

Rules? Where We're Going We Don't Need Rules

P Jonathan FAULDS^{*1}

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* QC, Field Law, Edmonton, Alberta.

¹ Rules? Where we're going we don't need rules. *Back to the Future*, with apologies to Doctor Emmett Brown, the inventor of time travel.

INTRODUCTION

In a recent and important judgment,² Alberta Associate Chief Justice John Rooke confronted a phenomenon that has been plaguing courts and law enforcement systems in Canada, the United States, the United Kingdom and elsewhere; the rise of the so-called Freemen-on-the-land movement and others of the same ilk. For those who have not encountered them, such Freemen (and they are usually men) are individuals who take a very literal view of the social contract. They believe they have found a way to avoid being subject to or bound by any law and follow various strategies and protocols which they believe allow them to opt out of the law's authority. Justice Rooke's decision deconstructing the Freemen movement, laying bare the hucksters behind it and the fallacies on which it based, and documenting the mischief to which it gives rise, is of considerable utility for those in the legal system who must deal with them.

But the decision is also illuminating in the contrast it draws between how Freemen think the law works and what the law actually is. In the Freemen view, the law is a set of rigid rules and inflexible procedures. These they interpret in an extremely idiosyncratic way to expose purported loopholes which they can exploit in order to avoid of the law's jurisdiction. In reply, ACJ Rooke provided the so-called Freeman before him, and all his brethren, with a clear and detailed lesson in the inherent authority of Canada's provincial superior courts and how that authority may be exercised to fill in gaps. As ACJ Rooke observed, this inherent jurisdiction is 'adaptive' and is capable of expansion into any area of legal existence not specifically allocated to another decision-maker. His decision relies on this 'adaptive facet of inherent jurisdiction' to make clear that the Freemen are mistaken if they believe they can find a lacuna where they can hide beyond the law's reach.

Just as this adaptive capacity can be used to thwart those who would avoid justice, it can be employed by the Courts in aid of those who

² *Meads v Meads*, 2012 ABQB 571.

seek it. It is one of the tools available to the Courts to introduce an element of flexibility into their procedures, to meet new situations as they arise, and to facilitate access to justice. Rules of procedure, the so-called ‘building codes’ of the architecture of justice, play an important role in ensuring that cases brought within the judicial system are managed in a fair, predictable, and efficient manner that makes the best use of available resources. But more is required to give meaning to the concept of access to justice. One aspect of what ‘more’ is required is this adaptive capacity in the use and application of these rules of procedure. In keeping with the theme of this conference, this short paper will explore the concept of flexibility by analogy to its architectural equivalent, and then by use of some concrete examples that illustrate its operation in a modern judicial system.

I. WHAT IS ACCESS TO JUSTICE?

As a preliminary matter it is worth thinking about what we mean by ‘access to justice.’ Most lawyers instinctively think of access to justice as synonymous with access to the courts. For example, when class action lawyers and judges speak of the class procedure as facilitating access to justice, they mean access to a judge. Class actions enable this in two ways: by combining actions together, they allow claims that would not be economic on their own to be advanced, and by allowing a judge to resolve a multitude of individual claims with a single decision, they free up her or his time to hear other cases. But justice is not confined to the courts, as Canadian constitutional scholar Roderick Macdonald reminded us more than a decade ago, and access to the courts is not a guarantee of justice as many people would understand the term. Speaking as the President of the now defunct Law Commission of Canada at a Justice Canada symposium, Macdonald spoke of the need for law to be responsive to ‘the recalcitrant facts of social life’ and for ordinary people to have better access to the formulation of substantive law. He concluded his remarks with the following observation:

