Use and Occupancy: Building Codes and Maintenance Manuals in the Court of Queen's Bench of Alberta

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1 The views expressed herein are those of the author, and not those of, or binding on, any other member of the Court of Queen's Bench of Alberta, or the Court itself.

Some of the ideas herein originate from the research I conducted while studying for (and my experience since) my Master of Laws in Dispute Resolution at the U of A, Faculty of Law in 2008–2010: Improving Excellence: Evaluation of the Judicial Dispute Resolution Program in the Court of Queen's Bench of Alberta (Evaluation Report), available online: http://cfcj-fcjc.org/clearinghouse/hosted/22338-improving_ excellence.pdf; and The Multi-Door Courthouse is Open in Alberta: Judicial Dispute Resolution is Institutionalized in the Court of Queen's Bench (Thesis), available online: http://cfcj- fcjc.org/clearinghouse/publication.php?id=22471.

I. INTRODUCTION AND HIGHLIGHTS

Although increasingly challenged by inadequate judicial and other resources, the Court of Queen's Bench of Alberta (Alta QB) currently has most of the building blocks in place to meet the demands of civil[2] justice in 2012—new rules, a fully developed case management system (including, recently added, case management counsel) and a broad range of options available through a comprehensive judicial dispute resolution system. However, the resource challenge and the growing demands and complexities associated with access to justice (A2J)[3] are causing us to re-examine our 'codes and manuals'—our procedures—indeed, our role in the A2J challenge. Thus, in this latter respect, our 'Architecture of Justice [is] in Transition.'

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[2] This includes family cases. I will also touch on criminal justice a little at the end of this paper.

[3] The Action Committee on Access to Justice in Civil and Family Matters, chaired by the Honourable Thomas Cromwell, of which the Canadian Judicial Council's Administration of Justice Committee (of which I am a member) has representation, is pursuing Canada wide initiatives in this area, funded by the Federal and Alberta governments. A working definition of access to justice (A2J), is defined broadly to include both the variety of out-of-court services through which the public seeks assistance with their legal problems, as well as access to formal dispute resolution processes through tribunals, the courts and effective enforcement mechanisms. Programs and processes must balance the legitimate interests of all parties. For Alta QB purposes, "access to justice initiatives will focus specifically on:

- processes that are meaningful, which include affordable, understandable, geographically available, timely and effective;
- resolution processes which are, or can be made, available within the formal justice system;
- information services and resources which can be made available to ensure public understanding; and
- encouraging the availability of legal advice and representation" (quotation taken from Court of Queen's Bench of Alberta, Access to Justice Steering Committee Terms of Reference).

To add to this transition, I believe that there are some other potential answers to some of our social problems that do not need to be, or should no longer be, the responsibility of the justice system. Those new answers may come through the health care system (e.g., mental health responses), or social agencies (e.g. some family conflicts and disputes) and others, all of which will need further innovative, 'out of the box,' thinking and development. However, that will not be my focus—rather, my focus will be to examine the current system in the Alta QB, as an example of the challenges that I believe many superior courts face.

Let's look at the current role and building blocks in place in the Alta QB and the challenges to the judicial structure we have built from which the public can access justice.

II. RULES OF COURT

At the time of the Canadian Bar Association, Task Force Report on Civil Justice (Task Force Report) in 1996, the Alta QB had available to it, or shortly thereafter implemented, all the rules of procedure for a modern Canadian superior trial court.

Since then, we have expanded our judicial case management (CM) and judicial dispute resolution (JDR) systems.

After years of worldwide research by the Alberta Law Reform Institute (ALRI) to modernize the substance and wording of the Alberta Rules of Court, the New Alberta Rules (AR 124/2010) (NAR) came into force on November 1, 2010. We have now had close to two years to observe their operation. Where followed, they are working reasonably well, with some exceptions, relevant ones of which are mentioned below.

The NAR were fairly progressive, with one exception. The NAR focussed on CM and the mandating of pre-trial dispute resolution (DR). The NAR rejected the concept of case flow management (CFM),[4] long prevalent in the United States and with which the Alta QB flirted in the early 2000s. Instead, the NAR reinforced the concept of parties managing their own cases, and the mandating and imposition of individual file judicial CM only on Court order, **where necessary**.

[4] CFM refers to "cradle to grave" case management, by judicial (and/or court services) managers, of all or some targeted civil files.

