REVOLUTION ON THE PATH TO ACCESS TO JUSTICE? A Closer Look at the 2009 and 2010 Reforms to the Rules of Civil Procedure in Alberta, Nova Scotia, Ontario and British Columbia*

*Barbara Billingsley and Joel Franz***

> *In many ways, contemporary . . . litigation is analogous to the dance marathon contests of yesteryear. The object of the exercise is to . . .hang onto one's client, and then drift aimlessly and endlessly to the litigation music for as long as possible, hoping that everyone else will collapse from exhaustion.*[1]
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> *The trial of an action should not resemble a voyage on the Flying Dutchman with a crew condemned to roam the seas interminably with no set destination and no end in sight.*[2]
>
> *Every step added to a proceeding carries a cost, and must therefore be presumed an impediment to justice. If steps are added which do not in practice move cases towards resolution, they simply drain resources that litigants could better use on steps that will have greater value in the long-run. Litigants want "value for money"; mandated events in a lawsuit should be kept to a minimum.*[3]

I. Introduction

As the above comments illustrate, discourse about civil litigation in Canada and elsewhere has long been dominated by concerns

* The authors are grateful for the research support provided by a Roger S. Smith Award, jointly funded by the University of Alberta and the University of Alberta Faculty of Law, and awarded to Joel Franz in 2013. Additionally, Professor Billingsley would like to thank the Canadian Forum on Civil Justice and the University of Alberta Faculty of Law for supporting the presentation of an early version of this paper at the Socio-Legal Studies Association Annual Conference in Aberdeen, Scotland in April, 2014.

** Barbara Billingsley is a Professor at the University of Alberta Faculty of Law. Joel Franz is a student-at-law at the Edmonton, Alberta office of McLennan Ross, LLP.

1. Arthur R. Miller, "The Adversary System: Dinosaur of Phoenix" (1984), 69 Minn. L. Rev. 1, at p. 9.
2. *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, 338 D.L.R. (4th) 193 (S.C.C.), at para. 4 (*per* Binnie J.).
3. The Honourable Warren K. Winkler C.J.O., "Access to Justice – Remarks", Speech presented to The Canadian Club of London (April 30, 2008), at p. 4, online: BC Justice Review Task Force, www.bcjusticereview.org.

about the excessive time and expense associated with civil lawsuits. Indeed, "[t]he twin evils of excessive cost and delay in resolving civil disputes within the organized court system have existed for centuries".[4] In recent years, these long-standing concerns have been enveloped within the broadly cast problem of access to justice, reflecting an understanding that the cost and time involved in litigation often hinder the ability of the court system to serve as an effective forum for resolving civil disputes.

Spawned in large part by these concerns, in 2009 and 2010, the provinces of Alberta, Nova Scotia, Ontario and British Columbia (the "comparator provinces") implemented revised versions of their respective rules regarding civil procedure for superior court trials (the "Revised Rules").[5] Unlike ordinary rule amendments, which are typically enacted on a piecemeal basis, the Revised Rules were the product of a systemic review of civil litigation procedures in each of the comparator provinces. Further, while each of the comparator provinces was aware of the initiatives being undertaken by its counterparts and while consultations about reforms did occur among them, each jurisdiction acted independently in revising its rules.[6] In other words, no formal co-ordination or uniformity efforts were undertaken between the comparator provinces in regards to either the process or the content of the reforms.[7] Instead, each province developed its own mechanisms for evaluating existing procedures and came to its own conclusions about how its procedural rules could be best designed to meet the challenges of modern-day litigation.

4. M. Teplitsky, "Excessive Cost and Delay: Is there a Solution?" (2000), 19:2 Advocates' Soc. J. 5, at p. 5.
5. See *Alberta Rules of Court*, A.R. 124/2010 ("*Alberta Rules*"); *Nova Scotia Civil Procedure Rules*, online: www.courts.ns.ca/rules/toc.htm, as amended by the *Judicature Act*, R.S.N.S. 1989, c. 240, s. 47(3A) ("*Nova Scotia Rules*"); *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 as amended by O. Reg. 438/08 and O. Reg. 394/09 ("*Ontario Rules*"); and *British Columbia Supreme Court Civil Rules*, B.C. Reg. 168/2009 ("*British Columbia Rules*").
6. In doing so, the comparator provinces were acting in accordance with their constitutional authority. Pursuant to the Canadian Constitution, each province and territory has legislative sovereignty over civil trial procedures in their respective superior courts. See the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(14), reprinted in R.S.C. 1985, App. II, No. 5.
7. This is not to suggest that reformers did not recognize the value in having some degree of uniformity in civil litigation procedures among the provinces or that the desire for uniformity was not relevant to a given province's assessment of the procedures to adopt. The point is simply that the provinces did not formally co-ordinate their reform efforts in order to arrive at uniform procedural rules.

This independent, systemic reform of civil trial rules in four Canadian provinces within the same two-year span provides a unique opportunity to examine contemporary litigation processes in Canada.[8] In this article, we take up this opportunity by offering a comparative look at the goals, processes and outcomes of the procedural reforms undertaken by each of the comparator provinces. Overall, this comparison demonstrates that, despite employing independent reform processes, and despite some variation in detail with regard to both process and outcome, the comparator provinces have ended up with remarkably similar litigation processes and have implemented reforms which tweak, rather than revolutionize, the traditional litigation paradigm. This conclusion, in turn, raises important questions about whether, and to what extent, the reforms are, on their own, capable of effectively diminishing litigation costs and delay so as to significantly improve access to justice.

II. Parameters of the Comparison

Several restrictions on the scope of this paper should be noted at the outset.

First, this article does not offer a rule-by-rule, concordance-type comparison of the Revised Rules as between the comparator provinces. Variations in the structure and drafting of the rules in each of the provinces makes this sort of point-by-point appraisal both impractical and unhelpful for present purposes. Instead, after briefly reviewing the impetus for change and the reform process utilized in each of the comparator provinces, this article concentrates on comparing the Revised Rules in relation to five elements which we believe are key considerations regarding the time and cost of litigation. These elements are: (A) the governing principles and structure of litigation; (B) litigation time management responsibilities; (C) the scope for including or adding third parties to litigation; (D) the range of mandated pre-trial disclosure; and (E) the employment of compulsory alternative resolution mechanisms.

Second, the emphasis of this article is on describing the outcome or conclusions reached by the comparator provinces in order to compare them to one another, not on comparing the pre-reform rules to the Revised Rules in each province in concordance fashion. In other words, this paper does not focus on identifying the extent to which each province substantively changed its own past processes as part of its reform efforts, though this issue may necessarily be touched on in certain instances and in respect of particular rules. Instead, our aim is simply to outline the commonalities and differences among the four sets of Revised Rules, in regards to the selected factors identified above, with a view to determining the extent to which these Revised Rules, together, reflect a new and common approach to the longstanding problems of cost and delay. Further, our focus is on the Revised Rules as they were implemented in 2009 and 2010, though subsequent amendments may be acknowledged where relevant.

