ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Management of Litigation

Consultation Memorandum No. 12.5

March 2003

THE RULES PROJECT CONSULTATION MEMORANDA

No.	Title	Date of Issue	Date for Comments
12.1	Commencement of Proceedings in Queen's Bench	October 2002	January 31, 2003
12.2	Document Discovery and Examination for Discovery	October 2002	January 31, 2003
12.3	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

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ACKNOWLEDGMENTS

This consultation memorandum sets out the proposals of the Working Committee with responsibility for the topic of management of litigation. The Committee's views are communicated in this paper which was written by Doris I. Wilson, Q.C., Special Counsel to the Rules Project. She was greatly assisted by the members of the Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the Committee are:

The Hon. Justice C. Adele Kent (Co-Chair), Court of Queen's Bench of Alberta
The Hon. Justice Doreen A. Sulyma (Co-Chair), Court of Queen's Bench of Alberta
Kenneth F. Bailey, Q.C., Parlee McLaws
P. Jonathan Faulds, Q.C., Field Atkinson Perraton LLP
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PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute by June 30, 2003.

This consultation memorandum addresses issues concerning management of litigation. 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. 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:

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The process of law reform is essentially public. Even so, you may provide anonymous written comments, if you prefer. Or you can identify yourself, but request

that your comments be treated confidentially (i.e., your name will not be publicly linked to your comments). Unless you choose anonymity, or request confidentiality by indicating this in your response, ALRI assumes that all ***written comments are not confidential***. ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although usually we will discuss comments generally and without specific attributions.

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BACKGROUND

A. The Rules Project

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

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

B. Project Objectives

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

[1] Notable recent civil justice reform projects responding to these concerns include: Ontario Civil Justice Review, *Civil Justice Review: First Report* (Toronto: Ontario Civil Justice Review, 1995) and Ontario Civil Justice Review, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, 1996) [*Ontario Civil Justice Review*]; The Right Honourable H.S. Woolf, *Access to 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)
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: 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 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/>. General concerns identified in 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 has been prepared and is available on our website: <http://law.ualberta.ca/alri/>. Copies of the Report will also be provided to Rules Project working committees and other interested persons. A summary of the Report's conclusions is set out below.

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 will be dealt with by committees dealing with rules relating to the Enforcement of Judgments, Appeals, Costs and other matters. Family law rules and practice are also the subject of a specialized legal community consultation, now underway with the issuance of an Issues Paper: Family Law Rules, available on our website: <http://law.ualberta.ca/alri/>.

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. Management of Litigation Committee

This Committee reviewed the operation of the litigation system in Alberta, and looked at ways in which the Rules of Court could contribute to allowing access to a fair and effective justice system. The responsibility of lawyers in, and to, the justice system was discussed. Based on research and materials drawn from other jurisdictions, and reviewing the reforms that have been instituted in some of those jurisdictions, the Committee considered the question of whether Alberta should move from a traditional litigation system to a more system-wide approach to the management of litigation. The Committee also carefully considered the benefits of time standards, and reviewed methods by which time standards could be adopted in Alberta. As part of the inquiry into making actions more efficient, the Committee looked at several other issues, including procedures which could be used to shorten actions, and whether the introduction of litigation protocols would lead to a more effective and accessible justice system in Alberta. The Committee members are:

The Hon. Justice C. Adele Kent (Co-Chair), Court of Queen's Bench of Alberta
The Hon. Justice Doreen A. Sulyma (Co-Chair), Court of Queen's Bench of Alberta
Kenneth F. Bailey, Q.C., Parlee McLaws
P. Jonathan Faulds, Q.C., Field Atkinson Perraton LLP

Anthony L. Friend, Q.C., Bennett Jones LLP
Elizabeth A. Johnson, Ackroyd, Piasta, Roth & Day LLP
Cynthia L. Martens, Alberta Law Reform Institute
Gerald F. Scott, Q.C., Fraser Milner Casgrain LLP
Doris I. Wilson, Q.C., Alberta Law Reform Institute

The Committee met periodically during the Spring and Fall of 2002, and in early 2003, and has additional meetings planned. Many ideas concerning the management of litigation were discussed and the Committee identified several issues arising and has made initial proposals regarding them. These preliminary proposals are not final recommendations; those will be made after receiving input from the legal community on this consultation memorandum. The Committee will also address implementation after receiving comments from the legal community.

I. Consultation Memorandum

This consultation memorandum addresses issues concerning the management of litigation in Alberta, including whether changes in the litigation system are necessary, time standards for completion of actions, and methods to increase the efficiency and accessibility of the justice system. The Committee has identified a number of issues relating to this topic and made proposals regarding them. As noted above, the proposals are concerned with issues of policy, not drafting. At a later stage in the Rules Project, draft rules will be circulated for comment. These proposals are not final recommendations, but preliminary proposals. When reviewing them, please feel free to comment on other issues that need to be addressed relating to the management of litigation in Alberta.

EXECUTIVE SUMMARY

This summary highlights only some of the issues that the Committee discussed and the proposals which it has made. The complete discussion of all issues and Committee proposals is contained in the consultation memorandum. Once we receive feedback from the legal community on the wide-ranging proposals contained in this consultation memorandum, the Committee will address the specific Rules and Practice Notes on case management and pretrial conferences in the final recommendations.

A. Is Change Necessary?

Lawyers have a responsibility by virtue of their special role and expertise in the civil justice system to make informed and constructive contributions to improving that system. Alberta is no different from other jurisdictions in needing strategies and mechanisms to assist in modernization of the system to accommodate growth in numbers of cases, the consequences of lack of financial resources and other support for the judicial system, and the impact of technological changes. Support was received from the Alberta Bar in the legal consultation process for change and for new approaches to the management of litigation.

Each year the number of cases being handled by the justice system increases. About 98% of the more than 50,000 cases filed annually resolve at some point before trial, yet the justice system is geared toward the hearing of trials, rather than to supporting efforts at earlier resolution. Civil trials almost invariably take place 2 or more years from the date of commencement, and often several years longer, depending on the type of case. Some measures introduced to assist the parties, such as pretrial conferences, have resulted in further delay, as judicial resources cannot always be made available to accommodate the parties when they are ready for a pretrial conference.

The Committee reviewed the results of introduction of reforms in other jurisdictions: Ontario's reforms, Australia's approach, and the British experience were all discussed. Caseflow Management, case management "tools", and different approaches to implementation were all considered by the Committee. In practice there is a great deal of overlap and blending of the different approaches, and the Committee

recognized that Alberta already incorporates some of the tools of case management, and is a leader in forms of judicial dispute resolution, such as minitrials.

Some of the delays are attributable to the litigants or their lawyers. Currently lawyers have the primary responsibility for the pace of the progress of cases through the judicial system. Systems such as Ontario which have introduced Caseflow Management, have done so partly in response to criticisms of their system that delay has been magnified by lawyers' and litigants' tactical manoeuvres.

The Committee considered that adoption of full Caseflow Management in Alberta would entail a significant shift in legal culture. The Committee felt that any system in Alberta would have to contain as much freedom for individual users of the system as was compatible with the system running smoothly and with as little delay as possible. Concern was also expressed about whether resources would be available and allocated appropriately in Alberta to provide the kinds and types of judicial intervention at intervals that full Caseflow Management implies.

The Committee recommends that changes to the operation of the litigation system in Alberta be considered in order to respond to problems of delay and excessive cost, with a view to creating a "made in Alberta" solution, tailored to local conditions and needs. The traditional system of litigation management should be maintained in Alberta, with the central element of lawyer responsibility for the progress of an action, but certain elements drawn from Caseflow Management systems should be added. Initiatives of the Court of Queen's Bench should be maintained and built upon, while adding additional elements such as time standards and litigation tracks, which may require the courts to reallocate some judicial and administrative resources.

B. Time Standards and Litigation Tracks

The backlog of cases in many Canadian jurisdictions has been contributed to by lack of standards for dealing with cases expeditiously. Time standards can be imposed by requiring disposition within a specified time, or by requiring certain steps to be completed by a certain time. The response from the Alberta Bar was that deadlines

should not be arbitrary, nor should they increase the cost of litigation. Lawyers favoured an informal and flexible regime which left them with some discretion.

The Committee recommends that Alberta adopt time standards based on the time required for each step in the action, and that a comprehensive timetable, which can be amended by agreement between the parties, apply to each action.

The Committee also recommends that the Alberta court system have 3 litigation "tracks": simple, standard and customized. The plaintiff would initially choose the track, but if that choice is contested, an application can be made to the court for directions. A Timetable Schedule in the Rules of Court, for each of the standard and the simple tracks, would apply to every action, unless the parties filed a different timetable.

So that the Timetable Schedule does not become a source of delay, the Committee made several recommendations: that disagreements be resolved by application to the court; that time under the schedule continue to run while applications are pending; and that all applications relating to a particular step in an action be required to be filed within 30 days of the completion of that step in the action (for example, applications relating to undertakings would be made within 30 days of completion of Examinations for Discovery).

The Committee decided to seek input from the practising Bar as to when the Timetable Schedule should commence (e.g., upon filing of Statement of Defence; or upon filing of Affidavit of Records, etc.).

C. Shorter Actions

Given that the Committee is recommending a Litigation Track system with a Simple Track for appropriate actions, the Committee seeks input from the legal profession as to whether it seems necessary to retain a separate Streamlined Procedure, or, alternatively, whether the limits on discovery and appeal should be incorporated into the Simple Track.

D. Protocols

Pre-action protocols, which require the exchange of certain information before an action can be commenced, have been adopted in Britain and Australia. In these jurisdictions, they are considered a significant factor in the reduction or elimination of delay. The Committee noted, however, that in Alberta limitations dates are shorter and there is less time for pre-action protocols to take place. While pre-action protocols may simply codify "best practice" methods, the Committee agreed that the rules should focus on what happens after an action is commenced and not before that. Introduction of pre-action protocols would be too radical a change in Alberta.

The Committee would like to receive feedback from the legal profession as to whether "action protocols" to govern what happens in an action after the pleadings are filed, based on the best practices available, would be a useful addition to the rules.

LIST OF ISSUES

CHAPTER 1. BROAD POLICY ISSUES

[1] Management of litigation is a broad topic, encompassing matters as straightforward as deadlines for filing or service, and as complex as how the entire litigation system should be organized in Alberta. In meetings of the Committee, the discussion has ranged from the particular to the general, from policy to procedure, and from specific Rule changes to system-wide suggestions. We have looked at the practical questions of use of the "tools" of case management in the Rules and Practice Directions, and considered the experiences of other jurisdictions in introducing pilot projects to test new systems for management of litigation. Case management as introduced by the Court of Queen's Bench and embodied in the Rules of Court has been studied and compared to the availability of similar and other mechanisms in other jurisdictions. Comments from the practising Bar and members of the public have been considered through the ALRI consultation process. The Committee has reached some specific recommendations and is seeking input from the practising Bar on how to implement reforms.

[2] Three broad policy issues have guided our discussion:

(1) any changes considered should contribute to the realization of a fair, effective and accessible justice system in Alberta;

(2) it is useful to compare Alberta's management of litigation with models available in other jurisdictions, to inform ourselves of methods for better management of litigation which may be effective in Alberta; and

(3) a principled approach which seeks to minimize delay and expense as much as is consistent with a fair result should guide our recommendations for reform in Alberta.

The discussion that follows addresses the need for change in the litigation system, reviews the experiences of other jurisdictions in adopting reforms, and discusses the special responsibility of lawyers as frequent users of the system to contribute to improving the system. The Committee's recommendations are proposals only at this stage; once we receive feedback from the legal community on these proposals, the Committee will address the specific Rules and Practice Notes on case management and pretrial conferences in the final recommendations.

ISSUE No. 1
In order to improve access to a fair and effective justice system in Alberta, is there a need to consider changes to the operation of the litigation system in Alberta; to review how litigation is managed; to reconsider the role and responsibility of lawyers in the system?

