



## Federal Court of Appeal and Federal Court Rules Committee



### *Federal Courts Rules – 2024 Global Review*

#### **Invitation to Participate**

**April 2, 2024**

#### **Introduction**

The Federal Courts Rules Committee has established a Sub-Committee to conduct a global review of the *Federal Courts Rules* (the Rules). Participation in this review process by all interested persons is welcome. The Sub-Committee invites comments on the proposals described below, as well as any other proposals for changes to the Rules you may wish to suggest. Please provide your input during the consultation period from **April 2, 2024 to July 2, 2024**. The Sub-Committee encourages you to provide your input by completing this [form](#). More detailed information on how to participate is provided at the end of this document.

It has been more than 10 years since the previous global review of the Rules. The report of the 2012 Sub-Committee expressed “a high level of satisfaction” with the Rules, and found “no need for any wholesale, far-reaching revamping of [their] substance”. The 2012 Sub-Committee nevertheless made a number of proposals, many of which were subsequently implemented.

The areas for discussion identified by the 2024 Sub-Committee encompass several broad and recurring themes. Most of the proposed changes are intended to update the Rules to reflect technological advances and current procedures. For example:

1. Update the Rules to permit electronic service and filing of documents throughout;
2. Remove references to anachronistic practices and technology;
3. Incorporate important elements from the Federal Court of Appeal (FCA)’s Consolidated Practice Direction and the Federal Court (FC)’s Amended Consolidated General Practice Guidelines (collectively the “Practice Directions”);
4. Amend the Rules to reflect jurisprudential developments;
5. Increase the monetary limit for simplified actions;
6. Expand the role of associate judges;
7. Grant a limited discretionary power to the registry to accept or refuse non-compliant documents;
8. Revise the Rules governing class actions to reflect procedural changes in the provinces; and
9. Miscellaneous amendments.

## **Issue 1. Update the Rules to permit electronic service and filing of documents throughout**

**Electronic service:** The Rules currently state that a party shall not serve a document by electronic service unless the recipient has consented pursuant to Rule 141. The Practice Directions include measures that are intended to facilitate electronic service. The Sub-Committee is considering whether to modernize the Rules to address electronic service more fully (including, when appropriate, to reflect the procedures already adopted *via* the Practice Directions). Examples of potential amendments include:

- Making electronic service the default;
- Requiring parties to provide an email address with each document filed with the Court and amending Rule 141 to deem consent to electronic service to be given where a party has filed a document in the Court that includes an electronic address;
- Amending Rule 146 to require that proof of service by email state the time the email was sent and attach a copy of the email. The Rule could also provide that if a document is served after 5:00 pm, service is effective the next day that is not a holiday (Rule 143); and
- Allowing the registry to effect service of an originating document filed electronically on the Crown, the Attorney General of Canada or any other Minister of the Crown in accordance with the practice under Rule 133. The Rules could also provide that service effected in this fashion will relieve an applicant from the requirement to effect personal service.

**Discussion Point:** Should the Rules be modernized to more fully address electronic service?

**Relevant Rules:** all Rules requiring parties to provide their address on a document filed with the Court, including Rules 125(2), 126.1-148.1

**Electronic filing:** Rule 71 currently provides that a document may be sent to the Registry for the purpose of filing by delivery, mail, fax or electronic transmission. The Practice Directions allow for the electronic filing of documents, and set out the criteria that electronic documents should meet. The Sub-Committee proposes to incorporate the substance of the Practice Directions into the Rules. The Sub-Committee also wishes to receive input on the following additional potential amendments related to electronic filing:

- Require electronic filing in all but exceptional cases; and
- Eliminate the current requirement in Rule 71(5) that a person who sends an originating document by electronic transmission provide the registry with paper copies for issuance or arrange for the registry to prepare paper copies.

**Discussion Points:** Should the Rules be modernized by standardizing the use of electronic filing?

## **Issue 2. Remove references to anachronistic practices and technology**

The Sub-Committee proposes to eliminate anachronisms from the Rules and reflect the more digital environment. Examples of potential amendments include:

- Removing the option to serve, submit or file documents by fax;
- Amending Rule 16 to eliminate references to locked boxes;
- Amending provisions that address the length of a document by referring to their word count rather than to the number of pages;
- Updating Rules that refer to the format of documents; and
- Updating the Rules to improve the efficiency with which payments are collected.

