From: Denis Ferland [Denis.Ferland@fd.ulaval.ca]
Sent: August 28, 2012 3:25 PM
To: Stratas, David W Hon.; jwalker@yorku.ca
Subject: RE: First draft, subcommittee report Commentaires du Professeur Ferland intégrés au texte du Projet de rapport

Attachments: Global review subcomm report (circulated) 001a.doc

Monsieur le Juge-Président,

Chère collègue Professeure Walker,

Il me fait plaisir de vous transmettre mes commentaires particuliers, intégrés en rouge, pour attirer votre attention, au First draft, Global review subcommittee report ci-joint.

Je tiens à vous féliciter de l'excellence de votre synthèse des délibérations du sous-comité sur la révision globale des Règles des Cours fédérales et de votre enrichissement personnel d'arguments au soutien de la cohérence des consensus des membres du Sous-comité.

Votre présentation a le mérite d'être juridiquement exacte, bien articulée, cohérente, claire, succincte et habilement marquée par le souci constant de l'équilibre, de la sage modération et propre à susciter politiquement l'adhésion des Juges en chef (practice directions), des membres du Comité des Règles des Cours fédérales, des membres de la communauté juridique, et celle du public consommateur des services de justice offerts par les Cours fédérales.

Je vous soumets respectueusement quelques suggestions mineures qui ne visent pas à modifier substantiellement votre projet de Rapport avec lequel je suis en accord, mais à attirer l'attention sur certaines observations ou précisions d'un point de vue strictement personnel, sans prétention particulière, sinon une opinion parmi plusieurs autres que je soumets à votre sage réflexion, ajoutée à celle des membres du Sous-comité.

Salutations respectueuses et cordiales,

Denis FERLAND, Ad. E.

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Envoyé : 27 août 2012 17:46
À : Stratas, David W Hon.; Bowers, Chantelle; Gauthier, J. Hon.; Denis Ferland; Hughes, Roger; phutchins@hutchinslegal.ca; romackin@justice.gc.ca; jrmorrissey@smart-biggar.ca; Rennie, Donald; cstrickland@smss.com; Tabib, Mireille; jwalker@yorku.ca; Baumberg, Andrew
Objet : RE: First draft, subcommittee report

Apologies. I just discovered that you got the second-last version. Here's the latest. The only difference between the two is the correction of some typographic errors, so if you have begun working with the draft I sent earlier, that's just fine.

From: Stratas, David W Hon.
Sent: August 27, 2012 4:56 PM
To: Bowers, Chantelle; Gauthier, J. Hon.; 'Denis.Ferland@fd.ulaval.ca'; Hughes, Roger; 'phutchins@hutchinslegal.ca'; 'romackin@justice.gc.ca'; 'jrmorrissey@smart-biggar.ca'; Rennie, Donald; Stratas, David W Hon.; 'cstrickland@smss.com'; Tabib, Mireille; 'jwalker@yorku.ca'; Baumberg, Andrew
Subject: First draft, subcommittee report
Importance: High

Dear Colleagues,

Attached is a first draft of our subcommittee’s report. Janet and I have been working on it.

This draft is a first stab at trying to report our conclusions/recommendations and expressing them in a compelling, persuasive way, with supporting analysis. of course, the conclusions/recommendations are our best guess as to where we ended up in our discussions. And plenty of the supporting analysis comes from our resource centre and discussions.

As you read this, remember that we have several potential audiences. Of course, our primary audience is the Rules Committee. But there are other audiences -- those who filed submissions, Federal Courts' users and stakeholders who did not file a submission but who are very interested in our work, people in the future who want to research why certain Rules changes were made (as part of an examination of legislative history), others who might be curious about our thoughts concerning the the procedural issues of the day.

I would like us to try to be as unanimous as possible. However, as previously mentioned, there is room for offering minority recommendations where there are a number of us who share a common point of view that is different from the majority (whatever the majority may turn out to be).

I would propose that each of you take this draft and mark it up using track changes and send it back to me. Or mark it up with a pen and scan it and send it back to me. Or just write a memo of thoughts and send it back to me (might be better for larger conceptual comments).

I shall post on the website whatever people send to me so we can all see each other’s comments.

