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November 30, 2007

Via Facsimile & E-mail

B.C. Justice Review Task Force
c/o Law Society of B.C.
8th Floor, 845 Cambie Street
Vancouver, B.C.
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Dear Sirs/Mesdames:

Re: Maritime Law Section of B.C. ("CBA")
<u>Comments on Proposed New Rules of Civil Procedure</u>

The Maritime Law Section has canvassed its members for input in response to the call by the Task Force for comments on the proposed new rules ("Proposed Rules"). The present Rule 55 (Admiralty Rule) which will be the proposed Rule 19-1 is of particular interest to the Maritime Section but this letter includes comments with respect to many of the other proposed changes to the Rules.

We express our appreciation for the considerable effort, critical examination and re-drafting of the Proposed Rules by members of the Task Force. There are many laudable aspects to the Proposed Rules. Our comments are limited to concerns raised by members of the Maritime Law Section with regard to certain of the changes proposed. We trust that the Maritime Section's comments will assist the Task Force in its efforts to make positive changes to the Rules. We have structured the comments to follow the Concept Draft Overview of July 23, 2007.

1. Object of the Rules (Part 1)

We are supportive of the overall objective of ensuring that litigation is dealt with justly and pursuant to a principle of proportionality. While more active court management can be of assistance to litigants, we are concerned that the factors that form the basis of the "courts assessment" do not specifically include the importance of the case to the actual parties to the litigation. Certainly at the trial level, many cases are of significant importance to the litigants

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whereas the importance to the jurisprudence of British Columbia may be less so. This ought not to impact the process available to the litigants.

We also consider that the reference to the "public interest" as an important factor in considering the amount of time and process for a proceeding, without inclusion of the litigant's interests as a factor is troublesome. The interests of the litigants with respect to the process available to them, particularly at the trial level, ought to be as important as the public interest.

2. **Case Initiation/Response Process (Parts, 2, 3, 5 and 14)**

Terminology

We see little demonstrated reason to change the terminology for pleadings. The term "dispute summary" will be confusing to the public and to overseas clients in maritime actions. Foreign companies, shipowners and insurers are well acquainted with terms such as "Statement of Claim" and "Statement of Defence". They are long-standing terms, well recognized, and are found throughout the case law. English, American and other courts use similar terms.

Summary of Facts

We concur that an arbitrary 3-page limit on the summary of facts should be abandoned.

Statement Certifying Belief that Facts are True

This requirement is problematic for the maritime bar. A high percentage of maritime claimants are from foreign countries. The requirement for this certificate will be difficult, if not impossible, to obtain on short notice particularly where there are several claimants. Often, in maritime proceedings, an action is commenced only once a vessel has arrived into B.C. waters in order that the vessel may be arrested to obtain security for the claim. It is not uncommon for proceedings to be commenced and a vessel arrested within the space of a few hours. A certification requirement will nullify the longstanding admiralty process of arresting a vessel on short notice.

Other logistical issues that come to mind include:

(a) Time sensitive matters such as a maritime ship arrest or injunction will be adversely impacted.

(b) Who will sign for a foreign corporation (or local for that matter)?

(c) The basis of allegations are often comprised from evidence of many witnesses. How is one person to certify a belief in all of the facts necessary to the pleading?

(d) Many maritime actions involve subrogated insurers without the direct involvement of the party named.

The same concerns are raised with respect to the requirement that respondents must certify their belief in the truth of the facts stated.

Service of Dispute Summary

We strongly support the expeditious movement of actions ahead but service of the Dispute Summary within 60 days will cause needless motions in maritime actions leading to increased costs. We recommend that the timeframe be liberalized to an initial 120 day period with full discretion given to the court on the length of time extensions.

Amendments to Pleadings

The proposed rules have eliminated a free amendment to the pleadings following a Case Plan Conference. This could lead to increased costs if counsel do not agree to an amendment following discovery. We consider that the parties should be entitled to one free amendment.

Particulars

The entitlement to require further and better particulars ought to be retained. This may be particularly so in complex cases or if the new Dispute Summary will be limited in length.

3. **Document Production (Part 6)**

We acknowledge that voluminous document production in some cases is unwarranted. However, the reduction in the scope of producible documents at least initially will pose problems. The present requirement for full production at an early stage still does not eliminate difficulties in obtaining the documents from reluctant parties. The concern is that a requirement for less than full production will encourage only piecemeal disclosure leading to delay and increased costs following on applications to court. The existing Rule 26 at least provides some comfort to a party demanding discovery of documents that opposing counsel and his client are obligated to make every effort to obtain and disclose all relevant documents. We consider that a similar requirement should remain in the Proposed Rules.

Currently, the rules permit a party to request an Affidavit verifying documents which often serves the purpose of persuading production of documents from a reluctant party. We consider that a similar provision ought to be retained in the Proposed Rules.

4. **Case Plan Orders and Conferences (Part 4)**

The requirement for personal attendance of parties at a Case Planning Conference is difficult in many maritime cases. Often both parties are foreign companies on one side of the world or another. The Federal Court has dealt with this problem in its case management conferences by permitting telephone and/or video attendance where appropriate. There ought to be a mechanism enabling counsel alone to appear in appropriate situations. Many maritime cases involve subrogated actions where an insurer has stepped into the shoes of the plaintiff. In many of those actions a foreign shipowner's defence is handled by the owner's protection and indemnity

association. Perhaps the proposed rule should permit attendance of instructing insurers rather than the actual party where appropriate.