[3] In common with other jurisdictions Alberta has experienced some strains in the judicial system due to increased case numbers, perceived delays in the system, complexity of cases and modern laws, the allocation of judicial resources, and technological changes. Several studies have been completed to determine why there are delays, whether justice can be accessed equally by all, and whether it can be accessed at a reasonable cost. A major impetus for reform in Canada was the Canadian Bar Association's *Systems of Civil Justice Task Force Report,*[2] which enquired into the state of the civil justice systems across Canada and developed strategies and mechanisms to assist in the continued modernization of the system. That report develops the theme that lawyers, by virtue of their special role and expertise in the civil justice system, have a responsibility and are in a position to make informed and constructive contributions to improving the civil justice system.

[4] The foremost concern raised by the *CBA Report* was lack of accessibility to the legal system, which was contributed to by systemic factors such as lack of sufficient user orientation; complexity and lack of flexibility; traditional approaches to litigation; inadequate management tools and resources; and concerns regarding accountability and transparency. The report set out a vision for civil justice, together with some recommendations for specific tools for achieving it. While trials would remain a key component of the legal system, there would be a greater focus on:

- early resolution (through settlement, alternative dispute resolution (ADR), or judicial dispute resolution (JDR))
- greater court control over the progress of cases
- multiple tracks for dispute resolution
- increased access through small claims and expedited and simplified procedures

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[2] The *CBA Report*, *ibid*. was the first national survey of case management in Canada. It built on the work done in The Ontario Joint Committee on Court Reform's *Case Management and Case Flow (Ontario)* (Toronto: The Ontario Joint Committee on Court Reform, 1989), and the *Ontario Civil Justice Review*, *ibid*.

- procedural reforms, and
- reforms at the appellate level.

[5] Many Canadians felt, according to the *CBA Report*, that they could not exercise their rights effectively "because using the civil justice system takes too long, is too expensive or is too difficult to understand."[3] These concerns were echoed in the Alberta Summit on Justice[4] and in the Alberta Court of Queen's Bench *Annual Reports,*[5] which would lead one to believe that many of these criticisms do apply in Alberta. Delay in the resolution of civil disputes arises from many causes, some of which can be identified as:[6]

- delay in moving a case forward once commenced
- lack of familiarity by users of the system with available procedures
- time to obtain a Chambers hearing date or a booking for a Pretrial Conference
- no set timelines in the Rules of Court for completion of steps in an action
- time to obtain a trial date once the case is ready; time required for a hearing or trial; and time taken for rendering a decision
- tactical decisions taken in the course of litigation by litigants or counsel
- high litigation costs, and
- adjournments of interlocutory applications, trials and appeals.

[6] The delays encountered are contributed by a multitude of factors, including the complexity and breadth of documentary and oral discoveries; litigants' and lawyers' schedules and time constraints arising from practice requirements; difficult and complex cases; procedural steps that lawyers are obligated to pursue; interlocutory applications and appeals; preparation and presentation of expert evidence; lack of resources, including insufficient number of judges, facilities, or court staff; conduct of trials; and the processing of appeals.

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[3] *CBA Report, supra* note 1 at 11.

[4] *Alberta Summit on Justice Final Report* (1999), online: <http://www.gov.ab.ca/justicesummit/rec/final.htm> [*Alberta Summit on Justice*].

[5] Alberta, Court of Queen's Bench, *Annual Report of the Court of Queen's Bench 1999* (Edmonton: The Court, 1999) [QB *Annual Report 1999*] and Alberta, Court of Queen's Bench, *Annual Report of the Court of Queen's Bench 1999-2000* (Edmonton: The Court, 2000) [QB *Annual Report 1999-2000*].

[6] *CBA Report, supra* note 1, and the QB *Annual Report 1999*, *supra* note 5 at 3.

[7] It was recognized that costs and delays are most prevalent in the area of discovery, yet that without such disclosure, many settlements would not occur and trials would be characterized by ambush and surprise. The *CBA Report* found that the negative consequences of delay include higher costs for clients; erosion and sometimes loss of evidence resulting from the passage of time and the fading of memories; stress and frustration for clients, lawyers, judges and court administrators; in some circumstances, erosion and loss of legal remedies because of the passage of time; increased likelihood of professional negligence; and decreased confidence in the administration of civil justice.

[8] Although there is little in the way of direct Alberta research and statistics to document problems in Alberta, support for the need for some new approaches, as well as some concerns, are found in the information contained in the *Annual Reports* from the Court of Queen's Bench of Alberta, and in the comments received from the Alberta Bar in the legal consultation process on the proposed revision and reform of the Alberta Rules of Court.[7] A summary of comments in the database follows:

- *There is generally strong support in the legal community for the case management procedures that have been offered by the Alberta Court of Queen's Bench. A typical comment is:*

  > Just knowing that you have to attend a meeting and report to a judge on your progress is likely to make some progress happen; if not, if your case is ready, and you've taken all the steps you can without the other side making some progress, you can point that out to the Case Manager and get some movement on the file.

- *...[T]he effectiveness of case management, currently, depends upon the judge. If they are willing to make orders and keep things moving, the case will move along, but not all of them are. Some judges accommodate delay by their orders.*
- *Because of the current informal style of case management, sometimes lawyers are "ambushed" in a case management meeting, when the other side raises a new issue and the judge is prepared to make a ruling. Many members of the Bar fail to discuss and negotiate their differences in advance of the case management*

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[7] QB *Annual Report 1999*, *supra* note 5; QB *Annual Report 1999-2000*, *supra* note 5. Alberta Law Reform Institute's Rules of Court Project legal consultation process: results are published on the ALRI website online: <http://www.law.ualberta.ca/alri/crrntproj/abrules.html>. All subsequent italicized comments are from a summary of the ALRI database, unless otherwise noted [ALRI database summary].

meeting with the result that case management turns into little more than a private contested chambers application.

- *There were concerns expressed about the demand that the current case management system is placing on judicial resources... Some judges require a [case management] meeting at set times, whether or not it is needed, and this wastes time and adds to the complexity of litigation and the costs.*
- *Most counsel thought that case management should not be mandatory for every case, but that it should be easy to access when necessary. Some also thought it should be possible to apply to take a matter out of case management.*
- *While there was a significant proportion of the Bar who felt that case management should be left in the lawyers' control, it was also acknowledged that this can lead to costs, delay and uncertainty in the process. Others thought that case management costs the client money and causes delay, as the court requires the parties to take steps that normally wouldn't have to be taken.*
- *One proposed solution was that case management should be reserved to those cases where the parties have shown an inability to manage their litigation, where there are more than 2 or 3 lawyers involved, or where one of the lawyers is being difficult. Others thought that case management should be available upon the request of any lawyer.*
- *It was generally acknowledged that case management is the only way to go for large cases, very long trials, or numerous related actions. The rules cannot work for these cases, as the procedures have to be adapted.*
- *The majority of commentators found case management very effective when there were self-represented litigants involved.*
- *Many felt that judges have the most "persuasive" advice and therefore should be the case managers, although it was acknowledged that a court official with some actual power to enforce consequences such as costs could be effective. There was a great deal of concern expressed about whether the current system has the resources to make judges available in a timely manner to manage cases, with current resources. There was concern that imposing system wide case management will slow down the cases that are presently in the system.*

[9] To gauge how serious the problem of delay is in Alberta practice, information was gathered by this Committee about the number of cases in the system, and the time required for resolution. An analysis was undertaken by the Committee of the reasons

for delay, in so far as those reasons could be determined from the information available. A summary follows:

- Every year the number of civil case filings increases; the number is currently 54,000 per year.[8] Of these 54,000 filings, there are only about 1000 civil trials heard each year in Alberta, a figure that is consistent with the ratio of trials to filings in other Canadian and foreign jurisdictions (less than 2%).[9] Thus 98% of cases conclude in some manner before trial. Yet the justice system is geared toward the hearing of trials, rather than to supporting efforts at earlier resolution.
- Civil trials almost invariably take place 2 or more years from the date of commencement, and often several years longer, depending on the type of case.[10] No statistics are kept by the Alberta justice system relating to the time elapsed between the filing of the Statement of Claim and the time of trial. Certain steps are required to be taken in any action: for example, disclosure, examination for discovery, and exchange of expert reports. Other steps are optional or become necessary due to the nature of the particular case. Currently there are no clearly delineated time periods within which pretrial steps must be completed.
- The QB *Annual Reports* (the most recent of which is 1999-2000) indicate that there has been a 6-8 month wait from the time the Certificate of Readiness is filed until the trial takes place, in larger cities in Alberta, and the wait has been

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[8] QB *Annual Report 1999*, *supra* note 5; QB *Annual Report 1999-2000*, *supra* note 5. Note that all figures exclude divorce, adoption, lawyer-client disputes arising from contingency agreements, depended adult, estate and bankruptcy matters. If these are included, the number of cases filed for 1999-2000 is 79,400.

[9] *CBA Report*, *supra* note 1 at 11; *Ontario Civil Justice Review*, *supra* note 1 at 171; *Woolf Report*, *supra* note 1 at 32.

[10] QB *Annual Report 1999*, *supra* note 5; QB *Annual Report 1999-2000*, *supra* note 5. Trial statistics are kept on an annual basis, and not tagged to the date of commencement. However, the ratio of trials to filings is consistent with information from other jurisdictions, see *ibid*. A report entitled *Civil Court Study Report* (Ottawa: Canadian Center for Justice Statistics, 1999) examined civil cases initiated in the Court of Queen's Bench in Edmonton and Calgary in 1991. In the studied cases, less than 2% went to trial, with a median elapsed time from initiation to trial of 678 days for the Calgary cases and 764 days for the Edmonton cases.

several weeks in smaller judicial centres.[11] Long trials are usually booked to take place several months to one year after the Certificate of Readiness is filed.

- Court reports estimated that 30% of cases settle after a pretrial conference and before the Certificate of Readiness is filed; and 75% settle after a judicial dispute resolution and before trial.[12]
- There is some frustration among members of the Bar, and concerns have been raised by members of the public, about the delays while waiting for resolution of litigation.[13]
- The Alberta Rules of Court contain several measures which can aid in management of litigation, but those procedures are not clearly organized and their availability to the litigants is not always certain: for example, pretrial conferences; summary and streamlined trial procedures; sanctions for delay; and costs.
- The Rules of Court contain intermittent timelines for service and document production, and exchange of expert reports, but set no timelines for completion of Examinations for Discovery and production of undertakings, both of which have been implicated in litigation delays.
- There are few limits on the number or type of interlocutory proceedings or appeals from interlocutory rulings, which can add substantially to the time required to process a case through the court system.
- In addition, the Alberta Queen's Bench has introduced several initiatives which provide innovative approaches to case management through Practice Notes and by making judicial resources available to assist the litigants outside of the formal trial procedures. These include: pretrial conferences, judicial dispute resolution (JDR), "mini-trials", individual case management, a proposal for Caseflow Management, and the issuance of several Practice Notes designed to assist the

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[11] The latest published statistics are contained in the QB *Annual Reports: Annual Report 1999*, *supra* note 5; QB *Annual Report 1999-2000*, *supra* note 5. See also *Alberta Summit on Justice*, *supra* note 4. A press release from the Government of Alberta dated October 23, 2002 indicates that in 2001-2002 the wait for a 5 day or less trial in Edmonton was 23 weeks and in Calgary, 21 weeks.

[12] QB *Annual Report 1999*, *supra* note 5 at 7- 8.

[13] See ALRI database summary, *supra* note 7.

parties in their preparation for trial (Q.B. P.N. #1, #3, #4).[14] However, the availability of some of these initiatives is unclear to litigants and the application of them is inconsistent between judicial centres throughout Alberta.

[10] In analysing this information and the impact it has on the progress of cases through the litigation system in Alberta, the Committee identified several concerns. Many of these concerns may be, at least in part, attributable to the traditional approach to litigation in Alberta, in which the pace of the litigation is controlled almost exclusively by the litigants or their counsel, with little involvement of the court unless the litigants or counsel perceive a problem with the progress of their case.[15] Some of those concerns are:

- All cases are treated as if they were going to trial. The courts, in effect "reserve" the use of resources which may never be needed. The court only obtains information on case status when a case is ready to be set for trial, as litigants or counsel determine when activities, events and disposition will occur. There is no systematic control or record of the stage reached by each individual case within the system and thus no information about what resources may be required by each case or when. As a result, there is often a substantial waiting period once a matter is ready for trial.
- The rules do not provide incentives to pursue early disposition, and there is no identification of cases that would benefit from early judicial attention.
- The system countenances, and perhaps even encourages, delay as the litigants set their own timing, with little court oversight, for resolving interlocutory disputes, discovery of documents and examinations for discovery, and resolving scheduling disputes; while adjournments are, in the opinion of some, too easily obtained.[16]
- Many of the management "tools" currently available are contained in Practice Notes, rather than in the Rules, and some litigants may be unaware of them.