Janet and I will then try to synthesize the comments and redraft the report. This first round of comments will help us all identify what remains contentious and what might need further discussion. We'll then be able to see where we are and determine how to best to proceed (meetings, etc.).

As you know, we have to move reasonably briskly if we are to get our material to translation and report to the Rules Committee in time.

To that end, could you please offer your comments and suggestions as soon as you possibly can, and in any event no later than September 5? If you will need more time, please let me know, but I'd be grateful if you can do your very best to move quickly.

Many thanks,

David

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
(Submitted to the Rules Committee, November 9, 2012)

Justice David Stratas (Chair of the Subcommittee) ● Chantelle Bowers (Secretary to the Subcommittee)
Andrew Baumberg ● Professor Denis Ferland ● Justice Johanne Gauthier ● Justice Roger Hughes ● Peter Hutchins
Robert MacKinnon ● John Morrissey ● Justice Donald Rennie ● Cecily Strickland ● Prothonotary Mireille Tabib ● Professor Janet Walker

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PART I – Background

Origin of the subcommittee

This subcommittee arises from the vision of the architects of the *Federal Courts Rules* some 14 years ago.

Back then, older rules had been in force for over a quarter-century. Circumstances had changed. The older rules were seen as no longer responsive to those circumstances. It was time to cast aside the old and bring in the new.

The *Federal Courts Rules* represented the Federal Courts' response to those changed circumstances. They came into force in 1998.

The architects of the *Federal Courts Rules* foresaw that, absent periodic review, the rules could become outmoded and unresponsive to the times, just like the rules they replaced. So they recommended that, every decade or so, the *Federal Courts Rules* be reviewed globally in order to assess their continued suitability. As a result of this periodic global review, they envisaged that the *Federal Courts Rules* would remain relevant to changing circumstances and contemporary needs.

Key to the proper functioning of the *Federal Courts Rules* is the Rules Committee, a statutorily regulated committee comprised of representatives of the Federal Courts and the Bar.

Under section 46 of the *Federal Courts Act*, Parliament has given the Rules Committee the task of regulating practice and procedure in the Federal Courts. More importantly, Parliament has vested the Rules Committee with the responsibility of ensuring that the intentions and objects underlying the *Federal Courts Act* are attained. Those objects include fairness, justice, accessibility and efficiency.

Since 1998, under the stewardship of the Rules Committee, many minor revisions and several significant reforms have been made to the *Federal Courts Rules*. Significant reforms include the introduction of case management, provisions for offers to settle, the creation and regulation of class proceedings, **an amendment to reinstate former rule 114 which provided for representative proceedings and was repealed in 2002 when a regime for class actions was first introduced in the Federal Court,** the management of expert witnesses and their evidence, and the availability of summary judgment and summary trial.

[Commentaire DF: il pourrait être intéressant en outre, même s'il en sera question ci-après, de faire état sommairement des réformes procédurales contemporaines au plan international (en particulier England) qui ont inspiré les réformes procédurales récentes en droit canadien (en particulier Québec, Ontario, British Columbia, Alberta), pour justifier la révision globale des Règles des Cours fédérales et leur harmonisation dans un contexte de globalisation et mondialisation du droit]

While these reforms serve to keep the *Federal Courts Rules* responsive to new circumstances and needs, a periodic global review adds a further assurance of this and a different dimension. To put it in another way, from time to time over many years new trees may be planted in the forest, but every once and a while it is prudent to stand back and look at the whole forest.

To this end, in 2011 the Rules Committee struck a subcommittee to engage in this global review.

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 given a voice: judges, prothonotaries, private lawyers specializing in different areas, government lawyers and court personnel.

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, to examine the main principles and policies they express, and to determine whether they need to be modified, refined or re-articulated in light of changing needs and circumstances. It asked the subcommittee to provide it with a report setting out its analysis and recommendations.

It was left to the subcommittee to consider and determine how to carry out its mandate.

The subcommittee's mandate is best understood as a high-level policy review— not to propose specific changes, but to recommend the kinds of reforms that the Rules Committee might wish to pursue.

How the subcommittee discharged its mandate

Initial decisions

At its first meeting, the subcommittee determined how it would carry out its mandate.

