ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions

Consultation Memorandum No. 12.9

February 2004

Deadline for Comments: April 30, 2004

THE RULES PROJECT CONSULTATION MEMORANDA

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

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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 Rewrite. The Committee's views are communicated in this paper, which was written by The Honourable Justice June Ross and Institute counsel, Margaret Shone, Q.C. and Debra Hathaway. They were 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 Committee are:

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

PREFACE AND INVITATION TO COMMENT

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

This consultation memorandum addresses issues concerning a wide but inter-related range of subjects: Amendment of Pleadings; Joinder of Claims and Consolidation of Actions; Joinder of Parties; Third Party Claims; Counterclaims; and Representative Actions. 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 may identify yourself, but request that your comments be treated confidentially (i.e., your name will not be publicly linked to your comments). Unless you choose anonymity, or request confidentiality by indicating this in your response, ALRI assumes that all ***written comments are not confidential***. 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
Rob Anderson (Observer), Acting 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
The Hon. Justice June M. Ross, Court of Queen's Bench of Alberta
Phyllis A. Smith, Q.C., Emery Jamieson LLP
The Hon. 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*]; 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) [*Woolf Interim Report*] 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) [*CBA Report*].

- 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/>. Excerpts from the Report are set out under the subheadings below.

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 broken, 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 do not 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.

E. 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 describing the responses has been prepared and is available on our website: <http://law.ualberta.ca/alri/>. Some of the respondents indicated a willingness to participate in focus groups about rules reform. In the fall of 2002, focus groups were conducted in Edmonton and Calgary. A Report of the Focus Groups has been prepared and is also available on the website.

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.

F. 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 Rules 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 are now being reviewed by committees dealing with rules relating to the Enforcement of Judgments, Appeals, Costs, Judicial Review and Criminal Practice.

G. 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.

H. General Rewrite 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

The Hon. Judge Allan A. Fradsham, Provincial Court of Alberta

The Hon. Justice Eric F. Macklin, Court of Queen's Bench of Alberta

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Alan D. Fielding, Q.C., Fielding Syed Smith & Throndson

Debra W. Hathaway, Counsel, Alberta Law Reform Institute

William H. Hurlburt, Q.C., Alberta Law Reform Institute

Alan D. Macleod, Q.C., Macleod Dixon

Sheryl Pearson, Alberta Law Reform Institute

Wayne Samis, Deputy Clerk, Court of Queen's Bench of Alberta

I. Consultation Memorandum

This Consultation Memorandum covers a wide but inter-related range of subjects: Amendment of Pleadings (Chapter 1) (which includes amendments adding, deleting and substituting parties); Joinder of Claims and Consolidation of Actions (Chapter 2);

Joinder of Parties (Chapters 3 and 4); Third Party Claims (Chapter 5); Counterclaims (Chapter 6); and Representative Actions (Chapter 7). It organizes discussion under 43 issues distilled from research, consultation and the experience and views of the General Rewrite Committee.

EXECUTIVE SUMMARY

A. Introduction

This Consultation Memorandum covers a wide but inter-related range of subjects: Amendment of Pleadings (Chapter 1) (which includes amendments adding, deleting and substituting parties); Joinder of Claims and Consolidation of Actions (Chapter 2); Joinder of Parties (Chapters 3 and 4); Third Party Claims (Chapter 5); Counterclaims (Chapter 6); and Representative Actions (Chapter 7). It organizes discussion under 43 issues distilled from research, consultation and the experience and views of the General Rewrite Committee.

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

B. Amendment of Pleadings

Consultation Memorandum 12.8, *Pleadings*, dealt with the general subject of the form and content of pleadings. This Consultation Memorandum builds on that previous work and goes on to discuss the general subject of amendments.

With respect to amendments by one party, the Committee proposes that

- there be no limit on the number of amendments a party may make to a pleading without leave of the Court, instead of the present limit of one. However, amendments without leave should be possible only before the close of pleadings.
- amendments adding, deleting or substituting parties continue to be possible without leave.
- consequential amendments by the other side should be made within 10 days and should be limited to responding to matters raised by the original amendment.

The Committee considers the Court's present broad discretionary power to allow a party to amend pleadings at any time, as interpreted by the case law, to be satisfactory. It proposes that the court should not have a unilateral power to amend

pleadings, as it now does under Rule 133, and that references to amending "proceedings" should be deleted.

Other than proposing that the language of the Rules be simplified, the Committee does not propose any change in the form and method of making amendments, time for delivery of an amended pleading, amendments at trial, amendment of a record other than a pleading, or costs.

C. Joinder of Claims and Consolidation of Actions

Apart from proposals for appropriate form and terminology of the Rules relating to joinder of claims and consolidation of actions, the Committee proposes that:

- some current restrictions should be removed so that all parties will be allowed to sue in different capacities in one action, in which case a party suing in different capacities would be treated as multiple parties.
- the court would have power to order one proceeding to be made a counterclaim in another proceeding.
- a trial judge be given power to reverse or vary a chambers judge's order for concurrent or consecutive hearings.

D. Joinder of Parties

The Committee proposes that

- there be a single rule for the joinder of plaintiffs and for the joinder of defendants, under which it would be enough to satisfy one of the factors listed in an expanded rule, rather than having to satisfy all of them as is necessary under Rule 46.
- there be a single rule giving relief against joinder of parties or claims on grounds the joinder will cause undue complication, delay or prejudice, with an expanded list of remedies.
- the court have a clear, open-ended discretion to add, delete and substitute parties where necessary without causing prejudice.
- the substance of Rules 51 (appointment of a representative for an unborn, unascertained or missing non-party) and Rule 53 (order making a settlement binding on an absent person) should be retained, but the application of the two rules should be made co-extensive, so that the successor to Rule 53 will apply to

the interpretation of documents as well as to proceedings concerning estates and trusts.

- the specific provisions in Rules 48, 49 and 52 be left to general rules.
- the provisions of Rules 54, 55 and 56 preventing the abatement of claims should be replaced by a general provision that a proceeding is not terminated only by reason that any estate, interest or title is transferred or transmitted (a) by reason of death where the cause of action survives, (b) by assignment or conveyance, or (c) by the operation of law. An order of the court should be required to continue the proceeding.

E. Third Party Claims

Rule 66(4) presently restricts third party claims to claims that a third party may be liable to a defendant for all or part of the plaintiff's claim against the defendant. The Committee thinks that Rule 66(4) is unduly restrictive. Given the usefulness of third party procedure as a means of consolidating actions, the Committee proposes that a defendant should be able to advance an independent claim under third party procedure if the claim is sufficiently related to the main action. The Committee points to an Ontario rule which permits not only a claim over, but also an independent claim arising out of a transaction or occurrence involved in the main action or out of a related transaction or occurrence, or out of a series of such transactions or occurrences.

Otherwise, the Committee proposes that, in general, the substance of the rules relating to third party claims should be retained, though with a considerable amount of re-drafting and tidying up, and with the dropping of provisions of specific application that are better left to general rules. On one question, whether a limitation period on a claim for contribution may trap a defendant who is served at a late stage with a statement of claim, the Committee thinks that the question should be left to the *Limitations Act* and, that, if the question causes a problem, the problem should be resolved by an amendment to that Act.

F. Counterclaims

The Committee makes recommendations for improved drafting and organization of the rules. It proposes that, with respect to time for defence, new defendants by

counterclaim should be governed by the same rules as other defendants, and that, with respect to other pleadings, the time be set at a consistent 10 days.

G. Representative Actions

Rule 42 provides that "where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all." The *Class Proceedings Act*, which was enacted in 2003, provides for the bringing of an action by a representative plaintiff or plaintiffs on behalf of a class of persons who share an issue in common against a defendant or defendants.

The Committee proposes that Rule 42 be abolished with respect to plaintiff classes because it will not be needed for those classes once the enactment of the *Class Proceedings Act* is proclaimed. The Act was enacted to overcome the problems of the representative action rule, and the Committee is of the view that procedures under the Act can be tailored to suit simpler cases as well as more complex ones. However, the substance of the rule should be retained for defendant classes, which are not provided for in the Act, though the successor rule should be redrafted in more modern language.

LIST OF ISSUES

AMENDMENT OF PLEADINGS

JOINDER OF CLAIMS AND CONSOLIDATION OF ACTIONS

JOINDER OF PARTIES (GENERAL)

JOINDER OF PARTIES (MISCELLANEOUS)

THIRD PARTY CLAIMS

COUNTERCLAIMS

REPRESENTATIVE ACTIONS

CHAPTER 1 AMENDMENT OF PLEADINGS

A. Introduction

[1] Part 9 of the Alberta Rules of Court (Rules 130 to 141) deals with amendment of pleadings. Amendments may occur in one of three ways: by one party without leave of the court, by one party with leave of the court or with the written consent of all parties. Part 9 also provides how amendments are to be indicated on the face of pleadings and when such amended pleadings should be made and delivered.

B. Amendment of Pleadings – Without Leave

1. How many amendments and before what deadline?

ISSUE No. 1
Should Rule 130 allow for more than one amendment without leave?

ISSUE No. 2
What should be the cut-off date for amendment(s) without leave:

- **close of pleadings?**
- **delivery of notice of trial?**
- **commencement of examinations for discovery?**
- **other?**

[2] Alberta Rule 130 currently provides that a party may, without leave, amend any pleading once before a stated deadline. British Columbia also limits amendment without leave to one amendment only.[2] By contrast, the rules of Ontario[3] and the Federal Court[4] do not explicitly state a limit of one amendment without leave. Presumably in those jurisdictions a party could amend more than once, provided all amendments are made before the stated deadline.[5]

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[2] British Columbia, *Supreme Court Rules*, r. 24(1)(a) [British Columbia].

[3] Ontario, *Rules of Civil Procedure*, r. 26.02(a) [Ontario].

[4] Federal, *Federal Court Rules, 1998*, r. 200 [Federal].

[5] I could not, however, find any explicit statement to this effect in case law listed in the *Canadian*

(continued...)

[3] In Alberta[6] and Ontario,[7] amendments without leave must be made before the close of pleadings. In British Columbia,[8] amendments without leave must be made before delivery of the notice of trial or hearing. In the Federal Court,[9] the amendment must occur before another party has pleaded to the pleading that is sought to be amended.

[4] The Rules Project received one comment in this area from the profession. Members of the CBA Family Law section suggested that multiple amendments without leave should be freely available until the commencement of examinations for discovery.

POSITION OF THE GENERAL REWRITE COMMITTEE

[5] The Committee sees no reason to arbitrarily limit the number of amendments without leave. However, it is important that liberal availability of such amendments should be tempered by having an early date for finalizing the pleadings, after which they can be amended only with leave of the court. The Committee therefore recommends that the Alberta rules should allow an unlimited number of amendments without leave but only until the close of pleadings.[10]

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5 (...continued)
Abridgement or in Professor Garry D. Watson & Professor Craig Perkins, *Holmested and Watson Ontario Civil Procedure*, looseleaf (Toronto: Carswell, 1984), vol. 3 in its chapter on "Rule 26 Amendment of Pleadings" [Holmested & Watson].

6 Alberta, *Alberta Rules of Court*, r. 130(1) [Alberta].

7 Ontario, r. 26.02(a).

8 British Columbia, r. 24(1)(a).

9 Federal, r. 200.

10 The General Rewrite Committee has recommended that there be no changes to the current Alberta rules concerning close of pleadings: Alberta Law Reform Institute, *Pleadings* (Consultation Memorandum No. 12.8) (Edmonton: Alberta Law Reform Institute, 2003) at 54-55 [ALRI CM 12.8].

2. Adding, deleting or substituting a party

ISSUE No. 3
Should it be possible to add, delete or substitute a party by way of an amendment without leave?

[6] Until very recently, it was not possible in Alberta to use Rule 130 to add, delete or substitute a party by way of an amendment without leave – a court order was required for such an amendment by virtue of an Alberta Court of Appeal decision.[11] In 2002, this longstanding interpretation was overturned when the rules were amended to add Rule 130(1.1) and (1.2) which now explicitly authorize this ability.

[7] By contrast, Ontario[12] explicitly prohibits such an amendment. Its rule states that an amendment without leave can be made "if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action." Similarly, British Columbia's rule governing amendments without leave is subject to another rule which provides that a party can be removed, added or substituted only by order of the court.[13] The Federal rules are silent on this point.

POSITION OF THE GENERAL REWRITE COMMITTEE

[8] The Committee agrees with the recent Alberta amendment allowing a party to be added, deleted or substituted by an amendment without leave and sees no reason to change this policy.

3. Consequential amendments and time limits

ISSUE No. 4
Should the rules about consequential amendments and time limits be simplified and clarified?

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[11] *Myskiw v. Wynn* (1977), 4 A.R. 464, 3 Alta. L.R. (2d) 231 (C.A.).

[12] Ontario, r. 26.02(a).

[13] British Columbia, rr. 24(1)(a) and 15(5).

[9] Amending one pleading may result in the other side amending its own pleadings to respond to the original amendment. Alberta Rule 130(2)-(7) sets out some fairly elaborate provisions concerning specific types of pleadings and time limits for consequential amendments. By contrast, the equivalent Ontario rule[14] seems a lot simpler and more straightforward (and also governs amendments made with leave or consent). British Columbia's rule[15] is also less involved and has the additional virtue of clarifying that consequential amendments can only respond to the matters raised by the original amendment. As noted by Stevenson and Côté, this is not clear in the Alberta rule,[16] although a recent case does hold that the scope of an amended pleading is limited to responsive amendments only and does not allow a general response to all issues.[17]

[10] The Rules Project received a comment in this area from a lawyer concerning a problem he faced in practice. Rule 130(2) specifies a time limit of 8 days for consequential amendment of a statement of defence. Rule 130(4) provides that, in lieu of an amended statement of defence, the defendant can deliver a new defence instead. The lawyer advised us that he once amended a statement of claim without leave and then, many months later following discoveries, the defendant filed a completely new defence and justified its lateness because Rule 130(4) does not specify a time limit. He and the other counsel settled the issue, but he advocates clarifying that the same time limit governs in both Rule 130(2) and (4).

POSITION OF THE GENERAL REWRITE COMMITTEE

[11] The Committee agrees that our rules concerning consequential amendments and time limits should be clarified and simplified. The Ontario model should be followed in this regard. There should be a standard 10 days to file consequential amendments or pleadings and the rules should clarify that this applies in all situations.

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[14] Ontario, r. 26.05.

[15] British Columbia, r. 24(8)-(9).

[16] The Honourable W.A. Stevenson & The Honourable J.E. Côté, *Alberta Civil Procedure Handbook 2004* (Edmonton, Alberta: Juriliber, 2004) vol. 1 at 116 [Stevenson & Côté, *Handbook*].

[17] *Talisman Energy Inc. v. Petro-Canada Inc.* (2000), 272 A.R. 48 at 53 (Q.B.), 2000 ABQB 602.

C. Amendment of Pleadings – With Leave

1. Court's discretion

ISSUE No. 5
Should the court's ability to grant leave to amend be stated in discretionary or mandatory language?

[12] Alberta Rule 132 gives a court the discretion to allow a party to amend pleadings or other proceedings at any stage of the proceedings. "The general rule is that pleading can be amended at any time, no matter how careless or late is the party seeking to amend."[18] There are only four exceptions to the general rule. An amendment should not be allowed if:

- the amendment would cause serious prejudice that cannot be repaired by costs;
- the amendment is hopeless and would have been struck out if contained in the original pleadings;
- the amendment would add a new cause of action or a new party outside a limitation period;
- the amendment, or the failure to plead it earlier, indicates bad faith.[19]

[13] Like the equivalent rules of most Canadian jurisdictions, Rule 132 is stated in permissive and discretionary terms. For a court to grant discretionary leave to amend, "an amendment (1) must not cause injustice to the other side, (2) must raise a triable issue, (3) must not be embarrassing, and (4) must be pleaded with particularity."[20] To show that a triable issue is raised, the applicant must produce at least some evidence substantiating the facts that the applicant now wants to plead by amendment.[21] The onus for proving prejudice is on the respondent, who will raise it (if applicable) to

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[18] Stevenson & Côté, *Handbook*, *supra* note 16 at 109.

[19] *Canadian Deposit Insurance Corp. v. Canadian Commercial Bank* (2000), 82 Alta. L.R. (3d) 382 at 388, 2000 ABQB 440.

[20] *Rago Millwork & Supplies Co. Ltd. v. D. Woodhouse Construction Ltd.* (1981), 28 A.R. 499 at 511 (Q.B. Master), citing Williston and Rolls on *The Law of Civil Procedure*. The necessity of pleading the amendment with particularity has been reiterated in *Anadarko Canada Corp. v. Gibson Petroleum Co.*, 2003 ABQB 736 and *Ilic v. Toronto Sun Publishing Corp.*, [1998] 224 A.R. 116 (Q.B.).

[21] *Hodge v. Carey Industrial Services Ltd.* (1997), 50 Alta. L.R. (3d) 306 (Q.B. Master); *Kaup v. Weir* (1998), 224 A.R. 347 (Q.B.).

resist the motion for amendment. Concerning the degree of prejudice necessary, the Alberta Court of Appeal has stated that unless a respondent "can show that the granting of the amendment would prejudice it in such a way that it could not be compensated in costs, then the amendment must be allowed."[22]

[14] Unlike other jurisdictions, Ontario uses mandatory language in its rule – the court "shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment."[23]

> The use of mandatory language in the Rule has been held to reduce the court's former discretion to refuse an amendment ..., but some discretion beyond that specified in the Rule may still survive.... Typically leave is now granted unless prejudice would result that could not be compensated for by costs or an adjournment (*e.g.*, where a limitation period has intervened) or where the amendment involves withdrawal of an admission....[24]

POSITION OF THE GENERAL REWRITE COMMITTEE

[15] The Committee is not aware of anything indicating that Alberta's current discretionary language causes problems in this area. There is accordingly no need to adopt the mandatory language used in Ontario. The discretionary language used in our Rule 132 should remain. The Committee does not propose that the rule should codify any criteria for the exercise of that discretion – it is sufficient that the criteria are stated in case law. However, the Committee would be interested in hearing from the legal profession on this point.

2. Amendment of proceedings (not pleadings)

ISSUE No. 6
Do the amendment rules need to apply to "proceedings" as well as pleadings?

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[22] *Miller v. Canadian Pacific Railway*, [1933] 1 W.W.R. 233 at 236 (Alta. C.A.).

[23] Ontario, r. 26.01.

[24] Holmested & Watson, *supra* note 5, vol. 3 at 26-5.

ISSUE No. 7
Do the amendment rules need to empower a court to amend in circumstances other than for non-compliance with the rules?

[16] Under Alberta Rule 132 a party can also, with leave, amend the "proceedings" as distinct from pleadings. The next rule, Rule 133, authorizes the court to amend "any defect or error in any proceedings" as well. Under Rule 558, the court also has a broad power to set aside, amend or otherwise deal with any "act or proceeding" that is not in compliance with the rules. Two things to note about these provisions:

- Rule 132 concerns amendments made at the behest of a party; Rules 133 and 558 concern amendments made by the court. Stevenson and Côté note that Rule 133 may let a court make amendments against the wishes of the party whose document is amended.[25]
- In addition to amendments to pleadings, it is possible to amend "proceedings." "Proceedings" is not defined in the rules nor in the *Interpretation Act*, but is clearly different than pleadings. "Proceedings" must also be different than orders and judgments, because Rule 339 specifically authorizes the court, on motion, to correct clerical mistakes and other inadvertent errors in judgments and orders. Commenting on the phrase "or other proceedings" in Rule 132, Stevenson and Côté note that the "quoted phrase seemingly refers to [the party's] proceedings analogous to pleadings,"[26] saying later "whatever they may be."[27] Stevenson and Côté also suggest that "[i]t rather appears that the difference between the two Rules [concerning pleadings and proceedings] is historical and of slight importance today."[28]

[17] Ontario and British Columbia both frame their amendment provisions in terms of amendment by the parties (not court) and restrict amendments to "a pleading" (Ontario Rule 26; undefined term) or "an originating process or pleading" (British Columbia Rule 24(1); both are defined terms). The Federal Rules also frame its amendment

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[25] *Supra* note 16 at 121.

[26] *Ibid.* at 116.

[27] *Ibid.* at 121.

[28] *Ibid.* at 121-122.

provision in terms of amendment by the parties (not court). However, Federal Rule 75 broadly allows a party to amend "a document," which clearly encompasses more than just pleadings. The Federal Rules define "pleading" as a "document in a proceeding in which a claim is initiated, defined, defended or answered"[29] but do not define "document." Whether the federal concept of "document" might be equivalent to our Alberta concept of "proceedings" is unknown.

