



Subcommittee on Global Review of the *Federal Courts Rules*
Le sous-comité sur l'examen global des *Règles des Cours fédérales*

Report of the Subcommittee

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To the Rules Committee:

We are pleased to present our report.

Our report consists of eight parts. At the end of many of these parts, we set out findings and recommendations.

In all, we have made 26 findings and recommendations. The subcommittee is unanimous or nearly unanimous on each.

For your convenience, a complete list of our findings and recommendations – in effect, an executive summary of this report – appears at the end of this report.

Respectfully submitted for your consideration,
The subcommittee

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PART I – Background

Origin of the subcommittee

Although recently established, this subcommittee owes its existence to the vision of the architects of the original version of the *Federal Courts Rules*.

Before the *Federal Courts Rules* came into force in 1998, some older rules had been in place for over a quarter-century. But circumstances and needs changed. By the 1990's, it was time to cast aside the old and bring in the new.

The *Federal Courts Rules* were the response. Today, some 14 years later, they remain in place, regulating the practice and procedure of two of Canada's federally-established Courts, the Federal Court and the Federal Court of Appeal (collectively called the "Federal Courts").

Over those 14 years, many minor revisions and several significant reforms have been made to the *Federal Courts Rules*. Significant reforms include additional provisions for offers to settle, the management of expert witnesses and their evidence, the creation and regulation of class proceedings, an amendment to reinstate former rule 114 concerning representative proceedings, and the availability of summary judgment and summary trial.

However, back in 1998, the architects of the *Federal Courts Rules* foresaw that periodic instances of reform would not be enough. They recommended that the rules should be reviewed globally, at a high policy level, every once in a while to ensure that they continue to respond appropriately to contemporary needs.

In effect, they foresaw that, from time to time, over many years, trees might be added to or removed from the forest, but it would be prudent from time to time to move back a distance, adopt a broader perspective, view the entire forest, and assess how it looks.

The trigger for the process of global policy review is the Rules Committee, a statutory body comprised of representatives of the Federal Courts and the Bar. The Rules Committee is the guardian of the *Federal Courts Rules*, ensuring that the objects underlying the *Federal Courts Act* — fairness, justice, accessibility and efficiency — are attained. (See generally section 46 of the *Federal Courts Act*.)

To that end, and loyal to the vision of the architects of the *Federal Courts Rules*, in 2011 the Rules Committee announced a global policy review of the rules. It struck a subcommittee for that purpose.

We are that subcommittee. We have completed our review. In this report, we offer our findings and recommendations.

Composition of the subcommittee

In order to ensure a fair and thorough review, the subcommittee was designed to include as many differing perspectives as possible. Committee members were chosen from a number of different regions and backgrounds. Different constituencies and their perspectives were represented: the Courts, through their judges and prothonotaries, court personnel, and lawyers specializing in different areas in both private practice and government practice.

Through the subcommittee's consultative process, described below, other constituencies and their perspectives were also given a voice.

Mandate of the subcommittee

The Rules Committee charged the subcommittee with the responsibility of examining the *Federal Courts Rules* globally, examining the main principles and policies they express, and determining whether they need to be modified, refined or re-articulated in light of changing needs and circumstances. It asked the subcommittee to provide it with a report setting out its analysis, findings and recommendations.

The subcommittee's mandate is best understood as a high-level policy review and assessment. Its mandate does not extend to issues of implementation, such as drafting proposed amendments.

How the subcommittee discharged its mandate

Initial decisions

The Rules Committee authorized the subcommittee to determine for itself how it should carry out its mandate.

We decided that a global policy review of such breadth required the broadest possible input from stakeholders and others.

However, we recognized that there were dangers associated with the breadth of the mandate given to us. We worried that without some self-imposed constraints, we might fall into a “black hole” of policy analysis from which we might never emerge. We recognized that if this report were to be of practical use, we would have to discharge our mandate in a timely way. However, we did not want to overly constrain participants in the consultation process from raising issues of concern.

We addressed this by identifying and announcing several specific issues that, in our view, warranted examination, while signalling a willingness to receive and consider additional issues raised by participants in the consultation process.

The consultative process

We prepared a consultation paper. In it, we announced our subcommittee’s creation, described our mandate, listed certain specific issues, and invited submissions on these issues and whatever other issues respondents wished to raise.

The consultation paper listed the following specific issues:

1. *The involvement of the Federal Courts in proceedings.* At present, with the exception of case-managed proceedings, the rules largely permit parties to manage their own proceedings, with little input from the courts. Should the Federal Courts seek to engage more actively in the management of proceedings, and, if so, in what sort of proceedings, and how should management take place? Should litigation plans be required from the parties and assessed by the court, and, if so, in what sort of proceedings and on what basis should the assessment proceed? Does the existing system of case management work well? Do cases with self-represented litigants raise special considerations? Should the Federal Courts be empowered to impose sanctions for abuse of procedures and, if so, in what circumstances, and what sort of sanctions?

2. *Judicial determination vs. alternative disposition (e.g., settlements).* Currently the *Federal Courts Rules* are aimed primarily at getting matters ready for a judicial determination on their merits. 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.” Can the rules do more to promote settlements? Should they? How might they do so?

3. *Proportionality*. Should the extensiveness of court procedures vary according to the magnitude of the dispute? What procedures might be attenuated, and in what sorts of cases? If proportionality is to be implemented as a policy, is this best done under Rule 3, or under specific rules concerning particular procedures?

4. *Practice directions*. These allow for minor procedural matters to be addressed quickly and flexibly. However, they are not the product of wide consultation and counsel and self-represented litigants are often unaware of them. Are too many matters being regulated by practice direction? Should any existing practice directions be promoted to rules or vice versa? What can be done to ensure greater compliance with practice directions? Can practice directions be better publicized? How?

5. *“One size fits all” procedures vs. specialized procedures*. For the most part, the *Federal Courts Rules* adopt a “one size fits all” approach — virtually all of the rules apply to virtually all proceedings. Should there be specialized procedures for specialized areas, e.g., intellectual property, immigration, or does the “one size fits all” approach work well even for specialized areas?

6. *The architecture of the rules*. Is the current structure, ordering, numbering and indexing of the rules “user-friendly”? In this regard, it should be remembered that some users are self-represented litigants. Might “user-friendliness” be accomplished in other ways, such as through the use of information technology, and, if so, what ways?

After listing these specific issues, the consultation paper invited respondents to identify any other issues of importance:

7. *Other issues*. We invite you to suggest other policy issues that should be discussed and considered, and to offer your views on those issues.

The consultation process confirmed that that the issues were well-chosen. Respondents raised very few additional issues and these related closely to the specific listed topics.

We also asked one of the subcommittee's members, Professor Janet Walker, to prepare a discussion paper concerning the specific listed topics. This discussion paper set the topics in context and raised ideas for consideration in an effort to stimulate the thought processes of respondents.

Armed with a consultation paper and a discussion paper, we were ready to engage in consultation. Our objective was to gather information and views from as broad and diverse a range of persons and organizations as possible.

We sent the consultation paper and the discussion paper to hundreds of persons across Canada on the Federal Courts' email distribution list. We also approached various Canadian Bar Association sections and attended various Bench and Bar Committees of the Federal Courts, publicizing our activities. Finally, at court meetings, we expressed our desire to receive submissions from the judiciary.

While the initial deadline for response to the consultation paper and discussion paper was January 6, 2012, we extended the deadline to March, 2012 in order to achieve the broadest, most helpful input possible.

In a couple of cases, we received submissions after the deadline. We accepted and considered these as well.

We received formal written submissions from seven organizations and five individuals, representing specific practice areas, government, the registry, the judiciary, and legal aid clinics. Specifically, we received formal written submissions from the Barreau du Québec, the National Aboriginal Law Section of the Canadian Bar Association, the Canadian Maritime Law Association, the Community Legal Assistance Society, the Department of Justice, Elliott Goldstein, the Intellectual Property Institute of Canada, John Morrissey, Justice Karen Sharlow, Prothonotary Richard Morneau, the Registry (FCA, and Eastern, Western and Toronto Regions), and Elizabeth Wasiuk.

The submissions were rich in analysis and broad in scope. We would like to express our sincere gratitude to these respondents for their important and valuable contribution to our work and, more generally, to the administration of justice.

In addition to formal written submissions, many approached us informally to offer views.

In all, we are satisfied that the subcommittee's mandate and activities were well-publicized, ample opportunity was provided to interested

persons to participate, and the submissions gave us a well-informed basis for conducting our policy review.