Finally, our treatment of the Revised Rules is deliberately and primarily observational, not analytical or critical. In other words, this article does not seek to substantively evaluate the wisdom or the effectiveness of the rule reforms in improving litigation efficiency.[9] These are obviously significant matters which may be raised by the comparisons provided by this paper, however they are issues which largely exceed the scope of the present discussion.[10]

8. More recently, significant reforms to civil procedure rules have also been passed in Quebec and Saskatchewan and at the federal trial court level, but these reforms are not included in the present comparison because they took place several years after the enactments in the Comparator Provinces. For more on the content of these reforms see: *Quebec Code of Civil Procedure*, C.Q.L.R., c. C-25, as amended by Bill 25, *An Act to Establish the new Code of Civil Procedure*, passed on February 20, 2014 and expected to be in force in the fall of 2015 (for detailed information, see online: www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2014-C1A.pdf) and www.justice.gouv.qc.ca/english/sujets/glossaire/code-proc-a.htm; Saskatchewan Queen's Bench Rules, which came into force on July 1, 2013 (see online: www.sasklawcourts.ca/index.php/home/court-of-queens-bench/rules-and-practice-directives); and the *Federal Courts Rules*, SOR/98/106 as amended by the Rules Amending the *Federal Courts Rules*, P.C. 2013-122, passed February 7, 2013 and mostly in effect as of that date (http://laws-lois.justice.gc.ca/eng/regulations/SOR-98-106/page-1.html).

9. So, for example, for the most part this paper does not discuss the judicial interpretation of the Revised Rules or attempt to offer any empirical or anecdotal evidence as to whether the Revised Rules have in fact reduced litigation costs and time.

10. There are numerous sources offering critical commentary about the Rules reforms in each of the Comparator Provinces, both before and after implementation. For example, see: J. Macfarlane, "The Future of the Civil Justice System: Three Narratives About Change" (2009), 35 Adv. Q. 284; R. Todd, "A Question of Proportionality" (2011), 6:2 *Canadian Lawyer In House Magazine* 17; D.R. O'Connor A.C.J., "Messages from the Market: What the Public Civil Justice System can Learn from the Private System" (2006), 25 Advocates' Soc. J. 4, pp. 4-11; Teplitsky, *supra*, footnote 4; C.J. Brown and S. Kennedy in "Changing the Rules of the Game: Rewinding the First Ten Months of the New Rules of Civil Procedure" (2010), online: www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147483784; and British Columbia: "Supreme Court Civil Rules Survey", Canadian Bar Association, British

III. Objectives of the Reforms

The comparator provinces initiated their respective rule reform projects for similar reasons and with the same fundamental objectives in mind. Specifically, each of the comparator provinces sought to modernize its governing rules of civil process so as to improve access to justice by reducing the cost and delay associated with civil litigation procedures. As noted by the Law Society of Saskatchewan, commenting on the civil procedure rule reforms in the comparator provinces:[11]

> The main reason cited for rule reform across the country is to increase access to justice. The expectation is that making the rules easier to understand for self-represented litigants, through the use of plain language and better organization, will achieve this goal. Access to justice may also be increased by reducing the cost of litigation through limiting pre-trial procedure, whether by eliminating steps or limiting the availability or length of the remaining steps.

The need for modernization was evident, particularly in Alberta and Nova Scotia where the *Rules of Civil Procedure* had not been systemically revised since 1968 and 1972 respectively.[12] The Rules needed to recognize and incorporate the use of technology (such as email, internet and video communications) in the context of litigation procedures.[13] Additionally, underlying the call for modernization was an understanding that existing procedural rules were unnecessarily complicated and needed to be rewritten "in plain language [so] that an ordinary, intelligent and reasonably literate person could see what we do".[14] This concern for more "user-friendly" rules was, in part, a response to a concern that the "widely

Columbia Branch, online: http://cba.org/bc/pdf/surveys/SummarySupremeCourtCivil%20RulesSurvey.pdf.

11. Reche McKeague, Law Society of Saskatchewan, "Queen's Bench Rules of Court webinars, Part 1: Overview" (January 28, 2013), p. 2, online: http://redengine.lawsociety.sk.ca/inmagicgenie/documentfolder/NQBR1A.pdf.
12. Alberta Law Reform Institute, *Rules of Court Project: Final Report No. 95*, October 2008, at p. 5, online: www.alri.ualberta.ca/docs/fr095.pdf; and Canadian Press, "New N.S. Civil Procedure Rules Aim to Make Filing a Lawsuit Easier", *Truro Daily* (January 15, 2009): www.trurodaily.com.
13. Alberta Law Reform Institute, *ibid.*; and Canadian Press, *ibid.*; C. Guly, "Bar-bench spar in NS over new court rules" *The Lawyers Weekly* (July 18, 2008), online: www.lawyersweekly.ca/printarticle.php. As noted by C.L. Campbell J., "Reflections on Proportionality and Legal Culture" (March 2010), Adv. J. 4, at para. 12: "The explosion of discovery of electronically stored information has focused debate on the time and cost associated with the resolution of civil actions."
14. Guly, *ibid.*, quoting Gerald Moir J.

observed growth in numbers of self-represented litigants in the courts is creating challenges for the civil justice system".[15]

The overall objective of revising the *Rules of Civil Procedure* in order to address concerns about cost, delay and access was expressly stated in the reform documents issued by each Comparator Province. Alberta identified the goal of making "pragmatic reforms to advance justice system objectives for civil procedure such as fairness, accessibility, timeliness and cost effectiveness."[16] Nova Scotia aimed at developing rules which "are efficient, effective and clear which would help reduce delays, lessen expenses and lead to more satisfactory results thereby improving access to justice".[17] In Ontario, Osborne A.C.J.O. noted that "meaningful improvement in access to justice can be achieved only if the justice system can provide mechanisms for the more timely resolution of litigated disputes at a reasonable cost to both the plaintiff and the defendant".[18] Finally, recognizing that "civil litigation has been beset with problems of cost, complexity and delay to the extent that the Supreme Court has become inaccessible to many members of the public", the express mandate of British Columbia's working group was to consider reforms to enable the civil justice system to better meet the interests of users, including accessibility, proportionality, fairness, public

15. See for example, Alberta Law Reform Institute, *Alberta Rules of Court Project: Self-Represented Litigants, Consultation Memorandum No. 12.18* (March 2005), at p. 1, on-line: www.alri.ualberta.ca/docs/cmo1218.pdf.
16. Alberta Law Reform Institute, *supra*, footnote 12. Other goals, identified on pp. 3-4 of this report, included improving the clarity and usability of the rules.
17. *Rules Revision Project*, online: www.courts.ns.ca.
18. Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (November 2007), online: www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf, Appendix A: Terms of Reference and p. 8 respectively. This objective of Ontario's rules reform has also been expressly recognized by a number of external sources. For example, as noted by Brown and Kennedy, *supra*, footnote 10, the Ontario rules "received an extensive overhaul in response to concerns about the inadequacies of the litigation system in Ontario, including inefficient procedure, excessive cost, lack of civility among advocates, long delays and a backlogged, insufficiently-resourced judiciary". See also "What's New? Changes to the Rules of Civil Procedure", Ministry of the Attorney General of Ontario, online: www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes_to_rules_of_civil_procedure.asp; C. Guly, "New civil procedure rules 'step in the right direction': New rules get good reviews as first anniversary approaches" *The Lawyers Weekly* (December 10, 2010), 30:30; Campbell J., *supra*, footnote 13, at para. 2; L. Fasciano, "New Year, New Rules", *The Canadian Business Journal* (April 2010), online: www.cbj.ca; and Brown and Kennedy, *ibid.*

confidence, efficiency and justice.[19] Accessibility was defined as "affordable, understandable and timely" access to civil dispute resolution processes, including courts.[20]