[18] Like Alberta, all those jurisdictions have a non-compliance rule allowing a court to do whatever necessary to set things right when the rules are not followed, including making amendments.

POSITION OF THE GENERAL REWRITE COMMITTEE

[19] The meaning of the term "proceedings" is vague and obscure. The need for a power to amend "proceedings" is not clear. Like the other provinces, our amendment rules should only concern the amendment of pleadings. Similarly unclear is the need for a special provision empowering a court to amend on its own initiative. The Committee does not see any justification for a court to have a unilateral power to amend and so in this regard the Committee proposes to follow the model used in other jurisdictions as well. Therefore, Rule 132 should no longer refer to the amendment of "proceedings" and Rule 133 should be deleted in its entirety.[30]

D. Amendment of Pleadings – With Consent

[20] Alberta Rule 135 provides that pleadings can be amended at any time without a court order if the parties file written consent. Other jurisdictions have similar provisions. There are no issues in this area.

E. Method of Making Amendments

ISSUE No. 8
Should the rules be simplified concerning how amendments are to be made?

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[29] Federal, r. 2.

[30] The General Rewrite Committee will review r. 558 at a later date and so it is not dealt with here. The Committee is not suggesting the removal of the court's power to amend in that context.

[21] Whether an amendment is made without leave, with leave or by consent, the rules direct how amendments are to be indicated on the face of pleadings and when amended pleadings should be made and delivered.

[22] Alberta Rule 134 provides a 14-day time limit for making amendments if a court order for amendment does not specify a time limit. Stevenson and Côté note that

> [t]his Rule has much less significance than appears on the surface. The court can always extend time limits under R. 548. Furthermore, R. 134 appears to be confined to a case where the court merely permits a party to make an amendment, maybe even just an unspecified amendment. Alberta orders usually direct a precise amendment, thus going beyond mere permission to a party, so R. 134 does not apply to such an order.[31]

[23] Alberta Rules 136 and 137 concern the method by which amendments are to be made to pleadings. They address such matters as written alterations, reprinting, colour of ink and endorsement of the amendment by a clerk. The detail of these rules contrasts sharply with the much simpler British Columbia[32] and Federal[33] rules. Although Ontario's rule[34] is as similarly detailed as Alberta's rule, it arguably reads more smoothly.

POSITION OF THE GENERAL REWRITE COMMITTEE

[24] The Committee does not propose any substantive changes to the rules about how amendments are to be made. However, these rules should be redrafted in simpler and more user-friendly language.

[25] The Committee considers Part 9's remaining provisions, Rules 138 to 141, to be unobjectionable and makes no recommendations for change. These rules cover time for delivery of an amended pleading, amendments at trial, amendment of a record other than a pleading and costs.

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[31] *Supra* note 16 at 122.

[32] British Columbia, r. 24(2)-(3).

[33] Federal, r. 79.

[34] Ontario, r. 26.03.

CHAPTER 2 JOINDER OF CLAIMS AND CONSOLIDATION OF ACTIONS

A. Introduction

[26] Most jurisdictions have very liberal joinder of claims rules. These rules arose to overcome two main historical impediments to efficient litigation: (1) the existence of separate legal systems of common law and equity, and (2) the common law position that the old "forms of actions" could not be mixed in one suit but needed to be litigated in separate suits.[35] Historically, both these factors resulted in complex, convoluted and expensive litigation. Joinder reform in the Victorian era was designed to prevent multiplicity of lawsuits so as to save cost, time and resources.

[27] Modern joinder rules have two basic concepts. Firstly, as between a single plaintiff and defendant,

> any claim, and any defence to a claim, may be asserted regardless of the subject of the out-of-court transactions involved in the claims. Thus, under modern rules a plaintiff could in one litigation sue a defendant for automobile accident injuries and breach of a contract to sell a house. (In real life, of course, it is rare that parties have concurrent legal disputes arising from such wholly unrelated transactions.)[36]

[28] Secondly, as among multiple plaintiffs and/or defendants, the claims must arise from the same or closely related out-of-court transactions. "That is, in a two-party case the claims can concern any subject matter ..., but in a multiparty case there must be at least one claim that involves all the parties."[37]

[29] Modern joinder rules juggle competing values of inclusiveness and simplicity.

> ...[T]he fundamental dispute remains unresolved over which principle – inclusiveness or simplicity – should dominate. The reasons for limiting joinder are the fear of confusion and complexity if a lawsuit is allowed to include many diverse issues and perhaps also the possibility of oppression arising from confusion and complexity. The matter comes down to a balance of inclusiveness and simplicity. Fears of confusion,

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[35] Jack H. Friedenthal *et al.*, *Civil Procedure*, 3rd ed. (St. Paul, Minn.: West Group, 1999) at 353-355 [Friedenthal].

[36] Fleming James, Jr. *et al.*, *Civil Procedure*, 4th ed. (Boston: Little, Brown and Company, 1992) at 463.

[37] *Ibid*.

> complexity, and oppression have not vanished, although they probably have always been exaggerated. But it is now seen that these evils can be avoided by giving the trial court discretion to order that issues be *tried* separately, where a balance of convenience dictates that course, without forbidding claims to be joined in the same action. A parallel reform authorizes the court to join trial claims filed as separate actions.[38]

[30] The Alberta rules mirror the modern approach to joinder of claims. These rules are found in Part 5 of the *Alberta Rules of Court*. Rule 32 allows a plaintiff to unite several causes of action in the same action. The rule is permissive only; nothing obliges the plaintiff to join claims although cost and expediency would probably render it advantageous to do so. Rule 36 provides that where there are multiple plaintiffs and/or defendants, joinder of claims may occur where the claims are "in respect of or arising out of the same transaction or occurrence or out of the same series of transactions or occurrences." It also clarifies that seeking different relief and asserting different kinds of liability will not hinder joinder of such claims.

[31] Alberta courts are given the discretion in Rule 37 to balance inclusiveness and simplicity by ordering misjoined or inconvenient issues to be tried separately. Rule 229 also gives the court discretion

- to consolidate separate actions into a single action;
- to order that separate actions be tried together;
- to order that separate actions be tried consecutively; or
- to order that one action be stayed pending the determination of another action.

B. Joinder of Claims Between Single Parties

1. Terminology

[32] Alberta Rule 32 concerning joinder of causes of action speaks only of "a plaintiff". By contrast, Ontario's rule references all those who can issue originating documents – "a plaintiff or applicant."[39] The language used in the British Columbia

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[38] *Ibid*. at 464 (emphasis in original).

[39] Ontario, r. 5.01(1).

rules[40] and the Federal Court rules[41] is even more generic and includes any person or party who claims or requests relief. Such generic language also clearly encompasses a defendant or respondent who is counterclaiming against a plaintiff or applicant, which is not as clear when the traditional language is used.

[33] The General Rewrite Committee intends to update the rules' terminology so that our joinder of claims rules will use the most generic language possible so as to encompass all those who may assert claims.

2. Same party, different capacities

ISSUE No. 9
Should the rules explicitly allow all plaintiffs, defendants, or both, to litigate in different capacities in the same proceeding?

[34] Alberta Rules 33-35 concern whether claims by or against a certain type of party can be joined with a claim by or against that party in a different capacity. Parties singled out for these special rules are trustees in bankruptcy, married spouses and executors of estates.

[35] Ontario, British Columbia and the Federal Court don't have these rules. In fact, they all explicitly allow joinder of claims concerning any parties in different capacities. British Columbia[42] and the Federal Court[43] rules apply to persons claiming relief in different capacities. The Ontario rule[44] is the most explicitly comprehensive because it deals both with plaintiffs/applicants who sue in different capacities and defendants/respondents who are sued in different capacities.

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[40] British Columbia, r. 5(1).

[41] Federal, r. 101(1).

[42] British Columbia, r. 5(1).

[43] Federal, r. 101(2).

[44] Ontario, r. 5.01(2).

[36] The Rules Project received a comment from the profession in this area – a lawyer who stated that Rule 33 (which prevents a trustee in bankruptcy from suing in more than one capacity) is "very inconvenient" because the trustee in bankruptcy is also commonly the receiver. This rule necessitates the filing of two actions rather than just one action in both capacities.

POSITION OF THE GENERAL REWRITE COMMITTEE

[37] If one party sues in different capacities in the same proceeding, the case would be treated as a law suit with multiple plaintiffs. The rules governing multiple parties would apply to prevent problems. The Committee advocates that our rules should explicitly allow all plaintiffs, defendants, or both, to litigate in different capacities in the same proceedings, providing that the different capacities are treated as multiple parties. Rules 33 to 35 should be deleted.

C. Joinder of Claims Among Multiple Parties

[38] Alberta Rule 36 has two main effects: (1) it allows joinder of claims among multiple parties where the claims relate to the same transaction or occurrence or series of transactions or occurrences, and (2) it provides that joinder of such claims is not hindered by differences of relief sought or liability asserted. These effects are also found in other provinces' joinder rules, but those jurisdictions have conceptually separated the effects into different provisions. Typically, the first effect is expressed in the rule about joinder of parties and the second effect is expressed in the rule about joinder of claims.[45]

[39] Rule 36 and its issues will be discussed in more detail in the next chapter concerning Joinder of Parties.

D. Relief Against Joinder of Claims

[40] To avoid unnecessary repetition in this Consultation Memorandum, Rule 37 and the issues concerning relief against joinder of claims will be discussed in detail in the next chapter, when the same issues concerning relief against joinder of parties are canvassed.

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[45] Ontario, rr. 5.02(2)(a) and 5.01(3); British Columbia, rr. 5(2)(b) and 5(4); Federal Court, rr. 102 and 101(3).

E. Consolidation of Actions

ISSUE No. 10
What changes, if any, should be made to Rule 229 concerning consolidation of actions?

[41] Alberta courts can also join claims from two or more actions by using Rule 229, which gives the court discretion to

- consolidate separate actions into a single action;
- order that separate actions be tried together;
- order that separate actions be tried consecutively; or
- order that one action be stayed pending the determination of another action.

[42] In Alberta practice, an order of consolidation is apparently quite rare. Usually the court just orders that two actions be tried together, not actually consolidated. Consolidation can pose practical problems when it comes to costs and the enforcement of a single judgment by the consolidated parties.

[43] The General Rewrite Committee considered some of the small differences that exist among various Canadian jurisdictions' consolidation rules to see whether our Rule 229 needs change.

[44] The Alberta and Ontario[46] rules state the same preconditions necessary for the court to consolidate actions: (a) the proceedings must have a common question of law or fact, (b) they must arise out of the same transaction or occurrence or series of transactions or occurrences, or (c) there is another reason justifying an order. By contrast, the British Columbia[47] and Federal Court[48] rules state no preconditions whatsoever.

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[46] Ontario, r. 6.01(1).

[47] British Columbia, r. 5(8).

[48] Federal, r. 105.

[45] Alberta provides for the same types of orders as Ontario and the Federal Court, with one exception: Alberta does not explicitly authorize the court to order that one proceeding be asserted as a counterclaim in the other proceeding.

[46] Ontario has one further unique saving provision in this area.[49] It provides that where a court orders concurrent or consecutive hearings of different proceedings, the judge presiding at the hearing can nevertheless order otherwise.

POSITION OF THE GENERAL REWRITE COMMITTEE

[47] The Committee believes that Rule 229's current statement of the preconditions to consolidation or related relief is useful, needed and acceptable. No change in that respect is required.

[48] The Committee believes that it might be useful to specify in Rule 229 that a court may order that one proceeding be asserted as a counterclaim in another proceeding.

[49] The Committee agrees that, in principle, a trial judge should be able to vary or reverse another judge's interlocutory order for concurrent or consecutive hearings, just like trial judges may vary case management orders (Rule 219(3)). Such orders are distinct from the types of substantive interlocutory orders that should only be set aside, varied or discharged by the judges who made them, as provided in Rule 390. The authority to vary or reverse an interlocutory order for concurrent or consecutive hearings should appear in the rules, although it may be contained in a centralized rule concerning variation and setting aside generally, rather than in a special rule immediately following Rule 229.

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[49] Ontario, r. 6.02.

CHAPTER 3 JOINDER OF PARTIES (GENERAL)

A. Introduction

[50] Like the rules concerning joinder of claims, the joinder of parties rules were historically reformed and liberalized to overcome complex common law rules that clashed with the rules of equity and made litigation difficult.[50] The policy goals of the liberalized joinder of parties rules are "to render complete justice in one action, and, as a corollary, to avoid multiplicity of actions."[51]

[51] While there is a relationship and a certain conceptual overlap between joinder of claims and joinder of parties,

> ... it must be cautioned that joinder of claims is treated quite independently of joinder of parties. Typically, joinder of claims is much more inclusive than joinder of parties. Therefore, even if the claim joinder requirements have been met, the party joinder requirements also must be satisfied before parties can be added with regard to the new claims.[52]

B. Joinder of Multiple Plaintiffs and Defendants

1. Test for joinder

ISSUE No. 11
Should there be a specific rule governing joinder of multiple plaintiffs and, if so, what should the test be?

ISSUE No. 12
Should there be a liberal disjunctive joinder rule concerning multiple defendants and, if so, what should the test be?

[52] Alberta refers to multiple plaintiffs in the context of the joinder of claims rule among multiple parties (Rule 36) but does not otherwise have a separate rule

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[50] Friedenthal, *supra* note 35 at 388.

[51] *Ibid*. at 342.

[52] *Ibid*. at 343.

specifically addressing when multiple plaintiffs can be joined. If Rule 36 is the only thing governing joinder of plaintiffs, then it appears that two or more plaintiffs can be joined when their claims are "in respect of or arise out of the same transaction or occurrence or the same series of transactions or occurrences," the same test as for joinder of claims among multiple parties.[53]

[53] In contrast, Ontario,[54] British Columbia[55] and the Federal Court[56] all specifically address the joinder of multiple plaintiffs separately from their joinder of claims rule. The test for when this joinder can occur is broader. These rules allow multiple plaintiffs to be joined where the claim arises out of the same transaction or occurrence or series of transactions or occurrences **OR** where a common question of law or fact "would arise" (British Columbia) or "may arise" (Ontario). Ontario and British Columbia also grant discretion to the court to allow multiple plaintiffs in other circumstances.

[54] While Alberta does not have a separate, specific rule about the joinder of multiple plaintiffs, it does have one about the joinder of multiple defendants. Rule 46 is drafted in an archaic style and is in desperate need of subsections to separate its various effects. Basically, the effect of Rule 46 is that multiple defendants can be joined when the claim made against them is in respect of or arises out of the same transaction or occurrence or series of transactions or occurrences **AND** where a common question of fact or law would arise if the proceedings were brought separately. (Rule 46 also governs relief against joinder, which will be discussed in the next part of this chapter.)

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[53] The different test for joinder of claims between a single plaintiff and a single defendant is found in r. 32. See the discussion in Chapter 2, Part A and Part B at 10-13.

[54] Ontario, r. 5.02(1).

[55] British Columbia, r. 5(2).

[56] Federal, r. 102.

[55] In contrast, the rules of Ontario,[57] British Columbia[58] and the Federal Court[59] are much more liberal because only one factor from a list of potential factors need be met to accomplish joinder. The list varies among these jurisdictions, but not the fact that all the factors are disjunctive. So multiple defendants may be joined where:

- the claim arises out of the same transaction or occurrence or series of transactions or occurrences (Ontario, British Columbia, Federal Court); **OR**
- a common question of law or fact "may arise" (Ontario) or "would arise" (British Columbia and Federal Court); **OR**
- there is doubt as to the person(s) from whom the plaintiff is entitled to relief (e.g., defendants are sued in the alternative) (Ontario); **OR**
- even if there is no factual relationship between the claims apart from a common plaintiff, there is doubt as to the person(s) from whom the plaintiff is entitled to relief or doubt as to respective amounts of liability (e.g., personal injury case involving successive auto accidents) (Ontario); **OR**
- the court exercises general discretion to allow joinder (British Columbia and Ontario if it "may promote the convenient administration of justice").

[56] At one time the joinder of parties rules in Ontario[60] and British Columbia[61] used to be like Alberta's current rules (conjunctive) but have since been liberalized (made disjunctive and expanded to include court discretion). It appears that, while Alberta's approach was once the Canadian norm concerning joinder of parties, it's now the old-fashioned approach in this area.

[57] The Ontario liberalization is designed to promote convenience and efficiency by saving time and costs through prevention of multiplicity of actions. Allowing multiple

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[57] Ontario, r. 5.02(2).

[58] British Columbia, r. 5(2).

[59] Federal, r. 102.

[60] The Honourable George Alexander Gale *et al.*, eds., *Holmested and Gale on the Judicature Act of Ontario and Rules of Practice (Annotated)*, looseleaf (Toronto, Ont.: Carswell, 1983), vol. 2 at 866-888 re former rr. 66-67 [Holmested & Gale].

[61] *Prince v. T. Eaton Co. Limited* (1984), 53 B.C.L.R. 236 (C.A.).

defendants to be sued in the alternative can also ensure that justice is done by avoiding the risk of inconsistent determinations.

> ... If the plaintiff is unable to join ...[alternate defendants] in the same action, and is forced to sue them in separate actions, there is the ever present risk that in each action the defendant will successfully lay the blame on the absent defendant with the result (which would not have occurred if they had been sued in one action) that both defendants escape liability and the plaintiff goes uncompensated.[62]

[58] Ontario's extremely liberal approach seems to proceed on the idea that problems flowing from having multiple defendants should not be dealt with by restricting joinder, but by creative use of the court's discretion to relieve against any negative effects such joinder might cause.[63] Therefore, Ontario[64] has a generous relief against joinder provision that details several specific kinds of relief the court can grant and concludes with unspecified discretion to relieve.[65]

POSITION OF THE GENERAL REWRITE COMMITTEE

[59] The Committee believes that we should have one rule covering the joinder of both multiple plaintiffs and multiple defendants, with the same factors for each. In accordance with the trend in other Canadian jurisdictions, we should adopt the liberalized approach of relating the factors for joinder disjunctively rather than conjunctively. Therefore, the Committee recommends that multiple plaintiffs or defendants should be able to be joined where:

- the claim arises out of the same transaction or occurrence or series of transactions or occurrences; **OR**
- a common question of law or fact would arise; **OR**
- the court exercises general discretion to allow joinder.

[60] The same list of factors can be used for both plaintiffs and defendants. The Committee rejected listing the other two factors from the Ontario provision that relate

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[62] Holmested & Watson, *supra* note 5, vol. 2 at 5-15.

[63] *Ibid.* at 5-6, 5-7 and 5-15.

[64] Ontario, r. 5.05.

[65] For a full discussion about relief against joinder, including Ontario's provision, see Part C of this chapter at 22-25.

only to joinder of multiple defendants (doubt as to the person(s) from whom the plaintiff is entitled to relief or doubt as to respective amounts of liability). These factors need not be explicitly listed because, if the court is given a general discretion to allow joinder, that discretion could be exercised in appropriate cases where needed to address those circumstances of doubt.

[61] Having a specific rule about joinder of multiple parties will also result in a change to Rule 36 that governs joinder of claims among multiple parties. Rule 36's first effect of allowing joinder of claims among multiple parties where the claims relate to the same transaction or occurrence or series of transactions or occurrences will now be expressed in the new joinder of multiple parties rule instead. Rule 36 will continue to express its second effect that joinder of claims among multiple parties is not hindered by differences of relief sought or liability asserted. This will match the format used by the rules of Ontario, British Columbia and the Federal Court.[66]

2. Representation of multiple plaintiffs

ISSUE No. 13
Should there be a rule explicitly requiring multiple plaintiffs to have the same lawyer?

[62] Where there are two or more plaintiffs joined in the same proceeding, Ontario[67] and the Federal Court[68] provide that the plaintiffs must all be represented by the same solicitor of record. However, this general rule against separate statements of claim and separate legal representation for multiple plaintiffs can be set aside by special leave of

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[66] See the discussion in Chapter 2, Part C at 13.

[67] Ontario, r. 5.02(1).

[68] Federal, r. 102.

the court[69] – for example, where the plaintiffs have different and conflicting interests[70] or where one plaintiff wishes to change counsel.[71]

[63] The Alberta and British Columbia rules are silent on this issue, but the B.C. Supreme Court has held that, as a matter of practice based on British precedent, plaintiffs who sue together must be jointly represented.[72]

POSITION OF THE GENERAL REWRITE COMMITTEE

[64] The Committee does not propose to specify this rule nor the several exceptions needed to it. Separate representation of multiple plaintiffs is not uncommonly required – for example, rarely can the same lawyer adequately (or ethically) represent both parent and child in a motor vehicle injury case where the parent was driving.