The deliberative process

At the outset, we established a web resource centre, accessible only by subcommittee members.

This resource centre housed the consultation paper, the discussion paper, notes of the subcommittee's meetings, respondents' submissions, and other resource materials submitted by subcommittee members or others.

Among other things, this resource centre served to inform subcommittee members about the nature of the issues and different jurisdictions' approaches to them. It helped to ensure that our deliberations were as informed and wide-ranging as possible.

After reviewing the submissions received, it became apparent to us that the issues were very much interrelated. We concluded that, for the purposes of our deliberations, the issues fell within two "baskets".

The first basket included: court-led procedure vs. party-led procedure; the court's authority to control abuse; trial vs. disposition; and introducing the principle of proportionality.

The second basket included: rules vs. practice directions; uniform procedures vs. specialized procedures; and making the "architecture" of the rules more user-friendly.

We held detailed and in-depth discussions concerning both baskets of issues over numerous meetings. The discussions were rich, wide-ranging, thorough, and filled with much insight informed by the valuable submissions we had received and the extensive experience of subcommittee members in working with the *Federal Courts Rules* in various capacities.

At this juncture, we consider it appropriate to give an assurance that conflict of interest rules were fully observed during our discussions, as was the independence of the judiciary. Although practicing lawyers on the subcommittee fully participated in our discussions and brought to bear their unique perspectives, no specific cases pending before the Federal Courts were discussed at any time.

PART II – Initial observations and overview

As can be seen from the foregoing, our process of consultation was very broad. Although we had defined some issues with specificity, we made it clear in our consultation paper that anyone was entitled to raise any other policy issues of concern.

Despite this, and despite the months in which respondents had to participate, relatively few responded. Further, no one suggested that the *Federal Courts Rules*, overall, do not work reasonably well or accomplish their purposes. In fact, the general tenor of comments suggested a high level of satisfaction with the rules.

All of the members of the subcommittee work with the *Federal Courts Rules* regularly. From this personal experience and the submissions received, we conclude that the rules — with a few notable exceptions — meet contemporary needs and circumstances, and work reasonably well.

This being said, the subcommittee and many participants in the consultation process agree that the Rules Committee should address certain pressing issues in the next round of reform to the *Federal Courts Rules*. Much of the remainder of this report deals with those issues.

During our consultations, some queried whether the *Federal Courts Rules* should be amended on a large scale in order to bring them substantively more into accord with the procedural rules existing in each province. This would make the *Federal Courts Rules* seem less alien to those who practice mainly in the provincial superior courts.

This, however, would be impractical. The procedural rules in each province vary, sometimes significantly. The *Federal Courts Rules* will never be able to come close to matching up with those in the provinces.

Some provincial rules are inapt and should not be part of the *Federal Courts Rules*. Some provisions of the *Federal Courts Rules* have to be different, as they reflect the special needs and circumstances of the litigation that takes place in the Federal Courts. Further, as we shall comment upon later in this report, some of the unique rules in the *Federal Courts Rules* possess certain advantages that should not be discarded.

Finally, we note that, in considering reform to the rules, the Rules Committee often examines analogous rules existing in the provinces and does not go out of its way to propose rules that are different.

As a result, at the outset, we find and recommend the following:

1. There is no need for any wholesale, far-reaching revamping of the substance of the *Federal Courts Rules*. Nevertheless, the Rules Committee should address some pressing issues, described below, in the next round of reform to the *Federal Courts Rules*.

PART III – Balances in the *Federal Courts Rules*

Introduction

To be effective as a set of procedural rules, the *Federal Courts Rules* must strike various balances appropriately.

In all, we examined five different balances sought to be achieved by the *Federal Courts Rules*. We asked ourselves whether the rules continue to strike the right balance.

Level of regulation

The *Federal Courts Rules* must regulate proceedings, but not under-regulate or over-regulate them. With too little regulation, the overly litigious, the ignorant or the mischievous can engage in abuses. With too much regulation — for example requiring the preparation and filing of forms every time a procedural issue arises in the litigation — the time and cost of proceedings can become a real obstacle to justice.

On this, we consider that the *Federal Courts Rules* continue to achieve a good overall balance.

However, as will be explained, we are of the view that new regulatory tools need to be developed to curb excessive or abusive use of the court's processes and to ensure that parties act proportionately in conducting their litigation.

Level of discretion vested in judges and prothonotaries

The *Federal Courts Rules* must give judges and prothonotaries enough discretion to manage litigation properly, but not too little or too much. If there is too little discretion and too much dictation, decision-makers cannot react appropriately to prevent abuses or adapt the process to meet the requirements of particular circumstances more efficiently. If there is too much discretion and too little dictation, litigation will suffer from uncertainty and unpredictability. Further, parties may become disengaged and rely too heavily upon the court to move litigation forward.

The unanimous sense of the subcommittee is that the *Federal Court Rules* continue to achieve a good balance here. The pitfalls of under and over-dictation, by and large, have been avoided.

However, our discussions and consultations have revealed the need for judges and prothonotaries to have additional powers to curb certain abuses and disproportionate conduct.

Judicial determination vs. pre-trial disposition

Should the *Federal Courts Rules* do more to move parties towards pre-trial disposition (e.g., settlement)?

It is fair to say that when the *Federal Courts Rules* were enacted in 1998 their primary and perhaps sole aim was to bring the parties to final determination of their proceeding. Rule 3 still reflects this. It speaks of the rules being interpreted and applied so as to secure the just, most expeditious and least expensive *determination* of every proceeding on its merits. "Determination" implies a decision on the merits after trial.

But circumstances have changed since 1998. For one thing, the case management and mediation provisions in the rules have proven to be effective in achieving settlement. In some subject areas of practice, trials are increasingly rare.

To the extent that trials are rare in some areas of practice, we believe that this should not be seen as a failure of the Federal Courts system or its rules, but rather an achievement brought about, in part, by the good work done under the case management and mediation provisions in the rules.

We believe that Rule 3 should be amended to recognize that the *Federal Courts Rules* often lead parties in directions other than a "determination." Although it is not our mandate to settle on the wording of an amended Rule 3, we think that words such as "disposition" or "resolution" might better reflect the current reality in the Federal Courts.

We are also generally supportive of the inclusion of other measures into the rules to encourage settlement.

For example, a majority of the subcommittee would like to see the costs provisions amended in order to make it more likely that a higher quantum of costs will be awarded when warranted. For example, the current scale of costs in the Tariff is low and has little effect on the conduct of large, sophisticated litigants.

There was little support in the subcommittee for further *mandatory* procedures to promote the pre-trial resolution of matters. However, there was support for giving litigants more options, such as permitting parties to

request a dispute resolution conference by letter rather than requiring them to bring a motion.

An amendment to the rules in this regard is probably unnecessary, as the informal practice of requesting uncontroversial relief by way of letter is already in place. However, we mention below in conjunction with recommendation 15, practice directions can usefully legitimize, define and publicize that sort of informal practice.

Court-led procedure vs. party-led procedure: the role of case management

One of the most significant reforms to the *Federal Courts Rules* in recent years has been the development of a robust system of case management.

Case management reflects a sea change in courts' and litigants' approach to the litigation process. It represents a moderation of the classic adversarial system, and a shift away from trial and toward settlement.

The Federal Courts, with their case management provisions, are at the forefront of this important conceptual trend.

Case management was once introduced into proceedings by way of motion. It was rarely invoked outside of a status review, which occurred automatically after one year for actions or six months for applications when the trial or hearing had not been scheduled. In other words, case management was a remedial measure for matters that were not progressing as they should.

Today in the Federal Court, case management is introduced in defended matters automatically after these time periods. Status review has been retained for actions that go undefended and in which no motion for default judgment has been filed for 180 days, and as a discretionary measure in applications in which there has been no requisition for a hearing date within 180 days.

Furthermore, some proceedings, such as patented medicines notice of compliance proceedings, now go automatically to case management. As well, parties in all types of proceedings increasingly move to have their matters case managed.

In the Court of Appeal, status review is triggered by the failure of an appellant or applicant to file a requisition for hearing within 180 days.

Perhaps the most important factor in the success of case management in the Federal Court has been the 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 Court, judges and prothonotaries are now actively involved in many aspects of procedure — determining deadlines for various stages of the proceeding, and scheduling and overseeing the steps needed to bring cases to resolution, whether by judicial determination or settlement through case management conferences or dispute resolution conferences — to mention just a few.