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[14] Alberta, *Rules of Court*, Practice Notes. Note that the settlement aspects of these procedures will be addressed in the Early Resolution of Disputes Committee consultation memorandum.

[15] Note that these concerns may not relate to cases which are formally part of the court's individual case management.

[16] ALRI database summary, *supra* note 7.

- Caseflow Management initiatives by the courts have been sidelined by lack of resources.
- There is a "streamlined litigation" procedure available, but litigants and even some counsel seem to be unaware of it.
- Currently there is no formal system for differentiating among different types of litigation which may require different resources from the system.

[11] Other jurisdictions have been coping with similar issues, and their responses differ according to local conditions and needs. In response to criticisms, some jurisdictions have moved away from the traditional model of case management in which the pace of litigation is controlled by litigants and their lawyers,[17] toward one in which that control rests with the court. Most jurisdictions have created a blend of systems by retaining aspects of the traditional system while adopting innovative procedures. As noted above, several lawyers responding to the ALRI consultation expressed opinions on how the system should be organized:

- *Some counsel felt that too much reliance on case management was looking to the courts to do the lawyers' job.*
- *Most counsel thought that case management should not be mandatory for every case, but that it should be easy to access when necessary.*
- *While there was a significant proportion of the Bar who felt that case management should be left in the lawyers' control, it was also acknowledged that this can lead to costs, delay and uncertainty in the process.*
- *One proposed solution was that case management should be reserved to those cases where the parties have shown an inability to manage their litigation, where there are more than 2 or 3 lawyers involved, or where one of the lawyers is being difficult.*
- *The majority of commentators found case management very effective when there were self-represented litigants involved.*

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[17] Some Canadian courts have experienced delay as a serious problem: former Chief Justice Antonio Lamer of the Supreme Court of Canada cited the causes of delay as including slow moving lawyers, a shortage of judges, a lack of court rooms and computerization, the increasing complexity of civil cases and the increasing litigiousness of Canadian society in a report mentioned in G. Pohlkamp, *Caseflow Management: A Delay Reduction Tool: An Issue Paper Prepared for the CBA National Systems of Civil Justice Task Force* (Ottawa: Canadian Bar Association, 1996) [*Caseflow Management*] at 2.

[12] While there was considerable support in the Committee for retaining lawyers' responsibility for the progress of their cases through the justice system, there was also interest in and commitment to improving the experience of litigation by introducing elements from other jurisdictions which have proven successful. The Committee noted that any solutions to be tried in Alberta should take into account the local landscape and truly be a "made in Alberta" solution.

MANAGEMENT OF LITIGATION COMMITTEE PROPOSAL

[13] The Committee recommends that changes to the operation of the litigation system be considered, that methods of managing litigation in Alberta be reviewed in light of solutions in other jurisdictions, and that the role and responsibility of lawyers for the progress of litigation be re-considered, in order to respond to problems of delay and excessive cost, with a view to creating a "made in Alberta" solution, tailored to local conditions and needs.

ISSUE No. 2
Should Alberta move from the traditional method of litigant or lawyer controlled management of litigation to a more systemic approach?

[14] In order to assess what suggestions might be made for reform in Alberta, the Committee reviewed several key concepts in the literature on management of litigation, and considered the results of introduction of reforms in other jurisdictions. In the following discussion, case management refers generally to the management of individual cases. In contrast, Caseflow Management refers to the progress of all cases through the justice system.

A. Current Situation in Alberta

[15] As noted above, Alberta has been experiencing some strains in the judicial system, due to increased case numbers; delays in trial booking and the booking of pretrial conferences and JDR; the complexity of systems and laws; the allocation of judicial resources; and technological changes. As a response to delays and cost, several other jurisdictions have introduced case management (often in the form of Caseflow Management). This modern approach to case management received its

impetus from studies done by business management specialists, and adapted for the legal case management milieu. As one Ontario judge said:[18]

> If you have no old cases in the system...if all litigation moves expeditiously to an early and economic resolution, if litigants are universally treated properly and practically, if reliable trial dates are the norm, and cases are so handled that there is little or no court time wasted, then your court or courts may not need case management.

[16] Few courts are in a position to make such a statement. That same judge also identified the responsibility for making changes in the system:[19]

> It must be emphasized that in this day and age, most of these issues are part of the direct responsibility of judges and the bar, and will by the public be so perceived, and if you believe otherwise then in my view you mislead yourselves, and in the future will pay a price for that, as will the courts in which you practice, and all their present and future members.

B. The *CBA Report*

[17] Is there a need for reform? The *CBA Report* found that:[20]

> a fair, effective and accessible civil justice system is essential to the peaceful ordering and the economic and social well-being of our society...[but]...many Canadians feel that they cannot exercise their rights effectively because using the civil justice system takes too long, is too expensive, or is too difficult to understand.

[18] The discovery process was identified in the *CBA Report* as a major cause of delay, yet it was also recognized that without such disclosure, many settlements would not occur and trials would be characterized by ambush and surprise. The *CBA Report* concluded that the negative consequences of delay include higher costs for clients, erosion and sometimes loss of evidence resulting from the passage of time and the fading of memories; stress and frustration for clients, lawyers, judges and court administrators; in some circumstances, erosion and loss of legal remedies because of the passage of time; increased likelihood of professional negligence; and decreased confidence in the administration of civil justice.

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[18] The Hon. N.D. Coo, "Practicalities of the Introduction of Case Management," *Access to Justice: Questions of Access; Questions of Cost* (Toronto: Canadian Bar Association Convention, August 1994) [unpublished, archived at ALRI].

[19] *Ibid*.

[20] *CBA Report, supra* note 1 at 11.

[19] A vision for civil justice was set out in the Report, with one of the key recommendations being that all Canadian jurisdictions consider introducing a Caseflow Management system.

C. Ontario

[20] Ontario has studied case management and Caseflow Management in detail.[21] The first report of the Ontario Civil Justice Review recommended that the "modern civil justice system should operate under the rubric of an overall caseflow management system."[22] That report defined Caseflow Management as "a case-processing mechanism which manages the time and events of a law suit as it passes through the justice system" meant to achieve earlier resolution of disputes; to reduce or eliminate delays and backlogs; to allocate judicial, quasi-judicial and administrative resources to cases in the most effective manner; and, to reduce the cost of litigation.

[21] Several key concepts emerge from that Review: Caseflow Management (CFM) entails a significant shift in the cultural mind set of judges, lawyers, and court staff; the traditional method of proceeding with a lawsuit has become ineffective in delivering civil justice, given rising costs and unacceptable delays; CFM involves the transfer of principal responsibility for the management of the pace of litigation to the judiciary; and CFM involves the establishment of reasonable, but firm, time limits and the adherence to them.

[22] Caseflow Management was seen as a method of combining and co-ordinating disparate elements of the civil justice system and integrating them, to prevent delay and reduce cost.

[23] On July 3, 2001, 100% case management came into effect in Toronto, and it is expected to be in effect throughout Ontario as resources permit. All civil actions are case managed. The plaintiff must file a litigation timetable or request a case

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[21] *Ontario Civil Justice Review*, supra note 1. For more information, the Ontario government website can be accessed online: <www.attorneygeneral.jus.gov.on. ca> and follow the links to "Civil Case Management" or Rule 77. The information about the Ontario system in the next paragraphs was obtained from that website.

[22] *Ibid*., at 169.

conference to establish a timetable within a certain number of days of commencement; mediation is mandatory; and a settlement conference and a trial management conference are required to be held in each case.

[24] The timetabling is counsel-driven, but if counsel cannot agree, a case conference can be convened to set the timetable, obtain pretrial orders, and manage issues arising in the action. The settlement conference is used to narrow and settle issues, explore strengths and weaknesses in the case through the delivery of briefs, witness summaries and legal issue analyses. Failure to proceed can result in dismissal of the case.

[25] If a party fails to comply with a time requirement or to attend mandatory mediation, the case management judge or master may convene a case conference to create or amend a timetable and order the party to comply, and can also order costs. Failure to comply with a timetable allows the judge or master to strike out any document filed by a party, dismiss the party's proceeding, amend the timetable, order payment of costs, and make any other order that is just.

D. Nova Scotia

[26] Nova Scotia had a caseflow pilot project in Halifax to which changes were made effective April 1, 2000.[23] Although it was decided after the pilot project not to pursue full Caseflow Management, several features from the caseflow system were retained, including dismissal of cases not proceeded with after 3 years; a required settlement conference 60 days before trial; "tracking" by designating cases as ordinary process, fast process or complex; and an Appearance Day motions court to settle procedural matters with less formality.

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[23] Comments in this section are based on review of the Proposal for Caseflow Management Pilot Project (Halifax), discussions with an official in the Nova Scotia (Halifax) court system (April 17, 2002), and a review of the Rules and Practice Memorandum 27. The main feature that was not retained was supervision of an entire case by one judge from beginning to end.

E. Australia

[27] In 1996 the Australian Law Reform Commission[24] recommended that the case management systems then in use in Australia be replaced by an "individual docket system" of case management (one form of Caseflow Management) together with a range of other procedural reforms. Until then, different forms of case management were in effect in different jurisdictions. The objectives of introducing Caseflow Management were seen as including: early resolution of disputes; reduction of trial time; more effective use of judicial resources; monitoring of case loads; development of information technology support; increasing accessibility to the courts; facilitating planning for the future; enhanced public accountability; and, the reduction of criticism of the justice system by reason of perceived inefficiency.

[28] The tools that were already available to the courts to manage litigation included: directions hearings to assist the parties in identifying the relevant issues and fix a date for trial; a pretrial settlement conference; case management conferences to obtain further directions for most economical and efficient means of completing proceedings and conducting trial; and Assisted Dispute Resolution. The Law Reform Commission proposed adding the following reforms: system wide individual case management with all new cases randomly allocated to a judge who would be responsible for a case up to final disposition; and new case management processes and timelines, aimed at disposing of 98% of cases within 18 months or less of commencement.

[29] It was recognized that even similar case management systems could produce different levels of effectiveness in different jurisdictions. The degree and extent of responsibility and commitment would have a major impact upon any case management program. Factors such as administrative and technological support, leadership, the level of judicial confidence, communication and caseload would influence efficiency. It was noted that the courts tend to evaluate case management by focussing on the effect on delay, but that issues of cost and user satisfaction should also be addressed.

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[24] Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No. 89), online: <www.austlii.edu.au/au/other/alrc/publications/reports>; and other related materials from the Australian Law Reform Commission.

[30] The individual docket system [IDS] was adopted in all Federal Court registries in 1997, and a comprehensive review was undertaken. That review found:[25]

> There was unanimous positive feedback in consultations and submissions about the operation of IDS. This is a significant accolade. The Commission consulted with several hundred practitioners from around Australia, experienced in Federal Court litigation, with expert witnesses, some litigants and judges and administrative staff from the Court. [footnote numbers from original deleted] Submissions and consultations were overwhelmingly supportive and complimentary of IDS, although practitioners did record some areas of concern.

[31] One of the greatest benefits identified was derived from having the same judge dealing with the case from start to finish. Another was that cases were being resolved more expeditiously, the majority within 2 years of filing. Some concerns remained: familiarity with the system by users, and communication with the public could both be improved. As a result, some refinements were introduced to the system of case hearing and case management including a national procedures guide to the individual docket system; a protocol for dealing with cases ready for hearing but not listed for hearing within a reasonable time; new requirements for trial readiness; costs of interlocutory proceedings to be payable and taxable forthwith; and, monitoring of the use and outcomes of court annexed mediation.