C. Relief Against Joinder of Parties and Claims

1. Circumstances in which court may act

ISSUE No. 14
Should there be separate rules addressing relief against joinder of parties and claims or should there be a single rule?

ISSUE No. 15
Should the rules restate the circumstances in which a court may relieve against joinder of parties and claims?

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[69] Holmested & Watson, supra note 5, vol. 2 at 5-21.

[70] *Guss v. Daigle* (1992), 79 B.C.L.R. (2d) 28 (S.C.). This case did not interpret the B.C. rules of court, but rather a B.C. statute (the *Family Compensation Act*) that required there be only one action.

[71] *Ryan v. Hoover* (1984), 40 C.P.C. 261 (Ont. S.C. Master).

[72] *Attorney General of Canada v. Canadian Pacific Limited* (1981), 30 B.C.L.R. 230 (S.C.).

[65] Currently, the Alberta rules deal separately with relief against joinder of parties and claims. In contrast, Ontario,[73] British Columbia[74] and the Federal Court[75] all have a single relief provision that applies to joinder of both claims and parties.

[66] What circumstances must exist before a court is able to give relief against joinder? Concerning joinder of claims, Alberta Rule 37 states that a court may give relief if several causes of action "have been misjoined or cannot conveniently be disposed of in one action." As for joinder of parties, since Alberta only has a specific joinder rule concerning multiple defendants, its provision about relief against joinder of parties only concerns defendants as well. Rule 46 provides relief against joinder of multiple defendants if "such joinder may embarrass or delay the trial or action."

[67] In jurisdictions with a single relief provision, the same circumstances apply to relief against joinder of both claims and parties. British Columbia states that "where a joinder of several claims or parties in a proceeding may unduly complicate or delay the trial or hearing of the proceeding or is otherwise inconvenient."[76] Ontario and the Federal Court both use the same basic approach: a court may grant relief where the joinder of multiple claims or parties would unduly complicate or delay the hearing or cause undue prejudice to a party.

POSITION OF THE GENERAL REWRITE COMMITTEE

[68] It would be beneficial for Alberta to have a single relief provision that addresses joinder of both claims and parties. Concerning the circumstances in which a court can grant relief, Alberta's current two tests are both somewhat brief and uninformative. The formulation used by Ontario and the Federal Court more fully states the usual kinds of circumstances in which a court should relieve against joinder. Therefore, the Committee favours having a single relief provision stating that a court may grant relief against joinder of claims or parties where the joinder of multiple claims or multiple

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[73] Ontario, r. 5.05.

[74] British Columbia, r. 5(6).

[75] Federal, r. 106.

[76] British Columbia, r. 5(6).

parties would unduly complicate or delay the hearing or cause undue prejudice to a party.

2. Relief which court may order

ISSUE No. 16
Should the rules expand the stated list of relief which a court may order against joinder of claims or parties?

[69] When dealing with joined claims, Alberta Rule 37 seems unduly narrow in its provision of relief. It provides that the court may order any cause of action to be tried separately "*and* may make all necessary directions." The use of the conjunctive "and" makes separate trials appear to be the only option for relief. In contrast, British Columbia's similarly-worded rule[77] is broader simply by saying that a court may order a separate trial "*or* make any other order it thinks just."

[70] When dealing with joinder of defendants, Alberta Rule 46 authorizes the court to "order separate trials or make such other order as may be expedient." Rule 47 also provides some relief where a defendant has no interest in part of an action. It authorizes the court to make orders "to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest." This is similar to the relief available in British Columbia.[78]

[71] The Ontario[79] and Federal Court[80] rules provide the most comprehensive range of available relief against joinder of both claims and parties. The court may do any of the following:

- order separate trials or hearings;
- order one or more of the claims to be asserted in another proceeding;

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[77] *Ibid*.

[78] British Columbia, r. 5(5) and (6).

[79] Ontario, r. 5.05.

[80] Federal, r. 106.

- compensate a party with costs for having to attend part of a hearing in which the party has no interest;
- relieve a party from having to attend part of a hearing in which the party has no interest;
- stay a proceeding against a party on condition that the party is bound by any findings made against another party;
- make such other order as may be just (only Ontario has this final basket clause, which makes its rule the most comprehensive of all).

POSITION OF THE GENERAL REWRITE COMMITTEE

[72] In Alberta's single provision providing relief against joinder of both claims and parties, the Committee favours adopting the Ontario list of available relief (as largely mirrored in the Federal Court rules as well), except for the express ability to stay a proceeding against a party on condition that the party is bound by any findings made against another party. Perhaps in other jurisdictions a court might order that other persons are bound by the result of a case, but this is not Alberta practice. Even if, in a rare case, an Alberta court did want to make such an order, it could do so under the concluding basket clause of general discretion, so that a specific rule to that effect is unnecessary.

D. Rule 38 – Misjoinder and Non-joinder of Parties

1. Introduction

[73] Historically at common law, it used to be a fatal error if the wrong parties were joined or not joined to a law suit; the action would be defeated as a result. During the *Judicature Act* reforms of the mid-1800s, a saving provision was created to overcome that rigidity and prevent that harsh result, so that errors of misjoinder or non-joinder of parties could be fixed by the court by adding, deleting or substituting parties and the law suit could proceed.[81] In Alberta, this saving provision and the various amendment powers of the court concerning parties are found in Rule 38.

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[81] *Carmacks Construction Ltd. v. Village of Beaumont* (1981), 15 Alta. L.R. (2d) 367 at 372 and 379 (Q.B. Master) [*Carmacks Construction Ltd. v. Beaumont*].

2. Misjoinder/non-joinder saving provision

[74] Alberta Rule 38(1) provides that misjoinder or non-joinder of parties is not fatal to a law suit and the court can continue to deal with the matter. This is a standard provision also found in the rules of the three Canadian jurisdictions used for comparison purposes (Ontario,[82] British Columbia[83] and the Federal Court[84]).

3. Adding, deleting and substituting parties

[75] The rest of Alberta Rule 38 concerns the circumstances in which a court will allow parties to be added, deleted or substituted in litigation in order to fix misjoinder or non-joinder situations in lawsuits saved by Rule 38(1).

[76] Issues No. 17, 18 and 19 are raised at various points in this part of the chapter. The response of the General Rewrite Committee to each Issue will be discussed collectively at the end of this part.

a. Substituting parties

[77] Under Rule 38(2), a court can add or substitute a plaintiff if the action was commenced in the name of the wrong person or if there is doubt that the right person is named as plaintiff. But according to Rule 38(4), no one can be added or substituted as a plaintiff (or as the next friend of a plaintiff) without that person's written consent.

[78] Under Rule 38(3), the court's discretionary power to add or delete "any party" (therefore, both defendants and plaintiffs) can be exercised only in very specific (and actually quite limited) circumstances. There is no explicit power under Rule 38(3) to substitute any party (defendant or plaintiff), only to add or delete a party. The court's only explicit power of substitution is found in the preceding Rule 38(2) and solely concerns plaintiffs. Master Funduk of the Alberta Queen's Bench has stated that "[t]he fact that express provision is made for substituting plaintiffs, and no such provision is made for substituting defendants, negates using ... [Rule 38(3)] for

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[82] Ontario, r. 5.04(1).

[83] British Columbia, r. 5(9).

[84] Federal, r. 103.

substitution purposes."[85] However, Rule 38(3) has been used by the Court of Appeal to grant "misnomer relief" and substitute a named defendant for a "John Doe" defendant.[86] On a strict reading of the rule, the use of Rule 38(3) for this purpose seems questionable. But the court also referred to Rules 38(7) and 39, the wording of which does seem to presuppose that substitution of defendants can occur.

ISSUE No. 17
Should the rules clarify whether a court can substitute defendants in a manner corresponding to the substitution of plaintiffs under Rule 38(2)?

b. Deleting parties

[79] When it comes to deleting a party under Rule 38(3), the court can only strike out the name of a party who is "improperly joined." A defendant is not "improperly joined" just because the case against the defendant is weak, refutable or non-existent. So, for example, Rule 38(3) cannot be used to strike out the name of a defendant on the ground that the pleadings disclose no cause of action against the defendant.[87] To obtain deletion under Rule 38(3), the party must have been joined to the action for some improper purpose. "The kind of 'improper' purpose contemplated by Rule 38(3) is the joinder of a person to obtain discovery or costs which could not otherwise be sought against that person."[88] It is improper to join a party who is not necessary to the determination of the claim.[89] Again, the court's discretion to delete parties under this rule is exercisable only in very specific and quite limited circumstances.

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[85] *M.L. Rathwell & Sons Trucking Ltd. v. Alforge Metals Corporation Limited* (1981), 15 Alta. L.R. (2d) 347 at 351 (Q.B. Master).

[86] *Nagy v. Phillips* (1996), 41 Alta L.R. (3d) 58 (C.A.); *Hann v. Foothills Provincial General Hospital* (1997), 209 A.R. 187 (C.A.).

[87] *Decock v. Alberta* (2000), 79 Alta. L.R. (3d) 11 at 19, 2000 ABCA 122 [*Decock*]. The court adopted the analysis of Master Funduk concerning this issue in *Carmacks Construction Ltd. v. Beaumont*, *supra* note 81 at 385.

[88] *Board of Education of Starland School Division No. 30 v. Alberta* (1988), 91 A.R. 329 at 332-333 (Q.B.).

[89] *Decock*, *supra* note 87 at 25.

c. Adding parties – the "necessary party" rule and private interest intervention

[80] When it comes to adding a party under Rule 38(3), the court can add any person as a party "who ought to have been joined or whose presence before the Court may be necessary

- in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, or
- in order to protect the rights or interests of any person or class of persons interested under the plaintiff or defendant."

[81] This is known as the "necessary party" rule. Its purpose is not to facilitate adding parties generally; its purpose arises out of the saving function of Rule 38. Where a law suit would formerly have been defeated for non-joinder of a necessary party, Rule 38(1) saves the suit and Rule 38(3) allows a court to solve the problem by adding the necessary party who is missing.[90] Or under Rule 40, the court can (rather than adding necessary parties) render judgment in an action that is defective for "want of parties" but save the rights of all persons not parties.

[82] To be added as a necessary party under Rule 38(3), a person must meet a two-fold test: (1) the person must have a direct legal interest (not merely an indirect or commercial interest) in the outcome of the litigation such that the person should be bound by the result of the suit, and (2) the question to be settled in the litigation must not be able to be effectually and completely settled unless that person is a party.[91] This is a very stringent test that will not often be successfully met.

[83] A non-party can also apply to be added as a defendant under Rule 38(6) (private interest intervention). A similarly strict test must be met here: (1) the applicant must have a direct legal interest (not merely an indirect or commercial interest) in the subject matter or result of the action, and (2) it must be just and convenient that the

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[90] *Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co.* (1993), 10 Alta. L.R. (3d) 325 at 329 (Q.B.), citing the English case of *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357.

[91] *PanCanadian Petroleum Ltd. v. Husky Oil Operations Ltd.* (1994), 150 A.R. 237 at 239; aff'd without comment on the interpretation of r. 38(3) or 38(6) at (1994), 157 A.R. 265 (C.A.).

applicant be allowed to defend the action, having regard to such factors as cost, additional complexity of the litigation, etc.[92]

[84] Ontario takes a uniquely compulsory approach to the issue of necessary parties and imposes the obligation that all necessary parties must be joined as parties, all jointly-entitled plaintiffs must be joined as parties and an assignor of a chose in action must be joined as a party in certain circumstances.[93] The court is also given the discretion to add necessary parties (like in Alberta).[94] Relief from mandatory joinder is available.[95] Despite the number of mandatory Ontario rules in this area, it has been noted that "... problems of compulsory joinder are a relatively rare occurrence since the necessary parties principle is a very narrow one."[96]

[85] The rules of the Federal Court[97] and British Columbia[98] are more modern amendment provisions that include restatements of the necessary party rule. They have not gone the Ontario route of mandating joinder of necessary parties.

ISSUE No. 18
Should a discretionary approach to necessary parties be retained or should Ontario's approach of compulsory joinder of necessary parties be adopted?

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[92] *Ibid.* at 240, citing Master Funduk in *Fullwood v. Master Excavators Ltd.* (1981), 34 A.R. 541 (Q.B.). The Alberta Court of Appeal has stated the test in slightly different terms (citing no specific authorities on which to base this formulation). "1. The non-party must have a direct financial or legal interest in the outcome of the litigation; and 2. The non-party's interest will not be adequately protected unless he is allowed to intervene": *Royal Bank of Canada v. Page Petroleum Ltd. (Receiver of)* (1989), 102 A.R. 347 at 349 para. 8 (C.A.).

[93] Ontario, r. 5.03(1)-(3).

[94] Ontario, r. 5.03(4).

[95] Ontario, r. 5.03(6).

[96] Holmested & Watson, *supra* note 5, vol. 2 at 5-24.

[97] Federal, r. 104.

[98] British Columbia, r. 15(5).

d. General discretion to add, delete or substitute parties

[86] In addition to its mandatory joinder of necessary parties rule, Ontario has a general provision governing the addition, deletion or substitution of parties that clearly applies to those contexts that would not be covered by the necessary parties rule. Ontario Rule 5.04(2) and (3) provides that:

> (2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or by an adjournment.
>
> (3) No person shall be added as plaintiff or applicant unless the person's consent is filed.

[87] The test for when a court will make amendments concerning the parties to an action is the same as when a court is asked to amend pleadings: "unless prejudice would result that could not be compensated for by costs or by an adjournment."[99] However, when that test is met to amend pleadings, the court *must* amend the pleadings, whereas when that test is met to amend parties, the court still has discretion whether to add, delete or substitute a party.

[88] It seems doubtful whether the Alberta rules already have a similar general discretion provision specifically governing the addition, deletion or substitution of parties, although it seems like courts sometimes regard Rule 38(7) as providing such general authorization. Rule 38(7) says "[a]n application to add, strike out or substitute a plaintiff or defendant may be made at any stage of the proceedings." But given that this is a subsection of Rule 38, it is more likely that its scope is restricted to an application to add, strike out or substitute a plaintiff or defendant *as provided in Rule 38*. Rule 38(7) would not therefore expand Rule 38's narrow circumstances in which adding, striking out or substitution of a party can occur. Of course, quite apart from whatever Rule 38(7) might encompass, Alberta courts could clearly use their general discretion under Rule 132 to amend pleadings to add, delete or substitute a party.

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[99] Ontario, r. 26.01 (amendment of pleadings) and r. 5.04(2) (amendment of parties).

ISSUE No. 19
Should there be a rule giving general discretion to the court to add, delete and substitute parties and correct misnomers in circumstances beyond the limited grounds available under Rule 38?

POSITION OF THE GENERAL REWRITE COMMITTEE ON ISSUES NO. 17, 18 AND 19

[89] The Committee does not advocate following Ontario's lead in having mandatory joinder of necessary parties. Alberta's discretionary approach is better. However, the Committee ultimately questions the need to have rules about necessary parties at all, beyond the saving provision that misjoinder or non-joinder is not fatal to the law suit. The narrow, limited application of Rule 38, together with its problematic gaps, just cause too many problems of application. Our rules also do not clearly deal with misnomer or substitution of defendants (for example, in a "John Doe" law suit). The Committee believes that if Alberta simply had a clear, open-ended discretionary provision giving the court discretion to add, delete and substitute parties where necessary without causing prejudice, then that power could be used equally well in all situations (whether the situation is a classic "necessary parties" situation or otherwise).

[90] Therefore, the Committee recommends that we should retain the saving effect of Rule 38(1) but delete the rest of Rule 38. In its place, Alberta should have a Rule equivalent to Ontario's Rule 5.04(2) and (3). At any stage of a proceeding the court should be able by order to add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or by an adjournment. No person should be added as a plaintiff or applicant without that person's consent.

CHAPTER 4 JOINDER OF PARTIES (MISCELLANEOUS)

A. Introduction

[91] In addition to the general joinder of parties rules discussed in Chapter 3, Alberta has a few other miscellaneous rules that have implications for or concern joinder of parties. However, these rules sometimes have a broader application or purpose than simply joinder of parties and so they are being discussed separately from the general joinder rules.

B. Joinder of Specific Types of Parties

ISSUE No. 20
Is there a continuing need for Rules 48 and 49?

[92] Alberta Rule 48 allows a plaintiff to join all parties to a contract (regardless of whether liability is joint, several or both) and all parties to a negotiable instrument. Rule 49 allows a surety to be made a party to any action on the contract whose performance has been guaranteed by the surety. Ontario, British Columbia and the Federal Court do not have equivalent provisions.

POSITION OF THE GENERAL REWRITE COMMITTEE

[93] The Committee is of the opinion that the general rules governing joinder of parties would be sufficient to deal with the types of parties covered in Rule 48. The Committee also believes that Rule 49 concerns substantive law and is therefore inappropriate for the rules to deal with. The Committee recommends that Rules 48 and 49 be deleted.

C. When Some Interested Non-parties Need Not Be Joined

1. Rule 52

ISSUE No. 21
Is there a continuing need for Rule 52?

[94] Alberta Rule 52 gives a court discretion to adjudicate property issues without joining as parties all persons interested in the property who are not before the court. Ontario, British Columbia and the Federal Court do not have an equivalent provision.

POSITION OF THE GENERAL REWRITE COMMITTEE

[95] The Committee questions the need for this rule and notes that other jurisdictions get along without an equivalent rule. The Committee recommends that Rule 52 be deleted.

2. Rule 53 and related issues about Rule 51

[96] Alberta Rule 53 allows a court to approve a settlement in a trust or estate case where one or more persons who would be interested in the settlement are not before the court as parties. If another person with the same interest is before the court and assents to the settlement, and if the court is satisfied that the settlement is for everyone's benefit and that serving the absent persons would cause unreasonable expense or delay, the court may approve the settlement and make it binding on the absent persons. The order binding the absent persons is challengeable only where it was obtained by fraud or non-disclosure of material facts.

[97] Similar provisions are standard rules of court across Canada. In substance, the other provinces' equivalent rules are the same as our Rule 53. However, there are a couple of differences concerning the types of cases to which these rules apply and the grounds on which an order binding an absent person to a settlement may be challenged.

a. Types of cases to which these rules apply

ISSUE No. 22
Should Rule 53 be cross-referenced to the list of proceedings found in Rule 51?

ISSUE No. 23
If so, should Rule 51's list of proceedings be expanded to follow the Ontario model? Or should the list of proceedings be eliminated altogether so that Rules 51 and 53 can be used in any situation?

[98] Except in Alberta and the Northwest Territories, the other provinces' rules to bind absent persons to a settlement are cross-referenced to their rules governing when a court can appoint a representative for an unborn, unascertained or absent non-party. This other rule lists the types of cases in which such a representation order (and, due to the cross-reference, a binding settlement order involving absent persons) can be made. Typically this list appears to be more extensive than the two types of cases (trust or estate) in which an Alberta court acting under Rule 53 could make a binding settlement order on an absent person. For example, the Ontario list includes the following types of proceedings:

> (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
>
> (b) the determination of a question arising in the administration of an estate or trust;
>
> (c) the approval of a sale, purchase, settlement or other transaction;
>
> (d) the approval of an arrangement under the *Variation of Trusts Act*;
>
> (e) the administration of the estate of a deceased person; or
>
> (f) any other matter where it appears necessary or desirable to make an order...[100]

[99] This Ontario list is followed by several other provinces.[101] However, while it appears to be much more extensive than Alberta's two categories of trusts and estates, many of its categories do simply amount to cases that concern trusts or estates. The only two real differences are Ontario's clauses (c) and (f).

[100] In Alberta, the provision governing appointment of a representative for an unborn, unascertained or missing non-party is Rule 51. It provides for the appointment of a representative only in certain limited types of proceedings – cases concerning the administration of a deceased person's estate, property subject to a trust or the interpretation of a written instrument (including a statute).

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[100] Ontario, r. 10.01(1).

[101] Saskatchewan, *Queen's Bench Rules*, r. 71(1) [Saskatchewan]; Manitoba, *Court of Queen's Bench Rules*, r. 10.01(1) [Manitoba]; New Brunswick, *Rules of Court*, r. 11.01(1) [New Brunswick] and Prince Edward Island, *Rules of Civil Procedure*, r. 10.01(1) [Prince Edward Island].