Talk of ‘access to justice’ twice displaces what should be our objective. We come to focus on ‘access’ to justice rather than on ‘justice’ itself; and while we proclaim ‘access to justice’ as a goal, what we really mean is ‘access to law.’ The most significant concerns about justice felt by Canadians have little to do with narrowly cast legal rights; they have to do, rather with recognition and respect. And the most significant barriers to access can only

be overcome through a re-orientation in the way we think about conflicts, rights, adjudication and all-or-nothing judicial remedies; disparities in social power, and not procedural glitches in the processes of civil litigation, are the root of injustice.³

Macdonald's pessimism about the unwillingness of what he called 'official law' to tackle what he considered fundamental issues of justice must have deepened when, in 2006, the Law Commission of Canada closed its doors. It had been defunded by the Conservative government that did not wish to support an institution, which criticized government legislation.⁴

There is much to be said for the view that many aspects of justice, particularly social justice, are more properly sought outside the court system through social evolution and legislative and administrative action. Equally, Macdonald may be right that focussing on procedural access to the courts may unwittingly divert effort from more substantive measures. But surely Macdonald is wrong in one respect. Access to the courts has the potential to provide access to justice, not just in the narrow sense of obtaining a decision from a judicial decision-maker, but in the broader sense of rulings grounded in concepts of fairness, equality, and respect for both individuals and groups; rulings that advance those values both explicitly and implicitly as far as the court's authority extends.

To take one obvious example; aboriginal peoples in Canada face many challenges and disadvantages which have their roots in their unique historical and social circumstances and which remain far from being overcome. But at least since the Supreme Court of Canada *Drybones*⁵ decision in 1969, Canadian courts have played a fundamental role in recognizing, articulating and advancing the rights of aboriginal peoples and defining the obligations of government toward them. This recognition by the courts has in turn resulted in greater awareness and understanding of the central place aboriginal peoples occupy in Canadian

³ Roderick A Macdonald, "Justice is a Noun, but Access Isn't a Verb" (Speaking Notes delivered at the Symposium: Expanding Horizons: Rethinking Access to Justice in Canada, March 31, 2000).

⁴ "Tories' program cuts see \$1B savings," *National Post* (26 September 2006) online: Canada.com <<http://www.canada.com/nationalpost/news/story.html?id=6e2fd91b-b20d-4b4d-9b58-55fa090d2af6&k=834>>.

⁵ *R v Drybones*, [1970] SCR 282.

society. Access to the courts has played an important role in the advancement of justice for aboriginal peoples in its largest sense, lessening inequality, increasing respect for and recognition of their aspirations, and reducing some of the barriers to opportunity.

II. WHAT IS FLEXIBILITY?

The title of this panel refers to Building Codes, and a credible analogy can be drawn between the role played by such codes in the construction of buildings and that of rules of procedure in the pursuit of justice. Both are regulatory in nature. They do not dictate what may be built or pursued; rather, they establish standards which must be followed whatever the desired objective.

The requirements of the building code are equally embodied in the skyscraper and the corner gas station. What kind of structure gets built is determined by the developer's assessment of what constitutes the best permissible use of the land and resources at his or her disposal. What that building looks like and how it works as a building is determined by the imagination of the architect. Neither the aims of the developer nor the vision of the architect are fettered by the building code, although its requirements may in some circumstances demand greater ingenuity to ensure its standards are satisfied. Ultimately, the code seeks to ensure that whatever is built is constructed properly with due attention to the health and safety of its users. In like manner, rules of court do not purport to direct what may be sought through the legal process but to provide for the mechanics of conducting a lawsuit and some baseline standards for fairness and efficiency in the resolution of legal claims. That is one type of adaptability.

Like building codes, the basis for rules of procedure is past experience, projection based on that experience and matters sufficiently proven by other means. What has not yet been experienced, predicted or proven is not reflected in the code or rules. Thus, prior to September 11, 2001, the ability of a skyscraper to withstand the effects of burning jet fuel was not encompassed in any building standard applicable in New York City. In like fashion, until the 1980s or 1990s, rules to deal with trials that lasted more than a year, or involved claims on behalf of thousands of people, did not exist. Until this year, the need to address a significant body of litigants who have concocted an elaborate stratagem to deny the authority of the judicial system had not arisen. Codes and rules

cannot encompass everything. But codes and rules do not preclude appropriate means, consistent with their spirit, being devised as circumstances demand and that calls for another kind of flexibility.