Additionally, the NAR mandated (unless waived by judicial order) some form of DR before entry for trial. The forms of DR available are:

- JDR processes (the Alta QB JDR services now formalized within the NAR);
- government and court annexed mediation programs (there are currently none, except a roaster of approved private mediators); and
- private mediation.

Class proceedings (CP) are a growing phenomena across Canada, and Alberta (since 2004) is no exception. These procedures are bringing A2J to some in the appropriate cases, but there are many pitfalls to avoid. In my view, it is too early to fully evaluate whether or not CP are a boon or bane to A2J, and the resolution of disputes in general.

The exception to the progressive nature of the NAR was the revoking of 'simplified trial' rules, apparently because, after they were introduced in the late 1990s, they received very little usage. This is regrettable having regard to the increasing need for these procedures. They should be reintroduced for voluntary use by those who cannot afford 'perfect justice' (as hereinafter discussed), or for court ordered use where litigation conduct under the regular procedures has become the antithesis of A2J, especially in family law, or where there is one or more self-represented litigants (SRLs).

Now, as we approach the end of 2012, a number of forces have caused us to reconsider the merit of some of the innovations in the NAR. Those forces include (in random order):

- a growing demand for CM, often when it is unnecessary;
- exponentially growing classes of differently motivated SRLs, which frequently makes CM necessary (if not essential), and invites a re-examination of the NAR rejection of CFM, especially in family law—indeed, recommending a multi-door courthouse[5] form of triage for these difficult cases and litigants;
- a insatiable demand for JDR—both leading to trial ready and non-trial ready (or never intended trial ready) cases;

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[5] For more discussion on the multi-door courthouse and triage, a concept taken from Harvard's Law Faculty, Professor Sander, and developed during my Master in Laws in Dispute Resolution, see the work I did there, as noted in footnote 1.

- a new and increasingly scary phenomena of the Organized Pseudo-legal Commercial Argument litigants ("OPCA litigants"), including de-taxers, freemen, sovereignists, and others—see *Meads v. Meads* 2012 ABQB 571, released September 18, 2012;
- a growing propensity of parties to try to avoid the rules so as to avoid the cost of a full trial—e.g. wanting 'viva voce' evidence in special chambers applications to avoid the
- filing fee for trial entry; and
- in face of these pressures, a failure of governments, while giving lip service to A2J, to be responsive to the desperate need for adequate judicial and related resources to carry out A2J innovations.

In essence we have, to keep the metaphor alive, the most modern of new structures to accommodate all (or most) of the justice systems we need, but we have hardly commissioned these structures, and already need to re-engineer or renovate them for new challenges. Let's examine some of these forces and possible responses.

III. CASE MANAGEMENT (CM)

CM is available under the NAR by court order, where necessary, on application directly to the Chief Justice or Associate Justice, or on the order or recommendation of another justice. Once ordered, the Chief Justice or Associate Chief Justice assigns a case management justice (CMJ). Currently each Alta QB puisne justice has an average of about 20 CM files to manage, some as many as 35–40, all handled (except for some substantive applications) outside normal courtroom hours; that is before 10 am, or at noon, or after 4:30 pm.

To try to alleviate this demand, it is my practice as Associate Chief Justice, before ordering CM, to make very sure that it is fairly clearly necessary, and not just convenient to one or more of the parties. In some cases the need for the appointment of a CMJ is obvious, in some cases it is clearly not, if the parties were meeting the mandated requirement that they effectively manage their own litigation. In some cases they merely want a 'dial-a-judge' to make interlocutory applications easier. In some cases they merely need a 'chair,' not a justice, to preside over a meeting to work out a schedule and grant a confirming order.

In response to the latter problem, the Alta QB asked Alberta

Justice to appoint two Case Management Masters to assist in this scheduling, and to grant appropriate orders. That was rejected, but we were given two (one in each of Edmonton and Calgary) Case Management Counsel (CMC), in a pilot project—Case Management Counsel (CMC) Pilot Project (CMCPP)—scheduled to be evaluated and ended (or continued) in June 2013. While the roles and duties of CMC have been a work in progress, the duties and responsibilities have included:

- assisting to narrow and/or resolve issues;
- assisting with scheduling and the development of litigation plans;
- providing guidance to parties, including discouraging unnecessary/inappropriate applications;
- vetting applications to ensure parties are in a position to proceed;
- monitoring and assisting in the management of the litigation;
- facilitating the preparation of consent orders for presentation to the CMJ;
- directing parties to appropriate services and procedures, including DR processes;
- attending CM meetings between the CMJ and parties/counsel as directed by the CMJ;
- and
- reporting and providing advice to the Chief Justice, Associate Chief Justice and/or
- CMJ as required.