F. Britain

[32] The *Woolf Interim Report* defined the objectives of the civil justice system as disposing of cases in a reasonable time, providing full disclosure, identification of relevant issues, hearing of cases without delay, and the conduct of trials in as expeditious a manner as justice permits.[26] Lord Woolf concluded that in order to meet these goals, there was "no alternative to a fundamental shift in the responsibility for the management of civil litigation in this country from litigants and their legal advisers to the courts." The adversarial system in England and Wales left the main responsibility for the initiation and conduct of proceedings with the parties, and normally the plaintiff set the pace. Lord Woolf felt that in the absence of effective control of litigation by the courts, "the parties ... exploit the Rules to their own advantage". An imbalance could result between the financially stronger or more

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[25] *Ibid*.

[26] *Supra* note 1. All quotations in this paragraph and the next are found at 26-28.

experienced party and other parties, who could "spin out proceedings and escalate costs". As a result, resolutions were frequently unfair or "achieved at a grossly disproportionate cost or after unreasonable delay".

[33] Further, Lord Woolf's report identified the use made of discovery, expert evidence and witness statements as contributing to cost, complexity and delay. In Lord Woolf's opinion, "unmanaged adversarial procedure has led to an unacceptable situation". His proposed solution was a court-managed system in which judges decide on discovery appropriate to a particular case, identify issues, and provide standard directions with timescales for the majority of cases. His recommendations for improvement of the legal system included: a multi-track system which would provide a variety of different methods of management with standard directions and timetables; case management conferences before trial; timetables with dates of trial firmly adhered to; limited interlocutory procedural appeals; and certainty of costs.

[34] The *Woolf Report* responded to concerns that the proposals would undermine the adversarial nature of the civil justice system. He stated that the concerns were not justified:[27]

> The responsibility of the parties and the legal profession for handling cases will remain. The legal profession will, however, be performing its traditional adversarial role in a managed environment governed by the courts and by the rules which will focus effort on the key issues rather than allowing every issue to be pursued regardless of expense and time, as at present.

[35] The Report recognized that there would be a need for training for both judiciary and court staff to improve the necessary case management skills, and that resources within the courts may have to be redeployed after priorities are established. One final important recommendation was that means be found of increasing the client's knowledge of what the progress and costs of the case would involve.

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[27] *Supra* note 1, Section II, Chapter 1, para. 3. Evaluation of the Civil Justice Reforms continues; an Early Evaluation was completed in March 2001 and the most recent in August 2002 which can be found online at <http: //www.lcd.gov.uk/civil/reform/ffreform.htr>. The findings in those reports are that case management has lessened the complexity of litigation; that cases are being heard more quickly; and that the number of interlocutory appeals has decreased, resulting in less cost and more speed.

G. Application to Alberta

[36] Alberta currently follows the traditional method of civil case management, although several aspects of modern case management have been added to it. In the traditional system, the litigants or their counsel are in control of the timing of events of the lawsuit as it passes through the justice system,[28] and they only seek the attention or assistance of the court when they perceive a problem with the progress of their case.

[37] From the point of view of the justice system, there is no differentiation between cases: all cases are seen as the same, subject to the same procedures and time limits. Each case makes some use of court systems, such as filing functions and services provided by court officials (clerks, registrars). Cases proceed in accordance with rules set out in the Rules of Court and procedural provisions contained in statutes, as well as interpretations of those procedures embodied in previous decisions of the court. For matters not explicitly stated in the rules or a statute, application can be made to a judge or designated official for guidance on procedures. If there is a dispute about the way that a particular Rule should be applied, application can be made to the court for an interpretation.

[38] Individual case management has been available in Alberta since the mid-1980's as an "*ad hoc* measure which could assist in moving an action to trial in an orderly, focussed and expeditious manner and to provide a potential vehicle for court-assisted resolution of the action."[29] It does not apply to all cases but only those for which a "...case management judge is appointed by the Chief Justice or Associate Chief Justice, at the request of counsel or a party, to manage the progress of a file. That judge then becomes involved in all procedural aspects of a case – the same judge may do the settlement conference as well."[30]

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[28] See H. Balke & M. Solomon, "Case Differentiation: An Approach to Individualized Case Management" (1989) 73 Judicature 17. This is a seminal study which has informed many of the commentators in the field. See also: *Caseflow Management*, *supra* note 17.

[29] QB *Annual Report 1999*, *supra* note 5 at 9.

[30] *Ibid*.

[39] In a traditional system, lawyers have the primary responsibility for the pace of the progress of cases through the system. This is one of the strengths of the system, as litigants and lawyers can move at their own pace, and determine when resources are to be devoted to a particular file. There may also be more scope for informal resolution, when deadlines are not imposed by the court but agreed to by the parties. In carrying out the litigant's instructions in managing the progress of a case, lawyers are bound by their obligations arising from the Alberta *Code of Professional Conduct*[31] and by their obligations as officers of the court. Self-represented litigants do not have these additional strictures.

[40] The rate at which a case progresses through the traditional court system will depend upon several matters, including: the litigants' desire to move the case forward and their resources for doing so; the complexity of the case and the number of steps required; tactical manoeuvres on the part of litigants and lawyers; the respective lawyers' and litigants' availability for certain steps; orders made by the court; and the availability of resources in and through the court system at the time the case is ready to use them. Since there is so much variability in these factors, they can lead to delay and extra costs. Delay and expense have been responsible for much of the criticism of the traditional system.

[41] In response to such criticisms, there has been movement in several jurisdictions from a traditional system to a Caseflow Management system (including Ontario, Nova Scotia, the Canadian Federal Court, and effective January 1, 2003, Quebec). Britain and Australia were amongst the first to introduce Caseflow Management, and those jurisdictions have had enough experience of the new system to have created some analysis of its effectiveness.

[42] The Ontario system moved from the traditional system to a Caseflow Management system, in part due to criticisms such as the following:[32]

> ..it has been the role of the lawyers, together with their clients, to decide if and when a lawsuit would proceed, and when various steps would be taken. They have done so within the framework of the Rules of Civil Procedure, and the time parameters laid out in those Rules. With few

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[31] Law Society of Alberta, *Code of Professional Conduct* (Calgary: The Society, 2002).

[32] *Ontario Civil Justice Review*, *supra* note 1 at 170-71.

> exceptions, however, the prevailing attitude in Ontario has always been that **those time parameters are to be honoured more in the breach than in the observance**...[emphasis added]
>
> ...We have heard constantly from lawyers, administrators, judges and members of the public that early intervention by the judiciary is of critical importance in the disposition of cases....It is often, and in our view accurately, said that the more times one can build into the system an occasion when counsel has to pick up his or her file and think about it, the more likely it is that there will be an earlier resolution of the case.

[43] Alberta lawyers are accustomed to the traditional system:

- *Some counsel felt that too much reliance on case management was looking to the courts to do the lawyers' job.*
- *...a significant proportion of the Bar ... felt that case management should be left in the lawyers' control...*

[44] At the same time, however, it was acknowledged that leaving management in the lawyers' control

- *...can lead to costs, delay and uncertainty in the process.*

[45] What was clear from the ALRI consultation, was that there was generally strong support for the case management procedures that are available, and that they are seen as effective, with some remarks that currently it depends upon the judge appointed as case manager. There was support in the consultation for case management, as long as flexibility was retained:

- *Lawyers in Alberta seemed to favour an informal and flexible, less paper intensive case management regime, which allows lawyers to agree on scheduling, and leaves them with some discretion. Several favoured having one judge assigned to take care of all procedural matters before trial, as this would stop abuse and it would become clear whether one of the lawyers or litigants was the cause of most of the delay, or was acting unreasonably.*
- *One flaw in the current case management, is that judges appear to entertain motions at the case management meeting without notice or evidentiary rules being applied. Another is that right now the system is a hybrid, where there are loose deadlines and judges being "hands on" and making additional deadlines.*

H. Caseflow Management (CFM)

[46] Caseflow Management (CFM) focusses on the movement of cases through the legal system.[33] In a CFM system, there is usually a system of set deadlines monitored by the courts, although individual cases are still managed by the lawyers or litigants. The characteristics of a CFM system are as follows:

- the court supervises the progress of all cases from commencement
- deadlines are imposed for completion of activities such as motions, discoveries, and settlement conferences
- cases are to be completed within a specified time limit
- the court monitors compliance with deadlines
- there are sanctions for failure to meet deadlines
- case scheduling occurs near the beginning of the case (trial booking)
- there is continuous review of age and status of pending caseload by the courts.

[47] The goal of Caseflow Management is to reduce delay and the cost of litigation by moving cases through the court process in a regulated and timely manner,[34] and while these and other systemic benefits do seem to result from CFM, there are also criticisms of this model that it reorients the judicial role; that it must be compulsory for all cases to work well, and some cases may not be suited to it; that it may promote settlement over other outcomes; that it increases lawyer work and therefore expense, thus changing the legal culture.[35]

[48] The *CBA Report* reviewed Caseflow Management as part of its mandate, and found that the benefits of such systems outweighed the concerns and recommended:

- that all Canadian courts have a Caseflow Management system to "provide for early court intervention in the definition of issues and for the supervision of the progress of cases" and
- that each court design its own system which, at a minimum, should provide for:

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[33] *Ibid*. at 169. See also: *Caseflow Management*, *supra* note 17 for discussion of the concepts in this section.

[34] See *Caseflow Management*, *supra* note 17.

[35] J. Resnik, "Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging" (1997) 49 Ala. L. Rev. 133, online: <www.law.ua.edu/lawreview/> and follow the links to volume 49.

- early court intervention by designated and trained individuals in all cases;
- the establishment, monitoring and enforcement of timelines;
- the screening of cases for appropriate use of non-binding dispute resolution processes; and,
- reliable and realistic fixed trial dates.[36]

[49] Caseflow Management has been adopted by several Canadian jurisdictions, including the Federal Court of Canada, Ontario, Nova Scotia, and, effective January 1, 2003, Quebec.[37]

[50] The Alberta Court of Queen's Bench intended to move to a Caseflow Management Pilot Project to be implemented concurrently in Edmonton and Calgary on November 1, 1998[38] but apparently this initiative was cancelled due to lack of funding.[39] After studying reduction of delay strategies used in other court systems, the Queen's Bench increased the availability of case management and proposed implementing a full Caseflow Management system which would:

- create a more structured system of file management
- funnel cases into 1 of 3 "tracks": short, standard or complex
- require all cases to adhere to a timeline
- require judicial leadership and consultation and cooperation with the Bar
- eliminate unnecessary delay while providing a just, speedy and inexpensive determination of every proceeding on its merits
- place the responsibility for progress of cases through the system on the judiciary
- provide a schedule with reasonable deadlines for completion of specific events
- enforce the schedule
- dispose of cases within a set time.

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[36] *CBA Report*, *supra* note 1 at 36, Recommendations 4 & 5.

[37] For a discussion of management of litigation throughout Canadian jurisdictions, please see: Doris I. Wilson, "Managing Litigation in Canada" (2002) 5 Canadian Forum on Civil Justice 4.

[38] *Notice to the Profession*, October 10, 1997 (The Honourable W.K. Moore, Chief Justice of the Court of Queen's Bench of Alberta).

[39] QB *Annual Report 1999*, *supra* note 5.

[51] That initiative had the full support of the Court of Queen's Bench and that of key representatives of the Bench, Bar and Administration of Justice, and was in accordance with similar initiatives in other provinces and countries, and with the recommendations of the *CBA Report* and the *Ontario Civil Justice Review*, among others. On December 20, 2000, the reforms were postponed until further notice.[40]

I. Case Management "Tools"

[52] While there may be a purely theoretical approach to case management which sees the traditional system as wholly litigant driven and those jurisdictions with Caseflow Management as wholly court supervised, the reality is that in practice there is a great deal of overlap and blending of the various approaches to case management and no pure system exists. Many jurisdictions have incorporated a number of the "tools" of case management into their more traditional systems over the last 20 years; some of the caseflow systems retain several aspects from the traditional system.

[53] Both litigants and the courts use such "tools" to better manage cases through the litigation process. All Canadian jurisdictions use some of these mechanisms, although they may be used somewhat differently in each jurisdiction. It is often difficult to distinguish between processes that use tools to provide some court management and processes that are systemic and thus manage cases from beginning to end. Some of the "tools" are:

- case management conferences (pretrial, settlement and duration conferences)
- notices
- applications to court for procedural directions
- deadlines for exchange of documents
- time limits for completion of other steps
- dismissal or other sanctions for delay
- status review
- pretrial hearings
- dispute resolution mechanisms and minitrials
- trial booking procedures, including certificates of readiness
- "tracks" or "streams" for different types of litigation.