This second variety of flexibility which may or may not exist within any particular set of rules, might be called functional adaptability. This may also be illustrated with an architectural analogy. The notion of flexibility in architecture has been described as comprising five key characteristics:

- **Adaptability:** the ability to adapt to the requirements of different occupants or the changing needs of one occupant with minimal disruption. A Japanese house with movable interior partitions which can be reconfigured to make rooms of different shapes and sizes illustrates this quality;
- **Universality:** a universal design is one that can be used for a variety of purposes by a variety of users without requiring significant individualization;
- **Movability:** movable designs can be readily disassembled and moved to where they are needed more;
- **Transformable:** typically these are modular, allowing customization through the selection, configuration and addition of preformed components;
- **Responsive:** responsive design reacts to the building's environment in useful or creative ways, for example windows that reflect or admit heat and light in response to external conditions and the occupants' needs.⁶

These same qualities (minus perhaps movability) are valuable in the legal process. Rules of procedure designed to be flexible in this way would be long on principles of general application and judicial discretion, and short on specific details. Rather than prescribing how proceedings must be conducted, they would establish a framework adaptable to the requirements of any particular case. Obviously large sections of any set

⁶ "Flexibility in Architecture" (15 November 2007), blog post online: *The Way We Live* <<http://thewaywelive.wordpress.com/2007/11/15/flexibility-in-architecture/>>. See also: Whole Building Design Guide (National Institute of Building Sciences), *Plan for Flexibility*, <http://www.wbdg.org/design/plan_flexibility.php>.

of procedural rules are more like the building code than the principles of flexible architectural design; rules for how and where an action should be started, disclosure requirements and so forth, that deal with the nuts and bolts of procedure.

But examples of the latter sort of rule also exist. They have been written into Alberta's rules of court since at least 1914 in which the following rule of general application appeared:

3. As to all matters not provided for in these Rules the practice as far as may be shall be regulated by analogy thereto.

A version of this rule still appears in the 2010 iteration. The *Alberta Rules of Court 2010* also saw the introduction of another such rule, the purpose statement, which provides:

- 1.2(1) The purpose of these Rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

This purpose is carried forward under Rule 1.4 which states:

- 1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 the Court may, subject to any specific provision of these rules, **make any order with respect to practise or procedure, or both, in an action, application or proceeding before that Court** (emphasis added).

And in case the "subject to" clause is inconvenient, there is the Court's further authority under rule 1.4(2)(d) to: "make any ruling with respect to how or if these rules apply in particular circumstances...."

Thus the rules allow, and provide principles to guide, their own adaptation and extension to meet new circumstances. And where not provided for by rules themselves, the Court's inherent jurisdiction is available to provide the necessary authority for fashioning new rules or adapting old ones to meet the need for such flexibility. What follows are three Alberta-based examples in which the Courts have done just that.

III. ADAPTABILITY IN ACTION: EXAMPLES OF THE ROLE OF FLEXIBILITY IN FACILITATING ACCESS TO JUSTICE

A. MANDATORY ADAPTATION: THERE MUST BE A RULE FOR THAT

Class actions are an extremely useful procedural tool. Where more than one person (often hundreds or even thousands) have the same claim, the class action allows them to be determined en masse. Claims that may not be large enough to justify an action individually become practical when combined together. Resources are conserved by allowing one decision to resolve many cases.