Increasing the involvement of the court in managing proceedings has an impact on party prosecution and on court resources.

Under the principle of party prosecution those who are most familiar with the dispute and who have the greatest interest in it — the parties — are free to prosecute or defend the case as they see fit. However, this principle may permit litigants to pursue unnecessarily complex and protracted proceedings. It can impact the fairness of cases where one party has far greater resources than another, particularly cases involving self-represented litigants.

Effective case management in the Federal Courts has moderated the excesses of party-prosecution.

In light of the foregoing, we examined several questions related to case management:

- Who should introduce case management?
- When should it be introduced? In which cases should it be introduced?
- Is the current system working well?
- Should all proceedings presumptively go to case management or, at least, undergo an initial review by the court early on to determine whether case management would be beneficial?
- Should a case planning conference be introduced early in the process as a prerequisite to proceeding with the matter as was considered in some jurisdictions, such as British Columbia and Quebec?

- Should case management remain primarily with the parties, but be modified by other measures such as the formulation of a discovery plan, as is the case in Ontario?
- Should certain kinds of proceedings, such as Aboriginal matters, cases involving self-represented litigants, or class proceedings, presumptively go to case management, subject to the parties jointly proposing otherwise?
- Should all proceedings that do not show adequate progress go to case management?

Our consultation revealed that, overall, the current case management system enjoys a high level of satisfaction. It was widely applauded as a critical feature in the Federal Courts' success. Some favoured more court-led procedure of various types, such as judicial dispute resolution. However, a number of participants raised concerns about the potential toll on court resources of the increased involvement of judges or prothonotaries. Others noted that certain proceedings, such as those involving self-represented litigants and Aboriginal matters, warranted special consideration.

On the whole, however, our consultation revealed no consensus on the questions listed above. Far from it. There appears to be little appetite for pursuing fundamental change in the rules by adopting a court-led, rather than a party-led process. Certainly, even if there were such an appetite, current resource limitations make fundamental change in this area impossible.

There also appears to be a consensus that useful approaches to case management could emerge from a clearer and better use of Practice Directions — as is recommended later in this report. For example, a consensus among the Aboriginal bar and the judiciary regarding how case management should normally be used in Aboriginal matters could lead to a Practice Direction addressing the questions listed above for that practice area.

To the extent that greater involvement of the Federal Courts in managing litigation is desired, much will be achieved by the primary recommendations we are making in this report, such as introducing the principle of proportionality throughout the rules, providing the Federal Courts with new tools to address abuses, and enhancing the status and influence of Rule 3.

One set of rules that applies to all vs. special rules for specialized areas

Conventionally, procedural rules in common law courts of general jurisdiction are trans-substantive: one set of procedures for all cases. This approach promotes familiarity and expertise in the procedures of the forum for both counsel and members of the court across the range of cases, and allows the experience gained from one case to be applied in another despite different subject matter.

For the most part, the *Federal Courts Rules* apply generally to all litigation. There are relatively few rules devoted to specialized areas of practice. The balance lies mainly in favour of one set of rules that applies to all, over special rules for specialized areas.

However, many of the matters in the Federal Courts fall within the specialized areas of the Federal Courts' jurisdiction — maritime law, intellectual property, Aboriginal law, judicial review and immigration. The rules in other jurisdictions provide for specialized rules to address specialized areas, such as family law, mortgages, judicial review proceedings, and estates matters.

This raises the question: should the *Federal Court Rules* continue to aim to be suitable for all areas of law, or should special sets of rules be developed for specialized areas?

The responses to the consultation process and our discussions did not support creating new, distinct sets of procedures for specialized areas. This was seen as creating unnecessary complexity.

The current special rules dealing with immigration matters, however, were viewed as beneficial and well-suited to that practice area.

Perhaps future rounds of rules reform, responding to particular needs, may implement some specialized rules. But in our consultation we did not detect any great appetite for a fundamental change in the overall balance between uniform rules and specialized rules.

This being said, our consultation did reveal support for the use of practice directions or guidelines in specialized areas. These would describe how various types of discretions in the rules might be exercised in certain situations in these areas. In this way, particular issues and needs that arise in specialized areas could be addressed.

For example, members of the intellectual property bar noted the benefits that other jurisdictions have realized with specialized procedures. They

recommended developing practice directions to simplify and streamline various aspects of procedure in intellectual property matters.

This approach would also assist in other areas, such as complex Aboriginal matters, and, in particular, the receipt of testimony of Aboriginal elders in those matters.

We considered this approach to be compatible within an otherwise uniform framework of rules that apply to all.

In fact, this approach combines the advantages of simplicity and coherence created by a uniform set of rules with the advantages of accommodating difference and addressing particular issues created by specialized practice directions. This approach has the potential to create a better balance between a “one size fits all” approach and a series of distinct provisions in the rules for different kinds of cases.

None of the submissions received expressed misgivings concerning such an approach.

We would add that some of our recommendations, discussed below, would eliminate existing concerns about practice directions, such as their visibility and acceptability. Implementing these recommendations would make the use of practice directions in specialized areas even more acceptable and appropriate.

Therefore, in this Part, and in light of the foregoing discussion, we make the following findings and recommendations:

2. On the whole, the *Federal Courts Rules* strike an appropriate balance on the level of regulation, avoiding the pitfalls of over-regulation and under-regulation. However, as recommended below, new regulatory tools need to be introduced to curb certain abuses and to ensure that parties take proportionate steps in conducting their litigation.
3. On the whole, the *Federal Courts Rules* also strike an appropriate balance by vesting decision-makers with an appropriate level of discretion to regulate proceedings, avoiding the pitfalls of over-dictation and under-dictation (or insufficient governing standards).
4. On the whole, the balance in the *Federal Courts Rules* between judicial determination and pre-trial disposition is appropriate, subject to the following two specific recommendations:

(a) Rule 3 should be adjusted to reflect the fact that many matters are resolved or disposed of in ways other than judicial “determination.”

(b) The costs provisions should be amended in order to make it more likely that a higher quantum of costs will be awarded when warranted, to provide greater incentive for pre-trial resolution.

There should be no new mandatory procedures to promote the pre-trial resolution of matters.

5. On the whole, the balance in the *Federal Courts Rules* between court-led and party-led procedure is appropriate at the current time. In particular, the existing case management provisions remain broadly acceptable and should not be changed, subject to the considerations discussed in the next Part.

6. The balance in the *Federal Courts Rules* between a uniform set of procedures for all and special procedures for specialized areas — a balance largely in favour of the former — is acceptable and should be maintained. However, the special needs of specialized areas of practice can be met by developing practice directions within those areas or, if appropriate, through the case management process for individual cases.

PART IV – Tools in the *Federal Courts Rules* to regulate proceedings

Introduction

Our consultation reveals a clear consensus in favour of introducing new tools to ensure that parties take proportionate steps in conducting their litigation and to curb certain forms of abuse. Both Bench and Bar seem to be on full agreement on this issue.

It is legitimate for parties to use the rules, even aggressively, to maximize their chances of success of the merits of the litigation. But our consultation reveals there is a widespread consensus that certain parties occasionally make excessive or disproportionate use of rights provided by the rules.

Such excesses include the use of procedures to delay matters and engaging in conduct that is disproportionate to the objective of achieving an expeditious, just and cost-effective judicial determination. Excessive use of procedure is of particular concern in the discovery process.

We are of the view that the *Federal Courts Rules*, as they presently stand, do not provide the parties and decision-makers with sufficient tools to enforce or promote proportionality.

We are also of the view that as the number of self-represented litigants increases, decision-makers need new tools to effectively regulate proceedings involving them.

For example, many self-represented litigants bring multiple proceedings and motions concerning the same subject-matter and sometimes the responding party does not take immediate action. At present, the Federal Courts do not clearly have the ability on their own motion to combine proceedings or eliminate duplicative proceedings.

Sometimes self-represented litigants bring proceedings that, on their face, have no chance of success. Yet, such proceedings often languish in the court system for a long time, wasting the resources of the court and other parties. It is not clear that the Federal Courts have the ability to eliminate such proceedings in a fair manner at an early stage.

In this section of our report, we discuss these concerns further. Also we consider ways of introducing into the *Federal Courts Rules* the principle of proportionality and measures to curb abuse.

Proportionality

A number of jurisdictions have introduced a principle of proportionality into their rules.