IV. Reform Processes in the Comparator Provinces

Each of the Comparator Provinces devoted significant resources to the systemic review and revision of their rules. Further, all of the reform processes involved some level of consultation among identified stakeholders in the litigation process, though variations between the Comparator Provinces exist in relation to both the stage at which this consultation occurred and the range of people consulted. As explained more fully below, Alberta's reform process was led by an independent law reform body, while the reforms in the other Comparator Provinces were initiated and carried out by court committees or designates of the respective provinces. This difference, in part, explains why the reform process in Alberta took nearly 10 years from start to finish, while the other Comparator Provinces completed their reforms in half that time. Additionally, it should not be overlooked that, because Alberta's extensive review of litigation procedures was initiated first, the other comparator provinces were able to access and benefit from the work done in Alberta.[21]

Alberta

Of the Comparator Provinces, Alberta was the first to initiate its rules reform project but the last to implement its reforms. The project was initiated in 2001 after the Alberta Rules of Court Committee[22] asked the Alberta Law Reform Institute[23] ("ALRI") to conduct a

19. Canadian Bar Association, British Columbia Branch, "Mandate", Civil Justice Reform Working Group, B.C. Justice Review Task Force 2002-2007, online: www.bcjusticereview.org/working_groups/civil_justice/mandate.asp.
20. *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006), Appendix A, at pp. 50-51, online: https://www.bcjusticereview.or/working_groups/civil_justice/cjrwg_report_11_06.pdf.
21. See for example See Canadian Press, *supra*, footnote 12, where Moir J., a member of the Nova Scotia rules reform steering committee, is quoted as saying: "The Alberta project gave us a big, big hand in the beginning. We could never have done this without them."
22. Alberta's *Judicature Act*, R.S.A. 2000, c. J-2, creates the Rules of Court Committee. Per s. 28.2(3) of this statute, the committee's role is to "meet as occasion requires to consider the rules of court made under this Act and any other Act" and to "make recommendations respecting those rules of court" to the Minister of Justice.
23. The Alberta Law Reform Institute is "the official law reform agency for the province of Alberta", providing "independent comprehensive advice to the Government of Alberta and other agencies" on law reform matters. See: www.law.ualberta.ca/alri.

comprehensive review of Alberta's Rules of Court.[24] In the hands of ALRI the project was backed by funding from several agencies and was "designed as a typical law reform project – open, transparent, consultative and inclusive of all interested and willing stakeholders".[25] Utilizing a reform process which involved extensive background research,[26] working groups,[27] and widespread consultation on a range of civil justice matters,[28] ALRI's reform project was the "most comprehensive review of civil procedure by the largest group of participants and volunteers in the most open and consultative manner ever carried out in [the] Province".[29] From this information, ALRI established reform policies and drafted a proposed set of revised rules. ALRI's final report on the project was published in 2008.[30] The report was put into the hands of the province's Rules of Court Committee,[31] which then conducted its own analysis of the proposed reforms. Ultimately, a revised version of the Rules of Court, based on ALRI's report, was recommended to

24. Alberta Law Reform Institute, *supra*, footnote 12, at p. 1. As noted on p. 2 of this report, the Rules of Court Committee approached ALRI because the size of the project "exceeded the personnel and resources of the Rules Committee."
25. Alberta Law Reform Institute, *ibid.*, at p. 2.
26. *Ibid.*, at p. 5, describes the research, which produced over 20 consultation memoranda, as consisting of "a thorough review and research of civil procedure and civil justice initiatives from around the common law world" for the purpose of "map[ping] out developments in civil procedure around the world". Further, as noted on p. 7, this preliminary research served "to inform a meaningful and rational assignment of responsibilities among the working committees" and "to ensure that each working committee had available to it a complete dossier of information on its subject matter areas".
27. Alberta Law Reform Institute, *supra*, footnote 16, states that more than 85 members of Alberta's legal community expended more than 30,000 hours participating on the 11 working committees which produced consultation memoranda and considered feedback. As stated on p. 8 of this report, "[t]he purpose of the working committees was to establish drafting instructions based on a clearly articulated and informed policy base".
28. Consultation efforts were undertaken at every stage of the review and included public forums, focus groups, working committees, and written feedback from stakeholders. See the Alberta Law Reform Institute, *supra*, footnote 12, at p. 12.
29. Alberta Law Reform Institute, *supra*, footnote 12.
30. *Ibid.*
31. The Rules of Court Committee is created by Alberta's *Judicature Act*, R.S.A. 2000, c. J-2, s. 28.2 and is empowered to periodically consider Alberta's court rules and to make recommendations for changes to the Minister of Justice.

the Minister of Justice by the Rules of Court Committee, was passed by regulation, and took effect on November 1, 2010.[32]

Nova Scotia

Pursuant to its statutory authority,[33] the Nova Scotia Supreme Court initiated a comprehensive review of the province's civil court rules in 2004. The revision work was guided by a steering committee which included representatives from the Supreme Court, the Barristers' Society and the Department of Justice; research and administrative support was provided by the Nova Scotia Law Reform Commission; and working groups comprised of judges and lawyers were "entrusted with the task of reviewing subjects selected for possible reform, discussing relevant policy, and proposing how those Rules should be improved".[34] Members of the practising bar were also consulted in the early stages of the project via a consultation memorandum.[35] A revised version of the rules was provided to the government in June 2008, passed by the legislature on November 25, 2008 and proclaimed in effect January 19, 2009.[36]

Ontario

The process for changing Ontario's civil procedure rules started in June 2006, when Ontario's Attorney General asked the Honourable Coulter Osborne, former Associate Chief Justice of Ontario, to lead the province's Civil Justice Reform Project.[37] Justice Osborne drafted a consultation paper which included proposed changes and a summary of the general aims of the reforms.[38] Input on the consultation paper was sought from judges, lawyers, other members of the legal community, members of the public, and advisory committees created for purposes of the reform project.[39] Relying on feedback

32. A.R. 124/2010, online: www.qp.alberta.ca/1125.cfm.
33. *Judicature Act*, R.S.N.S. 1989, ss. 46 and 48.
34. Law Reform Commission of Nova Scotia, *Consultation with the Bar Issues Memorandum: Nova Scotia Civil Procedure Rules Revision Project* (June 16, 2004), pp. 3-4, online: www.courts.ns.ca.
35. *Ibid.*
36. *An Act to Amend Chapter 240 of the Revised Statutes, 1989, the Judicature Act*, S.N.S. 2008, c. 60, s. 1.
37. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations*, *supra*, footnote 18, p. 3.
38. Coulter A. Osborne, *Civil Justice Reform Project Consultation Paper*, online: www.civiljusticereform.jus.gov.on.ca/English/consultation.asp.
39. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations*, *supra*, footnote 18, at pp. 4-6.