We decided that a policy review of the broad scope here 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 were concerned 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 its report was to be of practical use, we would have to discharge our mandate in a timely way.

We addressed this concern by identifying several issues which, in our view, warranted examination, while allowing for others during the consultation process to raise additional issues for the subcommittee's consideration.

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 ascessed 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 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 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. The aim of this discussion paper was to set the topics in context, raising ideas for consideration, all designed 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.

The consultation paper and the discussion paper was sent 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 ample 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 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 could be discussed in 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 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. Those that did respond did not suggest that the *Federal Courts Rules*, overall, do not work reasonably well or accomplish their purposes.

All of the members of the subcommittee work with the *Federal Courts Rules* regularly. From this personal experience and from our analysis and study of 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 participants in the consultation process agree that there are some pressing issues that the Rules Committee should address in the next round of reform to the *Federal Courts Rules*. Much of the remainder of this report deals with those issues.

As a result, at the outset, we 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

Procedural rules must achieve various balances. To be effective, the *Federal Courts Rules* must strike these balances appropriately.

In all, we examined five different balances sought to be achieved by the rules and asked ourselves whether the *Federal Courts 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. If there is too little regulation, the ignorant or the mischievous can engage in abuses. If there is 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 rules continue to achieve a good balance overall.

However, as will be explained, we are of the view that new regulatory tools need to be developed to curb certain abuses and to ensure that parties take proportionate steps in conducting their litigation.

Level of discretion vested in decision-makers

The *Federal Courts Rules* must give decision-makers enough discretion to manage litigation, but not too little or too much. If there is too little discretion and too much dictation, decision-makers are shackled and cannot react appropriately to disparate and sometimes pressing circumstances. If there is too much discretion and too little dictation, certainty and predictability suffer.

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.

Here too, however, decision-makers need to be more empowered to curb certain abuses and disproportionate conduct in litigation.

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." In the case of actions, "determination" implies a decision on the merits after trial.

But circumstances have changed since 1998. For one thing, the rules have been amended to include case management and mediation provisions. In addition, trials are increasingly rare. One factor behind this is the increasing success of case management in bringing parties to settlement.

It may be time to recognize that the paucity of trials is not a failure of the Federal Courts system or of the practice in the Federal Courts that has been fostered by the rules, but an achievement.

We believe that we have reached the point where the concentrated oral trial is such a rare occurrence and case management has achieved such significance that Rule 3 should be re-framed. Rather than stating that the rules are oriented at "determinations," it should speak of "dispositions." That term embraces settlements, in addition to decisions on their merits.

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 rule amended in order to allow for a higher quantum of costs to be awarded, when warranted. For example, the current scale of costs in the Tariff is low and has little effect on the conduct of litigation involving large sophisticated parties.

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 by 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.

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 establishment of a robust system of case management.

Case management has been an integral feature of a sea change in the approach to the litigation process in the adversary system in many courts. It represents a shift in the objectives of litigants away from trial and toward settlement.

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

Case management used to be introduced into proceedings by way of motion, and 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.

Currently, case management is introduced in defended matters automatically after these time periods. Status review has been retained for actions that go undefended for 180 days or in which there has been no requisition for a pre-trial conference for 360 days, and for applications in which there has been no requisition for a hearing date within 180 days).

Now, some proceedings, such as patented medicines notice of compliance proceedings, automatically go to case management, and parties can move to have their matters designated as specially managed.

Perhaps the most important factor in the success of case management 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 Courts, judges and prothonotaries have become actively involved in many aspects of procedure—determining the length of time permitted for various stages of the proceeding, appointing and examining experts, and determining the steps needed to resolve a case in case-planning conferences—to mention just a few.

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 have the greatest interest in it—the parties—are free to prosecute or defend the case as they see fit. However, this can create the potential for unwarranted demands on court resources by litigants who wish to pursue unnecessarily complex and protracted proceedings. It can also create concerns about the impact on fairness the fairness of the increasing number of 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 and some favoured increasing court-involvement in the process in various ways, such as judicial dispute resolution. However, a number of participants raised concerns about the toll that the increased involvement of judges or prothonotaries could have on court resources. Some noted that certain proceedings, such as those involving self-represented litigants and Aboriginal matters, warranted special consideration.