In these jurisdictions, it was once sufficient for courts to be concerned only about seeking a just determination that is efficient in terms of time and cost. However, these jurisdictions increasingly accepted that a balance needed to be struck between, on the one hand, the importance and complexity of the matter and, on the other hand, the amount involved.

In the 1990's, England moved to the forefront on this issue. Faced with serious concerns about the affordability of civil justice, Lord Woolf was commissioned to study the issue. The end-product, his "Access to Justice Report 1996," identified a number of defects in the civil justice system, many of which exist on occasion in the Federal Courts system. These include costs often exceeding the value of the claim, cases taking too long to conclude, a lack of equality between wealthy and under-resourced litigants, uncertainty in the length and cost of litigating the claim, parties ignoring the rules of civil procedure, and the courts not enforcing them as rigorously as they might.

Lord Woolf proposed several reforms. Among these was to establish "proportionality" as the "overriding objective" that must pervade the rules of civil procedure. As a result of this, several reforms were made in England. These included vesting judges with greater responsibility to streamline procedures and manage cases actively in the interests of controlling costs. According to Lord Woolf, unless judges became actively involved in managing the progress of cases, the adversary system would continue to operate in a way that failed to meet the need for affordable civil justice.

In other jurisdictions, similar concerns have emerged. Many have enacted reforms designed to increase the involvement of judges in proceedings through case management. The nature and extent of the concerns and the reforms vary.

Various Canadian jurisdictions have now recognized that general, non-enforceable statements of principle, such as Rule 3 in the *Federal Courts Rules*, are not enough. They are not sufficient to ensure that the rules are applied in a way that promotes the most effective operation of the civil justice system as a whole.

As for the Federal Courts, back in 1998 it was not necessary to introduce a principle of proportionality into the *Federal Courts Rules*. Back then, the implicit assumption in the *Federal Courts Rules* was that the interests of

those involved in litigation and those affected by operation of the civil justice system could be balanced and accommodated through specific rules existing under a general objective. That general objective exists in Rule 3: “the just, most expeditious and least expensive determination of every proceeding on its merits.”

Back in 1998, the general assumption behind the *Federal Courts Rules* was that most of the rules involve only a balancing of the interests of the parties, and no wider considerations.

But things have changed since 1998.

Ongoing advances in information technology have transformed litigation, dramatically increasing the availability of potentially relevant documents and multiplying the number of potential issues to be explored in the litigation. This has driven up the cost of litigation, thereby increasing the number of self-represented litigants.

Further, demands on judicial resources have increased, with the effect that each case must be viewed in light of the caseload of the court as a whole. The proper allocation of resources in the system is now of greater concern than it once was.

In this regard, we agree with the sentiments expressed by Lord Roskill in *Ashmore v. Corp. of Lloyd's*, [1992] 2 All E.R. 486 at 488:

In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues.

The Federal Courts system can no longer be seen just as a tool for parties to litigation to advance their ends with few restraints. We can no longer see the rules only in terms of accommodating and regulating the interests of particular litigants in a case. They must be seen as regulating the rights of litigants across the system. Overuse of scarce judicial resources in one case can potentially deprive other cases of these resources and inflict damage on the public purse.

While the Federal Courts system exists for the benefit of parties to litigation, something broader must not be forgotten: the Federal Courts system belongs to the community, is financed by the community, and must serve the community.

While the use of the Federal Courts system by the parties is generally appropriate and consistent with this concept, there are occasions where misuses of the system must be addressed.

Our consultations and discussions identified many circumstances where, in pursuing a right under the rules, or in ensuring compliance with the rules, a party expends time, cost and energy out of proportion to the realizable benefits. Committee members recounted many examples of disproportionality, such as motions seeking a ruling on over a thousand refused questions arising from seemingly endless discoveries in proceedings that did not warrant such an approach.

Including a principle of proportionality into the *Federal Courts Rules* can further access to justice and promote fairer outcomes. It is often the case that a poorly-resourced party claims against a better-resourced party. In some cases, the poorly-resourced party has a strong claim. At present, the better-resourced party can engage in disproportionate conduct designed to delay the litigation and drive the costs higher. In this way, the better-resourced party can force the poorly-resourced party to abandon its claim or settle at an unreasonably low level.

We also note that the principle of proportionality is being or has been introduced into a number of Canadian jurisdictions.

For example, in Quebec, article 18 of the next *Code of Civil Procedure* requires parties to “ensure that their actions, their pleadings, including their choice of an oral or a written defence, and the means of proof they use are proportionate, in terms of cost and the time involved, to the nature and complexity of the matter and the purpose of the demand.” Similarly, “Judges, in managing the proceedings they are assigned, must likewise ensure that the measures or acts they order or authorize, whether at the case management, trial or execution stage, are so proportionate, while bearing in mind the efficient processing of the court's caseload and the general interest of justice.”

In Ontario, the general principle is found in Rule 1.04 of the *Rules of Civil Procedure*. It provides that the rules “shall be liberally construed to secure the just, most expeditious and least expensive determination of the proceeding on its merits.” This Rule has been supplemented by another rule providing that “(i)n applying these rules, the court shall make orders

and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.”

In British Columbia, Rule 1-3 of the *Supreme Court Civil Rules* provides that “[s]ecuring the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to: the amount involved in the proceeding, the importance of the issues in dispute, and the complexity of the proceeding.”

In these jurisdictions, we have not observed any significant detrimental effects or dysfunctionalities arising from the implementation of a proportionality principle.

Some parties in these jurisdictions complain that the principle of proportionality constrains their former, almost absolute discretion to conduct their litigation as they wish. But, in our view, these complaints are of no moment — no one should be free to conduct litigation unreasonably.

Today, the vast majority of litigants in the Federal Courts conduct their litigation reasonably. We do not expect these litigants to experience any detrimental effects under a properly-applied proportionality principle.

Provided that the principle of proportionality is applied intelligently and sensitively with due regard to all relevant considerations, it can advance the objectives underlying the *Federal Courts Rules*. As many know, these objectives are expressed in Rule 3:

In light of the foregoing, we conclude that the *Federal Courts Rules* should be amended to include a principle of proportionality.

In our view, the principle of proportionality expressed in the rules of the other jurisdictions, noted above, is roughly what we propose. Exactly what sort of wording should be added to the *Federal Courts Rules* to describe the principle of proportionality is an implementation question for the Rules Committee to consider.

But, in our view, any new wording implementing the principle of proportionality should capture this concept: the level of procedures and the manner in which procedures are used should be appropriate to the nature and relative importance of the case, or of any issue in the case. Exactly how the principle applies in particular cases is a matter of

discretion depending on the circumstances. In some cases, it might streamline the procedures that can be used. In others, it might allow resort to resource-intensive procedures.

Exactly how the principle of proportionality should be implemented in the *Federal Courts Rules* carries significant policy considerations. This is a matter within our remit. We turn to it now.

We have identified three ways to implement the principle of proportionality in the *Federal Courts Rules*. Each of these has particular policy considerations associated with it. The three are:

- Option 1: Introduce the principle of proportionality into the general statement of principles in Rule 3. Proportionality would then be available as one of the guiding principles in Rule 3 that is used to interpret and apply the rules. However, proportionality would be limited to that role. This means, for example, that if another rule clearly gives a party a particular right, the principle of proportionality could not be used as a basis to intervene, restrict or regulate the exercise of the right.
- Option 2: Introduce the principle of proportionality into the general statement of principles in Rule 3 but remake Rule 3 so it is not just a source of guidance, but also a stand-alone source of power for the court to intervene and take steps in the proceedings. In other words, Rule 3 would be transformed from an *interpretive* power that assists the Federal Courts in choosing between procedural options presented by the parties, into an additional, stand-alone, *substantive* power. This means, for example, that if another rule clearly gives a party a particular right, the principle of proportionality could be used by the Courts, on their own motion, as a basis to intervene, restrict or regulate the exercise of the right.
- Option 3: Introduce the principle of proportionality concretely into particular rules. For example, the existing documentary disclosure and oral discovery rules could be modified to reflect the need for proportionality.

In our view, options 2 and 3 should be pursued.

First, as between options 1 and 2, we prefer option 2.

Option 1 is not without benefit. While the principle of proportionality is already implicit in some existing rules, such as those concerning case management and costs, introducing it into Rule 3 would send an important signal: the principle of proportionality must guide the interpretation and application of the rules in all stages of the litigation process.