from these consultations, Osborne A.C.J.O. submitted a final report to the Attorney General of Ontario on November 20, 2007 which included recommendations for changes to the Superior Court civil court rules.[40] In 2008, the Attorney General consulted with affected parties across Ontario about Osborne A.C.J.O.'s report.[41] Following these consultations, and acting under the authority of the *Courts of Justice Act*,[42] the Ontario Civil Rules Committee revised the rules based on Osborne A.C.J.O.'s recommendations. These revisions were adopted by provincial regulation,[43] and, for the most part, came into effect on January 1, 2010.[44]

British Columbia

British Columbia's rules reform resulted from a larger project intended to improve the province's civil justice system. In 2002, at the initiative of the Law Society of British Columbia, the Justice Review Task Force was created "to identify a wide range of reform ideas and initiatives that may help us make the justice system more responsive, accessible and cost-effective".[45] In November, 2004, the Task Force in turn established the Civil Justice Review Working Group "to explore fundamental change to British Columbia's civil justice system from the time a legal problem develops through the entire Supreme Court litigation process".[46] In 2006, the Working Group issued a report which made three major recommendations, one of which was the creation of new Supreme Court Rules.[47]

40. Osborne, *Civil Justice Reform Project*, *supra*, footnote 18.
41. Ontario, Ministry of the Attorney General, "What's New? Changes to the Rules of Civil Procedure", online: www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes_to_rules_of_civil_procedure.asp.
42. R.S.O. 1990, c. C.43, ss. 65-66.
43. O. Reg. 438/08 and O. Reg. 394/09.
44. O. Reg. 438/08, ss. 65 and 67(2); O. Reg. 394/09, s. 33.
45. *BC Justice Review Task Force*, online: www.bcjusticereview.org/default.asp.
46. *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006), p. v and Appendix A at p. 50, online: www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf.
47. *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (November 2006), p. viii, online: www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf. The other two recommendations, also noted on p. viii of the report, were: (1) to create "a central hub to provide people with information, advice, guidance and other services they require to solve their own legal problems"; and (2) to require potential litigants to "personally attend a case planning conference before they actively engage the system, beyond initiating or responding to a claim."

After the Justice Review Task Force's report had been published, a concept draft of new rules was created in 2007 by members of the judiciary, the Ministry of the Attorney General, and the legal profession.[48] This draft was toured at more than 50 venues throughout British Columbia by former Chief Justice Donald Brenner and former Deputy Attorney General Allan Seckel, Q.C. and was posted online in order to obtain feedback on the proposed reforms, following which the Rules Revision Committee put forward another set of changes.[49] Pursuant to the authority of the *Court Rules Act*,[50] these revisions were adopted by regulation deposited July 7, 2009 and proclaimed in effect as of July 1, 2010.[51]

V. Content of the Revised Rules

A. Governing Principles and Litigation Structure

The Revised Rules in each of the Comparator Provinces expressly identify the same foundational or guiding principle: namely, that the rules are intended to be used to assist in achieving a just resolution of a civil lawsuit in an expeditious and cost effective manner.[52] This statement of fundamental principle, directed at both courts and litigants, makes the point that the rules should be employed to facilitate the fair resolution of claims and that, conversely, the rules should not be used for their own sake or as a means of unnecessarily delaying litigation or running up costs against an opposing party.[53]

48. Canadian Bar Association, British Columbia Branch, "BC Justice Review Task Force, *Civil Justice Reform Working Group*", p. 1, online: www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp.
49. *Ibid.*, p. 1.
50. R.S.B.C. 1996, c. 80, s. 1.
51. B.C. Reg. 168/2009.
52. See *Alberta Rules*, r. 1.2(1); *Nova Scotia Rules*, r. 1.03; *Ontario Rules*, r. 1.04(1); and *British Columbia Rules*, r. 1-3(1). The inclusion of an express statement of the overall objective or intention of the rules was new only to Alberta; the other Comparator Provinces had purpose statements in their pre-reform *Rules*.
53. This interpretation is expressly articulated in the *Alberta Rules*, which elaborate on the general statement of principles in r. 1.2(1) by stating, in r. 1.2(2), that:

    In particular, these rules are intended to be used
    (a) to identify the real issues in dispute
    (b) to facilitate the quickest means of resolving a claim at the least expense,
    (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,
    (d) to oblige the parties to communicate honestly, openly and in a timely way, and

In other words, the rights, obligations and procedures provided for in the rules should be used in a manner which is proportionate to the matters at issue in the lawsuit, including the overall value of the claim. As noted by Colin Campbell J. of the Superior Court of Justice of Ontario, this "over-arching concept of proportionality" in the Revised Rules of the Comparator Provinces "obligates lawyers and their clients to address issues of time, cost and prejudice to the parties at each step of the litigation".[54]

Still, express use of the term "proportionality" varies between the Comparator Provinces. The Revised Rules of British Columbia explicitly reference the principle of proportionality in defining the obligation of both courts and litigants to pursue the "just, speedy, and inexpensive"[55] determination of proceedings. According to the British Columbia Rules:[56]

> Securing 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
> (a) the amount involved in the proceeding,
> (b) the importance of the issues in dispute, and
> (c) the complexity of the proceeding.

In the other comparator provinces, the principle of proportionality is explicitly referenced in regards to the exercise of court discretion in enforcing the rules. Specifically, in Alberta and Ontario, the Revised Rules expressly impose an obligation on the courts to consider proportionality when making any orders and imposing any remedies or sanctions under the rules.[57] Additionally, the Revised Rules in Alberta, Nova Scotia and Ontario explicitly identify proportionality as an issue to be considered by the courts when enforcing or modifying pre-trial disclosure obligations.[58] Ontario's Revised Rules also state that, where a court refuses to grant summary judgment, the court may make an order in respect of the disclosure of expert reports "so as to be proportionate to the amounts at stake".[59]

    (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.
54. Campbell J., *supra*, footnote 13, pp. 4-8 at para. 14.
55. *British Columbia Rules*, r. 1-3(1).
56. *British Columbia Rules*, r. 1-3(2) (emphasis added).
57. *Alberta Rules*, r. 1.2(4) and *Ontario Rules*, r. 1.04(1.1). Notably, the Nova Scotia Rules, r. 58.03, also empower the court, in the context of claims for less than $100,000, to give directions "to make the cost of procedures proportionate to the interests at stake in the action".
58. *Alberta Rules*, R. 5.3; *Nova Scotia Rules*, rr. 14.07(2)(a), 14.08(3), 14.09(2)(c), and 14.12(4); and *Ontario Rules*, r. 29.2.

Ontario's Revised Rules are unique in explicitly referencing proportionality in regards to the pre-trial disclosure duties of litigants. The Ontario Rules require litigants to submit a "Discovery Plan" outlining the parameters of pre-trial disclosure and further specifically require the parties to prepare the plan "to assist with the expeditious completion of the case in a manner *proportionate* to the claim".[60] Without explicitly referencing the principle of proportionality, however, Alberta's Rules describe the conduct expected of litigants in terms which are consistent with the requirements of proportionality. Specifically, the Alberta Rules state:[61]

> To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,
>
> (a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,
> (b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,
> (c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and
> (d) when using publicly funded Court resources, use them effectively.