But legislation enabling class action procedure is a relatively new phenomenon in Canada. At the end of the 20th century only a handful of Canada's 14 jurisdictions had enacted such statutes. Alberta was not among them.⁷ Class action statutes provide a detailed and comprehensive procedure for the conduct and judicial oversight of class proceedings. They establish the criteria that a claim must meet to be 'certified' as a class proceeding, provide the mechanism for judicial case management of certified claims, set the procedures for the identification and resolution of the issues that are 'common' to the claims and a host of other practical details relating to these unique proceedings. In contrast, as of 2001, Alberta had a single rule, which provided:

42 Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.⁸

When Alberta claimants attempted to pursue such 'representative actions' they were greatly disadvantaged by the uncertainty of their availability and the lack of procedural guidance. No doubt for similar reasons there was reluctance on the part of the Court to let representative claims to go forward, although some were allowed. One such claim was that brought by a group of more than 200 foreign investors who claimed to have been bilked in an investment scheme to which they contributed in

⁷ This shortcoming has since been remedied. See: *Class Proceedings Act*, SA 2003, c C-16.5.

⁸ *Alberta Rules of Court*, AR 390/68.

the hopes of enhancing their eligibility to obtain permanent residence in Canada. The question of whether or not their claim should be allowed to proceed as a class action under Alberta's lone rule fell to be decided by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc v Dutton*.⁹

The Supreme Court's decision was its first significant pronouncement on class actions in the modern class proceedings era and it is often cited for its statements concerning the history, nature, purpose and rationale for the class action. But it is also the highest authority for the ability of the courts to go where legislation and rules of procedure have not yet ventured, to create and fashion procedures as required by new circumstances. Indeed, the decision in *Dutton* suggests the courts have more than the ability to do this, they have a duty.

Clearly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies the parties ex ante certainty as to their procedural rights. One of the main weaknesses of the current Alberta regime is the absence of a threshold "certification" provision. In British Columbia, Ontario, and Quebec, a class action may proceed only after the court certifies that the class and representative meet certain requirements. In Alberta, by contrast, courts effectively certify ex post, only after the opposing party files a motion to strike. It would be preferable if the appropriateness of the class action could be determined at the outset by certification.

Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them: (citations omitted). However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts **must** determine the availability of the class action and the mechanics of class action practice¹⁰ (emphasis added).

⁹ 2001 SCC 46 [*Dutton*].

¹⁰ *Ibid* at 33–34.

The Supreme Court of Canada noted with approval that the Alberta courts had already taken steps 'to fill the procedural vacuum' and provided guidance for further evolution. That evolution was effectively short circuited by the passage of Alberta's *Class Proceedings Act* the following year, but the principle that the Courts can and must go beyond the rules and make their own when necessary still prevails.

B. PRISONERS: RULES DO NOT A PRISON MAKE

Remand centres in Canada have been under increasing stress for more than two decades. Rising populations, overcrowding, long periods of detention waiting for trials that are also long, lack of programming; all have been the focus of criticism by academics, judges, prison ombudsmen, and not least the inmates themselves. In Edmonton these and related conditions became the subject of a protracted and in-depth judicial review for which there was no procedural precedent when a group of almost 30 remand inmates organized a challenge to the conditions of their detention.

All of the inmates were alleged members of a gang said to be involved in manufacturing and distributing street drugs. The entire alleged criminal organization, from kingpins to street enforcers, had been rolled up by police following a major investigation involving undercover operations and months of electronic eavesdropping. They were detained en masse in Edmonton's Remand Centre for what was expected to be a long time awaiting what was expected to be an equally long, and complex trial. The Centre already held almost twice the number of inmates for which it had been designed. Faced with years in custody, under long hours of lockup, with limited access to recreation and other diversions, the inmates launched a challenge under the *Charter of Rights and Freedoms*, claiming that the conditions they experienced amounted to cruel and unusual treatment.