POSITION OF THE GENERAL REWRITE COMMITTEE

[101] The Committee favours making the types of cases to which Rule 53 applies co-extensive with the list of cases found in Rule 51. In other words, we should cross-reference Rule 53 to the list of proceedings in Rule 51, like other provinces do.

[102] However, the Committee did not favour eliminating or expanding the list of cases in Rule 51 so as to make that rule more widely applicable. In particular, the Committee would be reluctant to see a basket clause of general discretion placed in Rule 51 such as Ontario has. It is an extraordinary step to bind persons who are not before the court and no concerns have been raised in our consultations with the legal profession that suggest a wider application for Rule 51 is needed. It is best to limit Rule 51's effect to estates, trusts and interpretation of documents – the current list of proceedings to which it applies and the areas in which the need to proceed despite the absence of some interested persons is most likely to arise.

[103] However, the Committee does recommend that the list of proceedings in Rule 51 be stated in more straightforward terms, such as those currently used in Rule 53. Therefore, Rule 51 should apply to any proceedings concerning (a) an estate, (b) a trust or (c) the construction of a written instrument, including a statute.

[104] Although Rules 51 and 53 should be co-extensive in the cases to which they apply, the only real change in this area, in substance, will be that Rule 53 would now also apply in cases concerning interpretation of documents.

b. Grounds to challenge the binding order

ISSUE No. 24
On what grounds should a Rule 53 order binding absent persons to a settlement be challengeable – on Alberta's two current grounds or on Ontario's four grounds?

[105] All the provinces list the same two grounds as Alberta Rule 53 for challenging orders that bind non-parties to a settlement – fraud or non-disclosure of material facts. But Ontario and three other provinces[102] list two further grounds for challenge:

- the interests of the person or estate were different from those represented at the hearing
- some other sufficient reason the order should be set aside.

POSITION OF THE GENERAL REWRITE COMMITTEE

[106] Because a binding settlement creates rights and interests that should not lightly be set aside, the grounds to set aside this type of order should be as narrow as possible. In order to promote certainty and finality of settlements, Alberta should simply retain its two current grounds to set aside a Rule 53 order and should not expand the list of grounds further. The Committee is opposed to having a basket clause of general discretion in this provision.

D. Adding or Substituting Parties Following Change or Transmission of Interest

1. Introduction

ISSUE No. 25
Do the rules governing the addition or substitution of parties following a change or transmission of interest require any changes?

[107] Alberta Rule 56 allows a court to add a new party or turn an existing party into a party in another capacity where (a) a change or transmission of interest or liability occurs during the course of a law suit or (b) an interested person comes into existence after the commencement of the action. An order that the proceedings should be carried on between the continuing parties and the new party may be obtained on an *ex parte* application.

[108] "During the course of a proceeding it is possible that a party will die, or become bankrupt, or otherwise lose the right to sue or the liability to be sued.... At common

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[102] Saskatchewan, Manitoba, Prince Edward Island.

law, the proceeding simply came to an end upon such events (abatement)."[103] Alberta Rule 54 is a saving provision that ends abatement of proceedings in those circumstances. Alberta Rule 56 "provide[s] the procedure for reconstituting proceedings"[104] that would otherwise have abated at common law. None of these provisions affect whether transmission occurs and whether the cause of action or liability continues; that is determined by the substantive law. These provisions simply prevent abatement where transmission does occur and provide a procedure for continuation of the proceedings.[105]

[109] Although automatic abatement is prevented, automatic continuation of the proceedings is not substituted. Rule 56 provides that "an order that the proceedings be carried on between the continuing parties and the new party may be obtained on *ex parte* application." The rule does not specify who must seek the order, although generally it is the person entitled to carriage of the proceedings who is the proper party to obtain the order.[106] Nor is there a time limit for seeking an order to continue. "Where a plaintiff neglects to take out an order to continue, the defendant may move to limit the time for so doing, and in default to dismiss or stay the action".[107]

[110] Rule 55 is a special saving provision that ends abatement of proceedings where death occurs after the hearing of all evidence but before the entry of judgment. It prevents abatement and allows judgment to be entered even where the cause of action does not survive death and no transmission occurs. When death occurs at this late stage of the proceedings, no order to continue is required but a court order is still needed to backdate the judgment to an appropriate date.[108]

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[103] Holmested & Watson, *supra* note 5, vol. 2 at 11-4. The only exception to abatement at common law was if the interest or liability passed to someone who was already a party in the action; then the action could continue without hindrance or interruption. But if the interest or liability passed to a non-party, abatement occurred: *Ibid*. at 11-5.

[104] *Ibid*. at 11-5.

[105] *Ibid*.

[106] Holmested & Gale, *supra* note 60, vol. 2 at 1636.

[107] *Ibid*. at 1635.

[108] Courts in this situation typically backdate the judgment either to the date on which the trial evidence

(continued...)

2. Comparison of Alberta and Ontario

[111] All Canadian jurisdictions have a rule of court addressing the impact on ongoing proceedings of a transmission or change of a party's interest or liability. The Alberta and Ontario rules are the main models in this area.

[112] The Alberta model is the older model based on the old English rules of court and was once standard in Canadian rules.[109] The language of this model is passive, indirect and rather vague. It clearly prevents abatement but does not state (other than by implication) what the status of the action is pending the obtaining of an order to continue.

[113] The Alberta model is framed in terms of adding and substituting parties because conceptually it is still directly tied to the common law of abatement by reflecting the circumstances in which common law abatement would occur. However, the purpose of the provision is less about empowering the court to amend parties than it is about saving and fixing an action that would otherwise abate. The court's ability to amend and substitute parties is just incidental to that wider goal.

[114] By contrast, Ontario Rule 11 does not speak of relief from abatement, the need to add a new party, the need to change the capacity of an existing party or the need to add a party born after commencement of the action. Rule 11.01 simply provides that the effect of any transfer or transmission of interest or liability during the course of a law suit is to automatically stay the proceedings until an order to continue has been

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[108] (...continued)
ended or the day before the party died: *ibid*., vol. 2 at 1642-1643. Backdating occurs so that the date of the judgment is not the date of its pronouncement as that would make the judgment apparently defective on its face. "The theory behind antedating judgments in this way is that reserving judgment is for the convenience of the court and should not be permitted to operate to the prejudice of any party.": Holmested & Watson, *supra* note 5, vol. 2 at 11-20. An Alberta case using Rule 55 is *Vollrath v. Bruce* (2000), 282 A.R. 364 (Q.B.).

[109] For example, the same basic provision was used in Ontario before that province extensively revised its rules. The Alberta model is currently used in five other Canadian jurisdictions: British Columbia, r. 15(3) and (4); Northwest Territories, *Rules of the Supreme Court*, r. 76 [Northwest Territories]; Nova Scotia, *Civil Procedure Rules*, rr. 5.05 and 5.06 [Nova Scotia]; Newfoundland, *Rules of the Supreme Court, 1986*, rr. 7.07 and 7.08 [Newfoundland]; Saskatchewan, r. 73.

obtained.[110] Any "interested person" may obtain the order to continue on an *ex parte* basis.[111] This wording clearly allows someone to apply for an order of continuance before that person is made a party to the proceedings. If no order is obtained within a "reasonable time", the defendant may move to dismiss the action for delay.[112]

[115] The Ontario model[113] achieves the same thing as the Alberta model but its focus is on staying the action until such time as it is reconstituted. It does not focus on the changes that will be needed to reconstitute the action (adding and substituting parties). Saving the action from abatement and reconstituting it are treated here as "givens" that need not be dwelled upon. The main purposes of the provision are to establish the status of the action in the interim and to provide a quick and easy way to reconstitute the proceedings.

[116] Unlike in Alberta, an order to continue in Ontario is obtained from the registrar, not from a judge. The registrar adjusts the title of the proceeding, deleting and substituting the names of parties as needed. It appears that this is treated simply as an administrative matter, rather than as an exercise of the court's power to add, substitute or delete parties under Ontario's general rule to that effect. However, if the *ex parte* order to continue were challenged following service on the other parties, the matter would come before a judge at that time.

[117] Ontario no longer has a rule addressing death after trial but before judgment. It is thought that an Ontario court would nevertheless act by analogy to its former rule (which was the same as Alberta Rule 55) and enter a backdated judgment in those circumstances.[114]

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[110] Proceedings are stayed against the individual party whose interest has been transferred or transmitted, not against all the parties to the action: *Green Bay Packaging Inc. v. Meco Group Inc.*, [1999] O.J. No. 3120 (S.C.J.) (QL).

[111] Ontario, r. 11.02.

[112] Ontario, r. 11.03.

[113] The Ontario model is used in three other Canadian provinces: Manitoba, r. 11; Prince Edward Island, r. 11; New Brunswick, r. 13.

[114] Holmested & Watson, *supra* note 5, vol. 2 at 11-19.

POSITION OF THE GENERAL REWRITE COMMITTEE

[118] When a change or transmission of interest occurs during litigation, Alberta needs to have a saving provision to prevent abatement and a procedure to reconstitute proceedings. However, the Committee favours updating our rules in this area and recommends replacing Rules 54, 55 and 56 with new provisions.

[119] We should have an initial saving provision to prevent abatement worded along the following lines: "A proceeding is not terminated only by reason that any estate, interest or title is transferred or transmitted (a) by reason of death where the cause of action survives, (b) by assignment or conveyance, or (c) by operation of law." As in Ontario, the rule need not deal with adding a party born after commencement of the action because such a party could be added under the regular joinder of parties rule.[115]

[120] To reconstitute proceedings, the Committee advocates using the Ontario model that clearly stays the proceedings until an order to continue is obtained. However, the Committee does not favour the Ontario model of having the order to continue issued by a court official; it seems inappropriate to allow a court official to amend or substitute parties. In Alberta, an order to continue should be obtained "from the court" – wording which would also allow such orders to be given by Masters. Another party should be able to move for dismissal for delay if the order of continuation is not obtained within "a reasonable time" as stated in the Ontario rule.

[121] We should also continue to have an additional saving provision based on current Rule 55, so that a proceeding will not terminate only by reason of the death of either party after the hearing of all evidence but before the entry of judgment. Whether or not the cause of action survives, a (backdated) judgment in such a case should nevertheless be entered.

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[115] *Ibid.* at 11-15.

CHAPTER 5 THIRD PARTY CLAIMS

A. Introduction

[122] Third party procedure provides another method of joining parties and issues in one proceeding, and thus has the same purposes as other joinder rules (avoid a multiplicity of proceedings, avoid inconsistent judgments). In addition, third party procedure permits the third party to defend the plaintiff's claim against the defendant, and enables the defendant to have the issue against the third party decided as soon as possible, so that the plaintiff will not enforce a judgment against the defendant before the third party issue is decided.[116]

B. Nature of a Third Party Claim

ISSUE No. 26
Should the present scope and nature of third party notices be continued, or should they be broadened to include independent (but factually related) damages claims?

[123] Third party claim rules fall into three categories, from narrow to broad:

(1) a third party claim may be limited to a claim for contribution or indemnity in a technical sense (based on the statutory right to contribution between joint tortfeasors or a claim for indemnity arising from a "commitment, express or implied, to save a person harmless from the claims of another");[117]

(2) a third party claim may extend to other causes of action, but still be limited to a claim for relief from the defendant's liability to the plaintiff (i.e., the measure of an award of damages to the defendant will be all or part of the amount of the defendant's liability to the plaintiff);

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[116] *Dilcon Constructors Ltd. v. ANC Developments Inc.* (1994), 155 A.R. 314 (C.A.) [*Dilcon Constructors*]; *Kaptian v. Hardy* (1999), 251 A.R. 291 at 297 (Q.B.), cited in Allan A. Fradsham, *Alberta Rules of Court Annotated 2004* (Toronto: Carswell, 2003) at 114 [Fradsham]. See also Garry D. Watson and John M. Barber, "Third Party Practice" (1970) 4 Ottawa L. Rev. 132 at 139.

[117] Fradsham, *ibid.* at 115 citing *Dilcon Constructors*, *ibid.*, citing *Birmingham and District Land Co. v. London and North Western Railway Co.* (1887), 34 Ch. D. 261.

(3) a third party claim may extend not only to other causes of action, but also to other types of relief, including "independent," although factually related, damage claims.

[124] The current Alberta Rule 66(1) is in category (2), but historically there were times when the Alberta rule fell within category (1) and category (3). At this time, in jurisdictions across Canada, none limit third party claims as in category (1); Newfoundland and Alberta are in category (2); all others are in category (3).

1. History of the issue in Alberta[118]

[125] Rule 48 of the 1914 Rules permitted a defendant who claimed to be "entitled to contribution, or indemnity over against any person ..." to make a third party claim. This permitted only claims for indemnity as such, not a claim by way of damages.[119]

[126] This was replaced by a much broader Rule 81 in the 1944 Rules:

> Where in any action a defendant claims as against any person whether or not already a party to the action (in these Rules called the third party):
>
> (a) that he is entitled to contribution or indemnity, or
>
> (b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or
>
> (c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and defendant but as between the plaintiff and defendant and the third party or between any or either of them,
>
> the defendant may serve a "third party notice."[120]

[127] Rule 81 was interpreted by the Alberta Appellate Division in *Patey v. Papley* as expanding the types of permissible claims not only to "contribution or indemnity" in their widest sense, rather than in the former technical sense, but also to permit claims

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[118] As discussed in *Dilcon Constructors*, *ibid.* at 316-317 cited in Fradsham *ibid.* at 115- 116).

[119] *Saskatchewan Co-operative Elevator Co. Ltd., v. Grand Trunk Pacific Ry. Co.*, [1923] 1 W.W.R. 145 (Sask. K.B.), cited in *Dilcon Constructors*, *ibid.* at 317, cited in Fradsham, *ibid.* at 115.

[120] Alberta, Supreme Court, *Rules of the Supreme Court of Alberta (Consolidated): effective 1st July 1944, as authorized by Order in Council* (Edmonton: King's Printer, 1944) at 16.

for other forms of relief which raise the same subject matter and a substantially similar issue.[121] The case involved a multi-vehicle collision in which two defendants (the owners of one vehicle) issued a third party notice against the other defendant, seeking contribution or indemnity for any damage that the plaintiff might recover against them, and also seeking damages for their own loss. The court held that the latter claim could properly be made by third party notice.

[128] In its review of the development of the third party rule in the 1994 case of *Dilcon Constructors Ltd. v. ANC Developments Inc.*, the Alberta Court of Appeal commented as follows:[122]

> That view seems to have gone too far for general acceptance. Indeed, it might be said that it warranted a third party proceeding that was but remotely connected to the original claim, and where trial together is not necessarily warranted.

[129] While this might be the result of the test proposed in *Patey v. Papley*, this criticism would certainly not apply to the result in that case, in which the respective claims were closely linked. If these claims were brought separately, they would be consolidated or tried together, which, the Court of Appeal suggested in *Dilcon Constructors*, is an indicator that third party proceedings are appropriate: "Third party procedure is a simple method of consolidation in cases that cry out for it."[123]

[130] In 1968, the Alberta rule was amended again. In its present form Rule 66(1) provides:

> When a defendant claims against any person (whether or not that person is already a party to the action) that the person is or may be liable to him for all or part of the plaintiff's claim against him he may serve a third party notice.

[131] Under the current rule all that can be claimed in the third party proceedings is relief against all or part of the plaintiff's claim, and not separate relief to the defendant directly. However, a third party claim is not limited to claims based on statutory and

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[121] (1956), 20 W.W.R. 289 at 293 (S.C. (A.D.)), cited in *Dilcon Constructors*, *ibid.* at 317 cited in Fradsham, *ibid.* at 115.

[122] *Ibid.* at 317, cited in Fradsham, *ibid*.

[123] *Ibid*.

contractual causes of action for contribution or indemnity as such. This was settled in *Dilcon Constructors*. The case involved a third party notice by a defendant by counterclaim. The defendant contractor counterclaimed against the plaintiff subcontractor for money paid to the subcontractor for extras which allegedly were not authorized. The subcontractor defended on the grounds that the contractor's engineers had authorized the extras, and also third-partied the engineers, claiming that if the extras were not authorized the engineers were in breach of warranty of authority. The claim was characterized by the court as a damages claim and not a claim for indemnity. Nonetheless, in view of the purpose of Rule 66 (to avoid a multiplicity of proceedings) and in view of the language of Rule 66 (which does not stipulate a claim for contribution or indemnity), this was a proper third party claim. This was justified because the "measure of the award to Dilcon against the third party ... would be the damage award in the suit by the plaintiff by counterclaim against Dilcon"[124] and "it [was] unthinkable that, if Dilcon ... issued a separate claim against the engineers, the two suits would not be consolidated or, at least, tried together."[125]

2. Rules of other jurisdictions

[132] As noted above, rules in other jurisdictions also permit a defendant to claim against a third party damages separate from the defendant's liability to the plaintiff. Ontario Rule 29.01 permits a claim "for an independent claim for damages" that is connected with the main claim. British Columbia Rule 22(1) permits connected claims for "any relief" against a third party, and the Federal rules permit such claims with leave of the court (Rule 194).

[133] The former Ontario Rule167 was similar in effect to Rule 66 – a third party claim was available only in respect of claims for contribution or indemnity "or other relief over." The latter phrase did not permit the assertion of a claim that was independent of the outcome in the main action. But the new rule clearly permits this:

> 29.01 A defendant may commence a third party claim against any person ... who,
>
> (a) is or may be liable to the defendant for all or part of the plaintiff's claim;

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[124] *Ibid.* at 316, cited in Fradsham, *supra* note 116 at 114-115.

[125] *Ibid.* at 317, Fradsham, *ibid.* at 115.

> (b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of,
>
> (i) a transaction or occurrence or series of transactions or occurrences involved in the main action, or
>
> (ii) a related transaction or occurrence or series of transactions or occurrences; or
>
> (c) should be bound by the determination of an issue arising between the plaintiff and defendant.[126]

[134] Holmested and Watson comment on the change to the broader rule as follows:

> The significance of this change should not be underestimated. It changed the very nature of a third party claim. No longer is it limited to situations designed to obtain "a flow through of recovery" to D from the third party because of the judgment that the plaintiff may obtain against the defendant. Instead, it is a general joinder device by which a defendant may engraft on to the main action any "related claim" he or she may have against non-parties, subject to the [severance] power given to the court ...[127]

[135] Other than Alberta, only Newfoundland restricts third party claims to relief with respect to the defendant's liability to the plaintiff.[128] Other jurisdictions have rules that are virtually identical to Ontario's[129] or differently worded, but with similar effect.[130] For example, British Columbia Rule 22 provides for a third party notice where:

> (a) the party is entitled to contribution or indemnity from the third party in respect of a claim made against the party in the action,
>
> (b) the party is entitled to any relief against the third party relating to or connected with the original subject matter of the action, or
>
> (c) a question or issue relating to or connected with any relief claimed in the action or with the original subject matter of the action is substantially

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[126] The rules of Manitoba, r. 29.01; Nova Scotia, r. 17.02; New Brunswick, r. 30.01 and Prince Edward Island r. 29.01 use virtually identical language.

[127] *Supra* note 5, vol. 3 at 29-7.

[128] Newfoundland, r. 12.02.

[129] Prince Edward Island, r. 29.01; New Brunswick, r. 30.01; Manitoba, r. 29.01; Nova Scotia, r. 17.02 and Saskatchewan, r. 107.

[130] British Columbia, r.22; Northwest Territories, r. 142(1).

> the same as a question or issue between the party and the third party and should properly be determined in the action.[131]

[136] Federal Rules 193 and 194 take an interim position. Under Rule 193 a third party claim may be brought without court leave where the claim is with respect to the defendant's liability to the plaintiff. Under Rule 194 court leave is required to bring a claim against a third party whom the defendant claims:

> (a) is or may be liable to the defendant for relief, other than that referred to in rule 193, relating to the subject-matter of the action; or
>
> (b) should be bound by the determination of an issue between the plaintiff and the defendant.

POSITION OF THE GENERAL REWRITE COMMITTEE

[137] The General Rewrite Committee proposes to bring Alberta's rule in line with those in almost all other Canadian jurisdictions. Provided independent claims are sufficiently related to the main action, there is no reason not to permit them to be included in a third party notice. "Third party procedure is a simple method of consolidation in cases that cry out for it."[132]

[138] The Committee recognizes, as was observed regarding the 1985 Ontario rule, that this is a significant change, altering "the very nature of a third party claim," in that the claim would no longer be limited to "a flow through of recovery," but would become a "general joinder device by which a defendant may engraft on to the main action any 'related claim' he or she may have against non-parties, subject to the severance power given to the court."[133] However, it is not only a change that has been adopted in the great majority of Canadian jurisdictions, it is also a change that promotes the Rules Project objectives of efficiency (by avoiding a multiplicity of proceedings) and simplicity (by providing a simple method of consolidation). The Committee therefore believes that this is a warranted change to the rule.

