

COMMENTS FROM THE DEPARTMENT OF JUSTICE
Discussion paper on principles for a global revision to the Federal Court Rules

Question #	Comment
1.	The involvement of the 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 courts be empowered to impose sanctions for abuse of procedures and, if so, in what circumstances, and what sort of sanctions? The consensus among counsel across the Department of Justice is that proceedings should remain party-driven rather than more court-driven (the unsuccessful experience in the Ontario Superior Court of the use of mandatory case management and mandatory mediation was noted) so as not to escalate the expense and delay in proceedings. More flexibility in the rules to allow for party-driven litigation was suggested in certain areas. For example, one suggestion is to allow the parties to consent to extension of timelines, outside of case management, without the need for a formal written motion or order, as these motions are invariably granted and they add to the cost of the litigation. Another suggestion is to allow counsel the opportunity to agree on a litigation timetable among themselves to follow until there is a need for a status review. Counsel endorsed the approach that any party should be able to access case management on an as needed basis to help set schedules, resolve procedural matters, or to keep the proceeding moving without having the entire proceeding specially managed. One area in which the proceedings should be more court-driven or managed is in those proceedings with unrepresented litigants, or where counsel cannot agree on appropriate timelines. Very complex cases, such as aboriginal litigation, are also ones where case management would likely prove useful. A case management process which identifies these types of proceedings at an early stage could assist the prompt and effective resolution of these cases – these types of proceedings where there are unrepresented litigants or where there are complex issues and procedures could be automatically assigned to case management with an opt-out allowance where counsel agree. Some counsel pointed out that Rules 383 and 384 do not give clear direction as to the procedure to be followed to apply for a specially managed proceeding. It was suggested that the rules should be enhanced to more clearly explain the procedure for obtaining an order for case management. In case management, flexibility should be shown to allow parties to adjourn a step in a timeline in order to

COMMENTS FROM THE DEPARTMENT OF JUSTICE
Discussion paper on principles for a global revision to the Federal Court Rules

Question #	Comment
	explore a settlement mandate if that issue is raised by the parties. It was noted that the process in immigration matters is neither court-led or party-led but rather rule-led. The parties prosecute proceedings in accordance with timelines set out in the rules, and it works well for immigration matters. There is also a consensus that litigation plans should not be mandated at the outset of a proceeding, especially as the experience in Ontario on its usefulness is questionable. A litigation plan develops over time and requiring one at the outset, especially in a complex matter where all the information and facts are not known, would be subject to many revisions and would add to the costs of the proceeding without necessarily providing a concomitant savings in cost and efficiency. With respect to court imposed sanctions for abuse of procedures, the Court has the ability to impose cost sanctions, set strict timelines, dismiss or stay a proceeding as remedies for abuses of process. The rules should provide clearly for the Court's authority to act on its own initiative in relation to an abuse of process as well as on a motion of a party.
2. Judicial determination vs. alternative disposition (e.g., settlements)? Currently the 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?	
	Since there are a number of rules that deal with the resolution, and not merely the adjudication and final determination, of issues, some counsel suggest that Rule 3 should be amended to reflect this fact. For example, Rule 3 could be amended to read: “These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive resolution of every proceeding.” It is also suggested that an interpretative clause should be added explicitly stating that the Court should interpret the rules to facilitate and encourage the use of dispute resolution processes. For example, wording might be along the following lines:

COMMENTS FROM THE DEPARTMENT OF JUSTICE
Discussion paper on principles for a global revision to the Federal Court Rules

Question #	Comment
	“These rules should be interpreted to facilitate wherever possible the opportunities for the parties to resolve their matter through a dispute resolution process, such as mediation.” However, the Department of Justice does not support the imposition of further mandatory processes (such as mandatory mediation) obliging the parties to pursue alternatives to resolving the matter on the merits by the Court. The Federal Courts Rules include a number of possible options that could assist with the resolution of a matter without the need for adjudication including: • The requirement for settlement discussion (Rule 257) • Pre-trial conference (Rules 258-267) • Trial management conference (Rule 270) • Case management (Rules 383-385) • Dispute resolution conferences (Rules 386-391) Most of these processes are initiated by the court, however, and not at the parties’ initiative. Counsel suggest that the rules should provide for more options with respect to encouraging parties to resolve disputes. The amendmentments could include: • Provisions that allow for parties to request a dispute resolution conference, as opposed to making a motion as provided for in Rule 257 or being ordered to participate as provided for in Rule 386. The parties should also be able to request the type of process that should take place: mediation, neutral evaluation or mini-trial. Many other jurisdictions that allow for some form of similar judicially-assisted dispute resolution process allow for the parties to request it, rather than waiting for the court to order it (e.g. British Columbia, Alberta, Ontario, Quebec, Nova Scotia, New Brunswick, Newfoundland & Labrador, Yukon). • Provisions that allow for one party to request a trial management conference or case management, as opposed to the process being ordered by the Court as provided for in Rule 270, as well as in Rules 383, 383.1 and 384. Note that some jurisdictions allow for parties to request case management, especially in jurisdictions where case management proceedings