**Discussion Point:** Should the Rules be amended to eliminate outdated practices as described above? Are there other anachronisms in the Rules that should be addressed?

**Relevant Rules:** 16, 26, 65, 66(2), 70(4), 71, 72.2, 79, 139(1)(d), 140, 149(1)(b), 314(2)(e), 347(3)(e)

**Issue 3. Incorporate important elements from the [FCA’s Consolidated Practice Direction](#) and the [FC’s Amended Consolidated General Practice Guidelines](#)**

As stated above, the FCA and FC have issued Practice Directions to complement the Rules with respect to various matters. The Sub-Committee is seeking input on the possibility of incorporating elements of the Practice Directions into the Rules. Potential amendments include the following:

a) Confidential documents

Rule 152 requires that confidential material be filed separately and be clearly marked as confidential, identifying the legislative provision or the Court order under which it must be treated as confidential. The Practice Directions provide guidance with respect to confidential documents. Examples of practices that could be incorporated into the Rules include:

- Making it explicit that a motion must be filed in order for material to be treated as confidential, including where another court or tribunal has previously ordered that the same material be treated as confidential; and
- Clarifying the requirements and procedures that apply to the filing of confidential documents (including to the electronic filing of confidential documents).

**Discussion Point:** Should the Rules be amended to more fully address the filing of confidential documents?

**Relevant Rules:** 151, 152

b) Permit informal requests for interlocutory relief

When filing a motion for interlocutory relief, the Rules provide that a motion record is required. The FC’s Amended Consolidated General Practice Guidelines provide moving parties with the option to seek leave, by way of letter, to be relieved from the requirement of bringing a formal motion when certain requirements are met. This is consistent with the informal practice of the FCA.

**Discussion Point:** Should the Rules be amended to explicitly allow a moving party to seek leave, by way of letter, to be relieved from the requirement of bringing a formal motion in specified circumstances?

**Relevant Rules:** 366, 373

c) Adjournments

Rule 36 allows parties to seek an adjournment of a hearing. Although infrequently granted, the Courts recognize that there may be exceptional and unforeseen circumstances in which it may be reasonable to request an adjournment. The Practice Directions currently provide guidance on how requests for adjournment may be made.

**Discussion Point:** Should the Rules be amended to clarify the procedure for seeking an adjournment?

**Relevant Rule:** 36

d) Disposition and/or quantum of costs

Paragraph 74 of the FC's Amended Consolidated Practice Direction states that during the hearing of a motion, application or action, the parties should be prepared to inform the Court as to whether they have agreed on the disposition and/or quantum of costs. If the parties have not agreed to the disposition and/or quantum of costs, they should be prepared to make submissions on those issues to the presiding judge or associate judge before the end of the hearing.

**Discussion Point:** Should the Rules be amended to reflect paragraph 74 of the FC's Amended Consolidated Practice Direction?

**Relevant Rules:** 400, 403

e) Condensed books, Compendia and Day Books

Rule 348.1 provides that a party in an appeal may file a condensed book. Paragraphs 59 to 64 of the FCA's Consolidated Practice Direction address condensed books, as well as compendia and day books. Compendia are also addressed in the FC's Consolidated Practice Direction.

**Discussion Point:** The Sub-Committee seeks input on the following issues:

- Should the Rules require that condensed books be filed on appeal, or make explicit the FCA's authority to require that they be filed?
- Should the Rules require that compendia and day books be filed on appeal, or make explicit the FCA's authority to require that they be filed?
- Should the Rules address the use of compendia in the FC?
- Should the Rules provide that an outline of oral argument may be filed?

**Relevant Rule:** 348.1

#### **Issue 4. Amend the Rules to reflect jurisprudential developments**

Various decisions have clarified the scope of certain Rules or the authority of the Courts.

