified proper authorities.[140]

POSITION OF THE GENERAL REWRITE COMMITTEE

[123] The Committee questions whether special protections are needed when an action involving a person under disability is abandoned or discontinued, especially when the other party is abandoning or discontinuing the litigation against the person under disability. The Committee will not make a recommendation on this issue until it has obtained input from the profession.

5. Payment of money into court

ISSUE No. 25
Should payment into court of money from a judgment or settlement recovered on behalf of a person under disability be mandatory unless a court orders otherwise?

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[136] Alberta, *supra* note 47, r. 143; British Columbia, *supra* note 44, r. 6(11).

[137] Ontario, *supra* note 42, rr. 7.07 and 19.01(4).

[138] *Ibid*., r. 23.01(2).

[139] *Ibid*., r. 38.08(4).

[140] *Ibid*., rr. 24.02 and 48.14(9).

[124] Ontario provides that money from a judgment or settlement that is payable to a person under disability must be paid into court, although a judge may order otherwise.[141] British Columbia provides that a court may order such money to be paid into court or, in the case of a minor, to the Public Guardian and Trustee.[142] Both provinces' rules really amount to the same thing, although Ontario creates a stronger default position.

[125] Alberta has both types of provisions. Rule 182(1) provides that the court may order money recovered on behalf of a person of unsound mind to be paid into court. But later, Rule 344(1) provides that money (except for costs) recovered on behalf of a minor or a person of unsound mind must be paid into court, unless the law otherwise provides or the court otherwise orders. Rule 344(2) explicitly provides that payment to the guardian, next friend or committee is not a valid discharge.

POSITION OF THE GENERAL REWRITE COMMITTEE

[126] Rule 182(1) appears to be superfluous and should just be deleted in favour of the stronger Rule 344. However, Rule 182(2) concerning such matters as interest and investment of sums paid into court should be continued as a subsection of Rule 344. Also, in Rule 344 (and throughout the Rules), the now obsolete word "committee" should be replaced by its current equivalents ("trustee" and "guardian"). Rule 344 should also make reference to an attorney under an enduring power of attorney.

E. Special Rules for Disposition of Minors' Property

ISSUE No. 26
Should our Rules continue to have special provisions addressing applications to dispose of a minor's property under the *Minors' Property Act*?

[127] Since the General Rewrite Committee is already dealing with minors in this consultation memorandum, we will also address Rules 581-583 (Part 45) of the Alberta Rules. These specialized rules concerns applications under the *Minors'*

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[141] *Ibid*., r. 7.09.

[142] British Columbia, *supra* note 44, r. 58(14).

Property Act.[143] They primarily add the following requirements or glosses to what is otherwise mandated by the *Minors' Property Act* for obtaining court approval when dealing with a minor's property:

- the application must be by originating notice;
- the Public Trustee must receive notice;
- the supporting affidavit must contain certain information;
- where the Act requires the consent of a minor over 14, the consent requires verification in a certain way.

[128] On examining Rules 581-583, the Committee concludes that these rules are entirely superfluous. The requirement that such applications be started by an originating notice will flow in the future from our new general rules about commencement documents.[144] The requirement to give notice to the Public Trustee is already mandated by s. 5(1) of the *Public Trustee Act*.[145] Specifying the content of the supporting affidavit is superfluous because a lawyer will put the necessary evidence before the court to obtain the desired order. If there is evidence of a mature minor's consent, the court has to satisfy itself that the consent is valid and will use whatever method best produces that conclusion. Beyond these specific provisions, the rest of Rules 581-583 is quite simply a statement of the obvious that does not require special rules.

POSITION OF THE GENERAL REWRITE COMMITTEE

[129] Rules 581-583 (Part 45) are entirely superfluous and should be deleted from our Rules. Their effect would be produced anyway by the general rules of court, other statutory requirements and legal practice. If the government believes that special provisions are required in this area, it would be better to amend the *Minors' Property Act* to contain them.

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[143] *Supra* note 129.

[144] ALRI, *Commencement of Proceedings*, *supra* note 37 at 21-22.

[145] *Supra* note 86.