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[131] The rules of New Brunswick, r. 30.01; the Northwest Territories, r. 142 and Saskatchewan, r. 107 are similar.

[132] *Dilcon Contractors*, *supra* note 116 at 317, cited in Fradsham, *supra* note 116 at 115.

[133] Holmested & Watson, *supra* note 5, vol. 3 at 29-7.

C. Time Limit

ISSUE No. 27
Should the present time limit for the filing of a third party notice be retained or modified?

1. Rules time limits

[139] There is a variety of approaches to time limits to file a third party notice throughout Canadian jurisdictions.

[140] Alberta Rule 66(4) provides that a third party notice must be filed within six months from the time the defendant has filed a statement of defence or demand of notice provided that the defendant has not been noted in default or had judgment entered against him or her. Once filed, the defendant has 30 days to serve the third party notice.[134]

[141] Alberta's rule is the result of a 1981 amendment. Prior to that, third party notices had to be filed at or before the time of filing the statement of defence.[135] The change allows the defendant time for "a measure of discovery and investigation, if he is prompt."[136]

[142] Most Canadian jurisdictions have shorter time limits than Alberta. The Federal Rules provide that a third party claim is to be issued within the time for serving a statement of defence. Ontario, Manitoba, New Brunswick, and Prince Edward Island allow 10 days after delivery of a statement of defence, or 10 days after the prescribed time for delivery of a statement of defence, or any time before the defendant is noted in default. Provision is made for court extension of these time limits. Nova Scotia and

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[134] The time limit to file a third party notice in the Northwest Territories, rr. 142 and 143, is the same as in Alberta.

[135] This was the provision in the 1968 revision to the Rules, r. 66(4). Prior to that, third party notices had to be filed and served "within the time limited for delivering the defence" (15 days). See the discussion in *Dean v. Kociniak* (2001), 289 A.R. 201, 2001 ABQB 412 paras. 13-16.

[136] Stevenson & Côté, *Handbook*, *supra* note 16 at 74.

Newfoundland allow a defendant, without leave, to issue a third party notice before the defendant files a statement of defence and, with court leave, thereafter.

[143] Two provinces take a more generous approach to the time limit to issue a third party notice. In British Columbia, a defendant may file a third party notice without leave at any time before a notice of trial has been delivered, or after notice of trial, but more than 120 days before a scheduled trial date. With court leave, a third party notice may be filed at any time. Saskatchewan allows a third party notice to issue at any time before filing a joint request to the local registrar to assign a pretrial conference date; or where no such request has been filed, within 10 days of service of a notice of motion for an order that a pretrial conference be held. The Court may also grant permission to issue a third party notice at any time with leave.

2. Limitation periods

[144] Limitation periods are not within the mandate of the Rules Project. But the interaction of Rule 66 and limitation periods has been an issue in the case law, and the topic is therefore addressed with a view to informing a proper approach to potential reform of the rule.

[145] Limitation periods and their interaction with the rules changed significantly with the introduction of the new *Limitations Act*.[137] The new Act came into force on March 1, 1999. It included a transitional period, under which claimants were bound by either the time limited by the old *Limitation of Actions Act*,[138] or two years after the coming into force of the new Act, whichever is earlier. This transitional period expired on February 28, 2001.

[146] Only the new Act will be considered for purposes of rules reform. But the situation under the old Act will also be briefly described, to set the discussion of the new Act in context.

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[137] R.S.A. 2000, c. L-12.

[138] R.S.A. 1980, c. L-15.

[147] The various time limits for third party claims under the old and new Acts and Rule 66 were discussed in detail by Slatter J. in *Dean v. Kociniak.* The summary set out below is drawn in large part from that decision.

[148] Under the old *Limitation of Actions Act* the limitation period for claims for contribution or indemnity differed for common law and statutory claims. A defendant's cause of action for contribution or indemnity under the common law arose only when he or she was held liable to the plaintiff.[139] The limitation period (the default six-year period in the old Act) ran from that time, and thus was almost never a cause for concern.[140] But a defendant's statutory cause of action for contribution under the *Tort-Feasors' Act*[141] commenced and the limitation period commenced to run on the same date as the plaintiff's cause of action. This was the holding of the Alberta Court of Appeal in *CDIC v. Prisco*, based on the rationale that the claim is derivative, in the sense that "the defendant can invoke against the third party only the claim that the plaintiff might have brought but did not."[142] Thus, if the plaintiff sued "late" (close to the expiry of the limitation period) a defendant who wished to third party would be barred by the expiry of the same limitation period. This problem was alleviated with respect to shorter limitation periods applicable to tort actions for personal injury and damage to property by s. 60 of the *Limitation of Actions Act,* which provided that the "lapse of time limited by this Part" was no bar to third party proceedings. However, there was no relief with respect to the longer limitation periods under the Act.[143]

[149] The new *Limitations Act* also provides relief from limitation periods respecting third party notices (and other claims added to a proceeding) under s. 6 of the Act:

> 6(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.

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139 *Korte v. Deloitte, Haskins and Sells* (1993), 135 A.R. 389 (C.A.).

140 Stevenson & Côté, *Handbook*, *supra* note 5 at 75.

141 R.S.A. 1980, c. T-6.

142 (1996), 181 A.R. 161 at para. 10 (C.A.) [*Prisco*].

143 *Ibid.* is an example, as discussed in *Dean v. Kociniak*, *supra* note 135 at para. 11.

> (4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,
>
> (a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding, and
>
> (b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.

[150] In one sense this provision is broader than the old s. 60 – as it applies to all limitation periods, not only those for tort actions for personal injury and damage to property. But in another sense, the new provision is more restrictive – it permits late third party notices on two conditions. Not only must the added claim be related to the conduct, transaction or events described in the original proceeding (as was also the case under the old s.60), but in addition *the added defendant must have had sufficient knowledge of the claim within the limitation period applicable to the added claim plus the time provided by law for service*. With a third party who has not previously been a party to the action, it may be that no knowledge of the claim will have been passed on to the third party in advance of the service of the third party notice. In this case there may be no relief from the expiry of the limitation period under s. 6.[144]

[151] This makes all the more important the primary issue addressed by Slatter J. in *Dean v. Kociniak*, namely, the limitation period for a claim for contribution or indemnity under the new *Limitations Act.* As the Act provides one primary limitation period (two years from discoverability) for all types of actions, the crucial question is when that limitation period commences to run, and particularly when it commences to run for statutory causes of action for contribution under the *Tort-Feasors' Act.*

[152] As discussed by Slatter J., it can be argued on one hand that *Prisco* should continue to govern, as it was based on the *Tort-Feasors Act*, which has not been amended by the *Limitations Act.*[145] On the other hand, both the language and spirit of the new Act suggest that the limitation period for a defendant's claim for contribution

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[144] *Dean v. Kociniak*, *ibid.* at para. 27.

[145] *Ibid.* at para. 25.

should run from the discoverability of *that* claim.[146] Slatter J. concluded that, under the new Act, the limitation period for an action for contribution does not commence when the plaintiff is hurt, but when the defendant knows, or ought to have known, of a potential claim for which contribution might be sought.[147] He held that the new Act operates in similar fashion to Rule 66(4), in that the limitation period starts running when the plaintiff serves the statement of claim, or otherwise notifies the defendant, as this is when the defendant should be putting his or her mind to the question of contribution from other parties.[148] Thus, it is likely that so far as the *Limitations Act* is concerned, the defendant will have two years from the date of service of the statement of claim to bring a separate action or, subject to the Rules, to add a third party, although the law has not yet been definitively settled.

[153] The issue in *Dean v. Kociniak* has not yet been expressly addressed by the Alberta Court of Appeal.[149]

[154] Assuming *Dean v. Kociniak* is correctly decided, the new *Limitations Act* will provide adequate time for the commencement of third party proceedings, either within the 6-month time limit, or within an extended time approved by the court.[150] If it is not, and the third party claim must be brought within the limitation period applicable to the plaintiff's claim, this requirement, combined with the restricted application of s. 6 as discussed above, may put defendants of a late suing plaintiff at a serious disadvantage.

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[146] *Ibid.* at paras. 19-22, noted that the *Limitations Act, supra* note 137 does not deal specifically with when the primary limitation starts to run for a contribution claim, although s. 3(3)(e) does provide that such a claim "arises" for purposes of the ultimate limitation period when the claimant is made a defendant in respect of or incurs liability through the settlement of the main claim. Under s. 3(1)(a), a claimant must seek a remedial order within 2 years of discoverability of "the injury for which the claimant seeks a remedial order."

[147] *Dean v. Kociniak, ibid.* at para. 35.

[148] *Ibid.* at para. 32.

[149] In *Wallace v. Litwiniuk*, 2001 ABCA 118, issued three days before *Dean v. Kociniak, ibid.*, the Court of Appeal appeared to assume the continued application of *Prisco, supra* note 142 but did not discuss whether the new *Limitations Act, supra* note 137 had any application in the case.

[150] *Dean v. Kociniak, ibid.* at para. 52 refers to Moreau J.'s extensive review of the case law on late Third Party notices in *Flight v. Dillon*, 2001 ABQB 211 at paras. 18 and 28.

3. Relationship of Rule 66(4) and limitation periods

[155] Slatter J. suggested, in dicta, that Rule 66(4) provided some relief to defendants of late suing plaintiffs from limitation periods:

> Rule 66(4) provides that a Defendant can issue a Third Party Notice within six months of filing its defence. A claim for contribution in such a Third Party Notice is deemed by the law to be within time, even if the primary limitation period which runs against the Plaintiff has expired. This is a general remedial provision.[151]

[156] He cited *Prisco* and the earlier Alberta appellate decision in *J.R. Paine & Assoc. Ltd. v. Strong, Lam & Nelson Ltd.*[152] in support of this position.

[157] As useful as such a remedial provision might be, there are substantial difficulties with attributing this kind of effect to Rule 66(4). Neither *Paine* nor *Prisco* provide clear support for this.

[158] In *Paine*, the challenged third party notice had been filed a few days after the then existing rules limit. While the late filing under the rules was noted, the decision focussed exclusively on the provisions of the *Tort-Feasors Act* and the *Limitation of Actions Act* (including s. 60, which saved the third party notice). There was no suggestion that filing within the rules time limit would have provided immunity from the expiry of the limitation period.

[159] In *Prisco*, the Court of Appeal made the following comment, which likely underlies Slatter J.'s conclusion:[153]

> The best solution, rather obviously, would be a special time limit for defendants who would add third parties, one that dates not from the time the cause of action arose but from the filing and serving of the plaintiff's claim. In most cases, the time permitted under the rules should be sufficient. This is, by Rule 66(4), six months. This would offer a reasonable chance to a defendant without unduly extending the original cause. Unsurprisingly, amendments like this are now in place in several places.... (Perhaps I should add that the appellant failed also to meet this deadline.)

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[151] *Dean v. Kociniak*, *ibid.* at para. 11.

[152] (1979), 18 A.R. 112 (C.A.).

[153] *Supra* note 142 at paras. 17 and 18.

> In Alberta, also, there is legislative relief, but it applies only to actions for personal injury or injury to property. See s. 60(1) *Limitation of Actions Act.*

[160] This reference to Rule 66(4) seems to have been as a model for a potential legislative amendment, one that *did not* exist in Alberta for the type of claim involved in that case. The parenthetical comment that the rules deadline was not met does not indicate that, had it been met, the limitation period would not apply.[154]

[161] Apart from the difficulties of relying on *Paine* and *Prisco*, there are other reasons to doubt that Rule 66(4) would provide relief from a limitation period. It certainly does not do so explicitly. Further, in a conflict between statute law and a regulation, the statute prevails.[155] Limitation periods are now characterized as substantive law,[156] while the Rules deal with practice and procedure.[157] The legislative ratification of the Rules means that they can have some impact on matters of substance, but they should probably be interpreted as primarily concerned with procedure.[158] So interpreted, Rule 66(4) would provide an additional time limit applicable to claims that are brought by third party notice (as opposed to separate action) and not a remedial provision vis-à-vis a limitation period.

POSITION OF THE GENERAL REWRITE COMMITTEE

[162] The Committee proposes to retain the current 6-month time limit for filing a third party notice. This period provides a reasonable period of time for a defendant to discover the details of the claim against it and to investigate possible claims against third parties. A shorter time limit would likely result in an increased need to obtain

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[154] It is also inconsistent with the comment of the Queen's Bench justice who heard the application, who noted that the "Third Party Notice of Oland's proceedings was filed on the 16th November, 1992, just within the six-month period required under the provisions of r. 66(4)": *CDIC v. Prisco* (1995), 170 A.R. 388, [1995] A.J. No. 377 at para. 10 (Q.B.).

[155] *Strathcona No. 20 v. Alberta (Assessment Appeal Board)* (1995), 165 A.R. 300 para. 15 (C.A.); *FFM Holdings v. Lildale*, [2001] 7 W.W.R. 223 at para. 25, 2001 ABCA 9.

[156] *Jenson v. Tolofson*, [1994] 3 S.C.R. 1022 at 1072.

[157] *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, s. 20(1).

[158] *Canadian Reform Conservative Alliance Party, Portage-Lisgar Constituency Assn. v. Harms* (2003), 35 C.P.C. (5th) 261, 2003 MBCA 112 [*Harms*].

court orders permitting the late filing of third party claims; a longer time limit might result in trial delays. The 6-month period seems to be a sensible compromise. Neither the Bar nor the Bench expressed concerns about this time limit in the Legal Community Consultation.

[163] The Committee's recommendation is not based on nor intended to address any concerns relating to limitation periods. If the *Dean v. Kociniak* approach to the *Limitations Act* is applied, there is no need for a remedial provision vis-à-vis the limitation period for a third party claim. If the case law develops otherwise, the Committee is of the view that a remedial provision in the Act, rather than in the rules, would be the appropriate course of action.

4. Extension of rules time limit

ISSUE No. 28
Should the provision for court leave for late filing of a third party notice be changed in any way?

[164] If the six-month time limit is missed, the court is given discretion under the rules to allow the late filing of a third party notice. There is no special provision in this regard; the general authority to enlarge rules' time limits under Rule 548 applies. The defendant must establish a reasonable excuse for needing an extension of time, and that the extension will prejudice neither the third party nor the plaintiff. The defendant may also be required to provide evidence showing that the third party claim is well-founded. Reasons for a court refusing to extend time have included inordinate delay, an absence of a credible excuse, and prejudice. An application for an extension after the six-month time frame does not require the defendant to advance a reasonable excuse before any consideration of prejudice comes into play. In the case of a short delay, the court will focus primarily on whether prejudice exists. However in cases of a significant delay, the lack of a reasonable excuse for the delay may be fatal to an application for an extension.[159]

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[159] *Dean v. Kociniak, supra* note 150.

[165] In some other jurisdictions, there are special rules for the extension of time for third party claims. In Ontario a third party claim may be issued late (i.e., more than 10 days after the statement of defence) "with the plaintiff's consent or with leave, which the court shall grant unless the plaintiff would be prejudiced thereby."[160] In British Columbia, third party claims may be filed without court leave at any time before notice of trial or 120 days before the scheduled trial date, and with court leave after that time.[161] The rule does not specify what factor or factors govern the granting of leave.

POSITION OF THE GENERAL REWRITE COMMITTEE

[166] Generally speaking, the Committee prefers a smaller number of rules of general application, rather than a larger number of specialized rules. While a special rule relating to the extension of time for filing a third party notice could be adopted, there does not seem to be any clear advantage to this. The Committee therefore recommends that late filing of a third party notice continue to be provided for by reference to the court's general discretionary authority to extend rules' time limits.

D. Contents and Form of a Third Party Notice

ISSUE No. 29
Should there be any changes to the rules regarding the content and form of a third party notice?

[167] Alberta's Rule 66(2) requires that the nature and grounds of the claim must be stated. Rule 66(3) requires the inclusion of a notice to the same effect as Form C to be at the foot or end of the third party notice. The definition of "pleadings" in Rule 5(1)(m) does not specify that a third party notice is a pleading, but it has been held to be one.[162]

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[160] Ontario, r. 29.02(1.2).

[161] British Columbia, r. 22(3).

[162] *Misercordia Hospital v. Acres Consulting Services Ltd.* (1980), 14 Alta. L.R. (2d) 140 at 145 (Q.B. Master), cited in Fradsham, *supra* note 116 at 113.

[168] One commentator in the Legal Community Consultation noted that there is inconsistency in practice as to whether the third party name is included in the style of cause of a third party notice.

POSITION OF THE GENERAL REWRITE COMMITTEE

[169] The Committee recommends that the new rules make explicit that third party notices are pleadings, and that the third party name should be included in the style of cause.

E. Service of the Third Party Notice

ISSUE No. 30
Should there be any changes to the rules regarding service of a third party notice?

[170] Alberta's Rule 66(4) provides that a third party notice must be served within 30 days of filing. Rule 67 requires that a third party claim be served upon the plaintiff's solicitor within five days after being filed. Rule 70 treats a third party notice as a commencement document for the purpose of serving a third party notice *ex juris*.

POSITION OF THE GENERAL REWRITE COMMITTEE

[171] No changes, other than redrafting (including perhaps relocation and a more general statement of Rule 70), are recommended.

F. Motion to Set Aside

ISSUE No. 31
Should there be any changes to the rules regarding setting aside a third party notice?

[172] Alberta's Rule 68 allows a third party to make a motion to set aside a third party notice before he defends. A plaintiff may also move to set aside a third party notice at

any time. Some other jurisdictions do not have a similar specific rule; challenges to third party claims are brought as applications to stay or strike out the claims.[163]

[173] Rule 68's application to the plaintiff recognizes the fact that a third party becomes a *de facto* defendant for the purpose of disputing the defendant's liability to the plaintiff. The rule does not preclude an application by the third party to strike a third party notice after a defence to it has been filed, as the filing of a defence and the passage of time cannot serve to legitimize a third party notice that is groundless.[164]

POSITION OF THE GENERAL REWRITE COMMITTEE

[174] The Committee recommends that Rule 68 be retained because it indicates the plaintiff's status to bring a motion too.

G. Fourth and Subsequent Party Claims/Third Party Claims Within Counterclaims

[175] Under Rule 69, a third party may claim against a fourth party as though the third party were a defendant. Third party procedure rules apply *mutatis mutandis* to subsequent claims so far as is possible. Third party claims may also be made by defendants by counterclaim (Rule 79). All Canadian rules are to similar effect.[165] No concerns regarding these rules were raised, and no changes are proposed.

H. Defending the Main Action by the Third Party

ISSUE No. 32
Should there be any changes to the form or content of a defence to third party notice?

[176] Rule 71 provides that a third party may dispute his own liability or the liability of the defendant or both. Failure to dispute the liability of the defendant has the effect of a deemed admittance by the third party to the validity of any judgment against the

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[163] *E.g.*, Ontario, r. 25.11.

[164] *Herr v. Herr* (1991), 80 Alta. L.R. (2d) 328 (Q.B.) at 334 cited in Fradsham *supra* note 116 at 129.

[165] See Alberta, rr. 69 and 79; Ontario, rr. 29.11, 29.12 and 29.13; and Federal, r. 170. British Columbia, r. 22(1) provides that a third party notice may be filed by "a party of record who is not a plaintiff."

defendant. Likewise, failure to dispute the third party's own liability has the effect of a deemed admittance of that liability as alleged. Rule 71 thus creates exceptions to the usual pleadings rule that silence does not amount to an admission.[166]

[177] The purpose of Rule 71 is to prevent a defendant who may have nothing to lose by admitting liability from doing so to the prejudice of a third party who is ultimately liable. Parties who may become liable should be given the opportunity to defend the plaintiff's claim against the defendant regardless whether the defendant admits liability to the plaintiff.[167]

[178] Ontario and British Columbia rules are similar in effect but different in form. They provide for the filing by the third party of a statement of defence in the main action.

[179] Rule 71 also deals with the time for defence and with the right to and time for reply by the plaintiff.

POSITION OF THE GENERAL REWRITE COMMITTEE

[180] Ontario and British Columbia rules are different in form, but not in substance. No concerns have been raised regarding the Alberta practice, so no change is recommended.

I. Rights of a Third Party After Defending

[181] Under Rule 75, a third party filing a defence becomes entitled to service of all subsequent pleadings and proceedings, as well as production of documents, and examination for discovery of all parties with whom the third party has an issue or issues. No concerns were raised regarding this rule and no changes are recommended.

