Global Review of the Federal Courts Rules
A Discussion Paper

Background

When the major revisions to the Federal Courts Rules were implemented in 1998, it was intended that the Rules would undergo another major review after ten years. Since that time there have been many minor revisions and several significant reforms. Among the significant reforms have been those for: case management; offers to settle; representative and class proceedings; expert witnesses and expert evidence; and summary judgment and summary trial. Consequential changes occasioned by these reforms have also been made, as have a range of housekeeping changes. However, there has not yet been any overarching attempt to synthesize these changes or to consider more broadly the overall direction that the Rules should take in the years ahead.

It is now time to reflect on the Rules as a whole, to examine the main principles and policies they express, and to determine whether they need to be modified, refined or re-articulated in light of the experiences of other jurisdictions and the evolving practice in the Federal Courts. In doing so, it will be important to identify any critical areas of deficiency and to consider solutions based on reforms in other jurisdictions.

This discussion paper identifies the following possible issues that could form the basis for reform of the Rules:

1) Court-led procedure vs party-led procedure,

2) The Court's authority to control abuse,

3) Trial vs disposition,

4) Introducing the principle of proportionality,

5) Making effective use of practice directions,

6) Uniform procedures vs specialized procedures,

7) Making the "architecture" of the rules more user-friendly, and

8) Other areas of possible reform.

Issue 1—*Court-led Procedure vs Party-led Procedure*

Civil justice reform in many common law and civil law jurisdictions in recent times has featured an increase in court involvement in the management of the proceedings. This has helped to curb the tendency of litigants and their counsel to expend more time and money in the pre-trial process than is warranted to resolve the dispute.

In the Federal Courts, these reforms have contemplated greater involvement of judges and prothonotaries in many aspects of procedure—determining the length of time permitted for various stages of the proceeding, appointing and examining experts, and determining the steps needed to resolve a case in case-planning conferences—to mention just a few. Each proposal for an increase in the involvement of the court in managing

proceedings has involved careful consideration of the potential impact on the principle of party prosecution.

Under the principle of party prosecution those who are most familiar with the dispute and have the greatest interest in it—the parties—are free to prosecute or defend it as they see fit. However, over the years, concern has been expressed about the adverse impact this freedom can have on the fairness of proceedings when the parties are of unequal resources. Concern has also been expressed about the risk this freedom presents for unwarranted demands on court resources by litigants who wish to pursue unnecessarily complex and protracted procedures.

As mentioned, case management has been very successful in the Federal Courts and elsewhere in reducing the time and cost of dispute resolution through greater involvement of the courts in the pre-trial phase of the process. Case management could be enhanced by highlighting it at the beginning of the Federal Courts Rules as a fundamental building block of procedure or by identifying it as a general interpretive provision. A case planning conference could be introduced early in the process as a prerequisite to proceeding with the matter as has been done in some jurisdictions such as British Columbia.

Other jurisdictions, such as Ontario, have taken a different approach to facilitating the early resolution of disputes, by continuing to place primary responsibility for case management with the parties, but encouraging efficiency in various ways, such as through the requirement to produce a plan for discovery. In Quebec, the courts have been granted the power on their own initiative or after having heard the parties to declare an action or other pleading improper and impose a sanction on the party concerned.

As perspectives on the principle of party prosecution evolve and court involvement in the management of proceedings increases, the question arises as to whether we are nearing the tipping point at which we will begin to regard proceedings as, at least in principle, primarily court-led rather than party-led, and how the balance of responsibilities should guide future reforms.

Discussion Points—Should the Rules reflect a shift in the balance of emphasis from party-led to court-led proceedings in which the role of counsel is to facilitate the progress of proceedings, which are primarily directed by the court, rather than to have primary responsibility for conducting the proceedings? If so, would this reform best be reflected in a general interpretive provision or in specific amendments to the Rules? Should case management in the Federal Courts be further enhanced? If so, should it be incorporated as a general interpretive principle, or by way of a preliminary case planning conference, or by other reforms in the process?