However, in our view, option 1 does not go far enough. Putting the principle of proportionality into Rule 3, as Rule 3 stands at present, would not give the principle of proportionality the influence that it deserves. At present, Rule 3 has only an interpretive role.

Recent case law underscores the unsatisfactory nature of putting the principle of proportionality into a purely interpretive provision like Rule 3.

In *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, the Supreme Court examined the principle of proportionality in article 4.2 of Quebec's *Code of Civil Procedure*. One of the issues was whether the principle of proportionality was one of the criteria that had to be met before a class action could be authorized under article 1003. The dissenting justices in the Supreme Court addressed this issue. They found that the principle of proportionality in article 4.2 was only a principle of interpretation, not part of the mandatory criteria for authorizing a class action:

... Since the proposed actions meet all the conditions set out in the Code of Civil Procedure, they should have been authorized.

Article 4.2 C.C.P. on the principle of proportionality does not supplement the criteria for authorizing a class action set out in art. 1003 C.C.P. and therefore does not confer on the court a discretion separate from the one flowing from the latter provision. Proportionality is a guiding principle of civil procedure that cannot be applied independently. The purpose of art. 4.2 C.C.P. is to reinforce the authority of the judge as case manager. The effect of the principle of proportionality on art. 1003 C.C.P. is to give concrete expression to and to reinforce the discretion judges are already recognized as having when reviewing each of the four conditions for authorizing a class action. The enactment of art. 4.2 C.C.P. did not have the effect of requiring applicants for authorization to show that the class action would be the preferable procedure for resolving common

issues. The effect of requiring applicants to prove this would be to limit access to the class action.

The Federal Court of Appeal adopted a similar approach to Rule 3 in *Apotex Inc v. Merck & Co*, 2003 FCA 438. In its view, the interpretive principles in Rule 3 could not be used to carve back the rights of a party set out in the rules:

I do not understand Rule 385 to authorize a case management judge or prothonotary, in giving directions that are necessary for the "just, most expeditious and least expensive determination of the proceeding on its merits" to enable them to deny a party the legal right to have questions answered on examination for discovery which are relevant to the issues in the pleadings. That right is not merely "theoretical" (as the prothonotary put it) but is clearly spelled out in Rule 240 and I do not take the general words of Rule 385(1)(a) or of Rule 3 to be sufficient to override that specific right.

These cases, and others, show that if option 1 is adopted and the principle of proportionality is restricted to an interpretive role, contrary wording in later rules will override the principle, and courts will have no choice but to follow that wording. The principle of proportionality would be in the *Federal Courts Rules*, but would not be given full voice.

Indeed, practically speaking, it would not have much of a voice at all. We conducted research into the use of Rule 3 since 1998. We discovered that Rule 3 in its current form — as a mere interpretive principle — is seldom mentioned in the jurisprudence. Even when it is mentioned, it does not play a particularly significant role in the reasoning.

In our view, given the current challenges to the Federal Courts system, described above, the principle of proportionality should be given full voice, along with the other principles in Rule 3 such as expedition, cost-effectiveness and the promotion of justice. As we have said, the Federal Courts system belongs to the community, not just to the parties to a particular piece of litigation. Unrestricted access to the resources of the Courts should not be available to an individual litigant dedicated to disproportionate conduct, abusive conduct, or, more generally, conduct contrary to the principles in Rule 3, as amended.

Therefore, we conclude that option 1 — introducing the principle of proportionality into Rule 3 and allowing it to operate merely as an interpretive device — would not effect much change at all. Under the current circumstances more is needed.

Option 2 would implement the principle of proportionality more appropriately. Under that option, Rule 3 would not only incorporate the principle of proportionality but would be transformed from a mere interpretive guide to an independent source of judicial power, even in the face of the wording of a contrary rule. For example, using Rule 3, a court could deny a party the exercise of a particular right in the rules, where that exercise would be disproportionate.

Adopting option 2 — articulating Rule 3 as an independent source of power — would increase its influence. The desirable policies in Rule 3 — not just proportionality, but also expedition, cost-effectiveness and the promotion of justice — would actually be implemented. Our consultations revealed much support for this option and virtually no opposition.

Our consultations also revealed support for option 3 — introducing the principle of proportionality into specific rules. Many felt that it would be useful to give specific guidance in particular rules regarding how the principle of proportionality should play out. We agree.

Further, if a principle of proportionality is added into Rule 3 under option 2, we see utility in amending individual rules to reflect the new principle. Inconsistency between Rule 3 and these individual rules should be avoided.

The areas mentioned as likely to benefit from specific inclusion of a reference to proportionality included: case management (Rule 385), document discovery (Rule 222), examinations for discovery (Rule 234), rules governing which actions should proceed as simplified actions (Rule 292) and governing which actions should proceed as representative proceedings (Rule 114(1)(d)) and as class proceedings (Rule 334.6(1)(d)). Rule 400(3), governing the exercise of discretion in the awarding of costs already seems to embrace a proportionality principle: among other things, costs are to be awarded on the basis of the amounts claimed against the amounts recovered, and also the importance and complexity of the issues. The precise amendments required to implement proportionality into these rules is an implementation matter for the Rules Committee, to be settled upon after the usual consultative processes.

Controlling Abuses

Just as the current trend in procedural reform is to empower courts to tailor the procedure in particular cases in ways that are proportionate, so too is there widespread support for empowering judges to deal directly with dysfunctional and destructive conduct in the litigation process.

Examples include frivolous, vexatious or dilatory conduct, or conduct that causes unwarranted or undue prejudice or otherwise defeats the ends of justice.

For the purposes of this section, we shall use the general terms “abuse” or “abusive” to describe this conduct.

Robust case management in the Federal Court is to be credited with curbing much of the abuse that might otherwise exist when parties bear sole responsibility for the conduct of the pre-trial process. However, the Federal Court, with its substantial caseload of matters involving public law matters and self-represented litigants, continues to see instances of abuse in which the parties may not consider it appropriate or possible to seek redress.

It is arguable that the Federal Court has the authority to respond to incidents of abuse of its own motion. However, our consultation and our discussions strongly supported the introduction of specific provision for this in Rule 3 of the *Federal Courts Rules*, with Rule 3 being transformed into something more than an interpretive device.

An example of this is Rule 54.1 of the *Code of Civil Procedure of Quebec*, which provides that “(a) court may, at any time, on request or even on its own initiative after having heard the parties on the point, declare an action or other pleading improper and impose a sanction on the party concerned.” Rule 54.1 goes on to describe situations that may constitute abuse, including: “a claim or pleading that is clearly unfounded, frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate.” Rules 54.2-54.6 also contain further detail on the available remedies for abuse and the procedures for seeking and implementing them.

Although the precise wording of any amendments to the *Federal Courts Rules* is a matter for the Rules Committee’s consideration, we are attracted to the wording of Rule 54.1 of the *Code of Civil Procedure of Quebec* to Rules Committee. It aptly expresses the policy against abuse that we feel should be introduced into the *Federal Courts Rules*.

If the Federal Courts were given the power to address abuse on their own motion, how would they become aware of abuse?

One solution is to broaden the reach of Rule 74.

Typically, the Registry reviews documents presented for filing. Presently, it does so under two Rules:

- Under Rule 72 the Registry reviews a document to ensure that it complies with the formal requirements of the Rules. Where it does not comply, the Registry can refer the document to the Court for a ruling or direction.
- Under Rule 74, if the Registry believes that a document presented for filing substantively conflicts with a rule or other legislation, the Registry can refer it to the Court for assessment and appropriate response. After receiving submissions from the parties, usually written submissions, the Court can order that the document be removed from the court file. Rule 74 has rarely been used by the Federal Courts. But in one recent case, it was used to quickly purge an appeal that was brought contrary to law: *Rock-St Laurent v. Canada (Citizenship and Immigration)*, 2012 FCA 192.

It seems to us that Rule 74 could be broadened to allow for documents disclosing instances of abuse to be referred to a judge or prothonotary for determination. For example, a statement of claim that appears abusive on its face could be subject to an early show cause procedure under Rule 74(2) and, if it is abusive, it could be purged immediately from the Federal Courts system.

If Rule 74 is broadened as we suggest, we do not wish the Registry to be subjected to significant new obligations. The Registry is already fully-occupied in advising and managing self-represented parties. Any review under a broadened Rule 74 should remain cursory, as it is at present. For that reason, in the preceding paragraph we used the words “appears abusive on its face.”

Less obvious or questionable examples of abuse can be addressed on motions brought by parties.