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[40] *Notice to the Profession*, December 20, 2000 (The Honourable Catherine A. Fraser, Chief Justice of Alberta).

[54] In traditional systems which make use of such "tools", lawyers continue to have the primary control over the progress of the case, but they do so within a model which provides both the litigants and the courts with mechanisms to better manage cases through the litigation process. It will be noted that the majority of the case management procedures discussed are available in the Alberta system, but given that they are scattered throughout the Rules and the Practice Notes, they may not be as effective as they could be. Pretrial conferences, JDR, minitrials and the Practice Notes specifically addressing very long trials and case management procedures were all introduced as initiatives by the Alberta Court of Queen's Bench to improve the progress of cases through the system and control delay in litigation.

J. Three Approaches to Implementation of Case Management Systems

[55] In practice, with the overlap and blending of elements from various systems of case management, the approaches discussed here likely would, in being implemented, contain aspects similar to one another. Each jurisdiction operates somewhat idiosyncratically to take into account local history and unique factors, and it is difficult to place a jurisdiction's legal system in a particular spot along the continuum which starts with traditional case management and ends with a systemic Caseflow Management solution. All seek to utilize "tools" of case management in the best way for the system at hand, whether or not that accords with a purely theoretical approach. However, for purposes of discussion, it is useful to identify three methods that have been used to implement Caseflow Management systems, while keeping in mind that some of the aspects discussed have been incorporated as part of more traditional systems as well.

1. Differentiated "tracks" or "streams" of litigation; also called Differential Caseflow Management (DCM)

[56] DCM[41] is a way of implementing specific time lines for different types of cases. It uses pre-established deadlines, specific to the type of case, designed to move cases of varying complexity through the court process within time frames appropriate to the issues. Deadlines are set for major case events, and there is close court supervision (sometimes by court staff) until disposition. Jurisdictions which follow this approach attempt to define the specific features of cases which distinguish the level of case

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[41] Balke & Solomon, *supra* note 28.

management required. Most DCM systems have a minimum of three tracks: complex, simple, and standard. Some jurisdictions add a category for “holding” cases, which are not moving forward due to events such as settlement negotiations. There may also be separate tracks for specialized matters, such as family law or commercial litigation.

[57] The seminal *Woolf Interim Report*[42] which has influenced both Canadian and Australian reforms focussed on mechanisms that could be introduced to address delay in the court system. Lord Woolf concluded that there was "no alternative to a fundamental shift in the responsibility for the management of civil litigation from litigants and their legal advisers to the courts”,[43] to meet problems observed in the British system. Lord Woolf recommended a DCM "track system" which allowed for management of a case appropriate to that case, with standard directions and timing for the majority of cases. He recommended that the initial decision about which track a case would be placed on be made by a judge, but that standard directions and timelines would thereafter apply, unless a judge's individual attention to the case was required. The British system, as a result of reforms, now has litigation tracks, as well as specialist lists, with practice directions for each.

[58] DCM was the recommended model of Caseflow Management in the *CBA Report* for all Canadian jurisdictions.[44] Ontario and Nova Scotia have adopted “tracks” or “streams” for the management of litigation in the context of CFM.[45] Several other Canadian jurisdictions have some “streaming” even though they may not have implemented Caseflow Management fully: British Columbia has a “Fast Track action”, Manitoba and Newfoundland have an “Expedited Action”, Prince Edward Island and Saskatchewan offer a “Simplified Procedure”, and Alberta currently has a “Streamlined Procedure”. In Alberta, the Streamlined Procedure shortens the time for disclosure of documents and limits the time available for Examinations for Discovery.

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[42] *Supra* note 1.

[43] *Supra* note 1 at 18.

[44] *CBA Report*, *supra* note 1 at 38, Recommendation 8.

[45] Wilson, *supra*, note 37.

[59] Some of the benefits of DCM include: event and time standards for tracks are created to fit case requirements; tailoring of the court system to the particular case or kind of case is more appropriate than treating all cases as if they were the same; judicial intervention can occur as needed, reserving judicial supervision for the more complex cases; dispute resolution is encouraged at the earliest possible time; and the number of interlocutory motions is usually reduced, allowing trial dates to be more certain.

[60] The theory behind having different "tracks" for different types of cases is that counsel will be required to pay close attention to each case at the beginning of the case, to consider such matters as what is in issue, how many witnesses may be required, how many experts witnesses will be heard, and what amount of trial time will be required, in order to choose the appropriate "track" for the case. If counsel are unable to agree on the designation of a particular case to one of the tracks, then judicial assistance can be sought, again at an early stage. To use an analogy from the medical world, such early "triage" allows the most appropriate treatment for each case, rather than using the same treatment for all cases, large or small.

[61] Concerns include questions about how cases should be assigned to a track; whether it is necessary to have specific deadlines for each type of case; and how much judicial involvement at the early stage is necessary. Some DCM systems have been criticized for being "lockstep" and inflexible.[46]

2. Judicial monitoring; also called Individual List; Individual Case Management (ICM); Single Judge; Single Docket; Individual Docket

[62] Research indicates that early judicial involvement in a case will increase the likelihood of settlement.[47] The ICM method involves continuous control by a judge, who personally monitors each case on an *ad hoc* basis. Each case is assigned to an individual judge upon filing, and that judge manages his or her defined group of cases from commencement to conclusion. The judge ensures that the case moves at an

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[46] In the ALRI database summary there has been some criticism levelled at the Federal Court system for its "lockstep" nature and inflexibility, although other lawyers reported that they found the Federal Court system provided a useful structure for litigation. See *supra* note 7.

[47] See *Ontario Civil Justice Review*, *supra* note 1 at 170.

appropriate pace. Positive features of this approach to Caseflow Management include familiarity of the assigned judge with individual cases, earlier settlements, and less delay overall. This method has become entrenched in many American jurisdictions and has been studied in some detail.[48] Concerns or criticisms include the extensive use of judicial resources; the extra cost to litigants of meetings with the judge; and the added complexity in smaller cases.

[63] Australia has been a leader in the reform of management of litigation, introducing an ICM system in 1997 which randomly assigned all new Federal cases to a particular judge who would be responsible for the case for all interlocutory matters and the trial.[49] There were set times for Case Events (such as a Directions Hearing, an Evaluation Conference, etc.) to occur. The goal was to dispose of 98% of cases within 18 months or less of commencement. As noted above, feedback in an extensive review process was overwhelmingly positive: lawyers and litigants appreciated appearing before a judge who was familiar with all aspects of the particular case; there was more agreement between counsel on procedural matters; there was an earlier exchange of information and narrowing of issues; earlier settlement was facilitated by fixed trial dates and other features of the system. Cases were resolved more quickly, although the 98% goal was not reached. Concerns about the new system were that some counsel and litigants did not have the necessary familiarity with it; that it operated somewhat differently in various judicial districts; and that sanctions should be more consistent and effective.

3. Master List; also called Administrative monitoring

[64] With Master List,[50] deadlines are monitored by court staff, and the file is only referred to a judge when a problem arises, or when a case does not meet established time lines. Monitoring is achieved by requiring the parties to report to the court (often a Master or Registrar) at fixed milestones and the court exercises routine and structured control over timelines. All cases are controlled by the court registry and are assigned to different judges or judicial officers at different times for different

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[48] Resnick, *supra* note 35.

[49] *Supra* note 24.

[50] *Ontario Civil Justice Review*, *supra* note 1 at 187-196.

purposes. When an event relating to a case has been dealt with it is returned to the pool of cases to await the next event and to be assigned again, not usually to the same judge or judicial officer.

[65] The main advantage of Master List is that judicial resources are reserved to judicial functions, with court staff carrying out monitoring functions. The litigants and lawyers maintain a great deal of responsibility for the progress of cases, while the justice system has an "overall picture" of what is in the system and which cases are likely to require court resources in the near future. Ontario has adopted this system, initially by way of pilot projects in different judicial districts. It was recognized that CFM would entail a significant shift in legal culture, by transferring the principal responsibility for the management of the pace of litigation to the courts.[51] Positive comments by practising lawyers include that this approach allows qualified and committed court staff or Masters to become familiar with particular cases, and that it leads from commencement to trial expeditiously and inexpensively.[52] Other advantages include fixed trial dates, case conferences, and the ability to set timetables for all steps in the proceedings.

[66] Concerns about Master List include the availability of court resources for monitoring, unfamiliarity of different judges with steps previously taken on the file, delay due to lack of judicial resources when a case needs attention, and the complexity of administering the system. Some Ontario legal practitioners have argued that: it would be more useful to have one judge familiar with an action from beginning to end; judges are converted from adjudicators into referees; the onus is put on the system instead of on lawyers to manage their practices; cases are dealt with piecemeal

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[51] *Ontario Civil Justice Review, supra* note 1 at 170.

[52] See K.R. Aalto, "Case Management: The Way of the Future" (1999) 10:7 The Advocates' Brief 1; R.G. Slaght, "Case Management?" (1998) 10:3 The Advocates' Brief 1; S. Stanton & S. Wilson, "You Might Like to Know..."(1997) 8:8 The Advocates' Brief 5; R.G. Slaght, "Comment on the Case Management System Proposal" (1996) 7:7 The Advocates' Brief 7; (The Advocates' Brief is a publication of The Advocates' Society of Ontario). See also B. Garland, "Changes and Challenges in the Case Management System" in *Civil Litigation* (Ottawa: County of Carlton Law Association, 1998). See also: Balke & Solomon, *supra* note 28; *Managing Justice*, *supra* note 24.

and only in reaction to foul-ups or contentious matters; and, that judges have too many cases and not enough case responsibility.[53]

K. Litigation System in Alberta

[67] This Committee considered the various systems which have been introduced in other jurisdictions, and noted that most, if not all, are a blend of traditional elements with newer "tools" of case management while a few systems have adopted a more systemic Caseflow Management regime. It was noted in a review of the legal systems which have adopted full Caseflow Management that such a change would entail a significant shift in legal culture. In the Ontario Bar, while there was a great deal of support for changing the legal culture to provide more expeditious access to justice, there were also problems encountered in translating the theoretical gains into practical reality.

[68] Whether the courts or the litigants and their lawyers should have the major responsibility for moving cases through the system was an important concern for this Committee. Given responses in the legal community consultation, and the views of our Committee members, it was felt that any system in Alberta would have to contain as much freedom for individual users of the system as was compatible with the system running smoothly and with as little delay as possible. Concern was also expressed about whether judicial resources would be allocated appropriately in Alberta to provide the kinds and types of judicial intervention at intervals that Caseflow Management implies. After much discussion, the Committee considered that the goals sought could be achieved by having counsel take the initiative by moving a case along according to a case schedule or timetable and take responsibility for abiding by it. Once a case is ready for trial, and court resources are required, the monitoring function should move to the court or a judicial officer.

[69] The Committee considered the systems discussed above as representative examples of solutions to the problems of delay and cost, but noted that the systemic response also raises new concerns. It was felt that while generally the Alberta system worked quite well, significant improvements could be effected by introducing

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[53] *Ibid*.

litigation management "tools" at an earlier stage in the action, and specifically by attempting to control delay in certain aspects of litigation.

MANAGEMENT OF LITIGATION COMMITTEE PROPOSALS

[70] The Committee recommends that the traditional system of litigation management be maintained in Alberta, with the central element of lawyer responsibility for the progress of an action, but that certain elements drawn from Caseflow Management systems be added.

[71] Some aspects of Caseflow Management systems have already been introduced in Alberta, mainly through initiatives from the Court of Queen's Bench, and the Committee recommends that these innovations be maintained and built upon, by including additional elements that have proven useful in caseflow systems, such as time standards and litigation tracks, where those can be interpolated into the Alberta system.

[72] The Committee notes that in order to implement its proposals effectively, it may be necessary for the courts to reallocate judicial and administrative resources.

ISSUE No. 3
How should time standards for the progress of actions through the justice system be adopted in Alberta ?