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[166] ALRI CM 12.8, *supra* note 10 at 39-42.

[167] *Misercordia Hospital v. Acres Consulting Services Ltd.*, *supra* note 162; *Metz v. Breland* (1991), 76 Alta. L.R. (2d) 397 at 398 (C.A.); and *Edmonton Savings & Credit Union Ltd. v. Wruk* (1986), 45 Alta. L.R. (2d) 285 at 287-88 (Q.B. Master), all cited in Fradsham, *supra* note 116 at 131.

J. Trial/Severance of a Third Party Claim

ISSUE No. 33
Should there be any changes to the rules regarding trial or severance of a third party claim?

[182] Rule 75(2) provides that the normal practice is that the third party joins the trial of the main action, but if doing so will cause hardship to the plaintiff, the court may give alternative directions as necessary. Rule 76 adds that such an order may be varied or rescinded at any time. Under Rule 75(2) the court may sever a third party claim so as to allow the main action to proceed unencumbered by issues that only concern the defendant and the third parties.[168] With the addition of fourth and fifth parties, the proceedings become increasingly complex. Deciding how to proceed and in what order may become contentious. Rule 76 gives the court the discretion to adapt its directions to alleviate and prevent confusion.[169]

[183] Ontario rules are similar to Rule 75(2), but make explicit reference to the possibility of having the third party action tried immediately after the main action, or proceeding as a separate action, as well as making a general provision for directions.[170] Ontario has no equivalent to Rule 76.

POSITION OF THE GENERAL REWRITE COMMITTEE

[184] Generally speaking, the Committee prefers a smaller number of rules of general application, rather than a larger number of specialized rules. Rather than a specific rule providing relief against joinder of third party claims, the general relief against joinder of claims rule should be made applicable to the trial of third party claims. Some form of cross-referencing, so that someone reading the third party rules would be aware of this, might be advisable.

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[168] *Alberta Treasury Branches v. Jackson and Wood* (1988), 87 A.R. 7 at 16 (Q.B. Master), cited by Fradsham, *ibid.* at 134.

[169] Stevenson & Côté, *Handbook*, *supra* note 16 at 78.

[170] Ontario, rr. 29.08-29.10.

K. Third Party in Default

[185] Rules 72-74 will be addressed later, in the examination of the rules regarding default procedure.

L. Claims Against Co-defendants

ISSUE No. 34
Should there be any changes to the rules regarding notice to co-defendants?

[186] It is unnecessary in Alberta, under Rule 77, for a defendant to serve a third party notice on a co-defendant if all that is sought is contribution or indemnity pursuant to the *Tort-feasors Act* or the *Contributory Negligence Act*. A defendant may file and serve a notice claiming such relief within 10 days of filing a defence or demand of notice.

[187] In Ontario a defendant seeking contribution or indemnity under the *Negligence Act* against the plaintiff, or against the plaintiff and another person, does so by way of counterclaim.[171] Claims against co-defendants are by way of cross-claim, dealt with below. In British Columbia, a defendant seeks indemnity or contribution pursuant to the *Negligence Act* against a plaintiff by means of a counterclaim, and against any other person, whether or not a party to the action, by a third party claim.[172] However, a co-defendant against whom a claim for contribution or indemnity under the *Negligence Act* has been made may rely on her statement of defence to the plaintiff's claim, rather than filing a separate statement of defence to the third party claim.[173]

[188] Alberta's Notice to Co-Defendant as compared with Ontario's Cross-Claim follows.

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[171] Ontario, r. 27.01.

[172] British Columbia, r. 22(14). R. 22(15) states that where a person does not claim contribution or indemnity under the *Negligence Act*, but does claim an apportionment of liability under the Act shall make such a claim in the statement of defence.

[173] British Columbia, r. 22(16).

Where available

[189] Using Rule 77 notice is not mandatory as one can also avail oneself of ordinary third party notice procedure under Rule 66 but is available as a simpler modus operandi for limited types of claims against a co-defendant - claims for contribution or indemnity under either the *Tort-Feasors Act* or the *Contributory Negligence Act*. In Ontario, third-party claims are limited to those against non-parties. All claims against co-defendants are made by way of cross-claim. Potential claims against co-defendants are described in the same terms as potential claims against third parties. In addition to claims for contribution or indemnity under the *Negligence Act,* Rule 28.01 provides that a defendant may cross-claim against a co-defendant who:

- is or may be liable to the defendant for all or part of the plaintiff's claim;
- is or may be liable to the defendant for an independent claim for damages or other relief arising out of,
    - (i) A transaction or occurrence involved in the main action, or
    - (ii) A related transaction or occurrence, or
- should be bound by the determination of an issue arising between the plaintiff and the defendant.

Time limit to file cross-claim

[190] Under Rule 77, a defendant may, within 10 days after filing a defence or demand of notice, file and serve on a co-defendant a claim for contribution or indemnity.

[191] Rule 28.04 states that a cross-claim must normally be served within the time to serve a defence (subject to court extension).

What needs to be filed

[192] Under Rule 77, it is not requisite that the defendant file any pleadings in respect of a claim for contribution or indemnity unless otherwise ordered.

[193] Rule 28.02 requires the cross-claim to be included with the statement of defence. Rule 28.03 allows a defendant to amend its statement of defence to include a cross-claim.

Trial of the cross-claim

[194] Under Rule 77, a claim for contribution or indemnity shall be determined at the trial of the main action. Under Rule 28.10, the cross-claim shall be tried at or immediately after the trial of the main action, unless the court orders otherwise. Rule 28.10, however, provides relief to a plaintiff that may be prejudiced or unnecessarily delayed by the cross-claim procedures. In its discretion, the court may order severance of the cross-claim from the main action, allowing the cross-claim to proceed as a separate action where such may be done without injustice to the parties to the cross-claim.

[195] The remaining subsections of Rule 28 provide procedures analogous to third party procedure, dealing with defences to a cross-claim and to the main action. (A defence is not required where a cross-claim only seeks contribution or indemnity under the *Negligence Act*, the defendant has delivered a statement of defence in the main action, and the defendant to the cross-claim relies on the same facts alleged in the defendant's statement of defence. If no defence is filed in response to a cross-claim, the defendant to the cross-claim is deemed to deny the allegations of the cross-claim and to rely on the facts pleaded by the defendant in the main action.)

POSITION OF THE GENERAL REWRITE COMMITTEE

[196] No concerns were raised regarding Rule 77, and Ontario's cross-claim procedure does not appear to simplify procedure or provide other clear benefits. Therefore, the Committee recommends retaining the current Alberta procedure rather than introducing new terminology.

CHAPTER 6 COUNTERCLAIMS

A. Introduction

[197] The purpose of the counterclaim rule, like other rules joining parties and claims in one proceeding, is to avoid a multiplicity of proceedings. Combining proceedings results in benefits in terms of convenience and cost, and avoids inconsistent judgments.

B. Nature of and Parties to a Counterclaim

ISSUE No. 35
Should there be any change to the rules regarding who can bring a counterclaim, against whom, and regarding what types of claims?

[198] Under Rule 93(1), a defendant may bring a counterclaim against a plaintiff alone, or against a plaintiff and another person whether a party to the action or not. Where a non-party is added as a defendant by counterclaim she is to be served and then becomes a party with rights analogous to a defendant.

[199] As to the type of claim that may be brought by counterclaim, Alberta Rule 5(f) refers to "such a claim as might have been made by statement of claim in an independent action," making no distinction between persons already parties and those who are not. Case law provides that where parties are identical the counterclaim need not be related to the main action.[174] When a new party is added as a defendant by counterclaim, the cases divide between pre- and post-1991. In 1991 s. 17(3)(b) of the *Judicature Act*[175] was repealed. That provision indicated that there should be a relationship or connection between the relief sought in the counterclaim and that in the statement of claim. Post-1991, in the absence of that provision, the only restriction is

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[174] Fradsham, *supra* note 116 at 153, citing *Grenke v. Sookermany* (1986), 75 A.R. 300 at 305 (Q.B. Master). However, if the limitation period for the claim has expired, the requirement of the *Limitations Act*, *supra* note 137, s. 6(2) that the claim be "related to the conduct, transaction or events described in the original pleading in the proceeding" (the relationship requirement) would have to be met.

[175] R.S.A. 1980, c. J-1.

that the claim and counterclaim must be such that they can be conveniently disposed of in the same action.[176] This limitation is implicit in Rule 95 which provides for the severance of a counterclaim.

[200] Ontario rules are to the same effect. Rule 27.01 provides that a counterclaim against the plaintiff may be for "any right or claim" and that a counterclaim may be brought against a person not a party who is a necessary or proper party "to the counterclaim." This changed a requirement of the pre-1985 rules that the counterclaim relate to or be connected with the original subject matter of the plaintiff's claim.[177] The court has discretion to order that a counterclaim be tried separately or proceed as a separate action if it would unduly complicate or delay the main action.[178]

[201] While non-parties may be joined in an action as defendants by counterclaim, there is no provision to add non-parties as plaintiffs by counterclaim.[179] Only a defendant can bring a counterclaim. In *Saskatchewan v. Buskas*,[180] a defendant in a motor vehicle claim filed a defence and counterclaim after the expiry of the applicable limitation period. His wife, who was a passenger at the time of the accident, was named as an additional plaintiff by counterclaim. The court held that the defendant's counterclaim was properly "issued" under s. 60(1) of the *Limitation of Actions Act*,[181] but that the wife's counterclaim was not properly "brought" under the rules of court. The *Limitation of Actions Act* permitted a counterclaim by a defendant outside of the limitation period, but the rules did not allow a person other than a defendant to bring a

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[176] Fradsham, *supra*, note 116 at 153-155, citing *Pockar Bros. Masonry Ltd. v. Hilberta Construction Co.* (1978), 6 Alta. L.R. (2d) 289 (C.A.); *Midas Equipment Ltd. v. Zellers Inc.* (1989), 100 A.R. 52 at 55 (Q.B); and *Firemaster Oilfield Services Ltd. v. Safety Boss (Canada) (1993) Ltd.* (1994), 152 A.R. 148 at 154 (Q.B. Master). However, if the limitation period for the claim made in the counterclaim has expired, the requirements of the *Limitation Act*, *supra* note 137, s. 6(4) namely the relationship requirement and the requirement that the added defendant by counterclaim have received "sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits", would have to be met.

[177] Holmested & Watson, *supra* note 5, vol. 3 at 27-7.

[178] Ontario, r. 27.08.

[179] Fradsham, *supra* note 116 at 152.

[180] [1973] 3 W.W.R. 4 (Alta. S.C. (T.D.)).

[181] *Supra* note 138, s.60(1).

counterclaim. Therefore non-parties could not take advantage of s. 60 and circumvent the limitation period.

[202] Under the new *Limitations Act*,[182] s. 60(1) has been replaced by s. 6 which deals in a generic fashion with the addition of claims and parties to an action. The objective of the section has been described as follows:

> When a proceeding has been started by a timely claim, the parties will often wish to add further claims which are subject to a limitations defence. If the added claims are related to the conduct, transaction or events described in the original pleading in the proceeding, it will often be desirable, for reasons of justice and efficiency, to have them tried in a single proceeding with the original claims. The new Alberta Act will deprive a defendant of a limitations defence he would normally have to an added claim in the situation we have described, but only if requirements designed to give the defendant alternative limitations protection have been satisfied.[183]

Under s. 6, all added claims must be related to the conduct, transaction or events that are the subject of the original proceeding (the relationship requirement). Where new parties are added, whether as claimants or defendants, the defendant must have received sufficient knowledge of the added claim within the limitation period so that he will not be prejudiced in his defence (the knowledge to prevent prejudice requirement). Respecting new claimants only, there is an additional requirement. The addition of new claimants after an expired limitation period is permitted only where this is "necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding" (the original claim requirement). The intention behind the original claim requirement is to prevent a "nondiligent claimant" from slipping an "untimely claim" into an ongoing action. For example, the wife's claim in *Saskatchewan v. Buskas*[184] would not satisfy the original claim requirement:[185]

> [A]ssume that C1 brought a timely claim against D to recover for personal injuries suffered in an automobile accident, and that later C2, a

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[182] *Supra* note 137.

[183] Alberta Law Reform Institute, *Limitations* (Report No. 55) (Edmonton: Alberta Law Reform Institute, 1989) at 41-42.

[184] *Supra* note 180

[185] Alberta Law Reform Institute, *Limitations* (Report for Discussion No. 4) (Edmonton: Alberta Law Reform Institute, 1986) at 267.

> copassenger in the car driven by C1, sought to add an untimely claim against D to recover for C2's personal injuries. C2's claim would probably satisfy the relationship requirement, and it might satisfy the knowledge to prevent prejudice requirement. However, C2's claims would be based on a different injury from that suffered by C1, and C2's added claim would not be necessary to ensure the effective enforcement of the original claim brought by C1. We do not believe that D should be deprived of a limitations defence to the untimely claim of C2.

[203] Thus, under s. 6(3), the addition of claimants after the expiry of a limitation period is allowed only when a claimant has been misdescribed or incorrectly selected for the purpose of pursuing the originally intended claim. For example, the mistaken naming of a related corporation could be corrected, or a parent could be added to a suit brought on behalf of a child in which expenses incurred by the parent have been claimed. In both cases the substitution of the correct claimant would permit effective enforcement of the original claim, not the addition of a new claim.

POSITION OF THE GENERAL REWRITE COMMITTEE

[204] The Committee does not recommend any change to the rules with respect to the nature of counterclaims, or parties to counterclaims. The Committee did consider whether Rule 93 should be broadened to permit the addition of a plaintiff by counterclaim. Where a limitation period has expired, the addition of a plaintiff by counterclaim would be subject to the requirements of s. 6(3) of the *Limitations Act* (i.e., the relationship, knowledge to prevent prejudice and original claim requirements would have to be met). However, the relief that would be properly provided by this change would be quite limited, as s. 6(3) was not intended to allow the introduction of strangers to litigation. Further, such an expansion of the counterclaim rule would be unprecedented. The rules of all Canadian common law jurisdictions provide that only defendants may bring counterclaims. This is also the case in the new English and Queensland Civil Procedure Rules.[186] The Committee was concerned that such a change to the rules might encourage efforts to introduce stranger plaintiffs into litigation in an effort to circumvent limitations periods, and might lead to other unforeseen procedural complexities. The Committee concluded that it is preferable to

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[186] English, *Civil Procedure Rules*, r. 20.2 and the Queensland, *Uniform Civil Procedure Rules 1999*, rr. 177-178.

continue to require strangers with claims to start their own actions and seek to have them joined with other actions if that is appropriate.

C. Specified Claims Brought by Counterclaim

ISSUE No. 36
Should the rules continue to specify that set-off is pleaded by way of counterclaim? What about contributory negligence?

[205] Rule 93(2) provides that set-off is to be pleaded by way of counterclaim. This has been called misleading, "making set-off sound as though it were a kind of claim, but it is not. Set-off is ordinarily a true defence, not a claim."[187] Set-off and other types of cross-claims or counterclaims are different:

> By set-off is meant something in the way of a defence: where claim and cross-claim are merged and the lesser is thereby extinguished. True set-off must be distinguished from procedural set-off, where two unrelated claims are balanced up and a net judgment given.[188]

Distinguishing true set-off from other counterclaims can involve complex issues.[189]

[206] British Columbia rules also provide for set-off to be pleaded in a counterclaim.[190] In Ontario, however, set-off is pleaded in the defence, due to the Ontario *Courts of Justice Act*, s. 111(1), which provides that "in an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the

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[187] Stevenson & Côté, *Handbook*, *supra* note 16 at 87.

[188] *Abacus Cities Ltd. v. Aboussafy*, [1981] 4 W.W.R. 660 (Alta. C.A.), per Kerans J.A. at 670. See also other cases distinguishing set-off and counterclaim cited in Fradsham, *supra* note 116 at 156-157 citing *Canadian Commercial Bank (Liquidator of) v. Parlee McLaws* (1989), 64 Alta. L.R. (2d) 218 (Q.B.); *P.P.G. Canada Inc. v. Alta Window Mfg. Inc.* (1998), 235 A.R. 54 (Q.B. Master); *Grenke v. Sookermany* , *supra* note 174; and *C.I.B.C. v. Tuckerr Indust. Inc.*,[1986] 5 W.W.R. 602 (B.C.C.A.).

[189] *Holt v. Telford*, [1987] 2 S.C.R. 193.

[190] British Columbia, r. 19(13) "set-off or counterclaim".

plaintiff's claim a debt owed by the plaintiff to the defendant."[191] Federal rules permit either or both forms of pleading.[192]

[207] The treatment of set-off contrasts with the treatment of contributory negligence. The latter plea is included in a counterclaim in Ontario, and in a statement of defence in Alberta.[193]

POSITION OF THE GENERAL REWRITE COMMITTEE

[208] The Committee does not propose any change to Alberta practice as to the pleas of set-off or contributory negligence. This is an area in which practice varies across the country. Further, no concerns regarding the current Alberta practice were raised by the legal community.

D. Form of Counterclaims

ISSUE No. 37
Should there be any change to the form of a counterclaim?

[209] A counterclaim is conjoined and pleaded with the statement of defence. A defence to counterclaim is conjoined and pleaded with the reply.[194] Where a counterclaim is not conjoined, this is a defect in form and not substance, and can be remedied by the court provided there is no resulting prejudice that cannot be compensated for in costs.[195]

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[191] R.S.O. 1990, c. C.43.

[192] Federal, r. 186.

[193] Ontario, r. 27.01 provides that counterclaims are to include claims for "contribution or indemnity under the *Negligence Act*". This is a change from pre-1985 practice in which such claims were asserted in the statement of defence: Holmested & Watson, *supra* note 5, vol. 3 at. 27-7. The Alberta practice of including such claims in the statement of defence is not explicit in the rules, but established in the case law: *Tally v. Klatt* (1979), 17 A.R. 237 (C.A.). See also ALRI CM 12.8, *supra* note 10 at 12-19.

[194] Alberta, r. 93(4) and (5). This is also required in Ontario, rr. 27.02 and 27.05 and Federal, rr. 189 and 192, and permitted in British Columbia, r. 19(13).

[195] *Rorbak v. Gibb* (1983), 23 Alta. L.R. (2d) 363 (C.A.), cited in Fradsham, *supra* note 116 at 152-153.

[210] Ontario and Federal rules refer specifically to the parties as plaintiff by counterclaim and defendant by counterclaim. These terms are employed in pleadings and in practice in Alberta, but do not specifically appear in the rules. However, in British Columbia parties already in the action are referred to in their original capacities and not as plaintiff by counterclaim or defendant by counterclaim, while a person not already a party is listed in the style of cause as a defendant by way of counterclaim.[196]

POSITION OF THE GENERAL REWRITE COMMITTEE

[211] The Committee does not recommend any changes in the form of counterclaims. It was thought that it would be confusing to refer to parties in their original capacities, and that the rules should specify that parties are to be renamed as parties "by counterclaim."

E. Status of Counterclaim/Relationship to Main Action

ISSUE No. 38
Should any changes be made to the rules dealing with the status of a counterclaim and its relationship to the main action?

[212] There are several Alberta rules dealing with the status of a counterclaim and its relationship to the main action:[197]

- Rule 93(3) – A counterclaim has the same effect as a cross-action so as to enable the court to pronounce a final judgment in the same action both on the original and on the counterclaim.
- Rule 96 – A counterclaim may be proceeded with notwithstanding that the action of the plaintiff is stayed, discontinued or dismissed.
- Rule 97 – Where a defendant establishes a counterclaim against the claim of the plaintiff and there is a balance in favour of one of the parties, the court may give judgment for the balance.

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[196] British Columbia, r. 21(9).

[197] Alberta, rr. 151 and 155 will be addressed later, in the examination of rules regarding enforcement of judgments.

- Rule 98 – Where a defendant does not dispute the plaintiff's claim and sets up no defence thereto, but sets up a counterclaim, the court may stay proceedings respecting the plaintiff's claim with or without terms, until the counterclaim is disposed of.

POSITION OF THE GENERAL REWRITE COMMITTEE

[213] The Committee does not propose any changes in substance, but does recommend that these rules be brought together and simplified. The effect of Rules 93(3) and 96 can be achieved by providing simply that a counterclaim has the status of an independent action. Rule 97 is somewhat inconsistent with this, but should be maintained for convenience. As for Rule 98, the Committee proposes to eliminate it and rely on a general rule referring to the court's power to stay.