**Discussion Point:** Should the Rules be amended to reflect jurisprudential developments? In particular:

- Should the Rules be amended to permit the summary dismissal of an appeal (*Dugré v. Canada (Attorney General)*, [2021 CAF 8](#))?
- Should the Rules be amended to permit representation by a non-lawyer if the interests of justice so require (*Erdmann v. Canada*, [2001 FCA 138](#))? Should other amendments to the Rules be contemplated with respect to representation?
- Should Rule 167 be amended to provide that the burden of satisfying the Court that it ought to order another sanction rests on the party facing the dismissal of its action (*Sweet Productions Inc. v. Licensing IP International S.À.R.L.*, [2021 FC 216](#))?
- Should Rule 300 be amended to explicitly provide that trademark infringement proceedings may be brought by way of application (*BBM Canada v. Research In Motion Limited*, [2011 FCA 151](#))?
- Should Rule 446 be amended to explicitly provide that failure to comply with a direction can constitute contempt (*Njoroge v. Canada (Attorney General)*, [2023 FCA 98](#))?

**Relevant Rules:** 4, 55, 74, 119, 120, 121, 167, 300, 446

#### **Issue 5. Increase the monetary limit for simplified actions**

Rules 292(a) and (b) currently provide that, unless the Court orders otherwise, the procedure for simplified actions applies to:

- Any action in which each claim is exclusively for monetary relief in an amount not exceeding \$100,000, exclusive of interest and costs; and
- In respect of an action *in rem* claiming monetary relief, no amount claimed exceeds \$50,000, exclusive of interest and costs;

**Discussion Point:** Should the Rules be amended to adjust the monetary limits upwards?

**Relevant Rule:** 292

#### **Issue 6. Expand the role of associate judges**

Associate judges are officers of the Court. Rule 50 sets out the scope of the associate judges' jurisdiction. The Sub-Committee is seeking input on the possibility of expanding the role of associate judges in the Rules. Examples of potential amendments could include:

- Broadening the authority of associate judges over motions:
  - o for an injunction;
  - o for judgment on consent;
  - o to hold a person in contempt;
  - o for summary judgment;

- to vary an order of a judge in certain circumstances, such as on consent or where unopposed, or to extend a date previously ordered;
- Increasing the monetary limit for actions to more than the existing \$100,000.

**Discussion Point:** Should the Rules be modified to expand the role of associate judges?

**Relevant Rules:** Rules 50, 182(b)

**Issue 7. Grant a limited discretionary power to the registry to accept or refuse non-compliant documents**

Under Rule 72, where the Administrator is of the opinion that a document is not in the form required by the Rules or that other conditions precedent to its filing have not been fulfilled, the Administrator must refer the document to a judge or associate judge. The judge or associate judge may then direct the Administrator to accept or reject the document, or accept the document subject to conditions. There are situations where it may be appropriate for the registry to be given a limited discretionary power to accept or refuse certain irregular documents, under reserve of objection by a party and the Courts. For example:

- Unsworn affidavits or uncommissioned exhibits;
- Motion records containing no written representations or no supporting affidavits;
- Notices of Application that do not include information on the relief sought, the grounds for review or the list of documents to be relied upon;
- Documents not properly attached or not complying with the requirements of the Rules (numbered paragraphs, font, margins); and
- A pleading where the Crown is improperly identified or which contains minor discrepancies in the style of cause.

**Discussion Point:** Should the Rules be amended to provide limited discretionary power to the registry to either accept or refuse non-compliant documents?

**Relevant Rules:** 72

**Issue 8. Revise the Rules governing class actions to reflect procedural changes in the provinces**

The Sub-Committee is seeking input on the possibility of making changes to the Rules governing class actions to reflect certain procedural changes in the provinces, notably Ontario. Examples of potential amendments include:

- Permit certification only if common questions of fact or law predominate over questions affecting only individual class members;
- Clarify sequencing of motions to strike and certification motions, and the discretion of the Court to schedule motions based on the particular circumstances;
- Adopt an expedited process for carriage motions;
- Address matters pertaining to third-party funding agreements;
- Coordinate multi-jurisdictional class actions, including communications between Courts;
- Provide for discretionary or mandatory dismissal for delay;

- Guidance on costs.