Otherwise, as noted above, the obligation of litigants to use the rules in accordance with principles of proportionality is implicit in the general purpose statement contained in the Revised Rules of each comparator province.

As for the litigation structure mandated by the Revised Rules, the comparator provinces have all retained traditional processes. That is, the Revised Rules in all jurisdictions provide for a pre-trial litigation process which involves the exchange of pleadings, the opportunity for documentary and oral discovery of evidence, the exchange of expert reports, and the scheduling of trial. Further, in each of the comparator provinces, the litigants, rather than the courts, retain primary responsibility for managing the litigation process, with recourse available to the courts if the processes or timelines set down by the rules are being ignored or abused. Case management of litigation is not mandated, although all of the comparator provinces provide mechanisms for obtaining a case management order or a court conference to address procedural issues.[62]

59. *Ontario Rules*, r. 20.05(2).
60. *Ontario Rules*, r. 29.1.03(3) (emphasis added).
61. *Alberta Rules*, r. 1.2(3).
62. *Alberta Rules*, rr. 4.10 and 4.11-4.15; *Nova Scotia Rules*, rr. 26.02 and 26.03; *Ontario Rules*, rr. 50 and 77; *British Columbia Rules*, r. 5-1.

In regards to the obligation of parties to manage their own litigation, Alberta's Revised Rules include some unique features. For example, unlike the other comparator provinces where this obligation seems to be implied, Alberta's Revised Rules explicitly state "[t]he parties are responsible for managing their dispute and for planning its resolution in a timely and cost-effective way."[63] Further, Alberta's Revised Rules impose an obligation on litigants to categorize their lawsuit, within four months of the filing of the Statement of Defence, as either a standard or a complex case.[64] If the case is classified as complex, the litigants are required, within four months of the classification, to agree on a litigation plan which: establishes deadlines for identifying the real issues in dispute, disclosing records, completing oral questioning and exchanging expert reports; provides an estimated date for applying for trial; and sets out a protocol for the organization and production of records.[65] The Revised Rules in the other comparator provinces do not impose such obligations, although, as discussed below, Ontario's Revised Rules do impose a more limited obligation on litigants to establish a "discovery plan" which defines the scope and duration of pre-trial evidence disclosure mechanisms.[66]

Additionally, unlike the other comparator provinces, Alberta's Revised Rules do not provide for a simplified litigation process for claims below a specified value. The Revised Rules in Nova Scotia, Ontario and British Columbia mandate a simplified litigation process for claims of less than $100,000.[67] As part of its rule

63. *Alberta Rules*, r. 4.1. The particulars of this responsibility are itemized in r. 4.2 and include an obligation "to act in a manner that furthers the purpose and intention of these rules", to appropriately categorize the case as required by the Rules and to consider and engage in one of the dispute resolution processes described in the Rules.
64. *Alberta Rules*, r. 4.3(3). This rule also provides that, if the parties default in this obligation and a court does not categorize the litigation otherwise, the action is deemed to be a standard case. According to r. 4(2), the factors which are relevant to this classification include: the amount of the claim; the number of parties and documents involved; the number and complexity of issues raised; the need for expert reports; and the anticipated length of pre-trial questioning.
65. *Alberta Rules*, r. 4.5. According to r. 4.4, if the litigation is classified as a standard case, the parties must complete the essential steps of litigation "within a reasonable time". It is also open to a party to serve a proposed litigation plan on the other litigants, and, if the proposed plan cannot be agreed upon, to apply to the court to approve the plan.
66. *Ontario Rules*, rr. 29.1.03, 29.1.04, and 29.1.05.
67. *Nova Scotia Rules*, Part 12; *Ontario Rules*, r. 76; and *British Columbia Rules*, Part 15. Note: this paper does not address the substance of these simplified processes.

reform, Alberta intentionally omitted such a simplified litigation procedure, which had been available under its pre-existing rules.[68]

B. The Timing of Litigation Steps

Generally, the Revised Rules in the Comparator Provinces specify presumptive deadlines for the completion of essential litigation steps such as the service of pleadings, the exchange of Affidavits of Documents / Records, and the pre-trial disclosure of expert reports, but do not set fixed trial dates or fixed time periods for the completion of oral discovery.[69] Exceptions to this basic approach are few, but include most notably Alberta's rules regarding the disclosure of expert reports and Ontario's rules regarding both the exchange of Affidavits of Records and the scheduling of trial.

Unlike the other comparator provinces, instead of setting down a specific timeline for the pre-trial disclosure of expert reports, the Alberta Rules simply establish a sequence for the exchange of these reports (experts in chief first, then rebuttal experts).[70] In a similar vein, Ontario's Revised Rules uniquely do not specify a time for the exchange of Affidavits of Records, requiring instead that the Affidavits be served within the time period stipulated in the mutual discovery plan created by the parties.[71] Ontario is also alone among the comparator provinces in setting a deadline for scheduling an action for trial. Specifically, Ontario's Revised Rules provide that, if an action is not placed on the trial list within two years of the filing of the first Statement of Defence, the action may be dismissed for delay.[72]

68. Prior to the Revised Rules being enacted, Part 48 of the *Alberta Rules of Court*, A.R. 390/68, provided for a streamlined procedure for litigation involving claims for $75,000 or less. This procedure was dropped from the Revised Rules, apparently in favour of the requirement of categorizing claims as either simple or complex. As Alberta is the only Comparator Province not to provide for a streamlined or simplified procedure in its Revised Rules, it is worth noting that Alberta's Provincial Court (Civil Division) ("small claims court") also has a higher dollar limit than that of the other Comparator Provinces. Currently, Alberta's small claims court can hear cases for claims up to $50,000 while similar courts in Nova Scotia, Ontario and British Columbia can only adjudicate claims for $25,000 or less. (See Alberta's *Provincial Court Civil Division Regulation*, A.R. 329/89, s. 1.1; British's Columbia's *Small Claims Court Monetary Limit Regulation*, B.C. Reg. 179/2005, s. 1; Nova Scotia's *Small Claims Court Act*, R.S.N. 1989, c. 430, s. 9; and Ontario's *Small Claims Court Jurisdiction and Appeal Limit*, O. Reg. 626/00, s. 1.)
69. See Appendix A.
70. *Alberta Rules*, r. 5.35.
71. *Ontario Rules*, r. 30.03(1).
72. *Ontario Rules*, r. 48.14. Specifically, this rule provides that, where the trial is not scheduled within the requisite two years, a status notice is issued to the parties and, if the matter is not set down for trial within 90 days of the notice being served, the action may be dismissed for delay. Note: this Rule was recently amended so that, as of January 1, 2015, an action must be dismissed for delay if the action has not been set down for trial within five years of its commencement or by January 1, 2017, whichever is later, unless the parties file a timetable for setting the action down for trial within two years or seek a status hearing. See O. Reg. 170/14, ss. 10, 26(1).