F. Time for Delivery of Defence to Counterclaim and Reply

ISSUE No. 39
Should there be any change to the notice periods for delivery of a defence to counterclaim or a reply?

[214] Alberta's rules on this point are combined with general defence rules, and provide for 15 days for delivery of a defence by a person not previously a party (within Alberta, as set by order outside Alberta) and 8 days for a defence by a person already a party or for a reply.[198]

POSITION OF THE GENERAL REWRITE COMMITTEE

[215] Consistency in notice periods is desirable. New defendants by counterclaim should continue to be governed by the same rules as other defendants.[199] In Consultation Memorandum 12.8, the Committee has recommended that shorter notice periods for various pleadings purposes be set at a consistent 10 days, so the 8 day

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[198] Alberta, rr. 85, 86.

[199] The general time for defending will be dealt with in a later Consultation Memorandum.

period for a defence to counterclaim by a person already a party should be changed to 10 days.[200]

G. Severing a Counterclaim

ISSUE No. 40
Should a special severance rule for counterclaims be retained, or should the general power to sever misjoined parties and issues be employed?

[216] Rule 95 provides: "Where a counterclaim cannot be conveniently disposed of in the same action the court may order the counterclaim to be excluded or tried separately or make such other order as it considers expedient." Ontario and British Columbia rules have similar provisions.[201]

POSITION OF THE GENERAL REWRITE COMMITTEE

[217] Generally speaking, the Committee prefers a smaller number of rules of general application, rather than a larger number of specialized rules. Rather than a specific rule for counterclaims, the general relief against joinder of claims rule should be made applicable to counterclaims.[202] Some form of cross-referencing, so that someone reading the counterclaim rules would be aware of this, might be advisable.

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[200] See the recommendations re the notice periods for replies, close of pleadings, amended pleadings and particulars at ALRI CM 12.8, *supra* note 10 at 53-55.

[201] Ontario, r. 27.08 and British Columbia, r. 21(13).

[202] The same recommendation is made regarding third party claims at 61.

CHAPTER 7 REPRESENTATIVE ACTIONS

A. Scope of this Chapter

[218] Rule 42 is Alberta's version of the historic representative action rule of general application. It is the principal focus of this chapter.[203] Secondarily in this chapter, we deal with Rule 41.[204]

[219] The representative action rules originated as equitable remedies in the English Court of Chancery.[205] In a representative action, the "representative" party "represents" the interests of persons who share an interest in common. Only the "representative party" is a formal party to the proceeding. Usually, but not necessarily (*e.g.*, in the case of an estate), the persons whose interests are being represented make up a "class." These persons are bound by the outcome of the litigation even though, generally, they do not participate in the proceedings.

B. Rule 42: Representation under the General Rule

[220] Under this heading, we address two issues: first, whether Rule 42 should be retained for plaintiff classes, and second, whether Rule 42 should be retained for defendant classes. Before discussing these issues directly, we will provide some background information on Rule 42, the relationship between Rule 42 and Alberta's

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[203] Previously, we referred briefly to r. 42 in connection with unincorporated associations, discussed in Chapter 2, Part D, Alberta Law Reform Institute, *Parties* (Consultation Memorandum No. 12.4) (Edmonton: Alberta Law Reform Institute, 2003) [ALRI CM 12.4].

[204] Alberta, rr. 42 and 41 are not the only rules that govern representative actions. Other rules have to do with representation in estate, trust and related cases (specifically, rr. 43, 44 and 50) are discussed in ALRI CM 12.4, *ibid.*, c. 1 at 1-2 and rr. 51, 52 and 53 have been discussed earlier in this memorandum.

[205] Ordinarily, the Court of Chancery required all parties to an action to be present so that "a final end might be made of the controversy": *Duke of Bedford v. Ellis*, [1901] A.C. 1 at 8 (H.L.), *per* Lord Macnaghten. However, the Court relaxed this requirement by allowing one or more representatives to conduct the litigation on behalf of others in cases where "the parties were so numerous that you never could 'come at justice'". Later, when the courts of equity and common law were fused, that procedure was enacted in the Rules of Procedure Schedule appended to the *Supreme Court of Judicature Acts of 1873 and 1875*: *The Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict. 8, c. 66, Sch. Rule of Procedure, s. 10 and *The Supreme Court of Judicature Act, 1875* (U.K.), 38 & 39 Vict. 10, c. 77, Order XVI, First Sch., s. 9.

new *Class Proceedings Act*, and the treatment of the historic representative action rule in other jurisdictions having modern class action laws.

1. Introduction

a. Nature of Rule 42

[221] Rule 42 applies where many persons share a common interest in the subject matter of the litigation. It states:[206]

> Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

In short, Rule 42 allows one party to commence an action on behalf of other persons who have a common claim to a remedy against a defendant for a perceived wrong. It also allows the court to authorize a "representative defendant" to conduct a defence on behalf of a group of like-positioned defendants. Rule 42 does not confer any new causes of action (or defences). It simply provides a procedure through which existing causes of action (or defences) can be dealt with more effectively than through numerous individual actions.

b. Enactment of Alberta's Class Proceedings Act

[222] Alberta enacted a modern *Class Proceedings Act* in May 2003.[207] Like Rule 42, the Act allows a representative plaintiff to bring a claim on behalf of a class of plaintiffs who share a common interest. The statute operates in circumstances akin to those covered by historic representative action Rule 42. Alberta's *Class Proceedings Act* incorporates many, but not all, of the recommendations for the enactment of modern class action legislation made by ALRI in Report No. 25 on *Class Actions*.[208] In turn, ALRI's recommendations closely follow the provisions in the *Class Proceedings Act* adopted by the Uniform Law Conference of Canada in 1996 (ULC Act).[209] Neither the *Class Proceedings Act* nor ULC Act nor ALRI Final Report

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[206] Alta. Reg. 390/68, s. 42.

[207] S.A. 2003, c. 16.5. At the time of writing a proclamation date has not yet been set.

[208] Alberta Law Reform Institute, *Class Actions* (Report No. 85) (Edmonton: Alberta Law Reform Institute, 2000) [ALRI Rep. 85].

[209] Ruth Rogers, "A Uniform Class Actions Statute" in Uniform Law Conference of Canada, *Proceedings*

(continued...)

No. 85 addresses the issue of the continuing need for the historic representative action rule.

2. Judicial interpretation of Rule 42

[223] Historically, the courts adopted a restrictive interpretation of the circumstances in which Rule 42 would apply.[210] However, the historic approach changed in July 2001. In that month, the Supreme Court of Canada released its judgment in the case of *Western Canadian Shopping Centres Inc. v. Dutton*.[211] The leading case prior to *Dutton* was decided in 1983.[212] In the intervening time period, several jurisdictions had enacted modern class actions legislation. In *Dutton*, the Supreme Court remarked that experience under this legislation provided courts with information on a procedural standard that was untested in 1983. It held that courts should now pay attention to the criteria and procedures set out in modern class action laws when applying the representative action rule. Further, resort to Rule 42 generally should not be refused on the basis of any of the traditional bars to its use.[213]

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[209] (...continued)
of the Seventy-seventh Annual Meeting (Ottawa: Uniform Law Conference of Canada, 1995), Appendix O, online: www.law.ualberta.ca/alri/95pro/3950.htm or www.ulc.ca/en/us/index.cfm?sec [ULCC DP].

[210] ALRI Rep. 85, *supra* note 208 at 15. In December 2000, when ALRI issued Report No. 85, the leading case on the representative action rule was *Naken v. General Motors of Canada*, [1983] 1 S.C.R. 72. In its judgment (as other courts had done before), the Court interpreted the scope of the historic representative action rule then in force in Ontario restrictively, limiting its operation to cases in which the following conditions are met:

> (a) the principal issues of law and fact are the same for each plaintiff;
> (b) the class is clear and finite;
> (c) there is a discernible fund or asset against which the claim can be made; and
> (d) the plaintiffs claim the same remedy.

[211] 2001 SCC 46 [*Dutton*].

[212] *Naken v. General Motors of Canada*, *supra* note 210. The leading Alberta case is *Korte v. Deloitte, Haskins and Sells*, *supra* note 139.

[213] *Dutton*, *supra* note 211 at para. 43:

> ... (1) the relief claimed includes a demand for money damages that would require individual assessment after determination of the common issues; (2) the relief claimed relates to separate contracts involving different members of the class; (3) different class members seek different remedies; (4) the number of class members or the identity of every class member is unknown; or (5) the class includes subgroups that have claims or defences that raise common issues not shared by all members of the class.

[224] Given these procedural similarities, post-*Dutton* it is open to wonder what, if any, significant differences remain between the criteria and procedures that govern a modern class action and a representative action. Does Rule 42 continue to serve any useful purpose?

3. Representative actions in other Canadian jurisdictions

[225] Alberta is the eighth Canadian jurisdiction to introduce modern class action laws. The other seven jurisdictions are: Quebec (the first jurisdiction in Canada to take this step); Ontario (the second jurisdiction to do so), British Columbia, Newfoundland, Saskatchewan, Manitoba and the Federal Court of Canada.[214] Of these jurisdictions, British Columbia, Newfoundland and Saskatchewan have retained their representative action rule. Ontario initially repealed the rule but later introduced two rules that partially restore it. Manitoba repealed it. The Federal Court's modern class action rules replace the historic representative action rule.

a. Retention of the representative action rule

i. British Columbia

[226] British Columbia kept representative action Rule 5(11) and introduced class proceedings legislation. The case law discussion of the relationship between Rule 5(11) and British Columbia's *Class Proceedings Act* pre-dates the *Dutton* judgment, leaving open the question whether the same conclusions would be reached now that the availability of the historic representative action has been expanded.[215] In *Sutherland*, the court suggests that the rule "remains useful, especially in the specific circumstances it contemplates or as a follow-up to an unsuccessful attempt at class certification."[216] In *Chace v. Crane Canada Inc.*, the defendant argued that a modern class action was not the preferred procedure.[217] In rejecting this argument, the British Columbia Court of Appeal pointed out that the "*Class Proceedings Act* was designed

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[214] *An Act Respecting the Class Action*, R.S.Q. c. R-2.1; *Class Proceedings Act, 1992*, S.O. 1992, c. 6; *Class Proceedings Act*, R.S.B.C. 1996, c. 50; *Class Actions Act*, S.N.L. 2001, c. C-18.1; *Class Actions Act*, S.S. 2001, c. C012.01; *Class Proceedings Act*, C.C.S.M. c. C130; Federal, r. 299.15.

[215] *Sutherland v. Canada (Attorney General)* (July 10, 1998) Doc. Vancouver C971485 (B.C.S.C) [*Sutherland*]; *Chace v. Crane Canada Inc.* (1997), 44 B.C.L.R. (3d) 264 (C.A.).

[216] Allan P. Seckel & James C. MacInnis, *British Columbia Supreme Court Rules Annotated 2003* (Carswell: Toronto, 2002) at 35-36 [Seckel & MacInnis], citing *Sutherland*, *ibid*.

[217] *Supra* note 215 at para. 29.

for multiple plaintiff claims precisely because of the difficulty in prosecuting such claims" under the representative and multi-party action rules. A representative action under the historic rule would not be appropriate because "damages must be assessed individually, and a fund or pool of assets cannot be created in compensating damages."[218] The use of a multi-party action would not be appropriate because:[219]

> A multi-party action under Rule 5(2) would permit full discovery against each individual plaintiff and the possibility that each plaintiff would have to appear at trial to prove his or her case. Costs would be payable by each plaintiff jointly and severally, giving rise to potentially greater costs than recovery.

ii. Saskatchewan

[227] Saskatchewan has introduced class action legislation and retained Rule 70, its representative action rule.[220] McKeague explains the reasons for retaining Rule 70 by noting that "some representative actions will not fall within the *Class Actions Act*; the Act makes no provision for a defendant class – such actions will still properly be brought under this rule."[221] The judgment in *Monsanto Canada Inc. v. Hoffman* mentions Rule 70 in a discussion of why the new legislation and rules were required.[222] No other relevant case was found.

iii. Newfoundland

[228] Newfoundland has retained its "representative proceeding rule" and introduced modern class actions legislation.[223] No case law was found discussing when it is appropriate to use the historic rule rather than the modern legislation.

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[218] *Ibid.* at para. 29.

[219] *Ibid*.

[220] Saskatchewan, r. 70. Saskatchewan also introduced rr. 76-86 to go with its *Class Actions Act*, *supra* note 214.

[221] Saskatchewan, Court of Queen's Bench, *The Queen's Bench Rules of Saskatchewan: Annotated,* 3rd ed., looseleaf (Regina: Law Society of Saskatchewan, 2001) at 6-42.

[222] (2002), 220 D.L.R. (4th) 542, 2002 SKCA 120.

[223] Newfoundland, r. 7.11. Newfoundland also introduced r. 7A to go with its *Class Proceedings Act*, *supra* note 214.

b. Repeal of the representative action rule

i. Ontario

[229] In 1992 – the year Ontario's *Class Proceedings Act, 1992* was enacted – Ontario repealed the common law representative action rule on the belief that if it was "left in place, it might have offered an alternative route to a plaintiff who wished to escape all of the procedural strictures and safeguards imposed by the new statute and this was considered undesirable."[224] The Ontario Act provides for both plaintiff and defendant classes.

[230] In 1999, the common law rule was partially restored in the form of Rules 12.07 and 12.08. Rule 12.07 restores the rule for defendant classes; Rule 12.08 restores it for plaintiff classes comprised of members of an unincorporated association or trade union. The rules state:

> 12.07 Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.
>
> 12.08 Where numerous persons are members of an unincorporated association or trade union and a proceeding under the *Class Proceedings Act, 1992* would be an unduly expensive or inconvenient means for determining their claims, one or more of them may be authorized by the court to bring a proceeding on behalf of or for the benefit of all.

Holmested and Watson explain the origin of Rules 12.07 and 12.08 in their discussion of "class proceedings – proceedings by unincorporated association or trade union":[225]

> Two class proceeding judges brought to the attention of the Civil Rules Committee a difficulty in the operation of Rule 12 and the *Class Proceedings Act, 1992.* The difficulty is that the procedure of the Act is too elaborate and complex (and unnecessary) for some claims by trade unions and unincorporated associations, e.g., when they seek to assert a single (joint) claim such as the enforcement of a contract or lease for the benefit of their collectivity. Rule 12.08 has been passed (in force July 1, 1999) permitting the court in such cases to authorize one or more members of the association or trade union to sue on behalf of all the members without resort to the *Class Proceedings Act.*

[231] In 2001, just over three months before the Supreme Court of Canada decided *Dutton*, the Ontario S.C.J. applied both Rules 12.07 and 12.08 in the case of *Ginter v.*

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[224] Holmested & Watson, *supra* note 5, vol. 2 at 12-6.

[225] *Ibid.*, vol. 6, Appendix of Amendments: Amendment to the Rules § 16 at AR-277.

Gardon.[226] In that case, the national union had placed a local union into trusteeship. The national union brought a representative action to declare certain employment contracts signed by the local union and defendants null and void. The court held that a representative order for the plaintiffs under Rule 12.08 was appropriate, stating that Rule 12.08 is "expressly directed toward cases which would otherwise be dealt with under the *Class Proceedings Act, 1992* but for the expense and inconvenience of proceeding in that fashion."[227] In coming to its decision, the court took an approach that was consistent with the approach taken under the *Class Proceedings Act, 1992* but with necessary modifications. It found:[228]

- there was a proper cause of action;
- the claims to be advanced raised common issues;
- it would involve unnecessary expense to litigate through a class proceeding; and
- the proposed representative would fairly represent the interests of the entities being represented.

[232] The defendants to the first action brought a second action to challenge the trusteeship and to assert individual claims. The court held that a representative order under Rule 12.08 was not appropriate for the plaintiffs in the second action. Its reasons were:[229]

- a very real risk of conflict existed because the proposed representatives had individual claims in addition to representative claims;
- three of the eleven executive board members did not wish to be parties;
- there was no evidence that the other members wished to be represented;
- certain aspects of the claims were individual in nature and this raised the concern that it would be unfair to deny the defendants the opportunity to examine each of the claimants for discovery; and
- there would not be an appreciable savings of costs or other efficiencies because of the small number of parties involved.

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[226] (2001), 53 O.R. (3d) 489.

[227] *Ibid.* at para. 14.

[228] *Ibid*.

[229] *Ibid.* at paras. 17-20.

However, it was appropriate to name the representative plaintiff in the first action as representative defendant in the second action. This was achieved under Rule 12.07 for the same reasons that it was appropriate to make the representative plaintiff order in the first action. The court added that, for an order under Rule 12.07, it is not necessary that the defendants have a trust fund from which plaintiffs would be entitled to recover the amount of any judgment obtained.

[233] The *Ginter* judgment does not explain why it would involve unnecessary expense and inconvenience to require the issues raised to be litigated through a class proceeding.

[234] In another case, *Payne v. Ontario (Minister of Energy, Science and Technology)*, the judge describes Rule 12.08 as:[230]

> ... [vesting] in one or more members of a trade union the right to commence suit or, as in this case, an application without the necessity of passing over the procedural and substantive hurdles engendered by the Class Proceedings Act, S.O. 1992, c. 6 and Rules.

ii. Manitoba

[235] With the introduction of the Manitoba *Class Proceedings Act*, the representative action rule was repealed as "redundant."[231] The only case that refers to this change says in passing that the law has changed but it doesn't apply to actions filed before the Act came into effect.[232] In these cases, the court follows *Dutton*.

iii. Federal Court

[236] The Federal Court repealed the representative action rule for plaintiff classes when the new class proceeding rules were introduced. The representative action rule was considered to be deficient and the new rule was designed to address these

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[230] [2002] O.J. No. 1450 (Ont. S.C.J.).

[231] Karen Busby, *Manitoba Queen's Bench Rules 2003* (Scarborough, Ont.: Carswell, 2002) at 2-33.

[232] *Manitoba Métis Federation Inc. v. Canada (Attorney General)* (2003), 29 C.P.C. (5th) 148, 2003 MBQB 40.

deficiencies.[233] Cases that were started under repealed Rule 114 but heard after it was repealed have been made to conform to the new rules.[234]

[237] Federal Court Rule 299.15 replaces the common law representative action rule for defendant classes:

> 299.15 A party to an action against two or more defendants may, at any time, bring a motion for the certification of the action as a class action and the appointment of a representative defendant.

c. Recap of reasons to retain or repeal the representative action rule

[238] The preceding discussion reveals that the following reasons have been given in support of retaining Rule 42:

- some representative actions do not fall within modern class action laws *(e.g.*, defendant classes);
- the representative action rule remains useful, especially in the specific circumstances it contemplates;
- the representative action rule remains useful as a follow-up to an unsuccessful attempt at class certification;
- a proceeding brought under modern class action laws may be an unduly expensive or inconvenient means for determining claims;
- the procedure under modern class action laws is too elaborate and complex (and unnecessary) for some claims by trade unions and unincorporated associations, e.g., when they seek to assert a single (joint) claim such as the enforcement of a contract or lease for the benefit of their collectivity.

[239] The following reasons have been given in support of repealing Rule 42:

- it would be undesirable to offer an alternative route to a plaintiff who wished to escape all of the procedural strictures and safeguards imposed by the new statute;

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[233] Federal Court of Canada, The Rules Committee, *Class Proceedings in the Federal Court of Canada* (Discussion Paper) (Ottawa: The Rules Committee, 2000).

[234] *Federation of Newfoundland Indians v. Canada*, 2003 FCT 383; *Aussant v. Canada (Minister of Health Welfare)* (2002), 226 F.T.R. 25, 2002 FCT 1308; *Sawridge Band v. Canada*, 2003 FCT 665); *Samson Cree Indian Nation v. Canada (Minister of Indian Affairs and Northern Development*, 2003 FC 1170).

- once class action legislation takes effect, the representative action rule is redundant.

4. Plaintiff classes

ISSUE No. 41
Should Rule 42 be retained for plaintiff classes?

a. Plaintiff classes in Alberta

[240] As has been seen, Rule 42 and the *Class Proceedings Act* have similar purposes. Rule 42 expressly allows the court to authorize one or more persons to sue on behalf of and for the benefit of a class of persons who have a common interest. Alberta's *Class Proceedings Act* provides a procedure whereby a representative plaintiff or plaintiffs may sue on behalf of a class of persons who share an issue in common against a defendant or defendants. Given this similarity in purpose, is there any need to retain Rule 42 for plaintiff classes?

b. Modern class action hurdles

[241] Those who argue for the retention of a form of representative action rule argue that modern class actions unnecessarily complicate some cases. The requirements of a modern class action are canvassed in ALRI Final Report No. 85.[235]

[242] The Appendix to this consultation memorandum compares various features of modern class action with representative action procedures pre-*Dutton*, and includes comment on the effect of some of the differences. In considering whether or not these procedures add unnecessarily to the cost and inconvenience of a representative action or present unnecessary hurdles, consideration should also be given to the reasons for their inclusion. The perception that the requirements operate as "hurdles" may be offset by such countervailing considerations. One important aspect of several of the requirements is the protection of the class members whose rights are affected and who are bound by the outcome.