**Discussion Point:** Should the Rules governing class actions be amended to reflect certain procedural changes that have been made in the provinces, notably Ontario?

**Relevant Rules:** Rules that fall under Part 5.1

## **Issue 9. Miscellaneous amendments**

The Sub-Committee proposes that consideration be given to making other amendments to the Rules. Examples include:

Timelines:

- Amend Rule 7(2) to increase the period of a consent extension beyond one half of the initial period;
- Amend Rule 51(2) to extend the deadline to appeal the order of an associate judge in a simplified action to 30 days from 10;
- Set a deadline for the service of expert reports under Rule 52.2;
- Consider whether it would be preferable to set a fixed deadline (for example, 10 days) after service under Rule 203(2);
- Remove the 30-day notice in the notice of pre-trial conference under Rule 261;
- Consider whether the notice of appearance under Rule 305 should include grounds of opposition, and whether the timeline for filing the notice of appearance should be extended;
- Have the 30-day timeline for the service of the Applicant's affidavit under Rule 306 run from the date of transmission of Certified Tribunal Record (CTR) or, if there is no CTR, from the date of service of the notice of appearance or the expiry of the time to serve the notice of appearance;
- Extend the 20-day limit for cross-examinations under Rule 308;
- Amend Rule 314(2)(c) to require a party filing a requisition to indicate whether all parties agree with the assessment of the maximum number of days or hours required for the hearing, and if not, how many days or hours each party believes are required; and
- Amend Rule 314(2)(d) to require that parties provide their availabilities for more than 90 days in their requisition for a hearing.

Procedural issues:

- Consider whether the Rules should address the swearing of witnesses appearing by video from foreign jurisdictions, and whether Rule 92 should be amended to refer to "sworn or affirmed" rather than only to "sworn";
- Under Rule 95(2), consider requiring answers to non-privileged and proportionate questions under reserve of objection, unless otherwise ordered;
- Consider limiting written representations on a motion to a fixed page or word limit under Rule 364, and making related changes to Rules 369(3) and 369.2(3) for motions in writing;

- Consider creating a new Rule under Part 2 – Administration of the Court to govern communications to the Court via the Registry on matters of substance without the consent of the other party or leave of the Court. (See [Rule 1.09](#) of Ontario’s *Rules of Civil Procedure*).

### **Other areas of possible reform**

Other areas of possible reform identified by the Sub-Committee include the following:

- Currently, under Rule 51(1), decisions of associate judges may be appealed by a motion to a judge of the FC. Should the Rules be amended to provide that decisions of associate judges may be appealed only with leave, or directly to the FCA?
- Currently, the Rules apply to proceedings before both the FC and the FCA. Should there be two sets of rules, one for each Court?
- Should a Rule be added to address the permitted scope of practice directions?
- Should dedicated Rules be developed for particular practice areas?
- Should the Rules be streamlined or simplified in any particular way?

**Discussion Point:** The Sub-Committee welcomes any comments and suggestions regarding these possible reforms.

It should be noted that discrete aspects of the Rules are also undergoing review in separate processes. These include the Rules pertaining to the production of tribunal records, costs, changes to immigration practice, and proceedings in cases involving the rights of indigenous peoples. Proposals resulting from these exercises will be coordinated with the proposals arising from the 2024 global review in due course.

Participation in this review process by all interested parties is welcome. The Sub-Committee encourages you to provide insightful comments on the listed proposals, as well as any other proposals for changes to the Rules you may wish to advance.

### **How to participate**

The Sub-Committee encourages you to provide your input by completing this [form](#). Please note that each answer in the form is limited to 4,000 characters (approximately one and a half pages). You may choose to respond to questions in another document, and then export your answers into the form in a single session. If you encounter any issues, please contact [information@fct-cf.ca](mailto:information@fct-cf.ca).

We look forward to your comments.

Members of the 2024 Global Review Sub-Committee:

FCA: Justices LeBlanc and Monaghan  
FC: Justices Fothergill (Chair) and Furlanetto  
Associate Judges Steele and Horne