CMCs are only authorized to work on cases that have been ordered into CM. Once brought into a file by a CMJ to assist in scheduling and the like, CMCs can do all of that and record agreements, but, unlike the powers that CM Masters could have, CMCs have no powers to make orders. If a court order is necessary CMCs can try to frame it as a consent order and have the CMJ sign it. Otherwise the only alternative is to have the CMC brief the CMJ, who then makes an appropriate decision and order, with further input from the parties as appropriate. Nevertheless, where so appointed CMCs do have the authority of a referee to do a reference under the NAR and in such a role can recommend an order for the parties consent, or, if not consented, the CMJ to order in like fashion, or as modified after further submissions from the parties. The CMCPP has been a tremendous success and the Alta QB will be recommending its continuation—and, indeed, expansion.

IV. SELF-REPRESENTED LITIGANTS (SRLS)

SRLs are not new; there have always been a few, but now they are many, primarily, and at an epidemic level, in family law, but also increasingly in non-family cases. This alarming and escalating problem is so serious that it was the subject of a full day-long seminar by the Alta QB, and other relevant 'stakeholders,' representatives of Alberta Justice and the other two Courts, in Red Deer in October 2011. Why are there so many? To answer this would take a whole paper, but let me draw some quick observations.

There are the very poor; in family cases they may qualify for legal aid. However, the middle class usually does not qualify for legal aid and may not be able, realistically, to afford counsel, and so there numbers increase. There are those who probably could have afforded, or once did afford, counsel, but have used up there funds in the fight, with little to show for it. This is often the case in family law; a 'fight to the finish' attitude at the beginning, with counsel hired to make or defend every application possible, until they run out of money.

There are a growing number of 'recreational' SRLs; those who might be able to afford counsel, but wish to go on their own for various reasons. For some it is merely to continue psychological abuse, without apparent cost to them, knowing they are causing costs to the other side who is (or may be) not up to the fight on a personal level and must hire counsel, appropriate high cost awards against such SRLs when they cause costs to the other side in non-meritorious applications is a remedy. Often, these SRLs are not working and are on some form of social assistance, or are retired, and thus have time to litigate. Indeed, it often becomes an avocation, where delay is the order of the day and causing costs to the other side is a continuation of abuse. It thus becomes, unless lessened or stopped by adequate cost penalties, the very antithesis of A2J. Additionally, as the population gets more educated in the law, they become less and less afraid to take up the challenge themselves. A sub-group of these SRLs are the OPCA litigants which I will address separately. What do we do about these SRLs?

First, I believe that there needs to be, with the necessary government resources, the application of both a multi-door courthouse and triage system, in any case with an SRL entering the court system, or when one party becomes an SRL. One of those doors should be a CFM

system, utilizing CMCs. As to this multi-door courthouse/triage aspect for SRLs, one size does not fit all, so one needs to separate the litigants into appropriate streams; thus, the multi-door courthouse. As to triage, some independent court official must (by agreement when the parties are astute enough, and by compulsion when they are not) make a determination as to which program/door is appropriate. There should be no limits as to the number of programs (doors), but they would include:

- regular routine litigation;
- complex litigation;
- litigation with CM or CFM;
- dispute resolution;
- diversion (voluntarily or on order) to simplified procedures, summary trial, special and regular chambers, or other "less than perfect" justice responses (see the discussion below);
- mental health intervention;
- substance impacted intervention; and
- others; the list is not closed.

For SRLs who can possibly work out their family law problems without too much high conflict, a mild form of CFM may work. Part of this is to have a neutral, objective, legal CM officer who can help save the parties from themselves. All experienced family law practitioners (counsel or the judiciary) know that family law is not space science and the cases all end the same way, dealing with the same issues. However, not all SRLs know; indeed, most don't know that separation and divorce is, at law, non-fault based, and the other issues can be simply resolved without acrimony, if the parties wish. Therefore, separating parties, with judicial or judicial officer assistance as necessary, only need to make appropriate decisions for:

- parenting of children;
- providing rather arithmetic formulae for child support, regular (s.3) and special (s.7), under the *Divorce Act*, and provincial equivalents;
- determining spousal support, where appropriate, on the basis of entitlement, duration and quantum; and
- dividing property, usually on the presumptive 50/50% basis, subject to exemptions.

In this context, a CMC, on a CFM program, could work through the maze to bring such cases to resolution with the least cost and at the

earliest possible time; indeed, the Dispute Resolution Officer program in Calgary QB attempts to do that very thing.