Issue 2—*The Court's Authority to Control Abuse*

In conjunction with the trend toward greater involvement of the courts in the management of proceedings, the rules of procedure in some provinces now explicitly provide for the authority of the courts to take steps to control abuse more generally.

For example, articles 54.1 C.C.P., rules 84-90 of the Superior Court of Québec in civil matters and Rules 94 and 95 of the Court of Appeal of Québec in civil matters concerning vexatious or quarrelsome proceedings address concerns relating to abuse. These concerns are also addressed, in part, by rule 221(1)(a)(c)(d) and (f) of the Federal Courts Rules and by section 40 of the Federal Courts Act. However, the wording of article 54.1 C.C.P. is broader in that it refers to bad faith, excessive or unreasonable procedures, procedures used to cause prejudice to another person, in an attempt to defeat the ends of justice, and to procedures that restrict freedom of expression in public debate (SLAPP-Strategic Lawsuits Against Public Participation).

The expression "to defeat the ends of justice" appears to be the equivalent of the expression "using the courts for an improper purpose" adopted by the Supreme Court in defining the "doctrine of abuse of process":

> In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays . . . ***or*** *whether it prevents a civil party from using the courts for an improper purpose* **. . .** *the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice* (Emphasis added.)

See: *Société de la Place des Arts de Montréal* v. *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Stage Local 56,* 2004 SCC 2; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63.

Federal Court Rule 221 gives the Court the power to order *on motion* that a pleading be struck out whereas article 54.1 C.C.P. gives courts the power, *on request or even on its own initiative*, after having heard the parties on the point, to declare a pleading improper and to impose an interim sanction (case management) or a final sanction as set out in articles 54.3-54.6 C.C.P. These powers, which were codified in June 2009, specify that the Québec Superior Court has inherent jurisdiction, inherited from the common law, to control an "abuse of the court's process.

In sum, the power of the Federal Courts, on their own initiative or on application, to declare an abuse of process and to grant the appropriate sanction, based on the stage of the proceeding or at the end of the proceeding, could be enlarged and clarified. It might be helpful to address this in rule 3 or 47 rather than simply by amending rule 221(1)(f). The language could track CCP rule 54.1 or it cold be more general, possibly as follows:

> "3.(2) On motion of a party, or on its own motion, the Court may, at any time, take the steps necessary to prevent or remedy an abuse of process".

Discussion Point: Should the Federal Courts rules for abuse of process provide more clearly for the Court's authority to act on its own, as do the provisions in articles 54.1 ff of the Quebec Code of Civil Procedure? Should t his be done as recommended, or in some other way?

Issue 3—*Trial vs Disposition*

Historically, the pre-trial settlement of disputes was considered a compromise of fundamental procedural values. Litigants were presumptively entitled to "a day in court" even though it was recognized that the time and cost of proceeding to trial often placed this beyond their means. The ideal of resolution at trial persisted even though the benefits of persevering to gain the opportunity to try a case only to risk an uncertain outcome were frequently outweighed by the practical benefits of compromising to reach a settlement.

While the continuous oral trial may remain the fairest way to resolve matters that are not otherwise resolved beforehand, much has changed in the pre-trial process of litigation. The disposition of matters following a complete trial is increasingly the exception to the norm—indeed it has become a rare exception. In most cases, the parties gain sufficient information about the matter through the pre-trial process to reach a more expeditious and cost-effective resolution than would be obtained by continuing on to trial. In fact, this may be a result of mediation in the court. In other cases, disposition may follow upon the resolution of a legal question or the trial of a narrow set of issues.

The evolution of pre-trial resolution of disputes raises the question of whether we have reached the point where the objective of the Rules should now be described not merely as accommodating the disposition of matters without a complete trial, but as promoting it. For example, Rule 3 provides that "[t]hese Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits." Does the reference to determining a proceeding *on its merits* suggest that any disposition other than that following trial constitutes a reduced standard of justice?

Discussion Points—Should Rule 3 or other aspects of the Rules be amended to reflect the evolving objectives for the just disposition of matters before the Federal Courts?