On the whole, however, our consultation revealed that there is 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 if the role and review of Practice Directions were clarified and enhanced – as is recommended later in this report – some useful approaches to case management could be adopted. For example, if a consensus formed among the Aboriginal bar and the judiciary regarding how case management discretions should normally be exercised in Aboriginal matters, a Practice Direction could be enacted that would address many of the questions listed above in the Aboriginal law 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

The conventional approach to procedural rules in common law courts of general jurisdiction is trans-substantive: one set of procedures for all cases. This approach promotes expertise in the procedures of the forum for both counsel and members of the court across the range of cases, and it facilitates cross-fertilization of the experience in questions of procedure from one case to another despite differences in 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, most of the matters brought in the Federal Courts concern 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 the creation of a distinct set of procedures for specialized areas. This was seen as creating unnecessary complexity. It may be that some specialized rules might be developed in future rounds of rules reform in response to particular needs, 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.

However, 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, thereby addressing particular issues and needs that arise in specialized areas.

For example, members of the intellectual property bar noted the benefits that other jurisdictions have found with specialized procedures. They recommended that Practice Directions be developed to simplify and streamline various aspects of procedure in intellectual property matters.

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

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

In fact, the advantages of simplicity and coherence created by a uniform set of rules would be combined with the advantages of accommodating difference and addressing particular issues created by practice directions in specialized areas. This would 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 this approach.

We would add that some of our recommendations concerning practice directions, discussed below, would eliminate existing concerns regarding them. This 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 conclusions 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 outlined 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 generally appropriate, subject to the following two specific recommendations:
>
> > (a) Rule 3 should be adjusted to reflect the fact that most matters commenced in the Federal Courts are resolved through some form of "disposition" rather than "determination."
> >
> > (b) The costs rules should be amended in order to allow for a higher quantum of costs to 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 generally 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.

PART IV – Tools in the *Federal Courts Act* 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. To be specific, both Bench and Bar seem to be on full agreement on this issue.

It is legitimate for a party 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 abuse rights given under the rules.

Abuses include the use of procedures to delay matters and conduct that is disproportional 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 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 consider ways to introduce **[of]** the principle of proportionality and measures to curb abuse into the *Federal Courts Rules*.

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 is "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 the practice of litigation, dramatically increasing the availability of potentially relevant documents that could be disclosed on discovery. The steady increase in the cost of professional advice and representation combined with improved access to the information needed to commence litigation has prompted a similarly dramatic increase in the overall affordability of litigation, and the number of self-represented litigants. Finally, demands on judicial resources today are such that each case must be pursued with a view to the effect it has on the caseload of the court as a whole so as to ensure the appropriate allocation of resources in the system.

The Federal Courts system can no longer be seen just as a tool that parties to litigation can use, with few restraints, to advance their ends. The rules can no longer be seen as just 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 has the potential to deprive other cases and inflict damage on the public purse.

[Commentaire D.F.: les propos du Lord juge Roskill, auxquels ont souscrit les quatre autres lords juges de la formation, dans un arrêt de la Chambre des Lords, demeurent pertinents :

> **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.**
>
> ***Ashmore v. Corp. of Llyod's*, [1992] 2 All E R 486, 488.]**

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 many parties' use of the Federal Courts system is appropriate and consistent with this concept of community, there are occasions where the community principle deserves vindication and misuses of the system must be restrained.

Our consultations and discussions have identified many circumstances where the time, cost and energy expended by a party in pursuing a right under the rules is out of proportion to the realizable benefits. Committee members recounted experiences such as motions inviting the Court to rule on a thousand refused questions, or more, arising from seemingly endless discoveries in proceedings that did not warrant such an approach.

In our view, the introduction into the *Federal Courts Rules* of a principle of proportionality – a requirement that the rights given by the rules be used reasonably – is now needed to empower judges and prothonotaries to vindicate, in appropriate circumstances, what we have called the concept of community.

How have other jurisdictions introduced the principle of proportionality into their rules?

A number of Canadian jurisdictions have introduced proportionality through a general interpretive rule, such as rule 3 in the *Federal Courts Rules*.