For the more high conflict family law cases involving SRLs (one or both), the CMJ/CMC combination of 'carrot and stick' approach may be useful, again using CFM principles. Laissez-faire, 'you have an obligation to manage your own litigation,' principles won't work with these types. For the OPCA litigants, only individual CM (or CFM) with a very tough CMJ (and unlikely any use of a CMC) will work, because, unless they change, they have to be told what to do and then enforcement must make them do it.

Second, for non-family cases with SRLs present, I believe that there must be a return to voluntary or court ordered (and enforced) simplified procedural rules, using CFM and CM procedures as appropriate in an individual case. I say 'enforced' because it seems that these rules have not been taken up or followed informally. The intent is to provide a simplified trial procedure (not currently in place) and/or summary trial process that gets the parties to the resolution goal line as soon as possible; keeping the football metaphor alive, if you can't get what you want (a touchdown), go for the next best (a field goal). The emphasis should be on fair, expedient, adequate justice, not 'perfect justice,' where every legal issue is pursued to exhaustion. In other words, the parties need to work to a quick and appropriate resolution that provides 'substantial justice,' without having to exhaustively search and research every issue. Some parties are expected not to be able to afford more in time or money.

These are broad categorizations, and thus any time there is one or more SRL in place at the commencement or during the litigation, I believe that a triage system and multi-door court process, with a court officer, is necessary.

There is one phenomenon that applies to all reasonable SRLs. To the extent they are going to remain in the system, they need to educate themselves, and the courts and government court services can help this process. There are numerous methods to respond to this need that are beyond the scope of this paper. However, in a time of modern technology being used by almost everyone, there are useful 'how to' videos developed very successfully by the BC Justice Education Society (http://www.justiceeducation.ca/) that can be used (with their permission) and adapted, or others created, to assist in this education. The Alta QB would be active in the deployment and development of such resources, if

assistance from Alberta Justice Court Services can be brought to the plate. The phrase 'We Have an App for That' may also come to apply in the justice system as well.

V. DISPUTE RESOLUTION (DR) AND JUDICIAL DISPUTE RESOLUTION (JDR)

A. DISPUTE RESOLUTION (DR)

The NAR mandate some form of DR before a matter is entered for trial, unless the requirement is waived by court order. I will discuss JDR, one of the methods, below. Another is private mediation and little need be said about it other than there is a need for a public roster of trained and authorized individuals, which Alberta Justice now provides.

What remains is a DR process 'in the government sector' or a 'court annexed dispute resolution process.' Alberta Justice had such a Court Annexed DR process prior to the NAR, but there was little to no up-take of it, the parties preferring private mediation or JDR. The Alta QB has requested Alberta Justice to develop a program(s) that is/are complementary to the other existing DR processes to meet the demand discussed in the next section, but it appears to have dithered for over two years without any proposals even being put forward for discussion.

One of the ways that government may be able to provide some very useful government DR process is, in conjunction with Pro Bono Law Alberta, to harness pro bono resources from retired justices and lawyers; and indeed, any active lawyers, who wish to provide such services.

B. JUDICIAL DISPUTE RESOLUTION (JDR)

In 1996, the Alta QB formally developed the JDR program to try to alleviate an unacceptable trial waiting schedule of up to a year or more after booking to obtain a civil trial. The program originally involved primarily mini-trials (as documented elsewhere) and later moved to mediation (facilitative or evaluative). Mini-trials are usually only rights based (i.e., what a court would/could order) whereas the latter was open (as requested by the parties), either an interest based (any legal method of resolving a dispute whether within the jurisdiction of the court or not) and/or rights based process. Some of this distinction between interests

and rights is an illusion as, if a case is not resolved on an interest basis, it must be adjudicated on a rights basis; this is often referred to as 'negotiation in the shadow of the law,' as discussed in my Master of Laws thesis.[6]

Some justices of the Alta QB also offer a Binding JDR process where the parties mediate a case (using either an interest and/or rights base process) and, if resolution is unsuccessful, the JDR justice renders an opinion on rights, which by contract (not judicial directive) the parties agree to accept. Most frequently these are set up using the Summary Trial procedures to establish an evidentiary basis for any resulting opinion.