L. Time Standards

[73] Time standards are an essential feature of any case management system. The *CBA Report* studied the issue and found that the backlog within many Canadian justice systems had been contributed to by a lack of standards for dealing with cases in an expeditious manner. Currently, the Alberta system does not impose any deadlines for overall completion of cases, although there are timelines for certain steps in an action, such as disclosure of documents, and exchange of expert reports. Once a matter is set down for trial by Certificate of Readiness, the court may impose additional deadlines for completing steps prior to trial. If a case is in formal case management, orders may be made for timing of the Examinations for Discovery, the

disclosure of documents and reports, and the exchange of undertakings resulting from Discoveries.

[74] The *CBA Report* made the following recommendations:[54]

- every court set timelines for the overall determination of civil cases and develop suitable means by which to enforce such timelines
- every jurisdiction provide for the automatic dismissal of cases where they have not been determined within a specified period, subject to the discretion of the court to order otherwise in compelling circumstances
- model time guidelines be adopted for Canadian courts and the legal profession, being[55]
  - 90% of all cases should be settled, tried or concluded within 6 months of filing of readiness and within 12 months of case filing
  - 98% within 9 months of readiness and 18 months of filing
  - the remainder within 12 months of filing of readiness and 24 months of case filing
  - summary hearing proceedings should be concluded within 90 days of filing.

[75] In some jurisdictions, such as Ontario, Australia, and many American states, overall case completion dates have been adopted, indicating that cases are to be disposed of within a specified time limit. Flowing from the selection of a final date for trial is the assumption that interim procedures would have to be completed in a certain time frame in order to ready a matter for trial.

[76] Having a timetable for completing an action responds to the criticism of the traditional litigation system noted above that, as lawyers have the primary responsibility for the pace of litigation, they are in a position to delay cases, unwarrantedly, and that it has been their role to decide when steps are taken, when the

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[54] *CBA Report*, *supra* note 1 at 39, Recommendations 9 & 10.

[55] *CBA Report*, *supra* note 1 at 39, para. 3.4.2.

lawsuit will proceed, and that time parameters are honoured more in the breach than in the observance.[56]

[77] In the ALRI legal consultation, the question of time lines for the progress and completion of actions was explored:

- *It was a common theme that deadlines should not be arbitrary, nor should they increase the cost of litigation. Deadlines that are clear, concise and make sense would be helpful in moving cases forward.*
- *Lawyers in Alberta seemed to favour an informal and flexible, less paper intensive case management regime, which allows lawyers to agree on scheduling, and leaves them with some discretion.*
- *A schedule of events that predicts when things will happen was seen to be a solution, as long as there was the flexibility to either vary the steps, the time line, or even opt out if the step seemed unnecessary to both counsel, or to a judge.*
- *Some felt that a court imposed schedule would make sense, if counsel did not come up with their own schedule.*

[78] When Ontario adopted a Caseflow Management system designed to prevent delay and reduce cost, time deadlines were kept to a minimum in the final form of the system, as pilot projects had indicated that fewer time guidelines imposed by the court would be more effective. In the current Ontario system, the plaintiff files a litigation timetable. If other counsel do not agree with it, a case conference with the judge sets the timetable.

[79] This Committee felt that the introduction in Alberta of time standards for separate steps in an action would be useful, but saw no need at this time to impose overall completion dates on all actions. The Committee's perception was that time standards related to specific steps or procedures in an action, rather than to overall case completion, would entail less drastic change to the legal culture; would be more adaptable to the requirements of different types of cases; and would be less likely to be perceived by the Bar and by litigants as arbitrary. The expressed preference of members of the local Alberta Bar to maintain responsibility for their own cases was taken into account, as were court resource issues and enforcement difficulties.

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[56] *Ontario Civil Justice Review*, *supra* note 1 at 170-71.

MANAGEMENT OF LITIGATION COMMITTEE PROPOSALS

[80] The Committee recommends that Alberta adopt time standards based on the time required for each step in an action, rather than based on an end date for the litigation.

[81] The Committee recommends that a comprehensive timetable apply to every action.

[82] The Committee recommends that changes to the timetable be made by agreement of the parties and the timetable amended; if the parties cannot agree, an application should be made to the court for directions.

ISSUE No. 4
How should the court system be organized to allow for the most efficient progress of different types of actions through the justice system?

M. Litigation Tracks

[83] As was noted earlier, having different litigation "tracks" for different types of cases would require counsel to pay close attention to each case at the beginning of the case, to define the matters in issue, to consider how many fact witnesses and expert witnesses may be called at a trial, and how much trial time may be required, in order to choose the appropriate "track" for the case. This places a great deal of responsibility on counsel to make the decision which will be most effective for the case and for the legal system, so that resources are not needlessly accessed. Lawyers responding to ALRI's legal consultation process commented on the concept of litigation tracks:

- *Many felt that there should be at least 3 [litigation] tracks, expedited, ordinary and complex, which would be differentiated by steps necessary, nature and length of discovery, time limits and a varying costs schedule. However, rather than a judge or court officer choosing the track, most felt that counsel should be free to choose the correct stream for the case. Many noted that it is not only the value of the claim, but also the complexity and the impact of the result which should be considered in choosing the track. Some felt that lawyers usually choose the slowest track, and this could be discouraged by having the court impose a track if the lawyers cannot agree on one. Others felt that unforeseen*

issues could arise which would require a different track once the case got going, and this could cause problems.

- *Several noted that with tracks established, it would then be possible to direct some cases for immediate JDR, mediation, ADR, case management, long trial or summary trial procedures, or other alternatives to a full-blown legal case, with each of these streams having a set of rules applicable to them. There should be some flexibility to move from one stream to another (perhaps by court application).*

[84] Given the comments of counsel, and the views of members of the Committee, it was felt that lawyers should be free to choose the appropriate track by considering a number of factors, and if counsel were unable to agree on the designation of a particular case to one of the tracks, then an application could be made to the court for determination. This application should be made at an early stage, so that the most appropriate procedures are in place for each case, rather than using the same procedures for all cases.

MANAGEMENT OF LITIGATION COMMITTEE PROPOSALS

[85] The Committee recommends that the court system in Alberta should have 3 litigation "tracks": simple, standard and customized (for longer, more complex actions). The appropriate track should be chosen by counsel exercising their discretion taking into account the following matters:

- the amount in issue in the action and the complexity of the action
- the number of parties
- the number of documents involved
- the number and complexity of issues, and the importance of the issues
- how long discovery would take
- the number of witnesses, and expert witnesses, to be examined at trial
- the estimated length of trial
- any other relevant consideration.

[86] The Committee recommends that the plaintiff initially choose the track at the time of filing of the Statement of Claim, but if that choice is contested, an application can be made to the court for directions.

[87] The Committee recommends that there be a Timetable Schedule in the Rules of Court for each of the Standard Track and the Simple Track, which would apply to every action unless the parties file a different timetable.

CHAPTER 2. SPECIFIC RECOMMENDATIONS FOR IMPROVEMENTS TO MANAGEMENT OF LITIGATION IN ALBERTA

ISSUE No. 5
How would the Timetable Schedule work?

[88] The Committee defined three broad stages of litigation: issue definition, gathering of information, and resolution of the action. These three stages can be broken down further into discrete steps, including pleadings, service and response; examinations for discovery (together with undertakings completion), and exchange of expert reports; and, the final stage, trial preparation, trial readiness, and the trial itself. Each step serves a well defined purpose in the progress of an action, and expectations of completion of each step within a reasonable length of time are implicit in the rules.

[89] However, the current rules do not provide an overall system for the progress of litigation. The initial stage of issue definition is fairly well served by the rules, in that there are steps which include time lines in the rules, for commencing an action, for service of the Statement of Claim, and for responding with a Statement of Defence. The next step is filing of an Affidavit of Records, and again, there is a time limit set out in the rules, one which counts "forward" from the filing of the Statement of Defence.

[90] From the time when the Affidavit of Records must be filed and served until a matter is set down for trial, there is a period of time which could be described as "unaccounted for time" in the progress of the action. Steps do need to be taken in this period, in order to ready a matter to be heard at trial. Interlocutory applications may take place, experts must provide reports, witnesses should be interviewed, and examinations for discovery must be completed. Questions arising from the examinations for discovery, usually by way of undertakings, must be answered. Currently there are no time limits on completion of these steps.

[91] Instead, time during this period is, in effect, counted "back" from the trial date. Expert reports are to be exchanged 120 days before a trial commences (Rule 218.1(1)). There is no requirement that interlocutory proceedings or discoveries be

completed by any particular date; however, once the Certificate of Readiness is filed, no interlocutory proceedings or discoveries may take place without leave of the court (Rule 236(6)).

[92] Certainly steps are being taken and an action is being readied for trial or settlement in the period which we have described as "unaccounted for time" in the progress of an action. The "best practices" described to us by practising lawyers ensure that actions move along in a systematic way until they are resolved either at trial or by settlement. In proposing that time lines be introduced for completion of the steps in an action, and preparing a Timetable Schedule, the Committee has simply formalized the current practices, with an emphasis on the "best practices".

[93] The Committee proposes that there be a Timetable Schedule in the Rules of Court for the Standard Track, which would apply to every action. Alternatively, the parties may prepare their own comprehensive timetable for each action which defines, on a "go forward" basis, the timing of the steps in the previously "unaccounted for" period in a legal action, and in that case the parties should submit the timetable to the court. This responds to concerns expressed in the ALRI consultation with the legal community, that lawyers should be free to manage their own cases:

- *...the onus should be on lawyers to manage their cases...*
- *...control of timing should be left to the lawyers...*
- *It is good to have time lines and milestones to move litigation along. This is another area where the courts should be more strict and enforce the time lines unless there is a good reason not to. The time lines have to be reasonable and parties should be able to agree out of them if the circumstances warrant.*
- *Presently there is room for informality and flexibility, such that counsel may reach agreements as to scheduling, etc. amongst themselves. This is good and should be retained as far as possible.*
- *The time lines shouldn't be imposed by a judge, they should be set by the lawyers. If you make a commitment to the court, you will generally meet it.*

[94] Given that the Committee has also recommended that there be three litigation "tracks", the Committee then considered whether there should be a timetable for use for different litigation tracks. Again, this responds to matters raised in the ALRI consultation:

- *It may be useful to have time lines for completing steps as long as counsel has discretion to vary the steps, but have a means to enforce time lines if necessary. Counsel should be encouraged to sit down and come up with their own schedules. Give them an incentive to agree, such as knowing that they will be "stuck" with pre-determined time lines if they don't agree.*
- *There should be a way of making something happen if the other lawyer cannot agree that the next step will occur within three months. It causes a lot of problems.*
- *Actions should be completed in a certain time line. Discovery should be completed within six months... The rules for case management should not be rigid but there is a need to adhere to a time line. Lawyers should have to notify their own client if the lawyer's schedule is the reason for delay.... The court imposes time lines in criminal cases all the time, it should work for civil cases too.*
- *The recent trend to have judges case managing files wouldn't be necessary if there were mechanisms in the rules to allow lawyers to move actions along.*
- *It is not so much setting deadlines as setting objectives for each stage of the litigation. The schedules should be set by the lawyers (or litigants) with the judges reviewing to see if it is reasonable.*

[95] After discussion, the Committee considered that a Timetable Schedule could be introduced for "Standard" Track matters and "Simple" Track matters, but thought that the time standards to be imposed on the "Customized" Track for more complex matters would be likely be handled through case management and be given specific deadlines by the court or by agreement.

A. Standard Track

[96] Chart 1 is the Committee's proposed schedule for the Standard Track. The "Days" column indicates how much time is to be allocated for completion of each step listed in the "Steps" column, while the "Running Total" is the number of days elapsed since Day 1 of the schedule. As noted in the "Annotation" column, for illustration purposes Day 1 of the Timetable Schedule commences with the filing of the last Statement of Defence, whether that be to the Statement of Claim, to a Counterclaim, or a Statement of Defence by a Third, Fourth, or subsequent Party. This would provide the parties to the action with ample time at the beginning of an action to consider

settlement without engaging the court process and without requiring the parties to expend too much of their resources on formal litigation steps if those were unnecessary for that particular action. This time at the beginning of an action can be expanded by the plaintiff's agreement not to require the Statement of Defence to be filed within the time limited by the Rules of Court. However, the Committee is seeking input from the Alberta Bar as to when the Timetable Schedule should commence (e.g., the filing of the last Statement of Defence; the filing of the last Affidavit of Records, etc.).