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 our view, the principle of proportionality that these other jurisdictions’ rules express is the same. Exactly what sort of wording should appear in the *Federal Courts Rules* to describe the principle of proportionality is an implementation question for the Rules Committee to consider.

But in our view the wording should capture this concept: the level of procedures and the manner in which procedures are used should be appropriate to the nature and importance of the case. This means that the principle of proportionality is a tool that can reduce the procedures employed to bring smaller matters to trial. But the principle of proportionality should also be seen as permitting resource-intensive procedures in important, complex or publicly significant cases.

While the wording of the principle of proportionality is primarily an implementation matter for the Rules Committee, exactly how it should be implemented in the *Federal Courts Rules* carries significant policy considerations, a matter within our remit. We turn to this now.

We have identified three ways in which the principle of proportionality could be implemented 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 for interpreting and applying the rules. However, if another rule clearly gives a party a particular right, the principle of proportionality could not be used by a judge or prothonotary as a basis for intervening and restricting or regulating 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* substantive power that a Court could use to take certain steps of its own motion.

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 give 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. This is because Rule 3 only has an interpretive role at present and that would not give the principle of proportionality the influence that it deserves. Recent case law underscores the unsatisfactory nature of this.

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. Harm should not be wreaked upon the Federal Courts system and the community by an individual litigant dedicated to disproportionate conduct for an illegitimate end, or no end at all.

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 the principle of proportionality would be introduced into Rule 3 but would transform Rule 3 from a mere interpretive role to a **[substantive basis] independant source [for] 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.

[Commentaire: au Québec, les principes directeurs, incluant le principe directeur de la proportionnalité, ne permettent pas au tribunal d'ignorer les règles prévues au *Code de procédure civile (*A.M. c. P.B., B.E. 2007BE-11 (C.A.); A.E./P.C. 2006-4887 (C.A.)) et n'ont pas de portée <u>substantielle</u> permettant de mettre de côté des règles du *Code civil du Québec* (Droit de la famille — 11394, 2011 QCCA 319. Le terme «substantive» est-il alors approprié ?]

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 option 2 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.

Among the areas mentioned as likely to benefit from specific inclusion of a reference to proportionality were: 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 Abuse

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 instances of abuse.

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

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 abuses on their own motion, the question arises how they would become aware of abuses. Typically the Registry reviews documents filed with the Court. Under Rule 74, if the Registry is of the view that the Court does not have jurisdiction to deal with the document filed because of a law, the Registry can refer the document to a judge of the Court for assessment. After a show cause hearing, the judge 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 never should have been brought: *Rock-St Laurent v. Canada (Citizenship and Immigration)*, 2012 FCA 192. This use of Rule 74 is consistent with the concept of community we discussed in the context of proportionality. It seems to us that Rule 74 could be broadened to allow for documents showing instances of abuse of the sorts specified in an amended Rule 3 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.

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*.

The standard for such a declaration is justifiably high. Typically many meritless, often duplicative proceedings must be brought by an individual over several years before the Court will exercise this power.

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, with the result that enormous resources are allocated to litigation that is of no merit, depriving meritorious cases of the resources they need.

For the reasons discussed in the context of our discussion on proportionality, this should no longer be allowed to happen.

Nevertheless, the judiciary’s position of neutrality as between the parties must be preserved. That position of neutrality might be undermined if a judge initiates a vexatious litigant motion against a particular litigant and a fellow judge determines the matter. That should be avoided.

One way to avoid it is to involve the Courts Administration Service, not the judiciary, in the initiation of the application. The Courts Administration Service is a statutorily-recognized agency of the Government of Canada. It exists to support the Federal Courts. Among other things, it maintains the Registry of the Courts. On occasion, the Registry will form the view that a person is a vexatious litigant. In our view, when this is the case, the Registry should advise the Chief Administrator of the Courts Administration Service and the Chief Administrator should be empowered, without consulting the judiciary, to bring an application for an order declaring that person to be a vexatious litigant, filing a supporting affidavit disclosing all of the circumstances.

This arrangement would preserve an adequate measure of separation between the decision to initiate the application and the decision whether the application should be granted.