While the Alta QB JDR program was originally (and remains) voluntary, there was, until the NAR, no mandated DR process. Prior to the NAR there was much JDR demand and success.[7] However, since the NAR, the demand is so great that one can obtain a trial date much quicker than a JDR, and one must be very diligent to do timely booking of a JDR because once the JDR schedule is opened up for an up-coming term (fall, spring, and summer); all spots are usually taken within two days. This is with four justices doing 12 JDRs in Edmonton and five justices doing 15 JDRs in Calgary, each week of 10 months (fewer each week in the summer), with over a hundred done in other judicial centres in Alberta in a year.

There is demand to assign more justices to do JDRs, but as seen in the section below, governments have not provided the additional justices even they agreed to provide over 4 years ago and the demands are even greater now. In the result, unfortunately the access to JDRs may have to be limited in some way. We are currently looking at several alternatives which I will now discuss.

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6 Rooke, *supra* note 1.

7 In my evaluation of the JDR Program as a part of my Master of Laws in Dispute Resolution study in 2008–9, I reported that for the period July 2007 to June 2008, over 600 JDRs were conducted by the Alta QB, with a success rate of over 85% on all or some issues, and in that one year, JDRs, involving 6 justices, saved more than one year worth of civil trials, involving 12 justices, a significant saving in judicial resources. Additionally, it saved an estimated $10,000,000 in legal fees to clients.

i. ASKING THE RULES OF COURT COMMITTEE TO REMOVE THE MANDATORY DR REQUIREMENT BEFORE TRIAL

I do not favour this option, because it 'throws the baby out with the bath water.' Our experience has been that, in addition to those who previously volunteered for DR, including JDR, those that are now mandated/required to do DRs (JDR being one of the choices) have often come, 'kicking and screaming' in some cases, without an expectation to settle their case, but have in fact done so, cutting down in the cost, time, stress, and risk of trial.

ii. RESTRICTING THE JDR SERVICE TO THOSE CASES THAT ARE OTHERWISE CERTIFIED AS READY FOR TRIAL

I do favour this option, and always have, although JDR has been offered on a broader basis over the last 16 years, so as to build up the service JDRs offer, while resources were available. The principle behind this option is that the prime function of the Alta QB is to adjudicate cases, but it is a North America wide statistic that, in the end result, only about 5% of all cases that enter the system need adjudication. Thus, logic would dictate that it is those 5% that would not otherwise settle without judicial intervention that should be the ones on which judicial energy should focus to resolution, rather than trial. Indeed, we now provide, for the first 48 hours after the JDR schedule is released, a first priority for those who certify that they are ready for trial except the DR requirement. A possible variation on this would be an exception for those cases not ready for trial that the Chief Justice, or Associate Chief Justice, agrees to permit for good reason.

I should hasten to add that I am a proponent of DR, including JDR, at an optimum time in litigation, which may well be before trial readiness. Indeed, there is merit in a potential early neutral evaluation (ENE) segment of JDRs for attempts to settle cases after pleadings, but before any disclosure or questioning. However, the problem is not the interest of the Alta QB in providing this service, but the failure of governments to provide the judicial resources to accommodate it. Thus, we may have to retreat to less A2J for litigants and move back to our core responsibilities, as retrograde as that may be.

Moreover, we know anecdotally that many litigants (often in motor vehicle collision cases) do not ever intend to go to trial, but to rather get/save as much as they can at some form of JDR and call it a day;

this is recognized as one form of less than 'perfect justice' discussed above. They could just as easily do that at a private DR as a JDR. Indeed, some would argue (I am not one of them) that JDR should be unavailable for all such cases.

iii. OTHER ALTERNATIVES

A number of other alternatives are being debated within the Alta QB. Some include: a special mediation program in family law (hopefully Alberta Justice will expand current programs in this area outside the current JDR program); removing the availability of JDR during the summer months; adding a trial like 'entry fee' for JDRs, to 'level the playing field,' and others. Indeed, a committee of the Alta QB is currently studying all alternatives with a view to making recommendations. Through this committee the very motivations (positive or negative) for the popularity of JDRs over other forms of DR are being examined, along with ways to alleviate the negatives. Is it cost (in JDRs, the judicial mediator is 'free,' whereas private mediators charge a fee, currently without government subsidy)? Is it the desire to obtain a 'day-in-court,' to tell one's story to a justice of the Court, and to get a judicial opinion? Hopefully, the committee's report will provide some recommendations for assisting in alleviating the stresses caused by this JDR program being so successful.