The inmates invoked the writ of *habeas corpus* as the basis for their claim; a writ that is intended by its very nature to be available with minimal formality. Moreover, the case existed in a kind of jurisdictional limbo, with no agreement as to whether it was criminal or civil in nature. As a result none of the procedural structures that define, guide and facilitate usual court proceedings applied. As the scope of the inmates' complaints became apparent, this lack of structure became a matter of significant concern. Besides complaints of overcrowding, long hours of

lockup and little to do, there were allegations of inadequate diet, substandard health care, poor air quality, 'sick building' syndrome, unfair discipline procedures, racism on the part of some guards and more.

Faced with this, the trial judge drew heavily on his inherent jurisdiction to develop ad hoc procedures to render the case more manageable. He conducted case management days on a regular basis to deal with procedural matters and establish timetables. He required counsel to identify representative instances of the various kinds of complaints rather than hearing evidence about all of them. He ordered submissions to assist him in identifying and framing the real issues. He facilitated and expedited the hearing of some complaints, which the claimants considered critical, as discrete proceedings. This allowed him to render individual judgements on those issues much sooner than if they had remained bound up in the main case. When many of the claimants were released from custody, and later when the criminal case against them collapsed, he found a continuing jurisdictional basis to allow the claim to continue in the concept of public interest standing. None of this was made any easier by the vociferous and continual objections from counsel for the Edmonton Remand Centre (full disclosure, the author was that counsel) that he lacked any jurisdiction or authority to conduct the case as he did.

By the time it was over the case had occupied 265 court days, spread over several years. Some of the inmates' complaints were found to be valid. Most were not. Nevertheless, real change resulted. Most notably, a new and more impartial system of prison discipline was instituted, and special facilities and programs were established for inmates who face long term incarceration while awaiting trial. As a result of the trial judge's flexible adaptation of court procedures, remand inmates enjoyed unparalleled access to justice.

C. INDIAN RESIDENTIAL SCHOOLS: LEARNING FROM THE PAST

Beginning shortly after Confederation, and continuing for more than a hundred years thereafter, Canada in conjunction with the major Church denominations operated a system of residential schools across the country for aboriginal children. The schools separated aboriginal children from their families, homes, communities and cultures, typically without their consent. Sexual and physical abuse was as rampant as education was in short supply. The profound and lasting harm caused to the

aboriginal community by this system fuelled demands for an apology and redress that became increasingly insistent in the last decade of the 20th century.

The case against residential schools was pressed in many forums: politically, in books and plays, before a royal commission, and not least through the courts. Legal claims on behalf of former residential school students took a variety of forms. There were individual actions by the hundreds if not thousands. There were mass claims in which dozens of claimants joined as co-plaintiffs in a single action. In provinces which enabled class proceedings there were proposed class actions on behalf of everyone who had ever attended a particular residential school. And there was a national class action which sought to provide a claim on behalf of every aboriginal person who had ever been placed in a residential school anywhere in the country.

Alberta was one of the centres of Indian Residential School litigation, most of which originated in the days before *Dutton* and was thus advanced by individual and group claims. This onslaught of proceedings involving thousands of claims threatened to swamp the province's judicial system unless some means of organizing it could be found. As it happened, the Alberta courts had unique experience in devising effective ways to manage such mass litigation.

Faced with a previous wave of claims on behalf of hundreds of victims of Alberta's eugenics program, Alberta's then Associate Chief Justice Allan Wachowich had introduced the concept of mandatory comprehensive case management. The idea was elegant in its simplicity. First, gather all claims of the same nature under one roof. Order counsel for the claimants to pick some leaders to speak for the group. Establish a process involving both sides for identifying test cases that will be fast-tracked to trial. Conduct all pre-trial procedures in common so that they only need to be done once. While the decision in the test case trial would not be binding (as would be the case with a common issues trial in a class action) the buy-in resulting from the joint selection of the test cases ensures the decision's precedential value will be significantly enhanced, as will the motivation to pursue settlement. Of course none of this had any foundation in any accepted rules of procedure and some of it was contrary to what the rules and practise notes of the day required. But new circumstances required new solutions. That necessity was recognized on all sides and meaningful access to justice on behalf of some of Alberta's most vulnerable and grievously wronged citizens was achieved.