COMMENTS FROM THE DEPARTMENT OF JUSTICE
Discussion paper on principles for a global revision to the Federal Court Rules

Question #	Comment
	are not automatic (e.g. British Columbia, Alberta, Newfoundland & Labrador, Northwest Territories, Nunavut). Although it would not necessarily be part of the Federal Court Rules, there was a suggestion that the Federal Courts establish a roster of mediators who, having met certain criteria, could be used by parties if they elect to attempt to resolve their dispute with the assistance of a private-sector third party neutral. Mediation rosters are maintained by several other superior courts in Canada. The Federal Courts Rules should encourage the use of mediation by a neutral third party who is not a member of the Federal Court on a voluntary basis. Perhaps the award of costs could be used more effectively to increase the possibility of settlement. If there were a Tariff B increase, in order to reflect actual costs more accurately, this may act as an additional incentive on parties to consider settlement. This would not of course apply in the case of impecunious litigants.
	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? The Department strongly support the inclusion of this principle in the Federal Courts Rules. The principle should be introduced both as a general principle under Rule 3 and also as applying under specific rules, such as rule 222 covering document discovery. This principle can also be applied to rules related to motions, examinations out of court, trials and hearings. Proportionality is a significant issue with respect to the production of Crown documents, since many cases involve disparate collections of electronic data and paper documents in different departments across the country. Electronic discovery of documents in many Crown cases is a very expensive, labour intensive and time consuming process, so the principle of proportionality is an essential principle to refine the issues, and to reduce time and expense in proceedings so that appropriate resources can be dedicated to each case.

COMMENTS FROM THE DEPARTMENT OF JUSTICE
Discussion paper on principles for a global revision to the Federal Court Rules

Question #	Comment
	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? Many counsel suggest that Practice Directions be made more accessible both on the Federal Court website and in the Federal Courts Rules. The websites of the Federal Court and Federal Court of Appeal both contain a section entitled “Notices to Parties and Members of the Profession”. Documents grouped under that section include not only Practice Directions, but other notices, such as the notice for the Global Review, notices of amendment to the Rules of Court, and non-mandatory guidelines for practice in certain areas of law. All Practice Directives should be published on the court website and should be uniform across the country. The Practice Directives should apply equally to all parties and litigants. To ensure clarity, accessibility and better awareness by litigants, the Committee might wish to consider: • compiling and publishing all current and future Practice directions under a specific heading clearly identified in one place on the court’s website; • establishing a clearly visible link on the Home Page to the practice directions; • linking each Practice Direction to the pertinent rule(s) in a web-based format so that a litigant would know if there was a Practice Direction on point when he or she reviews the rule; • including an index in the Federal Courts Rules and incorporating the Practice Directions the index;

COMMENTS FROM THE DEPARTMENT OF JUSTICE
Discussion paper on principles for a global revision to the Federal Court Rules

Question #	Comment
	• setting up a notification on the Federal Court website, perhaps as part of its existing notifications for new cases, for new Practice Directions or revisions to old Practice Directions; • implementing a regular periodic review of issued Practice Directions; • including existing Practice Directions in the published volume of the Federal Court Practice under the rule(s) to which they apply; If any Practice Directions attempt to amend rules, then they should be incorporated as amendments to the rules. Care should be taken to ensure that Practice Directives do not regulate too many matters, since this can make Federal Court litigation more expensive and time consuming for counsel and can add to the complexity of litigation for unrepresented parties. The Federal Courts Act confers upon the Rules Committee very broad powers for regulating the practice of the Federal Courts by rules of court. Increased reliance on Practice Directions should not displace public policy objectives of the statutory scheme for rule making by the federal courts including : • The opening words of s. 46(1) – “Subject to the approval of the Governor in Council” –which allows for GIC consideration of proposed rules in light of broader Government policies. • S. 46(4) consultation requirement which provides an important mechanism to ensure that litigants are and the public are aware of the changes; • S. 46(5) requires that any new rule of court or any amendment to an existing rule be laid before Parliament, providing enhanced

COMMENTS FROM THE DEPARTMENT OF JUSTICE
Discussion paper on principles for a global revision to the Federal Court Rules

Question #	Comment
	public scrutiny; That said, Practice Directions have and can continue to play an important role in elaborating or clarifying the operation of rules in a manner consistent with the legal norms established through the rule-making process.
5. “One size fits all” procedures vs. specialized procedures. For the most part, the 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?	Counsel noted that some specialized procedures were well suited to certain areas of practice such as immigration or aboriginal cases so a “one size fits all” approach is not recommended. Separate rules related to immigration proceedings help ensure that these judicial review cases proceed efficiently. Aboriginal law claims have prompted the development of particular procedures regarding the admission of historical evidence at trial such as the protocols for the admission of elders’ evidence (many of these practices are set out in the Federal Court’s Aboriginal Litigation Practice Guidelines). Consideration should be given to how specialized rules can be incorporated into a more user-friendly architecture discussed in question #6 below.
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?	There seems to be a fair amount of cross-referencing required in the Rules now. The rules would be easier to navigate if the cross-referencing could be reduced and an improved index is added. Practice Directions should be referenced in the rules to which they apply (where possible).