VI. ORGANIZED PSEUDO-LEGAL COMMERCIAL ARGUMENT (OPCA) LITIGANTS

There has grown up to be a special brand of SRLs who attempt to defy court processes because they claim to be immune from government or court control. They come in a variety of not always consistent forms and names, including 'de-taxers,' 'freemen,' 'sovereignists,' and others. These have been dealt with by the court systems across North America on a piecemeal basis as they have arisen over the last few years, with each court having to substantially 're-create the wheel' to deal with them on an individual case. They have now, however, arisen in epidemic proportions in Alberta, primarily, but not exclusively, in central and northern Alberta. To try to expose them and their methods, and to set out potential ways to deal with them, I have recently delivered 'Reasons for Decision' in *Meads v Meads* 2012 ABQB 571, released September 18, 2012. This is not light bed-time reading, but rather a compendium of the players, their

methods of operation, and potential responses. Because this is a relatively new phenomenon, to provide more information, aside from these lengthy Reasons, I have attached an 'Executive Summary' of the Reasons as Appendix 'A.' I have collectively categorized them by the non-sexy but descriptive handle of 'Organized Pseudo-legal Commercial Argument' (OPCA)[8] litigants to reflect that they are indeed organized, use psychology and 'magic' to attempt to 'teflonize' themselves from the legal process, and are based on arguments prepared and sold commercially by anarchists who I call 'gurus.' These gurus are anti-government and anti-court and encourage naive or malicious litigants to purchase reams of their (supposedly, but truly not) legal drivel, for the commercial gain of the gurus, and with resulting abuse of court processes.

This is a first step in this battle to stop these "litigation terrorists," and to try to return the court system to those who follow the established rules to resolve their disputes.

Whereas there are some movements to remove or simplify rules (because they, arguably, increase costs and delay), these OPCA litigants demonstrate that not only are rules necessary, they must be enforced and those bringing nonsense before the courts, unknown to law, must be stopped. Time will tell what responses are required throughout the court system in North America to eradicate these elements. We are relative pioneers.

VII. RULE AVOIDANCE & LOOPHOLES

As I indicated earlier, there is a growing propensity of parties (and/or Counsel on their behalf) to not comply with, or worse, to try to avoid the rules so as to avoid the cost of a trial entry fee, or for other reasons. One of those methods, especially in family litigation, is to have everything go to a Special Chambers application or a JDR, where the $600 trial fee is not charged. However, when the parties or their counsel (due to laziness or some other reason) don't want to put evidence in affidavits and question/cross-examine thereon, but desire some questioning before the decision maker on issues of credibility and the like, they are too frequently seeking viva voce evidence in Special

[8] This "handle," while descriptive, doesn't easily "roll off the tongue," and therefore suggestions of a more appropriate handle are welcome.

Chambers applications. If this was on one narrow point on relevant conflicts in evidence involving one or two witnesses, and taking an hour or two total, there is not much problem. However, all too often, there is no imposed limit and the result looks very much like a trial by a different name, but without paying the $600 trial fee. To avoid this phenomena the justices in Edmonton QB have recently come to a consensus, pending a wider court-wide protocol, as how to avoid this by tight limits and procedures.

There is also, however, a broader malaise of parties or their counsel not following the NAR and causing the other side costs, or unnecessary procedures before the Court. These litigants are threatening to force a conclusion that the strategy of trying to get litigants to manage their own litigation has failed and to make a wider form of CFM necessary, a response that is impossible without significant judicial and court services resources, which are not even adequate enough at this time. As noted, summary trial and simplified trial procedures and trials of discrete issues are two other procedures to promote to continue to provide A2J.

There is also a growing concern that some parties are using the DR processes (or the lack of them) and the waiver of DR rules to delay the progress of a case; by failing to agree to a DR process in a timely fashion. The Bar and SRLs should know that the Court will not countenance any delay based on these issues, and will readily exercise its broad discretion and cost powers to prevent abuse. Nevertheless, there is anecdotal evidence this abuse is continuing, and adding cost and delay to litigation.

VIII. INADEQUATE GOVERNMENT SUPPLIED JUDICIAL AND OTHER RESOURCES

Notwithstanding all of these pressures, provincial governments and the Federal government, while giving lip service to A2J (indeed, the Federal and Alberta governments are funding a National committee on it), are failing to respond to the legitimate requirement for adequate judicial and related resources to make possible the A2J procedures that courts across the land are eager to provide.