Thus when the residential school litigation began gathering steam, there was a precedent if not a rule for how it could be effectively managed to advance the interests of all claimants without necessarily advancing all their actions in the usual way. Two case management judges were appointed and comprehensive case management began.¹¹ A plaintiffs' committee was struck, test cases were selected, pre-trial procedures were completed, expert reports exchanged, and the test cases made ready for trial. At this point, as with the eugenics litigation, a settlement was reached.

In ordinary circumstances that would be the end of the story. But this was not ordinary litigation. The settlement talks were conducted on a national basis and aimed to resolve all claims. Settlement, when it was reached, involved all claims, from individual actions to the proposed national class proceeding. To ensure finality and certainty it was agreed that all claims would be rolled into a series of class actions, one in each of the nine Canadian jurisdictions with a class action regime (which by this time included Alberta). Court approval for the settlement would then be sought in each of those courts. Approval by all would be required or the settlement would fail.

Once again the process had entered uncharted territory. There was no precedent for a settlement that required approval by so many different judges, each of whom sat individually and heard submissions separately. Could they speak to each other before rendering their respective decisions? What if their decisions differed, or contained different conditions requiring further action as class action approval decisions sometimes do.

The first problem was addressed by consensus. Counsel for the parties all agreed the judges could and should talk to each other. The second problem required more imagination. When the nine decisions were released, four courts had approved the settlement unconditionally but the other five had made their approval subject to changes to the way in which the settlement was administered.¹² To avoid a further round of hearings and further possible disagreement, the judges took the unusual step of convening a joint case management meeting, in Calgary, to

¹¹ See for example: *Re Indian Residential Schools*, 1999 ABQB 823.

¹² See for example the decision of Winkler J, as he then was, of the Ontario Superior Court of Justice: *Baxter v Canada (Attorney General)*, 2006 ONSC 9599.

hammer out the specific terms which would satisfy their conditions. This was followed by a joint hearing to formally approve the final orders. This novel proceeding opened with an explanatory statement that while they presented the unusual image of a judicial collective sitting together in a single courtroom, each of the judges present was acting individually in the exercise of his or her own unique jurisdiction as a member of his or her particular superior court. With judicial propriety thus preserved, the largest class action settlement in Canadian history was approved.

Today, five years after its approval, almost 100,000 of Canada's aboriginal peoples have received compensation under that settlement. Canada's Prime Minister has given a formal and unequivocal apology to all aboriginal peoples for this deeply misguided and harmful episode in our national history. A Truth and Reconciliation Commission created under the settlement continues its work across Canada to commemorate residential school survivors, pursue awareness of and healing from their experiences, preserve a record of the residential school system, and the stories of those who experienced it and promote a broader understanding of the residential school legacy. By any definition, that is access to justice.

CONCLUSION

Canada's legal system is one of the great engines of our society's evolution. It is seen as the place where issues of broad social concern—abortion, religious, rights, the death penalty, the sex trade, drug policy, constitutional reform—may be considered on a principled rather than a political basis. Particularly since the advent of the *Charter*, the Courts have been called upon to adjudicate an ever broader array of such issues often arising in ways which do not fit neatly in the procedural pigeon holes of the past. As the examples in this paper indicate the Courts are also increasingly called upon to deal with claims involving systemic and historic wrongs which may tax their usual procedures.

The need for rules of procedure in the conduct of litigation brings to mind Dwight Eisenhower's famous dictum that planning was essential in the conduct of war but nothing ever went according to plan. Rules are indispensable but cannot and should not try to account for every eventuality. The variety of the claims for justice by determined litigants and the novelty of the manner in which those claims are pursued by resourceful counsel defy prediction. Rather, they call upon the courts to

exercise their procedural powers in an adaptive fashion with the combination of practicality and creativity which the above examples illustrate.