COMMENTS FROM THE DEPARTMENT OF JUSTICE
Discussion paper on principles for a global revision to the Federal Court Rules

Question #	Comment
	The ordering of the rules is not always intuitive. A number of counsel suggest that the rules could be ordered more to reflect the order in which an action or application is conducted. It may also facilitate easier comparisons with rules in other provincial jurisdictions if the structure were similar to how the rules of superior courts are set out. This would have the benefit of making the rules more accessible to counsel who do not regularly practice before the Federal Court. Also, grouping of rules together that deal with the same subject matter would help: For example, there are a set of rules governing expert witnesses at Rule 52. There are further set of rules on expert witnesses at Rules 279-280. Expert witness panels are dealt with under the heading of “Evidence at Trial” (Rules on 282.1-282.2). The Code of Conduct for Expert Witnesses is located in a Schedule at the back of the rules. Another example is the topic of discontinuances. The main rules for discontinuance are located at Rules 165-166. However, the rule governing the discontinuance of a representative action is found at Rule 114(4), and the discontinuance of a class action is dealt with in Rule 334.3. Easy web access with hyperlinks would also assist access and use along with the other suggestions mentioned in question #4 above. Counsel noted that there were recent structural changes to the rules in the following jurisdictions: Alberta, Nova Scotia, British Columbia, and the Federal Court of Australia (a description of the rule changes addressed in these jurisdictions is set out in the attached Appendix A).
	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.
	Although there were no other policy issues raised as such, some other areas of reform are suggested: (1) Certified Record - It is recommended that the Rules Committee consider revising the rules regarding the treatment of the Certified Record. At present, the parties must deal with the Certified Record three times (first under rule 317, then attaching it to the Respondent’s affidavit, and then filing it yet again as part of the record). The Court of Appeal has interpreted the present rules to require that the Certified Record be attached to an affidavit and then

COMMENTS FROM THE DEPARTMENT OF JUSTICE
Discussion paper on principles for a global revision to the Federal Court Rules

Question #	Comment
	included in the applicant's or respondent's record. It would be beneficial if the rules could be changed to make it clear that the Certified Record when filed is properly before the Court and can be considered by the Court without the need to attach it to an affidavit or include it in the record of a party. Alternatively, the rules could make it clear either that the Certified Record can be included in the applicant's or respondent's record and considered by the Court without the need to attach it to an affidavit or, if the Certified Record must be attached to an affidavit, that the affidavit attaching the certified record does not need to be filed with the Court until it is filed as part of the applicant's or respondent's record. Among other things, this will reduce the amount of paper or documentation that must be filed and served, and will also minimize the confusion that results at present when the Certified Record is dealt with three times during one proceeding; (2) Class Proceedings - In class proceedings, Rule 334.39 should be revisited. The Rules Committee should consider changing the rules to permit the Court to award costs to or against a party in a proposed or certified class proceeding like it does in non-class proceedings. The practice could mirror the Ontario class action costs regime. This would deter meritless or doubtful class actions and encourage careful consideration before such proceedings are commenced.

Appendix A

Alberta Rules of Court:

Under the request of the Alberta Rules of Court Committee, the Alberta Law Reform Institute led a multi-year Rules Project to maximize the Alberta Rules of Court's clarity, usability and effectiveness. Their recommendations were regrouped in a final report, published in 2008.

The new Alberta Rules of Court (AR 124/2010), which came into force on November 1, 2010, are arranged in a logical, chronological order that reflects the progress of a lawsuit. Fundamental premises are at the beginning and technical rules are at the end. The Rules are written in plain English and archaic or repetitive rules were deleted. Individual rules are numbered, and rules within each part numbered, for example Part 1, Rule 5 is known as Rule 1.5; Part 5, Rule 27, Sub-rule 1 is known as Rule 5.27(1).

The Rules include an introduction to each part explaining "what this part is about", information notes to assist the reader with respect to specific rules and cross-references to related topics. In the electronic version, the cross-references are hyper-linked. Defined items are identified in the text and collected in an easily findable appendix. The Rules also contain a comprehensive index.