A final issue concerns vexatious litigants. At present, the Federal Courts have the power, on application, to declare a person a vexatious litigant and bar them from commencing new proceedings without leave. This power is found in section 40 of the *Federal Courts Act*. Such an application may only be made with the consent of the Attorney General of Canada.

The standard for such a declaration is justifiably high.

The Federal Courts cannot declare a person a vexatious litigant on their own motion. The traditional view is that the judiciary should remain neutral and not take adversarial positions against parties. At present, the Federal Courts must wait until a responding party, often the Crown, says “enough is enough” and brings the necessary application.

Sometimes, in our view, that does not happen soon enough, or at all. Typically many meritless, often duplicative proceedings must be brought by an individual over several years before the Court receives an application under section 40. Over those several years, courts and parties devote enormous resources to litigation that is of no merit whatsoever, depriving potentially meritorious cases of the resources they need and imposing unjustified costs on the public purse.

As we have said, the Federal Courts system is a community resource. Just as we would expect those who repeatedly misuse or misbehave in parks, libraries, community halls and national museums to be excluded from those facilities, truly vexatious litigants in the Federal Courts system must be dealt with. When warranted, vexatious litigant applications under section 40 need to be brought, and on a timely basis.

We considered whether the Courts should be given the power to bring a vexatious litigant application on their own motion. We also considered whether the Courts Administration Service, the administrative agency that supports the Courts and operates the Registry, should be empowered to make such an application. As a less aggressive option, we considered whether the Courts Administration Service, acting without input from the judges and prothonotaries, might be empowered to supply information to the Attorney General in appropriate circumstances so the Attorney General can consider whether an application under section 40 should be brought.

However, we concluded that these possible solutions are fraught with peril. They could thrust the Courts and their administration into an adversarial posture against some litigants, potentially subverting the appearance of impartiality and fairness.

However, we unanimously agree that this problem needs to be discussed openly and candidly, with a view to finding an acceptable solution.

At present, the Federal Courts have a Bench and Bar Committee that meets twice a year. It exists to allow representatives of the Bar, including counsel for the Attorney General, and representatives of the Courts and its administration to discuss issues of common concern. The discussions on that Committee are open, candid and positive. We suggest that the problem of purging vexatious litigants from the Federal Courts system in a

more timely way be discussed openly in a regularly-scheduled meeting of that Committee with a view towards devising a solution that is fair and appropriate. We also suggest that the Rules Committee be kept informed of the progress of those discussions.

Therefore, in this Part, and in light of the foregoing discussion, we make the following findings and recommendations:

7. A principle of proportionality should be introduced into Rule 3. Rule 3 should also prohibit the abusive use of the *Federal Courts Rules*. The types of abuse should be identified, as has been done under Rule 54.1 of the *Quebec Code of Civil Procedure*.

8. The role of Rule 3 as a device to be used when interpreting and applying the *Federal Courts Rules* should be preserved. But Rule 3 should also be transformed into a stand-alone power of the Federal Courts to intervene on their own motion to regulate or prohibit conduct that is inconsistent with the principles in Rule 3.

9. As an adjunct to this, Rule 74 should be amended so as to allow the Registry to refer to the Court a document presented for filing that shows evident abuse. Evident abuse is abuse of the sort described in recommendation 7 that is obvious and evident on even a cursory reading of the document. This would enable the Court to deal with abuse quickly, on the Court's own motion, following the procedures set out in Rule 74. Under this recommendation, the Registry should not be put to any greater obligation to review documents than exists at present under existing Rules 72 and 74.

10. The principle of proportionality should be introduced concretely into particular rules so that those rules are consistent with Rule 3. For example, the existing documentary disclosure and oral discovery rules should be modified to reflect the need for proportionality.

11. The issue of the frequency and timeliness of vexatious litigant applications under section 40 of the *Federal Courts Act* should be raised and discussed at one or more regular meetings of the Bench and Bar Committee, with a view to devising practical, effective and fair solutions. The Rules Committee should be kept informed of the progress and results of those discussions.

PART V – Rules and practice directions

The rule-making process

In our view, the existing process for the making, amending or repealing of rules does not require any modification. The process is open, transparent, and responsive to stakeholder input. No concerns were expressed during our consultation process.

Practice directions

From time to time, the Chief Justices of the Federal Courts enact practice directions to advise the profession on the interpretation of the *Federal Courts Rules* and to provide guidance on matters of practice that are not set out fully in the rules.

At the outset, it is useful to review some of the legal considerations that constrain the use of practice directions.

As between the *Federal Courts Rules* and practice directions, only the former are law. The *Federal Courts Rules* are regulations made under the *Federal Courts Act*. Practice directions are enacted by the Chief Justices of the Federal Courts.

Practice directions cannot conflict with the *Federal Courts Rules*, *i.e.*, the law. But they can work consistently with the rules in several ways. For example, they can supply guidelines concerning how discretionary powers in the rules will normally be exercised. In this way, they are akin to the policy guidelines that administrative bodies release, describing how their legal discretions will normally be exercised. Practice directions can also formalize unofficial, lesser-known practices that are being followed in the Federal Courts, practices that are not inconsistent with the rules.

Practice directions are a useful technique for regulating procedure. Although, in practice, the Chief Justices who make practice directions do consult within their Courts before making them, they do not have to engage in the sort of comprehensive process of notice and consultation with the public required for amending the *Federal Courts Rules*. This flexibility and comparative informality is important when the need is pressing and broader public consultation is not warranted. Indeed, in some other jurisdictions such as England and Australia, practice directions have been used in more substantial ways to establish procedures and protocols.

In our consultations and discussions, views were expressed about the desired nature and scope of practice directions, and whether the Federal Courts could make greater use of them. Several concerns were identified.

Some expressed uncertainty regarding the legal basis for practice directions. The *Federal Courts Rules* do not authorize or regulate their making.

Further, in our consultation, some expressed concern that without some broader mechanism for input or accountability, inapt practice directions might one day be made.

Some were also concerned that no mechanisms exist by which practice directions are reviewed for continued appropriateness and relevance. To this, we would add that there is no recognized forum at present where consideration can be given to promoting practice directions to rules. The Rules Committee is a natural place for such reviews and considerations to take place.

Almost everyone who consulted with us expressed concern that practice directions are not very visible and are sometimes hard to find. The Federal Courts' websites came in for particular criticism. Some suggested that a single document be created setting out all of the practice directions, or that all of the practice directions reside in one obvious place on the Federal Courts' websites.

Some commented that orders and directions made by judges clarifying the application of the *Federal Courts Rules* should also be more visible and accessible. Orders and directions that consistently implement certain practices could be usefully distilled into practice directions, visible and accessible to all.

We considered all of these concerns to be well-founded and deserving of solution.

Our proposed solutions are contained in the list of conclusions and recommendations at the end of this Part.

Finally, over the years a number of informal practices have developed, some of which arguably deviate from the rules. These are not reflected in practice directions.

For example, although Rule 369 suggests otherwise, the default option in the Court of Appeal is that motions are handled in writing, not by way of oral hearing.

In addition, a practice has developed under which, in consent or unopposed motions, the Federal Courts may be addressed by way of informal letter, rather than by way of motion record. Some counsel are taking liberties with this, resorting to informal letters containing relatively little information, in matters where a formal, complete motion under Rule 369 is warranted.

Finally, a practice has developed in some quarters where respondents to motions submit brief written representations by way of informal letter faxed to the Federal Courts.

To the extent that these informal practices are acceptable and consistent with the governing rule, they may usefully be legitimized and publicized by way of practice direction. This would ensure that all users, not just the most expert users, can avail themselves of the unofficial practice. It would also define the limits of the unofficial practices and ensure that the Courts have the information they need to adjudicate matters properly.

Therefore, in light of the foregoing, we offer the following findings and recommendations:

12. The existing process for the making, amending or repealing of rules does not require any modification.

13. The *Federal Courts Rules* should be amended to recognize the power of Chief Justices to make practice directions. That amendment should specify that practice directions are limited to setting out policies and guidelines concerning how the discretion in existing rules should be exercised, not to establish new rules.

14. The Rules Committee, as a body comprised of many of the Federal Courts' stakeholders, should review practice directions periodically, assessing their continuing relevance, appropriateness and suitability, and, where warranted, make non-binding recommendations to the Chief Justices. In addition, in appropriate circumstances, the Rules Committee should recommend the making of new practice directions. New practice directions can play a useful role in addressing special needs that arise in particular practice areas. Nothing in this recommendation would limit the ability of Chief Justices to make practice directions at any time as they see fit.