Since the power to declare a person a vexatious litigant is found in a statutory provision, not in the *Federal Courts Rules*, the Rules Committee cannot alone act. But it can recommend that the statutory provision be changed. In our view, the Rules Committee should do just that.

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

7. A principle of proportionality should be introduced into Rule 3. Rule 3 should also prohibit the use of the Rules in an abusive way. Examples 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 and regulate on their own motion the use of rules when that is consistent with the principles in Rule 3. As an adjunct to this, Rule 74 should be amended so as to allow the Registry to bring instances of abuse to the Court so that they can be dealt with quickly, on the Court's own motion.

9. The principle of proportionality should be introduced concretely into particular rules so that these 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.

10. The Courts Administration Service, on the advice of the Registry, should be empowered to apply for an order declaring a person a vexatious litigant in appropriate circumstances. The Rules Committee should recommend that section 40 of the *Federal Courts Act* be amended to give effect to this.

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 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 that describe 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 because they can be issued without first undergoing the comprehensive process of notice and consultation with the public. This flexibility and comparative informality is important when the need 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.

While informal consultation concerning practice directions takes place within the Federal Courts, practice directions are not developed through broad public input. As mentioned, this can be an advantage when it is necessary to act quickly to meet a pressing need. But in our consultation, some expressed concern that without some mechanism for input, inapt practice directions might 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 setting out all of the practice directions 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. Where orders and directions consistently implement certain practices and litigants should be aware of them, practice directions could be made.

We considered all of these problems 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 might be taken to be deviations from the rules. These are not reflected in practice directions.

For example, although Rule 369 is suggests otherwise, the default option 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 court 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 informal practices such as these are acceptable, they may usefully be legitimized and publicized by way of practice direction, assuming that the informal practice is consistent with the governing rule. 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 conclusions and recommendations:

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

12. The *Federal Courts Rules* should be amended to set out and regulate the power of Chief Justices to make practice directions. That amendment should specify that practice directions are used to set out policies and guidelines concerning how the discretion in existing rules should be exercised, not for establishing new rules. The Rules Committee, as a body comprised of many of the Federal Courts' stakeholders, should be empowered to study practice directions periodically, assess their continuing relevance, appropriateness and suitability, and make recommendations to the Chief Justices. The Chief Justices can accept or reject the recommendations.

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

PART VI – Access to justice

In 1998, legal representation was affordable for many and there were fewer self-represented litigants. The *Federal Courts Rules* were drafted against that backdrop.

Today, legal representation is no longer affordable for more and more litigants are presenting their own claims and defences. Because of this, the subcommittee considered issues relating to whether the *Federal Courts Rules* promote access to justice generally and, in particular, access to justice by self-represented individuals.

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.

As discussed, mechanisms are needed to address instances of abuse and, where necessary, to declare a litigant to to be a vexatious litigant. We have discussed this above.

However, those who are struggling to proceed in accordance with the rules deserve assistance. To them, the rules may 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 relating to matters such as the sequencing of the elements of the document, the structure of paragraphs and sub-paragraphs, the use of headings and numbering, and the inclusion of tables of contents and indexes. Careful attention to the architecture of a document ensures that it is easy to read and understand. This is especially important for those who might previously be unfamiliar with its contents.

Most seasoned members of the Bar have gained considerable familiarity with the rules of procedure in their court. They have developed such an intimate understanding of the way the rules are interpreted and applied, and how the rules operate in relation to one another that they might prefer for the rules to continue to be presented as they are currently presented, even if, from an objective standpoint, the current structure is not very logical or "user-friendly".

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 *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 create certain 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 be devised that would accommodate the needs of everyone who uses the *Federal Courts Rules* for all purposes.

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 different ways, in forms that are comprehensible by the Federal Courts' various audiences for their various needs.

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, complete with properl**y**- 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.

In our view, with the exception of inmates of federal penitentiaries, most self-represented litigants could have access to the webpage from home or through computers at their public library. Resources permitting, a computer could be made available for use in the Federal Courts' Registry offices.