Issue 4— *Introducing the Principle of Proportionality*

Recent reforms in other jurisdictions, such as in England and British Columbia, have highlighted the need for "proportionality". In the case of the Woolf Reforms in England, the civil justice system had become inaccessible to many litigants because the time and cost needed to navigate the procedural requirements for prosecuting or defending cases had become excessive. For ordinary litigants this created serious concerns about access to justice. In other places, even where both parties are capable of expending significant resources on comparatively small matters and therefore would not suffer prejudice, concern has arisen about the excessive demands made on the resources of the court.

The primary theme of the Woolf Reforms and similar reforms elsewhere has been to ensure that the extensiveness of the procedure matched the magnitude of the dispute. By recognizing the variation in the complexity of disputes, of the importance to the jurisprudence of the determination of the issues, and of the amounts in controversy, it has been possible to identify the cases in which the procedure could be simplified and the resolution of the matters made more cost-effective.

Certain reforms in the Federal Courts Rules have already begun to implement the objectives of proportionality. A number of rules currently provide for case management so that a proceeding that is ordered to continue as a specially managed proceeding will be advanced on the basis of an individually designed process. Furthermore, the Rules for determining costs currently provide for the assessment of costs based on various factors, including the nature of the litigation, its public significance and any need to clarify the law; the number, complexity or technical nature of the issues in dispute, and the amount in dispute in the proceeding.

Discussion Points—Considering the reforms directed at proportionality in other jurisdictions and the current practice in the Federal Courts, should further reforms be undertaken to implement the principle of proportionality? To what would the principle apply—the extent of discovery, the length of trials, some other aspect of the process—and how would it be applied? Should such a principle be incorporated as a general concept, perhaps in Rule 3; or should it be introduced in the specific areas that could benefit from its application; or should there be some combination of these two approaches?

Issue 5—*Making Effective Use of Practice Directions*

From time to time, the Chief Justice supplements the Federal Court Rules with Practice Directions to advise the profession on the interpretation of the Rules and to provide guidance on matters of practice that are not set out fully in the Rules.

Practice Directions are a useful technique for regulating procedure because they can be issued without first undergoing the comprehensive process of notice and consultation with the public. This flexibility and comparative informality is important when the need arises for timely adjustment to the practice in the Court, particularly where adjustments that seem likely to apply only to certain kinds of disputes or those that are not seen to warrant broader public consultation. Indeed, in some other jurisdictions such as England and Australia, Practice Directions have been used in more substantial ways to establish procedures and protocols. General questions arise as to the desired nature and scope of Practice Directions, and whether the Federal Courts could make greater use of them.

Despite their usefulness, there are some drawbacks to regulating procedure through the issuing of Practice Directions. Because they are not the product of broad public consultation and because they are not incorporated into the Rules, the litigants who come before the Court have less notice of them. To be sure, counsel whose practices are focused on areas of law that regularly bring them before the Federal Courts are able to maintain familiarity with the latest Practice Directions. However, beyond this relatively small group of practitioners, the public awareness of Practice Directions falls off considerably. To the extent that the resolution of a litigant's case may be adversely affected by ignorance of a Practice Direction, the extensive use of Practice Directions as a means of regulating procedure in the Federal Courts can raise basic questions of fairness. The court is now taking a variety of steps to improve awareness in the profession of the current Practice Directions.

***Discussion Points*:** Is the current balance between Rules and Practice Directions appropriate for the Federal Courts? Should we make more use of Practice Directions? Should the Global Revision of the Rules serve as an occasion to reconsider the many Practice Directions currently in effect in order to determine which should be incorporated into the Rules as formal amendments and which should be rescinded? Should the Global Revision serve as an opportunity to establish a policy of periodic review of Practice Directions for this purpose? Are there other ways of ensuring familiarity with Practice Directions that could be developed to address the concerns that the lack of public awareness might raise?

Issue 6—*Uniform Procedures vs Specialized Procedures*

The Federal Courts Rules like the rules of many courts are largely uniform or "trans-substantive" in that the same rules apply to all proceedings commenced in the court, regardless of the subject matter of the dispute. This "one size fits all" approach is typical of courts of general jurisdiction.