Finally, Alberta's Revised Rules permit the parties to schedule and proceed to trial without a preliminary court conference. Parties can set a matter for trial by submitting a written request to the court clerk: a court application is required only if the clerk is uncertain of the parties' readiness for trial.[73] Three months prior to the scheduled trial date, the parties must confirm in writing to the judge that they are ready to proceed.[74] In contrast, the other comparator provinces require a court conference before trial takes place. In Nova Scotia, a conference is required in order to set a trial date and a second conference must be held before the first day of trial.[75] In Ontario, a pre-trial conference or case management meeting must be held within 180 days of a matter being set down for trial,[76] and in British Columbia, a trial management conference must be held at least 28 days before the scheduled trial date.[77]

C. Third-Party Claims

The Comparator Provinces have all taken a generous approach in defining the circumstances when an existing defendant is entitled to expand a lawsuit by advancing third-party proceedings against a non-party. Specifically, all four jurisdictions presumptively permit a third-party claim to be brought on traditional grounds of contribution and indemnity, as well as on any grounds arising from the same circumstances as the original claim or where the third party should be bound by the finding in the original claim.[78] This broad approach reflects the view that litigation is overall more efficient and cost effective if all of the liabilities relating to a particular circumstance or

73. *Alberta Rules*, rules 8.4 and 8.5.
74. *Alberta Rules*, r. 8.6.
75. *Nova Scotia Rules*, r. 4.16(6).
76. *Ontario Rules*, r. 50.02(1).
77. *British Columbia Rules*, r. 12-2(1).
78. *Alberta Rules* r. 3.44; *Nova Scotia Rules*, r. 4.11; *Ontario Rules*, r. 29.01; and *British Columbia Rules*, r. 3-5(1). This broad approach to the addition of third parties reflects a substantive change in Alberta, where the pre-Reform rule only permitted a defendant to issue a third-party claim against anyone who may be "liable to him for all or part of the plaintiff's claim" (Alberta *Rules of Court*, A.R. 390/68, r. 66(1)).

series of events can be determined at the same time or within the same proceedings.

D. The Scope of Mandatory Pre-Trial Disclosure

(i) Information Required to be Disclosed

Generally, the comparator provinces all employ a relevance standard in prescribing the scope of information which must be disclosed by a litigant prior to trial.[79] This standard requires parties to disclose information that would be pertinent to determining a matter in issue at trial or at a preliminary application: "[t]he determination of relevancy for disclosure of relevant documents, discovery of relevant evidence or discovery of information likely to lead to relevant evidence must be made according to the meaning of relevance in evidence law generally."[80] Without retreating from an overall liberal approach to pre-trial disclosure, this modern relevance standard is intended to produce more efficient disclosure than the traditional 19th century "semblance of relevance" criteria,[81] which "expressed the view that 'relevance' should have a relaxed meaning outside trial"[82] and thereby promoted a "train of inquiry" approach.[83] Recognizing "that application of a 19th century test to the vast quantity of paper and electronic documents produced and stored by 21st century technology had made document discovery an unduly onerous and costly task in many cases", the modern relevance standard is intended to provide "reasonable limitations" on the scope of pre-trial discovery.[84]

The relevance standard expressly applies to both documentary and oral disclosure in Alberta, Nova Scotia and Ontario. In British Columbia, however, the relevance test expressly applies only to documentary production, leaving the scope of oral discovery to be determined by the more broad criteria of whether the information relates to the matters in question.[85] Commenting on the apparent anomaly created by the existence of two different standards for discovery in British Columbia, "with the duty to answer questions on

79. *Alberta Rules*, rr. 5.2, 5.6(1) and 5.17(1); *Nova Scotia Rules*, rr. 14.01(1), 15.02 and 18.13; *Ontario Rules*, rr. 30.02(1) and 31.06(1); *British Columbia Rules*, r. 7-1(1).
80. *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4 (N.S. S.C.), at para. 46.
81. See *Cie Financiere et Commerciale du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (Eng. C.A.), at p. 63.
82. *Saturley v. CIBC World Markets Inc.*, *supra*, footnote 80, at para. 16.
83. *Przybysz v. Crowe*, 2011 BCSC 731 (B.C. Master), at para. 27.
84. *More Marine Ltd.*, 2011 BCSC 166 (B.C. S.C. [In Chambers]), at para. 11.
85. *British Columbia Rules*, r. 7-2(18).

discovery being apparently broader than the duty to disclose documents", the British Columbia Supreme Court has suggested that "there are at least two good reasons for the difference".[86] First, the broader scope for oral discovery may provide a party with the evidence needed to establish the relevance of particular documents.[87] Second, the narrower relevance test serves the objective of ensuring proportionality in regards to documentary production, whereas this goal is served by other means in oral discovery, for example by restricting the time for examination.[88]

(ii) Disclosure of Documents / Records

The Comparator Provinces all impose a positive obligation on each party to a lawsuit to disclose, by way of affidavit, the relevant records within its possession, even in the absence of a request by an adverse party. Further, in recognition of the fact that much data in the modern world is created and stored electronically, the Revised Rules specify that this disclosure obligation applies to both hard copy and electronic records.[89]

(iii) Oral Questioning or Discovery

Generally, the Comparator Provinces all authorize a party to orally question, under oath, every party adverse in interest and a corporate representative or employee of a corporate party.[90] None-

86. *More Marine Ltd.*, *supra*, footnote 84, at paras. 7 and 8.
87. *More Marine Ltd.*, *supra*, footnote 84, at para. 8. For a detailed discussion of the change intended by the new standard, see *Saturley v. CIBC World Markets Inc.*, *supra*, footnote 80, cited with approval in *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32 (N.S. C.A.), at paras. 8-13.
88. *More Marine Ltd.*, *supra*, footnote 84, at paras. 9-12. As noted by the British Columbia Supreme Court in *Kendall v. Sun Life Assurance Co. of Canada*, 2010 BCSC 1556 (B.C. S.C. [In Chambers]), at paras. 15-16, however, the attempt to promote efficiency in oral discovery by limiting the time permitted for discovery poses risks to the integrity of the discovery process and relies on counsel to avoid these risks:

    > While the time limit on examination for discovery creates an incentive on the examining party to be efficient, it unfortunately also creates a risk that counsel for the examinee will be inefficient by unduly objecting and interfering on the discovery, for the purpose of wasting the limited time available. If that party is economically stronger than the examining party, it also can strategically increase the costs of litigation this way, by burdening the financially disadvantaged party with having to bring a court application to obtain a proper discovery.