Timetable Schedule — Draft
Standard Track

Steps	Days	Running Total	Annotation
Unaccounted Time			
Pleadings Service and Response Track Information Sheet			This schedule starts from the date of filing of the last Statement of Defence, including Defence to Counterclaim and Third and Fourth Party Defences. This leaves the time from filing of the Statement of Claim to last Statement of Defence unaccounted for in the case schedule.
SCHEDULE STARTS *At this stage, the pleadings and responses are complete and the parties have had some opportunity for negotiation and discussion. The track schedule now begins and unaccounted time ends.*			
		DAY 1	See text at paragraph 96 for prepared start time.
Resolution of Track Disagreements 30			
Disclosure of Documents	90	90	

Issue Definition (1st Evaluation)	30	120	Includes filing Case Schedule, Case Management Conference, or Court Application. Presumably a Striking Out Application after this would be very unusual.
At the end of this stage the issues should be clear, the parties determined, and the nature of the dispute understood.			
Discovery • Oral or Interrogatories • Transcripts • Undertakings	135	255	Completion of Discovery and Case Management Conference (if requested).
Interlocutory Applications filed 30 Experts -Reports	90	345	
-Rebuttals	30	375	
The information is more or less complete and the parties can perform a comprehensive evaluation of their case.			
Settlement Discussions 60		435	Settlement Conference and other types of Judicial Dispute Resolution can be booked but may be completed later due to the Court's schedule
Trial Readiness	60	495	Certificate of Readiness and Pre-trial Conference
Trial			

[97] The Committee recommends that the first expert report be provided 90 days from the end of discovery, with 30 days for a rebuttal report. This is a change from the current Rule 218.1, which requires that the expert statement (and report if it is to be relied upon) be served 120 days before the trial commences, and 218.12 which requires that the rebuttal statement (and report, if applicable) be served 60 days after the expert report. The Committee felt this was an appropriate change in focus, which would require counsel to put their minds to the issue of experts earlier in the litigation

process, likely before the Examination for Discovery takes place. Counsel would likely have to contact experts earlier in the course of the litigation to advise them of when their services will be required, and give them preliminary instructions. This would assist experts in that they would be given advance notice of when their services will be required and could book their time accordingly.

[98] The Committee discussed whether settlement discussions should be considered a separate phase from the trial readiness phase, but concluded that these steps could take place concurrently rather than consecutively. Since the parties are often not in control of the timing for booking formal ADR or JDR processes, the Committee thought it would be sufficient if the date for such activities was set during this period though they may not be completed until later.

B. Simple Track

Timetable Schedule — Draft
Simple Track

Steps	Days	Running Total	Annotation
Pleadings Service and Response Track Information Sheet			This schedule starts from the date of filing of the last Statement of Defence, including Defence to Counterclaim and Third and Fourth Party Defences. This leaves the time from filing of the Statement of Claim to last Statement of Defence unaccounted for in the case schedule.
Case Calendar			
		DAY 1	
Resolution of Track Disagreements 30 Disclosure of Documents	30	30	

Issue Definition (1st Evaluation)	30	60	Includes filing Case Schedule, Case Management Conference, or Court Application. Presumably a Striking Out Application after this would be very unusual.
At the end of this stage the issues should be clear, the parties determined, and the nature of the dispute understood.			
Discovery • Oral or Interrogatories • Transcripts • Undertakings	60	120	Completion of Discovery and Case Management Conference (if requested). Rule 665(1).
Interlocutory Applications filed 30			Rule 669 – for Streamlined cases.
Experts -Reports	60	180	
- Rebuttals	30	210	
The information is more or less complete and the parties can perform a comprehensive evaluation of their case.			
Settlement Discussions 30		240	Settlement Conference and other types of Judicial Dispute Resolution.
Trial Readiness	60	270	Summary Statement. Rule 666(1). Certificate of Readiness and Pre-trial Conference
Trial			

C. Is a Simple Track Necessary?

[99] The Committee discussed whether the Simple Track is necessary, given that many of the steps are the same in the two tracks. However it was recognized that some proceedings involve limited issues, and either may not require every step in the action, or may require less time to complete one or more of the steps in the action. Those cases should proceed more quickly and be tried more quickly. In the ALRI consultation, there was support for implementing a quicker procedure for appropriate cases:

- *There should be a fast track. Lawyers are always looking for reasons to delay. They are too busy, or are not paying attention to their files.*
- *The amount of money in an action does not necessarily determine the complexity of an action. Actions worth little may be complicated or important, and actions worth a lot may not be at all complicated. It is better to have a shortened form of procedure available for use in any action, and then counsel, who is familiar with the issues, can decide whether to use it.*
- *The biggest problem with the new Streamlined Procedure is that the rules don't move the action along after the Affidavit of Records are filed. After that time actions slow to the pace of regular litigation. There should be a time line for completing discoveries to ensure that smaller actions do move faster.*

[100] Having a Simple Track available for simple actions with few documents will allow this type of matter to move more quickly through the system.

[101] The Committee also recognized that many times an action moves forward because a certain step is required within a certain length of time; whether this is arbitrary or not, it has the effect of moving the litigation along. As noted in the ALRI legal consultation:

- *The recent trend to have judges case managing files wouldn't be necessary if there were mechanisms in the rules to allow lawyers to move actions along.*
- *Delay is because of the rules and the way the judges are using rules. Some counsel will use delay as a tactic. Lawyers procrastinate as a rule. Lawyers don't deal with matters unless they have to. Deadlines which are arbitrary and which increase the cost of litigation are unnecessary. Deadlines will help if they are clear, concise and make sense.*

[102] Schedules were seen as particularly appropriate if one of the parties is self-represented:

- *There should be a mandatory meeting early in the process if there is a self-represented litigant, where a judicial officer sets a schedule and advises the self-represented litigant what their obligations are. This schedule should be enforced – too often judges bend over backwards to accommodate self-represented litigants. This causes matters to go on forever and greatly increases the cost of the party with counsel.*

[103] The Committee recognized that some cases need to be dealt with more quickly than others, due to the imperatives of the clients, such as employment cases and small personal injury actions, where the plaintiff has fewer resources than the defendant and wants the matter resolved quickly and inexpensively. In the ALRI consultation, lawyers generally seemed to want tools to move an action along without spending a lot of their clients' money on court applications.

D. Does the Proposal of the Committee Permit Enough Latitude for Lawyers to Run Their Own Cases?

[104] Members of the Committee felt that most lawyers move matters along without requiring a schedule to be imposed, and it was clear from the ALRI consultation that this view was shared by lawyers in practice:

- *Presently there is room for informality and flexibility, such that counsel may reach agreements as to scheduling, etc. amongst themselves. This is good and should be retained as far as possible.*
- *It is good to have time lines and milestones to move litigation along. This is another area where the courts should be more strict and enforce the time lines unless there is a good reason not to. The time lines have to be reasonable and parties should be able to agree out of them if the circumstances warrant.*

[105] It was the view of the Committee that the proposed schedules merely formalize what happens in many case management conferences, where the court assists counsel in setting time lines for completing matters. The Committee's recommendation of a Timetable Schedule is meant to simplify matters by providing a standard timetable which the lawyers are free to amend by agreement, as long as the amended timetable is filed with the court.

E. How Will the Timetable Schedules be Used?

[106] The Timetable Schedules will apply to every action, unless the parties, or their lawyers, address timing and create their own Timetable Schedule. The schedules in the rules could also be used by judges as a "measuring stick" when lawyers or litigants are before them arguing about whether a step is being taken in a timely manner. There is also an element of trying to capture the "best practice"; introducing time lines will have educative value. Time lines are effective in moving an action through the system on an overall basis.

F. What if the Parties Disagree on the Applicable Timetable Schedule?

[107] The Timetable Schedule applies unless the parties agree otherwise, or the court orders otherwise.

[108] The Committee sees its approach as fitting the majority of cases, although not every case, and as creating a generalized template for most actions. A major feature of the system we are recommending is that lawyers will remain in control of their own time by being free to agree on their own schedule. The court may order the parties to use either the Timetable Schedule or another schedule if the parties cannot agree.

G. Should the Client be Informed of the Timetable Schedule?

[109] The Committee recommends that the rules contain a requirement that a copy of the Timetable Schedule (whether it be the one in the rules or one that is agreed to between counsel) be sent to the client, as the client will have to be available for examinations, and provide information for preparation of the Affidavit of Records and for undertakings. In the ALRI consultation, there was some discussion of the client's role in scheduling:

- *Delays caused by counsel (as distinct from clients) is one area where the rules might impose cost sanctions against counsel. In order to avoid a personal costs order against counsel in the event of delay, counsel would need to stipulate that the delay in question is caused by the client or some factor clearly beyond the control of counsel.*
- *Lawyers should have to notify their own client if the lawyer's schedule is the reason for delay.*

[110] There was discussion in the Committee as to whether or not the client should have to "sign off" on the Timetable Schedule prior to filing it, or whether the lawyer should have to certify that the client agrees to it. While this would formalize a "client-centred approach", it was also recognized that the lawyer has an ethical obligation and a duty to report to the client that this is the schedule for the litigation, and advise of the consequences of not following the schedule. The lawyer's agreement to the schedule binds the client in any event, so there should be no problem with a requirement that the client be kept advised of the schedule.

[111] The Committee seeks the input of the legal profession as to whether this recommendation is workable, or would be seen as intruding too far into the solicitor-client relationship.

H. Should the Timetable Schedule Commence After the Last Statement of Defence is Filed?

[112] The Draft Timetable Schedules included in this consultation memorandum uses the last Statement of Defence as the timing for commencement of the timetable, for illustrative purposes. The Committee felt that the timetable should likely commence at a point at which the rules do not mandate time limits currently. The Rules of Court already impose time limits for the Pleadings stage of an action. At the pleadings stage, some of the time limits can be extended by agreement, as for example the frequent extension of time to defendants to file the Statement of Defence. The time for filing a Statement of Claim is governed by limitations, which are outside the jurisdiction of the Rules of Court. Parties currently often vary times within the Pleadings stage by agreement, and the Committee recommends that this continue to be an acceptable practice.

[113] The Committee is seeking input from the practising Bar as to whether the timetable should commence on the date of the filing of the last Statement of Defence, or at some other time, for example, when the last Affidavit of Records has been filed.

I. How Should Differences Over the Choice of Track be Resolved?

[114] The Committee recommends that the appropriate mechanism to resolve differences over choice of track be an application to the court.

J. How Long Should Parties be Given to Resolve Differences Over the Choice of Track?

[115] Ideally the application to resolve differences over the choice of track would be heard within 30 days of the difference arising; but since the Committee acknowledges that the court may not hear, or decide, the application within the 30 days, the recommendation is that the application must be filed within 30 days, which would run concurrently with the obligation to complete the Affidavit of Records. Since the parties are able to extend time periods by agreement, and the court could also extend

the time for completion of the Affidavit of Records, the question of whether the time to complete an Affidavit of Records is to be extended could be addressed when hearing the motion to resolve the differences over the choice of track.

K. How Would the Running of Time Under the Schedule be Affected by Interlocutory Applications?

[116] There are many types of interlocutory matters which could affect time running under the schedule, such as summary judgment applications or an application to resolve questions of privilege in document production. The Committee felt that, *prima facie*, time under the schedule should continue to run unless the parties agreed, or the court ordered otherwise.

[117] The parties could agree to suspend the running of the time in the schedule pending the resolution of matters by application to the court. Alternatively one of the parties could make a motion to suspend the schedule pending a decision. Although it would be preferable to make this motion to the same judge who would be hearing the main application, the Committee acknowledged that the application may have to be made to a different judge if the main application were to be delayed for some reason.

[118] The Committee recommends that all interlocutory applications arising from a particular step in the action, which might affect the timing of other steps in the action, should be filed within 30 days of the completion of that step, even if the motion can not be heard within that time. For example, if the issue relates to Examinations for Discovery, then the application should be made within 30 days of the Discovery; if it relates to expert reports, application should be made to the court within 30 days of receipt of the expert report to resolve those questions.