The consultation process and our discussions revealed significant support for this type of web-based approach. This approach is already in the planning stages in the Federal Court of Appeal. Under the approach it is contemplating, after the self-represented litigant answers a few questions on the website, the website would automatically direct 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 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 provide a useful service in informing the public of the means of proceeding in the Federal Courts and in facilitating the involvement of litigants in a way that is consistent with the prudent management of court resources and with the effective resolution of disputes.

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 serve as obstacles to cost-effective, timely justice, without any offsetting advantage. The Rules Committee should continue to ensure that new and existing rules are assessed from this standpoint as well.

As part of our policy review, we conducted an overall assessment of the *Federal Courts Rules* from that standpoint. We note 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 Courts is that motions are determined on the basis of written submissions alone, with oral hearings held only when necessary, and that is rare. Indeed, on simple motions, 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. Where necessary, self-represented parties could be shown a hyperlink to the *Federal Courts Rules* and directed to their public library if they do not have a computer at home. When it is evident that they need guidance on how to comply with a particular Rule, this can be given in the order or the direction in plain language, and so on. To the extent that legal representation may be helpful, self-represented parties may be directed to webpages or phone numbers where legal assistance may be available.

These are just some of the ways in which judges and prothonotaries can facilitate access to justice using existing mechanisms in the rules. 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 discussed. It could be simplified and clarified. Other parts of the rules may similarly benefit from simplification or clarification.

In the course of our activities, we have become aware of the fact 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 conclusions and recommendations relevant to this Part:

> 14. 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.

15. 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.

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

17. 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.

18. 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.

19. The Rules Committee should continue to 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.

The Rules Committee should offer stakeholders a period of one month to offer comments concerning this report. It might find that feedback useful as it considers whether to adopt the recommendations in this report. To the extent that it adopts certain recommendations, it might find the feedback useful on implementation issues.

On the issue of implementing the recommendations, the Rules Committee should establish a new subcommittee for that purpose.

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:

> *20.* This report should be regarded as public. At a minimum, it should be posted on the Federal Courts' websites, sent to all who made submissions to us, and sent to the Federal Courts' regular email distribution list.
>
> *21.* The Rules Committee should invite feedback regarding this report. This should be done on a tight timeline, say one month.
>
> 22. To the extent the Rules Committee accepts this report's recommendations, it should establish a new subcommittee to examine implementation issues.

23. To the extent that 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.

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.

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

APPENDIX
Summary of conclusions 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 generally appropriate, subject to the following two specific recommendations:

   (a) Rule 3 should be adjusted to reflect the fact that most matters commenced in the Federal Courts are resolved through some form of "disposition" rather than "determination."

   (b) The costs rules should be amended in order to allow for a higher quantum of costs to 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.

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 and regulate on their own motion the use of rules when that is consistent with the principles in Rule 3. As an adjunct to this, Rule 74 should be amended so as to allow the Registry to bring instances of abuse to the Court so that they can be dealt with quickly, on the Court's own motion.

9. The principle of proportionality should be introduced concretely into particular rules so that these 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.

10. The Courts Administration Service, on the advice of the Registry, should be empowered to apply for an order declaring a person a vexatious litigant in appropriate circumstances. The Rules Committee should recommend that section 40 of the *Federal Courts Act* be amended to give effect to this.

Rules and practice directions

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

12. The *Federal Courts Rules* should be amended to set out and regulate the power of Chief Justices to make practice directions. That amendment should specify that practice directions are used to set out policies and guidelines concerning how the discretion in existing rules should be exercised, not for establishing new rules. The Rules Committee, as a body comprised of many of the Federal Courts' stakeholders, should

be empowered to study practice directions periodically, assess their continuing relevance, appropriateness and suitability, and make recommendations to the Chief Justices. The Chief Justices can accept or reject the recommendations.

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

Access to justice

14. 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.

15. 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.

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

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18. 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.

19. The Rules Committee should continue to 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.

Future steps

20. This report should be regarded as public. At a minimum, it should be posted on the Federal Courts' websites, sent to all who made submissions to us, and sent to the Federal Courts' regular email distribution list.

21. The Rules Committee should invite feedback regarding this report. This should be done on a tight timeline, say one month.

22. To the extent the Rules Committee accepts this report's recommendations, it should establish a new subcommittee to examine implementation issues.

23. To the extent that 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.