15. Certain informal practices under the *Federal Courts Rules* exist and are accepted. These should be legitimized, defined and publicized in practice directions.

16. Practice directions need to be more visible and accessible. One way to achieve this is by consolidating them into a single document accessible by a direct, clear link on the Courts' webpages.

PART VI – Access to justice

In 1998, legal representation was affordable for many. The vast majority of parties were represented by counsel. The *Federal Courts Rules* were drafted against that backdrop.

Today, legal representation is no longer affordable for many litigants. More and more are presenting their own claims and defences, trying to grapple with the *Federal Courts Rules*.

Because of this, the subcommittee considered issues relating to whether the *Federal Courts Rules* promote access to justice by self-represented litigants, and access to justice more generally.

The issue of self-represented litigants poses a particular problem.

Some are doing their best to work within the framework of the *Federal Courts Rules*, but some are not.

Those who are not trying to work within the rules need to be dealt with. Earlier in this report, we have proposed mechanisms for ensuring proportionality and controlling abuse. But for some, these mechanisms will have no effect. Sometimes the ultimate sanction of excluding them from the Federal Courts system by way of a vexatious litigant order must be applied. We have described that system as a community resource. Sometimes that system must be protected for the good of the community.

However, many other self-represented litigants are trying to comply with the rules but are struggling. They fall into a different category. They deserve assistance.

To self-represented litigants trying to comply, the rules often seem to be a collection of legalese arranged in a baffling order.

They are not alone.

Many counsel representing parties are infrequent litigators in the Federal Courts. Our consultations revealed that many find the *Federal Courts Rules* hard to follow. Many find the arrangement of the rules and the tables of contents and indices in the published versions of the *Federal Courts Rules* inadequate. Indeed, experienced practitioners in the Federal Courts and even some judges and prothonotaries find the arrangement of the rules and the tables of contents and indices unhelpful.

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 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 is easy to read and understand. This is especially important for those who are unfamiliar with the rules.

Some of us consider the architecture of the *Federal Courts Rules* to be inferior to the architecture of some provinces’ rules. For example, Ontario’s *Rules of Civil Procedure* were offered as an example of a set of rules with a superior architecture.

Most seasoned members of the Bar have gained considerable familiarity with the *Federal Courts Rules*. They have developed an intimate understanding of the way the rules are interpreted and applied, and how the rules operate in relation to one another. These members of the Bar might prefer the rules to retain their current architecture, even if, from an objective standpoint, it is not very logical or “user-friendly.”

However, 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, including counsel who are more accustomed to the rules of other courts, self-represented litigants and others interested in the Federal Courts’ processes.

We considered the possibility that the entire *Federal Courts Rules* might be rearranged into a more logical structure or separated into two different sets of rules, one for the Federal Court and one for the Federal Court of Appeal. Our consultations did not reveal much demand for this. As well, we consider that these measures would impose costs and inconveniences as everyone grapples with new numbering and a new structure.

In 1998, the benefits of repealing and re-enacting the rules using a different structure exceeded the costs and inconveniences. Today, a majority of us are not convinced that that is the case.

Some of us were skeptical that any one structure for the legal text could ever accommodate all the needs of everyone who uses the *Federal Courts Rules*.

Although there must always be an official legal text for the *Federal Courts Rules*, that text need not be the version that parties always use. The internet offers the possibility of presenting the rules in ways that are

comprehensible to the Federal Courts' various audiences for their various needs.

One advantage of the internet is its availability. With the exception of inmates of federal penitentiaries, most self-represented litigants have access to the internet from home, through computers at their public library, through friends' computers, or computers at legal clinics. Resources permitting, a computer could also be made available for use in the Federal Courts' Registry offices.

A second advantage of the internet is its accessibility and effectiveness as an educational tool. For example, by clicking on the word "bring a motion" on a webpage, a litigant could be told, in plain language, exactly what needed to be done to bring a motion, perhaps in the form of an easily-understood checklist, complete with properly-formatted pdf forms in which to type the details. In addition to the existing indices and tables of contents offered by commercially-available versions of the rules, a highly detailed, web-based searching tool could be introduced to the website.

Ultimately, the Federal Courts' websites could offer guidance, both verbal and through multi-media presentation, on when to bring motions, what attracts and repels judges and prothonotaries, and how to conduct oneself in the courtroom. At present, many judges speak at lawyers' conferences about advocacy and persuasion, and how to maximize their clients' chances of success. Why shouldn't this information be available to all, including self-represented litigants, expressed in plain language on the Courts' websites?

The consultation process and our discussions revealed significant support for this sort of web-based approach. This approach is already in the planning stages in the Federal Court of Appeal. Under the approach contemplated, after the self-represented litigant answers a few questions on the website, the website automatically directs him or her to the precise guidance she or he needs, written in understandable lay language, with pre-typed, fillable pdf forms.

On its website, the Federal Court already has a specific section for self-represented litigants, but adopting the recommendations in this report would enhance and broaden the assistance it gives.

The assistance given by the Federal Courts' websites would not replace professional advice and representation. But it would inform the public better about how to proceed in the Federal Courts. Litigants might act in a way more consistent with the prudent management of court resources and the efficient resolution of disputes.

In our view, for the reasons discussed at the outset of this report, the *Federal Courts Rules* generally achieve proper balances, avoiding, to the extent possible, the creation of unnecessary, bureaucratic requirements that hinder cost-effective, timely justice, without any offsetting advantage. The Rules Committee should continue to ensure that new and existing rules are assessed from that standpoint.

As part of our policy review, we conducted an overall assessment of the *Federal Courts Rules* from that standpoint. We found that the *Federal Courts Rules* possess a number of advantages over other jurisdictions' rules in terms of facilitating access to justice. For example, the default position in the Federal Court of Appeal is that motions are determined on the basis of written submissions alone, with oral hearings held only when necessary, and that is rare.

On simple motions in both the Federal Court of Appeal and the Federal Court, a practice has developed whereby parties address the Court by letter, copied to the opposing litigant. These features make it easier for parties to seek assistance from judges and prothonotaries when necessary to restore order and control costs due to the participation of a self-represented party, and facilitate access to justice.

On motions in the Federal Courts, the judge or prothonotary drafts the order, not the parties, and has the power to make directions. This allows the Court to tell self-represented parties exactly what they need to do.

For example, when a self-represented party's need for education is evident, some draft into their orders or directions advice in plain language about how to comply with the *Federal Courts Rules*, sometimes even with a hyperlink to them, sometimes even directing them to their public library if they do not have a computer at home.

Some draft into their orders preambles or terms that encourage the opposing party to assist the self-represented party in uncontroversial ways.

If legal representation might assist, some use orders or directions to direct self-represented parties to useful webpages or phone numbers.

The semi-annual official meetings of the judges and prothonotaries of the Federal Courts would be good fora to discuss and disseminate these ideas and perhaps others concerning how the rules can be used to facilitate access to justice.

Given the prevalence of self-represented litigants in the Federal Courts system, the Rules Committee should re-double its efforts to ensure that

new and existing rules are comprehensible to self-represented litigants and capable of being complied with. For example, Part 7 (on motions) is difficult for many lawyers to follow — let alone self-represented parties — especially in light of the informal practices mentioned above. It could be simplified and clarified. The same may be true of other parts of the rules.

In the course of our work, we have learned that in some offices, the Registry is aware of duty counsel and legal aid organizations, such as Pro Bono B.C. and Pro Bono Ontario, that are available to assist self-represented persons either by taking on their proceedings or by being available to offer brief advice concerning how to comply with the rules. However, this is not always the case.

In some offices, a roster of duty counsel and legal aid organizations has not been compiled. In other offices, duty counsel, legal aid organizations, or both are scarce or non-existent in the area of Federal Courts practice. Access to justice would clearly be served by developing and maintaining in each Registry office a roster of duty counsel and clinics.

Therefore, in light of the foregoing, we make the following findings and recommendations:

17. A wholesale restructuring or reordering of the *Federal Courts Rules* is not warranted or advisable at this time. The benefits do not exceed the costs.

18. Existing tables of contents and indices, such as those found in commercially available texts of the *Federal Courts Rules*, suffer from lack of detail and are unsatisfactory. The Courts should prepare tables of contents and indices that are satisfactory and make them publicly available.