However, trans-substantive rules are sometimes supplemented by specialized rules for certain kinds of cases. For example, the rules in some provincial superior courts provide for specialized procedures for various kinds of disputes such as mortgage actions, judicial review and estates matters. And the rules in many provincial superior courts provide for specialized procedures for family matters.

In contrast with the provincial superior courts, most matters brought in the Federal Courts concern one or another of the specialized areas of the Federal Courts jurisdiction—maritime law, intellectual property, aboriginal law, judicial review and immigration. The practice of tailoring procedures in various ways to promote proportionality, and the possible initiative to transform practice directions into rules, raise questions about whether it is time to reconsider the emphasis on trans-substantive rules and to introduce some subject-specific rules.

***Discussion Points*:** Could the practice of the Federal Court benefit from the introduction of specialized procedures for particular kinds of disputes? Would it be appropriate to transform practice directions for specific kinds of disputes into subject-matter specific rules, and thereby increase the public awareness of these specialized procedures?

Issue 7—*Making the "Architecture" of the Rules more User-Friendly*

Legal drafters sometimes speak of the way in which legal documents are structured and presented as a question of "architecture". Designing the architecture of documents may involve a range of considerations relating to matters such as the sequencing of the elements of the document, the structure of paragraphs and sub-paragraphs, the use of headings and numbering, and the inclusion of tables of contents and indexes. Careful attention to the architecture of a document ensures that it will be easy to read and understand. This is especially important for those who might previously be unfamiliar with its contents.

Most seasoned members of the Bar have gained considerable familiarity with the rules of procedure in their court. They have developed such an intimate understanding of

the way the rules are interpreted and applied, and how the rules operate in relation to one another that they might prefer for the Rules to continue to be presented as they are currently presented, even if, from an objective standpoint, the current structure is not very logical or "user-friendly".

It is becoming increasingly important for the Federal Courts Rules to be presented in a way that is readily comprehensible to those who are not previously familiar with them. Unlike the provincial superior courts in Canada, the Federal Courts are courts before which many cases are presented by counsel who are more accustomed to the rules of other courts. In fact, it is no longer rare in the Federal Courts for cases to be presented by the parties themselves – persons who may not be familiar with the rules of any court. Finally, advancements in information technology are encouraging more and more litigants to become actively involved in the litigation process, even if they do not ultimately seek to represent themselves before the court. They may want to know about the ways in which matters proceed in the Federal Courts.

In some jurisdictions, such as the Federal Court of Australia, this trend has led to web-based and other initiatives to make the litigation process more accessible to the general public. This does not replace professional advice and representation, but it provides a useful service in informing the public and facilitating the involvement of litigants in a way that is consistent with the prudent management of court resources and with the effective resolution of disputes. Indeed, the increase in the use of information technology generally has changed the way in which the public expects to receive information of all sorts, and this too may affect the way in which the Rules or information about the Rules should be presented. This could entail the introduction of supplementary web-based guidance on the practice of the Federal Courts, either independently or as part of an initiative to reform the Rules.

The increased interest of the public in the litigation process raises a number of questions about whether the Federal Courts Rules as currently presented are as "user-friendly" as they might be, and whether they serve well not only as effective means of regulating procedure but also as effective means of informing those seeking to know more about the practice in the Federal Courts.

Discussion Points—Should the manner in which the Rules are presented be made more "user-friendly", for example, by introducing an index, or by making the presentation format more consistent with the rules of other courts? Should the Rules be presented in a way that would facilitate web-based access? If so, how could these objectives best be achieved without precipitating unintended substantive changes to the practice in the Federal Courts?

Issue 8—*Other Areas of Possible Reform*

In considering the range of possible areas of reform it should be noted that another sub-committee is currently looking at the Rules to identify obstacles to the use of information technologies. That sub-committee will propose reforms to facilitate the use of information technology without altering the current effect of the Rules on the practice in the Federal Courts. Another sub-committee is currently considering a range of

miscellaneous revisions. Nevertheless, there may be other areas of potential reform that should be considered.

Discussion Point— Are there other areas of potential reform that should be considered at this time by the Subcommittee on Global Review of the *Federal Courts Rules*?