89. *Alberta Rules*, Appendix A, "record"; *Nova Scotia Rules*, r. 16.03; *Ontario Rules*, r. 30.01(1); *British Columbia Rules*, r. 1-1(1) "document".

theless, the Comparator Provinces have different ways of limiting the number of people who may be examined and the time spent on examinations. For example, Alberta's Revised Rules provide that a party may examine one or more officers and employees of a corporate defendant in addition to the designated corporate representative, but, where more than one officer or employee is questioned, the costs of the examination are presumptively borne by the examining party.[91] The Nova Scotia Revised Rules state that a court subpoena is required where a party wishes to examine more than one corporate officer or employee, and in order to obtain a court subpoena, the examining party must undertake to pay associated costs[92] and represent to the court "that the party believes the discovery would promote the just, speedy, and inexpensive resolution of the proceeding".[93] The Revised Rules in British Columbia and Ontario authorize a party to examine only one officer, employee or designate of a corporate party unless the court orders otherwise.[94]

Most significantly, the Revised Rules in Ontario and British Columbia restrict the total time for oral discovery to a maximum of seven hours unless the parties agree otherwise or the court orders otherwise.[95] In deciding whether to extend this time limit, the Revised Rules in both provinces require the court to consider a number of factors, including the conduct of the parties during examinations, the failure of parties to make reasonable admissions, and the amount of time that would reasonably be required to complete the examinations.[96] Ontario's Revised Rules also require a court to consider the financial position of the parties involved, the dollar value in issue, and the complexity of the claim.[97]

(iv) Written Interrogatories

All of the Comparator Provinces permit the pre-trial examination of witnesses to take place via written interrogatories, though the jurisdictions set different parameters on this form of examination. Under the Revised Rules of Alberta and Ontario, an examining party is *prima facie* entitled to ask questions in writing, but the

90. *Alberta Rules*, r. 5.17(1); *Nova Scotia Rules*, rr. 18.03 and 18.04(1); *Ontario Rules*, rr. 31.03(1) and 31.03(2); *British Columbia Rules*, rr. 7-2(1) and 7-2(5).
91. *Alberta Rules*, r. 5.17(1) and (2).
92. *Nova Scotia Rules*, r. 18.04(1)(c).
93. *Nova Scotia Rules*, r. 18.04(2)(b).
94. *Ontario Rules*, r. 31.03; *British Columbia Rules*, r. 7-2(5).
95. *Ontario Rules*, r. 31.05.1(1); *British Columbia Rules*, r. 7-2(2).
96. *Ontario Rules*, r. 31.03(5); *British Columbia Rules*, r. 7-2(3).
97. *Ontario Rules*, r. 31.03(5).

examining party cannot question a party both orally and in writing without the court's permission and, if more than one party is examining a witness, the examination must be oral unless the court orders otherwise.[98] Nova Scotia's Revised Rules state that a party can examine another in writing, unless the question has already been answered orally, and can demand written answers if satisfied that this will "promote the just, speedy and inexpensive resolution of the proceeding".[99] The British Columbia Revised Rules are more restrictive, providing that a party can examine another party via written interrogatories only by mutual consent or by order of the court.[100]

E. Compulsory Alternate Dispute Resolution Mechanisms

The comparator provinces diverge in their approaches to compulsory alternate dispute resolution: Alberta and Ontario both require litigants to engage in some form of dispute resolution process before proceeding to trial, while Nova Scotia and British Columbia do not. Notably, however, due to resource concerns, this requirement in Alberta and Ontario has been limited. In Alberta, the Revised Rules provide that, unless waived by the court, all parties are required to participate, in good faith, in a recognized dispute resolution process, failing which the action cannot be set down for trial.[101] Due to a lack of judicial resources, however, the operation of this requirement was suspended by a Notice to the Profession issued by the Chief and Associate Chief Justices of Alberta's Court of Queen's Bench on February 12, 2013.[102] Subject to specific exceptions, Ontario's Revised Rules require pre-trial mediation to take place within 180 days of the filing of the Statement of Defence,

98. *Alberta Rules*, r. 5.24; *Ontario Rules*, r. 31.02.
99. *Nova Scotia Rules*, rr. 19.01, 19.02(1), and 19.07(2)(c).
100. *British Columbia Rules*, r. 7-3.
101. *Alberta Rules*, rr. 4.16, 8.4 and 8.5.
102. Court of Queen's Bench of Alberta, "Notice to the Profession – Mandatory Dispute Resolution Requirement Before Entry for Trial", NP2013-01 (February 12, 2013), online: www.albertacourts.ab.ca/LinkClick.aspx?fileticket=yusOKnMC2Ow%3d&tabid=69&mid=704. Notably, on May 21, 2014, the Chief and Associate Chief Justices issued another Notice to the Profession indicating that, owing to a lack of resources, only two justices per week would be assigned to Judicial Dispute Resolution duties in the province's major centres (Calgary and Edmonton). See Court of Queen's Bench of Alberta, "Notice to the Profession – Reduction in Judicial Dispute Resolution Bookings in Calgary and Edmonton", NP2014-06 (May 20, 2014) online: www.albertacourts.ab.ca/LinkClick.aspx?fileticket=hniKPXbywTE%3d&tabid=69&mid=704.

but this requirement is restricted to actions commenced in Ottawa, Toronto or the County of Essex (Windsor).[103]

VI. Analysis & Conclusion

Overall, the Revised Rules in the comparator provinces do not revolutionize litigation in their quest to resolve long-standing problems of excessive cost and delay. The Revised Rules retain traditional litigation steps and, for the most part, maintain the traditional approach of leaving primary control over the timing of those steps in the hands of the litigants, with judicial intervention available to keep everyone on track when necessary. Among the five factors discussed in this paper, arguably the most significant restrictions on the traditional litigation process include the seven-hour time restriction on oral examination in Ontario and British Columbia, the deadline for setting a matter for trial in Ontario, and the compulsory alternate dispute resolution provisions in Alberta and Ontario. But these requirements are all subject to judicial exception and, as discussed above, in some instances have been limited by inadequate resources. In the case of Ontario's deadline for setting a trial date, the two-year period originally established in the Revised Rules has already been expanded to five years, effective January 1, 2015.[104]

Although minor differences exist among them, the Revised Rules in the Comparator Provinces are, in essence, variations on a theme. That theme is proportionality in the context of the traditional litigation paradigm. Expressly and implicitly, the Revised Rules all reference the obligation of the parties and the courts to keep litigation in check and to ensure that every litigation step, and the cost and time expended on that step, serves a necessary and constructive purpose toward resolving the claim on its merits. This reminder, and the embracing of proportionality as a guiding principle in the Revised Rules, is both significant and worthwhile. Nevertheless, it raises many questions about the extent to which the Revised Rules can successfully contribute to the reduction of litigation costs and delay.

The Revised Rules will be successful in reducing litigation cost and delay only if the players in the litigation process embrace the proportionality principle. This is the change in litigation "culture" referenced by some commentators and by the Supreme Court of Canada.[105] Can the Revised Rules spark the necessary cultural revolution? And, even if this cultural change towards proportionality takes place, how should proportionality be assessed? For instance, is the cheapest and quickest resolution process necessarily the most just?[106] Further, how can litigants' responsibility to act proportionately be effectively enforced in the face of dwindling court resources? It is beyond the scope of this paper to consider how these questions might be resolved, but we are hopeful that this article has succeeded in demonstrating that these questions remain important, notwithstanding, and in fact in part because of, the recent rule reforms in the four comparator provinces.

103. *Ontario Rules*, r. 24.1.