On the judicial resource side, here in Alberta it includes the failure of Alberta Justice to establish by order-in-council a commitment to four new judicial positions approved by the Minister of Justice (now Premier) over four years ago. In that intervening time, we now need at least three more (for which it is intended to shortly make application). In Québec,

where the government has legislated seven new positions for their Superior Court, the Federal Government has failed to amend the Federal Judges Act to provide for those positions, as it would need to do for Alberta as well. This is not a problem unique to Alberta, because I believe most Canadian superior trial courts are facing the same issues.

Additionally, while the current Federal government had a good record of replacing judicial vacancies prior to the last Federal election, notwithstanding their current majority, they have not been keeping pace since. Alta QB currently has one vacancy over a year old, and two that have arisen in the last three months. This process has been hampered by a lack of timely replacement by the Federal government of committee members and chairs on the Judicial Appointments Committees. Each of the provincial superior courts will have a different story to tell in these aspects.

On non-judicial resources; facilities, staff and equipment/supplies are also lacking. While Alberta may be better off than many, we have inadequate courthouses in almost every judicial centre, except Calgary, and major problems in Fort McMurray, Red Deer and Edmonton, in that order. While we have had a relatively good response from Alberta Justice on personnel, it is often less in authority (e.g., CMCs v. CM Masters) or number (there are a number of examples) than our real needs. Again, we in Alberta are relatively blessed with technology and systems, and the Judicial Information and Modernization of Services (JIMS) project promises more, but we are not currently state of the art in technological and information management systems (necessary for CFM for example), although the Calgary Courts Centre is (circa 2007) state of the art for courtroom technology. I know from remarks of Chief Justice Bauman of British Columbia to the BC Branch of the Canadian Bar Association that there are great inadequacies in support for the courts in that jurisdiction, and I would not be surprised to hear of similar situations in other provinces.

The result is not more A2J, but rather, less. This lack of judicial and other resources will be even more catastrophic if this continues because more and more cases will be adjourned and sent home, leading to more delay and costs in all cases and Askov applications in criminal cases; we have already had some in Alta QB, and more are looming. The governments which fail to provide judicial and related resources, while giving lip service to A2J, are, in fact, moving away from A2J. If they do not respond, they will have a burnt-out judiciary, a disgruntled public, and

possible constitutional and models of court administration[9] challenges.

Modern Canadian superior trial (and appeal) courts are working hard to provide A2J by being innovative and using the resources we have to improve the way to resolve disputes in Canada. However, if governments are not going to provide the judicial and other resources to do so, they should abandon the field and give the operating and capital financial resources to the judiciary, who know how to provide A2J, and have the ability to do so. The judiciary is not afraid of the trade-off of accountability, within the recognition that the judiciary is a third branch of government.

IX. CHALLENGES IN CRIMINAL LAW

The focus of this paper is civil (including family) law. However, there are also challenges in the criminal law. While the lack of judicial and other resources mentioned above are a problem affecting criminal law too, the other challenges seem fewer.

SRLs (including OPCA litigants) in criminal law is a growing and troublesome experience that puts the judiciary in a difficult position of trying to maintain fair trial processes, without becoming the litigants 'counsel.' Additionally, the more detailed process to ensure fairness is adding delays to the criminal schedule.

Another phenomenon that challenges judicial scheduling more than judicial resources is the increasing movement to bifurcated trials, with *voir dires* separated from the trial proper. Such separations, especially in jury trials, are often necessary, but are frequently not necessary, although often requested for the convenience of counsel or the accused, causing scheduling problems. The scheduling problems are due to the need to appoint the subsequent trial justice to hear the *voir dires*

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[9] Much work has been done on this by the Administration of Justice Committee of the Canadian Judicial Counsel, on both of which I am a member. That work includes: an analysis of the current systems for the administration of justice in Canada and abroad; a sample Memorandum of Understanding for governments and courts to review if they seek a move away from the executive model; and a Roadmap advising those involved in the administration of justice of the positives and negatives of changing from the executive model and why they might want to, or not, move from there, and how they might do it. Further detail is available on request.

before the trial proper. This has been assisted by the ability to appoint CMJs in criminal cases under the new (2011) provisions of s. 551.1 of the Criminal Code, when 'it is *necessary* for the proper administration of justice' (emphasis added). While these CM procedures arose from the needs of 'mega trials,' when enacted they were wisely broadened to apply to any criminal case where the test was met. The new provisions contemplate that the CMJ will be the trial justice as well, but make the voir dire rulings of the CMJ prima facie binding on the parties, even if the CMJ does not become the trial justice. Areas of interpretation leading to further jurisprudence remain under s. 551.1, but I believe these can be worked out. The result can be positive.