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[235] ALRI Rep. 85, *supra* note 208, c. 4: "A New Procedure for Class Actions".

c. Situations where representative action rule could be useful

[243] The General Rewrite Committee considered retaining the representative action rule in two situations. The first situation, suggested by Ontario Rule 12.08, has to do with unincorporated associations and trade unions. The second situation, suggested by the *Sutherland* case in British Columbia, has to do with the narrower range of cases and simpler procedure under which representative actions were decided under Rule 42 pre-*Dutton*.

i. Situation one: members of an unincorporated association or trade union

(a) Ontario Rule 12.08

[244] Ontario Rule 12.08 was adopted because of a concern expressed by two class proceedings judges about the procedure to which claims by trade unions and unincorporated associations were subjected under modern class action laws. That procedure was thought to be "too elaborate and complex (and unnecessary)" for some of these claims.[236] The same concern could arise in Alberta.

[245] The ensuing paragraphs look at the position of unincorporated associations under the current law in Alberta and elsewhere in Canada.

(b) Unincorporated associations under the representative action rule

[246] The general rule is that "[a]n unincorporated association can sue only in the names of all its members, or under the Rule or statute on class actions."[237] The authority for this statement was established by an early Alberta case, *Blackfoot Stock Association v. Thor*,[238] in which advantage was taken of the representative action rule to allow a "voluntary" association to sue in its own name:

> There seems to be no doubt upon the authorities that a voluntary association, such as the plaintiff, which has never been incorporated in any way, cannot sue except in the name of all the members unless advantage is taken of Rule 20 [a predecessor to Rule 42] and an order is made by a Judge that one or more of the members may sue for the benefit of all persons interested.

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[236] Holmested & Watson, *supra* note 5, vol. 6 at AR-277.

[237] Stevenson & Côté, *supra* note 16, vol. 1 at 9-11.

[238] [1925] 3 W.W.R. 544 (Alta. S.C. (A.D.)).

[247] The general rule applies to both plaintiffs and defendants. In the recent case of *Re Indian Residential Schools*, [2001] A.J. No. 1127, the Alberta Court of Appeal struck "The Roman Catholic Church" as a defendant from the Statement of Claim on this ground. The Court viewed the Church "as no more than an ecclesiastical entity incapable of being sued" because the parties wishing to sue the "The Roman Catholic Church" had not succeeded in showing that the Church was a suable legal entity in Alberta.

(c) Unincorporated associations in other Canadian jurisdictions

[248] One of two routes to suits relating to unincorporated associations is available in Canadian jurisdictions – specific authorization in the rules, or use of the representative action rule.

Unincorporated association rule

[249] Manitoba and the Federal Court repealed the representative action rule for plaintiff classes when they introduced modern class action legislation. In each of these jurisdictions, another rule specifically allows an unincorporated association to sue or be sued in its own name.[239] However, in 2003, the Manitoba Court of Appeal struck down the latter rule as unconstitutional.[240] In Consultation Memorandum 12.4, the General Rewrite Committee rejected the approach of allowing an unincorporated association to sue or be sued, preferring to continue to rely on the use of the representative action rule.[241]

Representative action rule

[250] British Columbia, Newfoundland and Saskatchewan have retained their representative action rule so it could be used to allow a member or members of an unincorporated association to sue or be sued in a representative capacity. Ontario has restored its representative action rule for members of an unincorporated association or trade union. Now that the Supreme Court of Canada requires the representative action

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[239] Manitoba, r. 8.10; Federal, r. 111. New Brunswick, which has not enacted modern class action legislation, has both a historic representative action rule and a rule that permits an unincorporated association to sue or be sued rr. 14.01 and 9.02, respectively.

[240] *Harms*, *supra* note 158.

[241] ALRI CM 12.4, *supra* note 203 at 18-20.

rule to be applied in a way that is analogous to a modern class action, the representative action procedure may no longer be as relatively "convenient" and "inexpensive" as it has been in the past. Whether these rules will continue to be used for this purpose is open to doubt.

(d) A note about representation by non-class members under modern class action laws

[251] In general, class action legislation allows only class members to commence proceedings on behalf of a class. However, most jurisdictions with modern class action laws, Alberta included, make an exception allowing the court to "certify a person who is not a member of the class as the representative plaintiff for the class proceeding."[242] The exception occurs only where doing so will "avoid a substantial injustice to the class." In this respect, modern class action laws are broader than the representative action rule. However, the representative is still required to be a "person" recognized by law. The expansion does not encompass an unincorporated association. Section 2(6) of Alberta's *Class Proceeding Act* clarifies this point by specifying that the court may "appoint as a representative plaintiff a non-profit organization that is incorporated."

ii. Situation two: undue expense and inconvenience in other cases

(a) Undue inconvenience

[252] Class action laws are designed largely for use in complex modern litigation which often involves large classes. As has been seen, the view that modern class actions legislation was "too elaborate and complex (and unnecessary)" for some claims led to the adoption of Ontario Rule 12.08. But are these cases the only claims to which the concerns expressed by the Ontario judges could apply? The judge in the *Sutherland* case in British Columbia suggests a second possibility – that the representative action rule "remains useful, especially in the specific circumstances it contemplates or as a follow-up to an unsuccessful attempt at class certification."[243] *Sutherland* was decided before *Dutton* so the procedural differences may have less significance now than formerly. However, the judge's observation does raise the question whether the pre-*Dutton* practice under Rule 42 should be preserved for some cases. By way of example, the court could be given discretion to create a simpler

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[242] ULCC DP, *supra* note 209, s. 2(4).

[243] *Supra* note 215 at 35.

representative proceeding for cases that satisfy the criteria laid down in the Alberta Court of Appeal judgment in *Korte v. Deloitte, Haskins and Sells*.[244] Those criteria are: the principal issues of law and fact are the same, success for one class member will mean success for all, and no individual assessment of the claims of individuals need be made.

(b) Undue expense

[253] Ontario Rule 12.08 names the undue expense of a proceeding under the *Class Proceeding Act, 1992* as another factor for the court to consider when deciding whether or not to authorize a proceeding under the rule instead of the Act. It is apparent from the comments in the Appendix that comparing the relative expense of proceedings under the representative action rule and the modern class action laws is not a simple task.

d. Possible solutions

[254] The General Rewrite Committee considered three possible solutions with respect to the issue whether representative action Rule 42 should be retained for plaintiff classes after Alberta's *Class Proceedings Act* is proclaimed into force: retain Rule 42 as is; repeal Rule 42; or create a modern representative action rule.

i. Retain Rule 42

[255] The Supreme Court of Canada judgment in *Dutton* eliminated many, if not most, of the differences that supported characterization of the representative action rule as a procedural option for plaintiff classes. It is difficult to see much, if any, advantage in keeping the rule in its present form. If the rule is retained, there will be a question about when it is appropriate to use the rule instead of the *Class Proceedings Act*.

ii. Repeal Rule 42

[256] Imaginative plaintiff counsel may be able to fashion a case that would benefit from proceeding under Rule 42 post-*Dutton*. Repealing Rule 42 altogether would do away with this creative opportunity. However, a better alternative may be to amend Rule 42 to provide a genuine alternative to the procedure provided by modern class action laws.

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[244] *Supra* note 139.

iii. Create a modern class action rule

[257] One possibility for the creation of a genuine alternative to modern class action laws would be to adopt Ontario's Rule 12.08. A second possibility would be to clothe the representative action rule in its former attire.

(a) Follow Ontario Rule 12.08.

[258] Adopting a rule based on Ontario Rule 12.08 would create an exception from the operation of the *Class Proceedings Act* for members of unincorporated associations or trade unions. However, the Supreme Court of Canada has said that the procedure under Rule 42 is guided by the procedure under modern class action legislation. Therefore, little advantage is apparent.

(b) A simplified procedure where Korte criteria apply

[259] An alternative approach would be to redraft Rule 42 for use where proceeding under the *Class Proceedings Act* would be too expensive or cumbersome. The redrafted rule would give the court discretion to create a simpler representative proceeding in cases which satisfy the criteria specified by the Alberta Court of Appeal in *Korte v. Deloitte, Haskins and Sells*.[245] It could also be made available to members of an unincorporated association. Fashioning a modern representative action rule along these lines would provide claimants with a genuine procedural option that curtails expense and inconvenience in situations that warrant it. This option best meets the procedural concerns about modern class action laws that were identified pre-*Dutton*. However, retaining two procedures designed to fill the same purpose – rule-based representative action and statutory class action – would be likely to cause confusion about which procedure to use. It would also create the risk of inconsistent results between the rules and the Act.

POSITION OF THE GENERAL REWRITE COMMITTEE

[260] The Committee recommends that Rule 42 be repealed for plaintiff classes. Modern class action laws are designed to overcome the problems that have arisen with the operation of the representative action rule. The *Class Proceedings Act* gives the court wide discretion over the conduct of a class action. The court can tailor the procedure for simpler cases by eliminating steps that are not mandated by the statute.

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[245] *Ibid*.

There should be no special rule concerning litigation by unincorporated associations; in order to sue, they should bring a class action under the *Class Proceedings Act* and ask the judge to simplify the procedure if necessary.

5. Defendant classes

ISSUE No. 42
Should Rule 42 be retained for defendant classes?

a. Defendant classes in Alberta

[261] Alberta Rule 42 expressly allows the court to authorize one or more defendants to defend on behalf of and for the benefit of a class of defendants. The rule can be used where a plaintiff or plaintiffs assert rights that raise common issues against more than one defendant. As already stated, Alberta's *Class Proceedings Act* does not include defendant classes.[246] In this respect, the Act does not follow ALRI's recommendation: see heading B.5.c. The question under consideration is whether Rule 42 should be retained for defendant classes.

b. Defendant classes in other Canadian jurisdictions with modern class action laws

i. Defendant class included in modern laws

[262] Among the Canadian jurisdictions which have modern class action laws, only two jurisdictions provide for a defendant class action: the Ontario *Class Proceedings Act, 1992*[247] and the Federal Court rules.[248] As stated above, in 1992 Ontario revoked the representative action rule on the belief that if it were retained litigants might use it to avoid meeting the procedural requirements and safeguards imposed by the Act. In 1999, Ontario restored the representative action rule for defendant classes as Rule 12.07, thereby providing a procedural choice between the rule and the Act. Federal Court Rule 299.15 is a modern class action provision.

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[246] When the marginal notes in modern class action laws refer to a "defendant's class proceeding," they are using this term to describe an application by a defendant for an order certifying a plaintiff class action and appointing a representative plaintiff. A defendant's class proceeding is not the same as a defendant class.

[247] *Supra* note 214, c. 6, s. 4 (classing defendants).

[248] Federal, r. 299.15.

ii. Defendant class excluded from modern laws

[263] The *Class Proceedings Act* adopted by the Uniform Law Commission of Canada (ULCC) makes no provision for the representation of a defendant class. As it does in Alberta, the class proceedings legislation in British Columbia, Saskatchewan, Newfoundland and Manitoba follows the ULCC model. British Columbia, Saskatchewan and Newfoundland retain a version of the common law representative action rule which recognizes a defendant class with a representative defendant. Manitoba does not provide for a defendant class in either statute or rules.

c. ALRI recommendations on defendant class

[264] ALRI recognized a need for the ability to create a defendant class and recommended adoption of the Ontario approach of including provision for a defendant class, but with greater attention to relevant adaptations of the plaintiff class provisions.

(a) Reasons for allowing defendant class actions

[265] ALRI Report No. 85 sets out the main reasons supporting defendant class actions. The reasons mirror the reasons supporting plaintiff class actions:[249]

- proceeding against a defendant class rather than against many individual defendants can save "enormous labour and expense"[250] for plaintiffs, defendants and the courts;
- by proceeding against a defendant class in one action instead of against defendants individually in different actions, inconsistent or varying adjudications or re-litigation of the same issues can be avoided;
- plaintiffs may gain access to justice that they could not otherwise afford – for example, it may make it possible for a plaintiff to obtain relief for relatively small claims against a number of defendants in situations where it would not have been economically viable to bring an action against each defendant individually; and
- the fact that plaintiffs will be able to bring actions against defendants as a class may deter wrongdoing by potential defendants.

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[249] ALRI Rep. 85, *supra* note 208, Recommendation 26 at 192.

[250] *Irish Shipping v. Commercial Union Assurance*, [1989] 3 All E.R. 853 at 860-861 (C.A.).

(b) Modifications for defendant classes

[266] ALRI recommended a detailed structure for proceedings against defendant classes. This structure would require a number of departures from the recommendations for plaintiff class actions. These include:[251]

- corrective measures where the proposed representative defendant is unwilling or reluctant or otherwise not wholly suitable as representative defendant;
- elimination of the need for the representative defendant to come up with a plan for advancing the proceedings;
- postponing the requirement to file a statement of defence until after hearing and determination of an application for certification of a defendant class action;
- modification of the "common issue" to require that the claims "of or against" the class members raise a common issue;
- prohibiting members of a defendant class from "opting out" of the litigation but giving them the option of being added as a named defendant or applying for the appointment of an additional representative defendant to represent an interest shared by members of a subclass of defendants;
- removing the requirement for court approval of a discontinuance;
- suspending the limitation period within which a plaintiff must bring suit against potential defendant class members only until certification is granted or refused.

[267] We understand that Alberta's *Class Proceedings Act* does not make provision for defendant classes because the Alberta government wished to maintain consistency with the ULC Act.

POSITION OF THE GENERAL REWRITE COMMITTEE

[268] The Committee recommends retaining Rule 42 for defendant classes. Allowing for representation of the interests of members of a defendant class in an appropriate case is useful to reduce time and cost and to increase efficiency. The rule might be redrafted in more modern language, possibly similar to Federal Rule 299.15.

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[251] For a fuller account of the reasons for recommending these modifications, see ALRI Rep. 85, *supra* note 208 at 170-192.

C. Rule 41: Representation in Actions for the Prevention of Waste or Protection of Property

ISSUE No. 43
Should Rule 41 be retained?

1. The rule in Alberta

[269] Rule 41 permits suit by a representative plaintiff in an action for the prevention of waste or protection of property. It says:

> In any action for prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and all other persons having the same or a similar interest.

It is used rarely, if at all, today. We did not locate any case law on the Alberta rule or its counterparts.[252]

2. Other Canadian jurisdictions

[270] The only other jurisdiction with a rule similar to Rule 41 is the North West Territories Rule 61. It reads exactly the same as Alberta's rule.

POSITION OF THE GENERAL REWRITE COMMITTEE

[271] The General Rewrite Committee recommends that Rule 41 be repealed. Other Canadian jurisdictions have functioned without a comparable rule. When the *Class Proceedings Act* is proclaimed, a modern procedure will be available to deal with cases that could have been brought under Rule 41.

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[252] Fradsham, *supra* note 116 makes no comment on the rule. Stevenson & Côté, *supra* note 16 note that the rule comes from English O. 16 r. 13 enacted 1925 (#1) and that it is virtually identical to 1944 C.R. 62, as amended by Alta. Reg. 35/60.

APPENDIX

MODERN CLASS ACTION AND REPRESENTATIVE ACTION PROCEDURES COMPARED

Procedure	*Modern class action*	*Representative action*	*Comments*
Certification	Court must approve before case can proceed as a class action. Criteria for certification are: • cause of action disclosed in the pleadings; • an identifiable class of two or more persons; • a common issue ("common issue" means "common but not necessarily identical issues of fact," or "common but not necessarily identical issues of law that arise from common but not necessarily identical facts"); • a proposed representative plaintiff who meets specified criteria; and • a class proceeding is the preferable procedure for the "fair and efficient" resolution of the common issues.	Traditionally, court approval required only where objection taken (although *Blackfoot Stock Association v. Thor* seems to expect a court Order). Rule 42 requires: • cause of action disclosed in the pleadings; • an identifiable class of two or more persons; • a common issue; and • a representative plaintiff.	Former procedural differences removed by *Dutton*. Definition of "common issue" widened. Preferable procedure requirement is new. Opportunity to oppose class procedure fair to defendant. Certification can be a big hurdle. Where individuals are unlikely to be able to afford to bring an action on their own, the certification decision can make or break the litigation. Therefore, defendants often put significant resources and effort into opposing certification.
Representative plaintiff	Criteria are: • would fairly and adequately represent the interests of the class; • has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and • does not have, on the common issues, an interest that is in conflict with the interests of other class members.	No criteria named.	Modern class action requirements protect class members (persons who are not before the court but whose rights and obligations are affected). Workable plan helps ensure procedural economy, convenience and efficiency.
Counsel for representative plaintiff	Counsel required. Suitability of counsel is a factor in selecting representative plaintiff.	Rule is silent; common law requires counsel.	Modern class action review protects class members; helps ensure effective conduct of case and presentation of arguments.
Notice to class members	Notification of certification to potential class members. Notification of resolution of common issue and process for determining individual share and issues to class members. Notification of settlement to class members in discretion of court.	Rule is silent; because of smaller class size, the practice may be to obtain individual consent to representative action from class members.	Modern class action requirements protect class members. Individual notice to members of a large class can be expense. However, notice is closely supervised by the court – court must approve notice and may, for example, dispense with notice, direct the means of giving notice, order another party to give the notice, or apportion the costs of giving notice among the parties. Court supervision of notice, including ability to dispense with it, allows balancing of procedural fairness, economy, convenience and efficiency.
Determination of class membership	Opportunity for potential class members to opt out of, or (in the case of non-resident class members) into, the proceeding.	Process not specified.	Opportunity to choose whether or not to join the class protects class members who are bound by the result of the proceeding.
Court role	Judicial case management.	Traditional role – conduct of case left mainly to parties.	Court oversees conduct of a modern class action and tailors the rules as necessary to accommodate it. Addresses complexity. Protects class members.

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Examination for discovery	Parties as of right, class members only with leave.	Parties as of right, class members only with leave upon the defendants showing reasonable necessity: *Dutton*.	Alberta Court of Appeal panel split on issue of discovery of class members. Majority in *Dutton* would have allowed discovery under Rules 187 and 201: In our opinion, Rule 201 should be read conjunctively to allow discovery of all persons for whose benefit an action is prosecuted or defended. This interpretation is made in light of, and in order to be consistent with, Rule 187 which allows for discovery of documents by declaring any person for whose benefit an action is brought as a party to the action.
Relief	Relief on aggregate or individual basis. Court directs process for distribution of award on common issues and determination of individual issues.	Same relief for all class members; formulaic determination.	Modern class action laws accommodate class, subclass and individual issues and provide versatile mechanisms for assessing individual entitlement and distributing award (where needed). This wasn't necessary, pre-*Dutton*, under the representative action rule because basis for relief and all claims were shared in common.
Settlement or discontinuance	Court must approve.	Rule is silent.	Modern class action laws protect class members.
Costs	May be awarded as provided for under the Rules of Court. Representative plaintiff is responsible. With court leave, representative plaintiff may solicit from class members in advance.	Representative plaintiff is responsible.	Support for representative plaintiff through the solicitation of costs from class members facilitates access to justice.
Legal fees	Contingency fee agreement requirements specified. Enforceable only if advance court approval and subsequent court review and approval of arrangement.	No particular provision.	Requirement of court approval in modern class action laws protect class members.
Class member participation	Court may permit where useful to the class for the "purposes of ensuring the fair and adequate representation of the interests of the class" or any other appropriate reason.	Rule is silent.	Class member participation is exceptional but this possibility in modern class action laws assists protection of class members.
Resolution of individual issues	Court directs procedure.	Procedure pre-*Dutton* limited to common issue shared by all class members	Wider scope of modern class action adds complexity.
Right to appeal	Class members may appeal decision on common issue in some circumstances.	Follows normal rule: appeal by representative plaintiff only.	Right of class members to appeal in modern class action laws affords protection to class members
Suspension of limitation periods	Provided in statutory enactments.	Rule is procedural only.	Modern class action laws protect class members in event class proceeding is not certified, or is certified and subsequently decertified or abandoned, or the definition of the class is changed so as to exclude persons formerly included.