MANAGEMENT OF LITIGATION COMMITTEE PROPOSALS

[119] The Committee recommends that:

- A Timetable Schedule be introduced for the Standard Track and the Simple Track to be used for every action unless the parties agree on and file a different Timetable Schedule with the court.
- Any disagreements about scheduling can be resolved by application to the court; the court would be able to order that the schedule proposed by one of the parties

be applied, that a Timetable Schedule apply, or that some other schedule selected by the court apply.

- While an application is pending before the court, time under the Timetable Schedule would continue to run unless the parties agreed otherwise, or the court ordered otherwise.
- All applications related to a particular step in the action would be required to be filed within 30 days of the completion of that step.

[120] The Committee seeks input from the practising Bar as to the date upon which the Timetable Schedule should commence (e.g. filing Statement of Defence; or filing of Affidavit of Records).

ISSUE No. 6
Are there procedures that can be adopted to shorten actions?

[121] The Committee reviewed various procedures which might promote the broad policy goals of contributing to the realization of a fair, effective and accessible justice system in Alberta, while minimizing delay and expense as much as is consistent with a fair result. In light of the recommendations of this Committee, the first question was whether the Streamlined Procedure in Part 48 of the Rules should be maintained. The Notice to Proceed has been used in some other jurisdictions as a method of minimizing delay.

L. Simple Track vs. Streamlined Procedure: Do We Need Both?

[122] Part 48 of the Rules is a Streamlined Procedure which currently applies to actions where less than $75,000 is in issue, if the parties agree, or if the court considers it appropriate. The Streamlined Procedure is intended as a "shorter quicker procedure for smaller cases"[57] and "smaller cases" is limited by dollar value of the claim. The Simple Track proposed by this Committee does not have a monetary limit; it is to be chosen by counsel or the parties after consideration of a number of factors (such as the number of witnesses expected to give evidence at trial, the number of legal issues, etc.).

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[57] W.A. Stevenson & J.E. Côté, *Alberta Civil Procedure Handbook 2002* (Edmonton: Juriliber, 2002) at 489.

[123] There was considerable support expressed in the ALRI consultation for the Streamlined Procedure by those lawyers who had used it, but it was also clear that the present procedure presents some problems in practice:

- *The biggest problem with the new Streamlined Procedure is that the rules don't move the action along after the Affidavit of Records are filed. After that time actions slow to the pace of regular litigation. There should be a time line for completing discoveries to ensure that smaller actions do move faster.*
- *Although we have a Streamlined Procedure, the only benefit that I have seen in practice is that it allows parties to limit discovery to a maximum of six hours, which is a good thing. Beyond that, it seems that the balance of the Streamlined Procedure Rules are ignored, which was a conclusion also drawn by Rooke J. in his recent ACTLA paper on trial preparation.*
- *The problem with the Streamlined Procedure is that while things move along quickly until the Affidavit of Records stage, after that it slows down and moves no faster than a regular action. There should be further time lines for discoveries, etc. to keep it moving to trial. The other problem is that although you may move through the process faster, when it comes to booking a trial you still have a year and a half wait. There should be a way for getting a trial time faster for a smaller matter.*
- *It may be useful to have a way of opting into a Streamlined Procedure. Just because a matter has a lot of money at stake does not mean that it is complicated.*
- *The practising Bar is, however, less than fully familiar with the applicable procedures, and remains concerned about the risks of putting in less than a full case for final disposition.*
- *The Streamlined Procedure is a good idea, but it should not be limited to actions of a certain value. Sometimes the amount claimed does not reflect the complexity of the action.... It would be better to have a system where one of the parties can choose to opt into or opt out of a Streamlined Procedure.*
- *It still takes six months to get to pretrial conference, even if you are in the streamlined process. It is no faster and very frustrating for the client.*
- *The Streamlined Procedures work well, although opposing counsel have had to be reminded that they are under this procedure and that they can't adjourn etc. Lawyers do not have a broad base of knowledge as to the content of the streamlined rules and their operation.*

- *The Streamlined Procedure is not working especially since half the Bar seems to be unaware of its existence when it applies. Also, using the dollar figure of the suit as the only criterion for tracking is not particularly useful as the complexity of the case is not usually determined by the dollars involved.*
- *If there were to be different "tracks" for different types of cases, it should somehow be based upon the issues in the lawsuit, not the dollars involved.*

[124] Several counsel who responded in the ALRI consultation noted that the Streamlined Procedure can be less expensive for the client, and may enable the parties to reach a result more quickly; although it was pointed out that only parts of the procedure are "streamlined" and that after the Examinations for Discovery are completed, the case falls into the regular system to be set for trial. The Streamlined Procedure differs from the regular procedure in that time limits for production of the Affidavit of Records are shorter, and there are limitations on discovery and on appeals. A different test for document production is employed under Part 48.

[125] The first question the Committee considered was: are the Streamlined Procedure and the proposed Simple Track different? While the Streamlined Procedure is reserved for smaller (dollar value) cases, the Simple Track, as proposed by the Committee, is not limited by size or value of the case; rather it is chosen by counsel or litigants after consideration of the several factors noted above. Under the Streamlined Procedure there are time limits on discovery, and limits on the appeal of interlocutory matters; this was not the intention of this Committee for the Simple Track. The Committee has proposed that Written Interrogatories (currently available in the Streamlined Procedure) be available for both the Simple Track and the Standard Track. Both the Simple Track and the Streamlined Procedure require the Affidavit of Records to be produced within 30 days, rather than the 90 day period under the Standard Track.

[126] In the consultations with the legal profession, there was both support expressed for, and opposition to, the shorter time in the Streamlined Procedure for production of the Affidavit of Records. Some counsel found the shorter time periods useful, others had not used the Streamlined Procedure, and some who had used it (or failed to use it

appropriately) found that the court was willing to impose penalties pursuant to the Rule.[58]

[127] The Committee felt that there were two options: the Streamlined Procedure could continue to exist as a separate litigation stream for smaller dollar value cases as it does now, with limitations on the right of discovery and appeal. Alternatively, the Streamlined Procedure could be replaced by the Simple Track, with the expectation that, for most "smaller" cases, counsel or the parties would choose the Simple Track. The Committee was supportive of allowing proceedings which only involve limited issues to proceed more quickly and be tried more quickly, but was unsure whether it was necessary to retain the limits on Discovery and appeal in order to allow cases to move through the system more quickly. A concern was that counsel or litigants could have difficulty in deciding whether to use the Streamlined Procedure or the Simple Track.

[128] The Committee decided to seek input from the legal profession in this consultation memorandum as to whether it seems necessary to retain a separate Streamlined Procedure, or, alternatively, whether the limits on discovery and appeal should be incorporated into the Simple Track proposed by this Committee.

M. Should a Notice to Proceed be Available in the Rules?

[129] Some jurisdictions have available procedures which would allow either the court or one of the parties to require that an action be moved along, if there is concern about the speed at which an action is moving. An example of such a procedure is the Notice to Proceed which could be served after a certain length of time had elapsed without a step being taken. It would be a simple form that could be issued by the court or be served by either party, if litigation is languishing. Some jurisdictions have found the Notice to Proceed very effective in dealing with long outstanding matters, where it has been implemented to deal with cases remaining on file at the courthouse, but not actually active. A comment from the ALRI consultation:

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[58] See: for example, *Zukiwsky v. Prime* 2002 ABQB 230. The penalties under Rule 187 for failure to produce an Affidavit of Records within 90 days was described by the court as "draconian" in *Grzybowski v. Fleming* 2001 ABQB 259 at 2.

- *The five-year drop-dead rule is mainly a problem for the defendant, because the courts keep extending the definition and the time available to plaintiffs. That rule was changed to try and make things be dealt with more expeditiously, but it has had the opposite effect. Right now, in order to bring matters to a close, we have to wait out the time, and then make an application, which costs our client a lot of money, and then the court usually gives the plaintiff another extension. There should be a quicker and cheaper way to find out whether the plaintiff is actually going to proceed with an action. There should be more of an onus on the plaintiff; right now the entire onus is on the defendant to make the application.*

[130] In the Alberta Rules, delay is subject to sanctions only if it is substantial.[59] Some counsel in the legal community consultation indicated that occasionally they experienced difficulty in getting other parties to an action to take steps in an expeditious way. For example, one party may not proceed to Examinations for Discovery quickly enough, or answer Undertakings given at Examinations for Discovery expeditiously. The only remedy in Alberta at the present time is to make an application to the courts to order the other party to move the matter along more quickly, or for case management, or in an extreme case, for contempt.

[131] The Committee recommends that there be no monitoring role for anyone other than counsel or the parties, with a Timetable Schedule in place. Monitoring the speed at which an action moves through the litigation system should be the parties' responsibility, not the court's. Instead of introducing an additional Rule, the parties should use the Timetable Schedule to move matters along, and if there were problems with compliance with the Timetable Schedule, an application could be made to the court, either to place the litigation into case management, or for the application of sanctions such as striking a claim or defence, costs or directions to take steps within a certain time.

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[132] The Committee decided to seek input from the legal profession in this consultation memorandum as to whether it seems necessary to retain a separate

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[59] Rule 244 (delay leading to prejudice); Rule 244.1 (5 year delay).

Streamlined Procedure, or, alternatively, whether the limits on discovery and appeal should be incorporated into the Simple Track proposed by this Committee.

[133] The Committee does not recommend the introduction of a Notice to Proceed.

ISSUE No. 7
Would protocols be effective in Alberta?

[134] Pre-action protocols have been introduced in Britain in conjunction with the overhaul by Lord Woolf of the British legal system. Pre-action protocols are mandated requirements for exchange of certain information before an action can be commenced. They are used in Britain, and several other jurisdictions, as a method of getting information exchanged early in the process, and are considered a significant factor in the reduction or elimination of the formal discovery processes.

[135] The Committee recognized that pre-action protocols are seen as effective in those jurisdictions, but felt it was important to note the British pre-action protocols were introduced in a context where there was little or no oral discovery, limitations periods were longer, and the legal system was seen as requiring massive change.

[136] The Committee noted that the general purpose of such protocols is to facilitate early exchange of information and dialogue between the parties prior to a matter entering the court system; but also noted that, in the Alberta context, limitations dates are shorter and there is less time for pre-action protocols to take place. The *Limitations Act* performs the function of requiring an action to be commenced at an early date. Committee members also felt that plaintiffs generally have an interest in getting action moving at an early date as, the sooner they ask for their relief, the sooner they will receive it.

[137] An argument in favour of introducing protocols is that they simply codify what the best legal practice is anyway, that is, the early exchange of information with a view to resolving a matter at the earliest possible date with the least expense to the clients. A concern is that without formal protocols, the trend may be toward inertia. The Committee also considered whether protocols could be introduced not as rules,

but as expectations in the system. Judges in JDR and case management say that their job will be made easier and more effective, if there is some understanding of common action by the participants. Case management would also be more straightforward if there were some protocols in place.

[138] There was concern in the Committee about whether the legal profession would accept any additional steps in the form of pre-action protocols required in the conduct of an action, considering that there is already considerable dismay expressed by the legal profession at the proliferation of Practice Notes. The Committee generally agreed that the Rules should focus on what happens after the action is commenced and not before that. Members of the Committee recognized that it would be too radical a change in Alberta to implement pre-action protocols.

[139] The Committee then considered whether there are other ways to include incentives or expectations as to good practice in the Rules or in some sort of accompanying materials to the rules (such as a set of "action protocols" to govern what happens in an action after the pleadings are filed) or whether this should be left to other parts of the system, such as the Law Society or Legal Education Society. It was noted that the Timetable Schedule we have recommended be filed for each action in the legal system will incorporate some expectations for timely completion of steps in an action.

MANAGEMENT OF LITIGATION COMMITTEE PROPOSALS

[140] The Committee does not recommend that pre-action protocols or action protocols be introduced at this time.

[141] However, the Committee would like to receive feedback from the legal profession as to whether "action protocols" to govern what happens in an action after the pleadings are filed, based on the best practices available, would be a useful addition to the rules.