X. OVERALL CONSIDERATIONS

All of this discussion leads to one elementary requirement. While discussing enhancement of A2J is positive, no proposals for the implementation of A2J reforms should be undertaken without a detailed cost/benefit analysis, and more importantly, the provision of the judicial and other resources needed to implement them. Without that analysis and the provision of the resources necessary, no A2J project should be advanced because to do so will increase expectations that cannot be achieved without burnout of the judiciary and court officials.

XI. CONCLUSION

While many issues remain, it is hoped that, like the International Space Station, some new judicial and staff assisted program modules can be added, others decommissioned, and still others renovated to avoid problems and provide A2J in the court system. However, all will require more government resources if A2J is to be maintained, never mind grown. It is time to continue to build and maintain our judicial architecture, but also to provide resources for its use.

The challenge of your questions is welcomed.

Appendix "A"

Court of Queen's Bench of Alberta

EXECUTIVE
SUMMARY

Date: September 24, 2012

From: Court of Queen's Bench of Alberta

Subject: Meads v. Meads, 2012 ABQB 571

Organized Pseudolegal Commercial Argument ["OPCA"] Litigation and Litigants

On September 18, 2012, Associate Chief Justice Rooke of the Alberta Court of Queen's Bench issued Meads v. Meads, 2012 ABQB 571, Reasons for Decision relating to a Court Order granted on June 8, 2012. These Reasons address, inter alia, the modus operandi of Mr. Meads who exhibits many of the stereotypic traits of a specific kind of vexatious litigant who has become increasingly common in Alberta courts, and are reported throughout Canada.

These persons call themselves various names, such as Detaxers, Freemen or Freemen-on-the-Land, Sovereign Men or Sovereign Citizens, The Church of the Ecumenical Redemption International (CERI), Moors,

and possibly others. While they may have different beliefs, these persons act in a similar manner and base their activities on a common collection of conspiratorial, legally incorrect (pseudolegal) and spurious beliefs. In Meads v. Meads they are referred to as Organized Pseudolegal Commercial Argument litigants ["OPCA litigants"], to functionally define them collectively for what they literally are.

OPCA litigants deny that they have an obligation to honour government, court, regulatory, contract, family, fiduciary, equitable, and criminal obligations. They attempt to use techniques, ideas, documents, and arguments that are promoted and sold as commercial products by "OPCA gurus." These gurus are often the leading personalities in "OPCA movements" (collections of OPCA litigants who share common perspectives and coordinate their activities).

OPCA ideas are often bizarre. For example, OPCA litigants have argued that spelling their name with irrelevant punctuation, or only in lower case letters makes them immune to court and state action. They claim that they can declare themselves exempt from the law, or can 'opt out' of being governed, paying taxes, or having motor vehicle licenses or insurance. They say they are only subject to some special and different law (as bizarrely defined by them), or no law at all. They make contracts with themselves and attempt to foist unilateral contracts on others. OPCA gurus and litigants claim a person can access secret bank accounts with huge sums of money. All these ideas, and others identified in the Reasons, are false.

OPCA litigants have proven highly disruptive, both inside and outside the courts. Their conspiratorial beliefs have led to confrontations with police, security, prosecutorial and other authorities, in-court disobedience, criminal convictions, sanctions for contempt of court, being declared vexatious litigants and a broad range of civil remedies. OPCA litigants consistently harm themselves, other parties involved in the litigation, and the administration of justice.

Meads v. Meads surveys and reviews aspects of OPCA litigation, the persons who promote and use these ideas, and the decade of judicial responses, nationwide. This analysis includes:

1. the identity and activity of known OPCA gurus and OPCA movements;

2. the stereotypic features of OPCA documentation and in-court conduct that identify persons who have adopted OPCA concepts, including Mr. Meads;

3. the arguments and ideas that have been advanced by OPCA litigants (including Mr. Meads) and gurus, and how Canadian courts have categorically rejected OPCA schemes as incorrect; and

4. the responses that courts have taken (and need to take) to litigation that involves OPCA elements.

These Reasons explain and organize OPCA ideas and arguments into groups, and identify global defects that permit more direct response to litigants of this kind. The Reasons also suggest how judges, lawyers opposite, and persons targeted by these abusive schemes can more effectively respond to these problematic litigants. The Reasons explain to Mr. Meads, and other OPCA litigants, that if they wish a fair hearing and decision on the merits of their substantive issues, they will have to abandon these OPCA practices (that raise arguments unknown to and invalid under the law) and, rather, follow Canadian law.

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