104. See footnote 73 and accompanying text.

105. See for example: C.L. Campbell J., "Reflections on proportionality and legal culture" (2010), 28:4 Adv. J. 4, at para. 58: "The cultural shift that needs to accompany the rule revisions is for the parties to focus early on a resolution process that suits their dispute. A trial where appropriate, with a known time and affordable cost, is preferable to a concerning trend of a war of attrition or an improvident settlement"; and A.I. Nathanson and G. Cameron, "Complex Litigation Under B.C.'s New Supreme Court Civil Rules", prepared for Insight Information Complex Litigation Conference (November 16-17, 2010)), online: www.fasken.com/files/Publication/5d925aa7-fe2b-4679-b70e-5bca57a3858f/Presentation/PublicationAttachment/fff45f9f-d9b0-4120-b65c-19756f767d40/Insight_Conference_-_Civil_Rules_paper.pdf: Unless counsel and their clients are prepared to endorse the principles underlying the [revised rules], the result will be nil . . . For counsel, achieving the objective of proportionality and minimizing expense will mean getting on top of your case early and making focused use of the tools that the rules provide. It will require cooperation and the avoidance of litigation by rote. See also *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, 366 D.L.R. (4th) 641 (S.C.C.), at paras. 28-33.

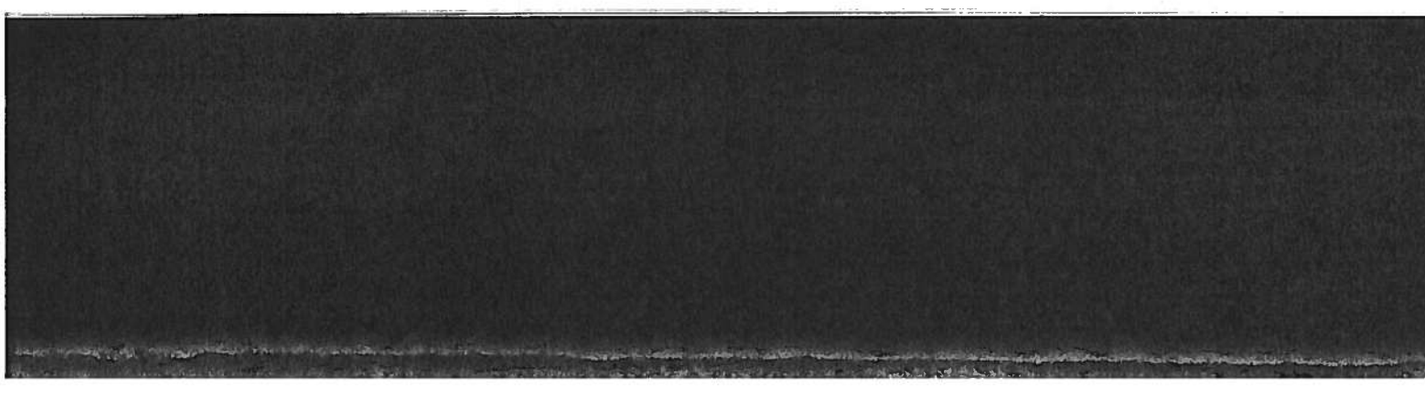
106. See, for example, Trevor C.W. Farrow, *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, 2014), at p. 304, where, recognizing the proportionality focus of the Revised Rules in the Comparator Provinces, Professor Farrow notes that: "A move to proportionality based thinking across the civil justice system is going to force us to make hard choices about how to preference justice over efficiency when it comes to thinking about the legitimacy and success of a procedural regime."

APPENDIX A:

Timing of Major Litigation Steps in the Revised Rules of the Comparator Provinces

ACTION	ALBERTA	NOVA SCOTIA	ONTARIO	BRITISH COLUMBIA
Pleadings	Statement of Claim to be served within one year of filing (R. 3.26); Statement of Defence to be filed and served within 20 days if the Defendant was served in Alberta; 30 days if the Defendant was served elsewhere in Canada; two months if the Defendant was served outside Canada (R. 3.31(3)); Third-Party Claim to be filed and served within six months of the Statement of Defence being served (R. 3.45(c)); Notice to Co-Defendant to be filed and served within 20 days of the Statement of Defence being served (R. 3.43(2));	Notice of Action to be served within one year of filing (R. 4.04(1)); Statement of Defence to be filed within 15 days if the Defendant was served in Nova Scotia, within 30 days if the Defendant was served elsewhere in Canada; 45 days if the Defendant was served outside Canada (R. 4.05(6) and R. 31.12); Third-Party Notice to be filed in the same time frames as a Statement of Defence (R. 4.11(7)); Cross-claim to Co-Defendant filed in the same time frames as a Statement of Defence (R. 4.09(7))	Statement of Claim to be served within six months of filing (R. 14.08(1)); Statement of Defence or Notice of Intent to Defend to be filed and served within 20 days if the Defendant was served in Ontario; 40 days if the Defendant was served elsewhere in Canada or the United States; and 60 days if the Defendant was served outside of Canada or the United States (Rr. 18.01(1) and 18.02; Third-Party Notice must be filed and served within 10 days of the Statement of Defence being served (R. 29.02(1)); Cross-Claim must be filed and served in the same time period as the Statement of Defence (R. 28.04(1))	Notice of Civil Claim to be served within 12 months of filing (R. 3-2(1)); Statement of Defence to be filed and served within 21 days if the Defendant was served in British Columbia, 35 days if the Defendant was served in North America, and 45 days if the Defendant was served elsewhere (R. 3-3(3)); Third-Party Notice to be filed within 42 days of receiving a Notice of Civil Claim (R. 3-5(4)) and served within 60 days after filing (R. 3-5(7));

ACTION	ALBERTA	NOVA SCOTIA	ONTARIO	BRITISH COLUMBIA
AFFIDAVIT OF RECORDS	Plaintiff to serve on the Defendant within three months after being served with a Statement of Defence (R. 5.5(2)); Defendant to serve Plaintiff within one month after receiving Plaintiff's Affidavit of Records (R. 5.5(3))	Plaintiff and Defendant must serve one another within 45 days of the close of pleadings (R. 15.03)	Must be served as stipulated within the parties' Discovery Plan (R. 30.03(1))	Plaintiff and Defendant must serve one another within 35 days of the close of pleadings (R. 7-1(1))
ORAL DISCOVERY	No deadline; can take place anytime after a Statement of Defence has been filed and an Affidavit of Records has been served (R. 5.20(1))	No deadline; can take place anytime after pleadings have closed (R. 18.02)	No deadline; can take place anytime after a Statement of Defence has been filed and an Affidavit of Records has been served (R. 31.04)	No deadline; no limits on when can commence
EXPERT REPORTS	No deadline for pre-trial disclosure; sequence for exchange is Expert-in-Chief Report followed by Rebuttal Expert Report (R. 5.35)	Expert in Chief Reports must be filed six months before the finish date (R. 55.03(1))[a finish date is the date by which all pre-trial procedures are to be completed; it is set by a judge at a trial date assignment conference (R. 4.16(6))]; Rebuttal Expert Reports must be filed no more than three months after the filing of the Expert in Chief Report (R. 55.03(2))	Expert in Chief Reports must be served 90 days before the pre-trial conference (R. 53.03(1)); Rebuttal Expert Reports must be served 60 days before the pre-trial conference (R. 53.03(2))	Expert Reports must be disclosed 84 days before a scheduled trial date (R. 11-6(3))



ACTION	ALBERTA	NOVA SCOTIA	ONTARIO	BRITISH COLUMBIA
TRIAL DATE	No deadline	No deadline	Must be put on trial list within two years of filing Statement of Defence or may be dismissed for delay.	No deadline