Nova Scotia Rules of Civil Procedure:

The Nova Scotia Rules of Civil Procedure are partially interactive in their electronic version. For each rule of procedure, a link to the related electronic form appears. These electronic forms can be filled out on the computer and printed from the Court's website.

B.C. Supreme Court Civil and Family Rules:

On July 1, 2010, new B.C. Supreme Court civil and family rules and revised schedules of fees came into force. The structure of the new Rules has been reorganized. It follows a more logical and chronological flow, along with new, simplified terminology to modernize the rules.

Time periods are set in multiples of seven for easy calculation in weeks. Information on the new Rules, such as Q&As, tables of concordance, flowcharts and reference guides are available on the Ministry of Attorney General website. The website also offers links to various multimedia and other self-help resources.

Further, the Supreme Court of British Columbia website has information for litigants who do not have lawyers, as well as links to the new civil rules, forms and fees. Self litigants are also

advised to try Clicklaw, a website that provides user friendly, searchable access to key legal information, education and help for British Columbians.

Federal Court of Australia Rules and e-Court strategy:

(1) Rules

On August 1, 2011, the Federal Court of Australia abolished its existing Rules and replaced them with a more modern set of rules.

The new Rules have an extensive table of contents (31 pages in length). They are divided into six separate chapters:

- Chapter 1 - Introductory provisions
- Chapter 2 - Original jurisdiction – proceedings generally
- Chapter 3 - Original jurisdiction – special classes of proceedings
- Chapter 4 - Appellate jurisdiction
- Chapter 5 - Judgments, costs and other general provisions
- Chapter 6 - Disciplinary
- Schedule 1 - Dictionary
- Schedule 2 - Powers of Registrars
- Schedule 3 -Costs

The introductory provisions refer to the general powers of the Court, the functions of the registrars and the registry, the way in which documents are filed and the like, and rules relating to proceedings generally. Chapter 2 deals with the starting of proceedings, interlocutory proceedings and interlocutory processes. Chapter 3 deals with the original jurisdiction of the Court insofar as it applies to special Acts. Chapter 4 deals with the appellate jurisdiction of the Court, Chapter 5 with judgments, and Chapter 6 with contempt.

Each chapter is divided into parts. The parts are the broad topic headings within each chapter, and each part is divided into divisions, and the divisions are subtopics of the parts, and the divisions include the various rules. The new Rules are numbered according to the Part and Division they belong to. For example, for a Rule that is included in Part 2, the numbering will start at 2.01.

The Rules are written in plain language, use the active voice and are gender neutral. Archaic terms have been eliminated. The Court provides comparative tables with the new and old versions of the Rules. The home page of the Court's website features a prominent link to the Rules and associated information.

The Rules rely heavily on forms for the parties and lawyers to make use of. They are told the form which they must use, the documents which must accompany the forms, and the processes which must be carried through to obtain the orders which they seek. The forms are easily found near the Rules.

The Court provides step-by step descriptions of the processes litigants must follow depending on the type of case they are bringing (e.g., admiralty, bankruptcy).

(2) e-Court strategy :

The e-Court strategy has been created to ensure that the Australia Federal Court is more responsive to the needs of the public in the 21st century. As part of its new e-Court strategy, the Australia Federal Court currently provides the following services online:

- o "eLodgment" enables any member of the public, whether they be practitioners, law firms, corporate bodies or self represented litigants, to electronically lodge documents with the Federal Court of Australia and the Federal Magistrates Court of Australia. eLodgment may be used to commence an action in either jurisdiction by enabling the lodgment of initiating documents and any supporting documents. Similarly, documents pertaining to existing matters may be lodged via eLodgment as long as the file number is known.
- o "Federal Law Search" allows the public to search for detailed information on specific cases.
- o "eCourtroom" allows parties and their legal representatives to participate in a virtual courtroom. The virtual courtroom assists in the management of pre-trial matters by allowing directions and other orders to be made online by the relevant docket Judge.
- o "eCase Administration" is a service that may be used by practitioners or parties to communicate with chambers' staff, on case related issues, in a secure environment. Only parties to the matter or their legal representatives will have access to this service and access is restricted to those matters where they are a participant in the proceedings. It is in essence an effective case management tool for both chambers and the participants in the matter.

o “Commonwealth Courts Portal” and “My Files”: The 'My Files' concept is a single web-based interface (or portal) that integrates the electronic provision of information and services mentioned above. The ‘My Files’ concept is delivered through the Commonwealth Courts Portal (CCP), a joint initiative of the Federal Court, Family Court and Federal Magistrates Court of Australia. It provides web-based services to judicial officers, lawyers, litigants and court staff providing real-time information about cases before the courts. Users can obtain a composite, user friendly view of their cases that provides information about documents filed and scheduled listing events, as well as details of any orders made.