19. The Federal Courts should make better use of their websites to enhance access to justice, particularly by self-represented individuals. Measures include creating unofficial, non-legal user-friendly summaries and checklists concerning frequently-used procedural steps such as motions and appeals, providing pdf versions of the Forms that users can type into, and giving guidance, especially to self-represented parties, concerning the most appropriate and effective ways of conducting of litigation.

20. The *Federal Courts Rules* possess a number of advantages over other jurisdictions' rules in terms of facilitating access to justice. The official meetings of the judges and prothonotaries of the Federal Courts would be

good fora to discuss and disseminate ideas concerning how orders and directions under the rules can be used to facilitate access to justice.

21. A roster in each province and territory of duty counsel who are prepared to represent self-represented persons or provide them with advice concerning the *Federal Courts Rules* should be developed and maintained in each Registry office.

22. The Rules Committee should assess all existing rules from the standpoint of access to justice, particularly by self-represented parties, with a view to seeing if any simplification or clarification is warranted. In future, proposed rules should be assessed from that standpoint as well.

PART VII – Future steps

It will be for the Rules Committee, in plenary session, to consider the appropriateness of the recommendations in this report.

This report is a discussion of public policy related to the practice and procedures of the Federal Courts. Therefore, in the interests of transparency and open discussion, this report should be made available to the public. At a minimum, it should be posted on the Courts' website, sent to all who made submissions to us, and sent to the Courts' regular email distribution list.

Given the importance we place on access to justice, feedback from poverty law groups and legal aid clinics concerning our recommendations would be particularly valuable.

The Rules Committee should offer stakeholders a short period to offer comments concerning this report. The Rules Committee might find the comments useful on implementation issues.

If the Rules Committee accepts recommendations in this report, it should establish a new subcommittee to advise it on implementation issues and, if necessary, to draft the legal wording necessary to implement the recommendations.

In other cases, such as those concerning the Federal Courts websites, the recommendations do not involve amendments and are more properly within the purview of the Courts themselves and the Courts Administration Service. The subcommittee understands that the Courts Administration Service is already involved in redesigning the Courts' websites. If the Rules Committee accepts some of our recommendations concerning the Courts' websites, it would be useful to have one or more representatives on the subcommittee involved in that process.

Therefore, we make the following recommendations:

23. This report should be regarded as public. The Rules Committee should invite feedback on this report to be sent to the secretary to the Rules Committee, for appropriate circulation. This should be done on a tight timeline. This report, along with an invitation for feedback, should be posted on the Federal Courts' websites and sent to:

- (a) all who made formal submissions to us;
- (b) groups who may have special insight on some of the recommendations made (e.g., poverty law groups, legal aid agencies, governmental officials, and judges on other Canadian courts who have studied access to justice issues);
- (c) the Federal Courts' regular email distribution list; and
- (d) the prothonotaries, judges and senior administrative staff of the Federal Courts.

24. If the Rules Committee accepts some or all of the recommendations in this report, it should establish a new subcommittee to examine implementation issues.

25. If the Rules Committee agrees with the recommendations concerning the Federal Courts' websites, one or more representatives of the subcommittee should work with the Courts Administration Service with a view to implementing these recommendations.

26. A new global policy review of the *Federal Courts Rules* should take place whenever the Rules Committee considers it appropriate, but no later than ten years from now.

PART VIII – Miscellaneous Issues

- I -

The Rules Committee has established other subcommittees. These are looking into such matters as the introduction of technology, specific substantive amendments, specific procedural amendments, and enforcement matters. We have been careful not to look into matters within their remit. However, in some cases, their work has given us guidance.

We expect additional recommendations, sometimes of a policy nature, to come from these subcommittees. This subcommittee is not involved in these.

- II -

During the consultation process, we received a number of suggestions regarding specific amendments to the *Federal Courts Rules*.

To the extent that these bore upon policy issues within our mandate, we have considered them. To the extent that these concerned specific matters of wording, as opposed to larger issues of policy, these were beyond our mandate so we did not consider them.

We have forwarded all of the suggestions regarding specific amendments to the *Federal Courts Rules* to the Secretary to the Rules Committee, for the due consideration of that committee.

APPENDIX – Summary of findings and recommendations

Initial observations and overview

1. There is no need for any wholesale, far-reaching revamping of the substance of the *Federal Courts Rules*. Nevertheless, the Rules Committee should address some pressing issues, described below, in the next round of reform to the *Federal Courts Rules*.

Balances in the *Federal Courts Rules*

2. On the whole, the *Federal Courts Rules* strike an appropriate balance on the level of regulation, avoiding the pitfalls of over-regulation and under-regulation. However, as recommended below, new regulatory tools need to be introduced to curb certain abuses and to ensure that parties take proportionate steps in conducting their litigation.

3. On the whole, the *Federal Courts Rules* also strike an appropriate balance by vesting decision-makers with an appropriate level of discretion to regulate proceedings, avoiding the pitfalls of over-dictation and under-dictation (or insufficient governing standards).

4. On the whole, the balance in the *Federal Courts Rules* between judicial determination and pre-trial disposition is appropriate, subject to the following two specific recommendations:

(a) Rule 3 should be adjusted to reflect the fact that many matters are resolved or disposed of in ways other than judicial “determination.”

(b) The costs provisions should be amended in order to make it more likely that a higher quantum of costs will be awarded when warranted, to provide greater incentive for pre-trial resolution.

There should be no new mandatory procedures to promote the pre-trial resolution of matters.

5. On the whole, the balance in the *Federal Courts Rules* between court-led and party-led procedure is appropriate at the current time. In particular, the existing case management provisions remain broadly acceptable and should not be changed, subject to the considerations discussed in the next Part.

6. The balance in the *Federal Courts Rules* between a uniform set of procedures for all and special procedures for specialized areas — a balance largely in favour of the former — is acceptable and should be maintained. However, the special needs of specialized areas of practice can be met by developing practice directions within those areas or, if appropriate, through the case management process for individual cases.

Tools in the *Federal Courts Rules* to regulate proceedings

7. A principle of proportionality should be introduced into Rule 3. Rule 3 should also prohibit the abusive use of the *Federal Courts Rules*. The types of abuse should be identified, as has been done under Rule 54.1 of the *Quebec Code of Civil Procedure*.

8. The role of Rule 3 as a device to be used when interpreting and applying the *Federal Courts Rules* should be preserved. But Rule 3 should also be transformed into a stand-alone power of the Federal Courts to intervene on their own motion to regulate or prohibit conduct that is inconsistent with the principles in Rule 3.

9. As an adjunct to this, Rule 74 should be amended so as to allow the Registry to refer to the Court a document presented for filing that shows evident abuse. Evident abuse is abuse of the sort described in recommendation 7 that is obvious and evident on even a cursory reading of the document. This would enable the Court to deal with abuse quickly, on the Court's own motion, following the procedures set out in Rule 74. Under this recommendation, the Registry should not be put to any greater obligation to review documents than exists at present under existing Rules 72 and 74.

10. The principle of proportionality should be introduced concretely into particular rules so that those rules are consistent with Rule 3. For example, the existing documentary disclosure and oral discovery rules should be modified to reflect the need for proportionality.

11. The issue of the frequency and timeliness of vexatious litigant applications under section 40 of the *Federal Courts Act* should be raised and discussed at one or more regular meetings of the Bench and Bar Committee, with a view to devising practical, effective and fair solutions. The Rules Committee should be kept informed of the progress and results of those discussions.

Rules and practice directions

12. The existing process for the making, amending or repealing of rules does not require any modification.

13. The *Federal Courts Rules* should be amended to recognize the power of Chief Justices to make practice directions. That amendment should specify that practice directions are limited to setting out policies and guidelines concerning how the discretion in existing rules should be exercised, not to establish new rules.

14. The Rules Committee, as a body comprised of many of the Federal Courts' stakeholders, should review practice directions periodically, assessing their continuing relevance, appropriateness and suitability, and, where warranted, make non-binding recommendations to the Chief Justices. In addition, in appropriate circumstances, the Rules Committee should recommend the making of new practice directions. New practice directions can play a useful role in addressing special needs that arise in particular practice areas. Nothing in this recommendation would limit the ability of Chief Justices to make practice directions at any time as they see fit.

15. Certain informal practices under the *Federal Courts Rules* exist and are accepted. These should be legitimized, defined and publicized in practice directions.

16. Practice directions need to be more visible and accessible. One way to achieve this is by consolidating them into a single document accessible by a direct, clear link on the Courts' webpages.

Access to justice

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