The Proposed Rule requires a Case Plan Order. The maritime bar has familiarity with similar procedures in the Federal Court and agree with the general purpose of the rule, that is, that an action cannot proceed far without the claimant and respondent consenting to a Case Plan Order setting out a timetable for the steps in the action.

However, some difficulties arise in maritime actions. The rule sets out a list of steps that a party can take before obtaining a Case Plan Order but does not create an exception to allow for the arrest of ships or mareva injunctions which are steps often taken at an early stage and without notice in maritime litigation. This needs to be corrected. That the rule permits a party to bring a motion before a Case Plan Order if the matter is urgent only creates further delay, costs and expense. Admiralty arrest of ships has historically been a simple, procedural right, which the Proposed Rule erodes.

The proposed structure for Case Plan Orders should be streamlined. For instance, requiring a signature by all parties for a Case Plan Order before a conference can be held is cumbersome. Reluctant parties can put up many hurdles to generate delay and ultimately increase costs.

5. Ascertaining Facts (Part 6)

Examination for Discovery

The Maritime Bar is of the opinion that counsel ought not to be constrained by arbitrary time limits on discovery. Counsel usually reach agreement on the length of discovery and accommodate opposing counsel if further time is required where reasonably necessary. However, formally requiring consent could lead to unnecessary court applications and increasing costs. It also does not make sense that one defendant's rights of discovery are limited by the plaintiff's choice of the number of defendants he seeks to pursue.

Witness Summaries

The question is whether the increased costs at an early stage of obtaining witness evidence summaries will provide a savings in time and judicial resources. It is suggested that the Proposed Rules provide further guidelines with respect to consequences for refusal to provide a summary and on the level of detail that the summary is required to contain.

6. Expert Evidence (Part 8)

Significant changes are being proposed within the New Rules as they pertain to experts and expert evidence. It appears that the purpose of these changes is to attempt to obtain more objective evidence from experts, and to limit the number of experts required in an action. However, in certain cases, these changes may actually increase costs and cause delay, limit parties' ability to negotiate early settlement, and may even contaminate expert evidence tendered in matters.

The key concerns with respect to the Proposed New Rules are as follows:

1. The requirement that expert opinion evidence cannot be tendered unless provided for in the case plan order applicable to the action [Rule 8-1 (2)];

2. Detailed, formal requirements with respect to appointment of joint experts [Rule 8-2]; and

3. The requirement that all experts giving opinion evidence on an issue must meet, without counsel, and produce a joint statement detailing the differences between them in advance of trial [Rule 8-3 (4)].

(i) Case Plan Order [Rule 8-1 (2)]

We do not anticipate any problems with respect to the proposed requirement that expert evidence cannot be tendered unless provided for in a case plan order, unless there is a risk that parties may be prevented from relying on experts either already retained before the case plan order is made, or if parties are prevented from adding experts after an initial case plan order has been finalized.

Parties and potential parties to litigation often retain and consult experts prior to commencing legal proceedings, which consultations often result in early settlement. Parties will be discouraged from seeking advice from experts and obtaining written opinions necessary to resolve matters before the case plan order has been made if there is any chance that expert evidence, after being obtained, will not be approved through the case plan order process. There must be certainty that the time and expenses incurred with respect to experts will not be wasted, and can be used later in the event that a court action becomes necessary. As a result, parties and potential parties to actions will be less likely to resolve claims either prior to the commencement of actions, or early on in legal proceedings, where a particular expert that a party believes is necessary to provide evidence has not yet been approved in a case plan order.

Similarly, this Proposed Rule may also complicate the ability to settle throughout the course of legal proceedings if experts cannot be added after an initial case plan order has been made. Parties often consult with experts as a case develops to confirm a strength or weakness in their case before attempting settlement, but will be reluctant to do so where that expert has not already been approved in the case plan order, or where the party does not want to identify the fact that they are consulting with a particular expert by naming them in the case plan order, perhaps due to the fact that the party is testing a weakness in their case. Under the current Rules, it is possible for parties to test weaknesses by consulting experts, and to opt, at a later date, whether or not to deliver and rely upon that expert's evidence. If the New Rules force parties to identify and approve all experts that they intend to rely upon at an early stage in proceedings, or before the parties can comfort themselves that their experts will be permitted to give evidence in the matter, parties will be reluctant to seek expert advice on anything other than the clearest of issues as they will run the risk of either assisting the opposition case if an expert is identified and the opinion that is obtained is not favourable, or of obtaining expert opinion evidence that the party cannot later rely upon because it is not approved within the case plan order either at the outset, or at some later date.

In addition, it appears that this Proposed Rule may increase costs, and cause delays. Currently, parties are free to consult experts at any point that they deem appropriate, and to decide at a later date whether or not to rely upon that evidence. This Proposed Rule simply adds additional steps and potentially new Court appearances that will be required before retaining and instructing experts, which steps could result in increased costs, and delays in proceedings.

(ii) Appointment of Joint Experts [Rule 8-2]

The Proposed Rules have added several steps and formalities with respect to the appointment and instruction of joint experts. While some of these formalities may be necessary in the situation where a defendant and plaintiff agree to appoint a joint expert, the formalities seem unnecessary and, potentially, time consuming in situations where co-defendants are interested in entering a cost sharing agreement to rely upon a joint expert.

(iii) Conference Between Experts and Joint Statement [Rule 8-3 (3)]

The requirement for experts to confer and produce a joint statement in advance of trial is a significant concern as it allows the experts to essentially try the case behind closed doors, without structure, or policing, of any kind. The primary concern is that a situation is created where the experts are essentially trying to convince each other of the other's position. While obtaining a joint statement will assist in identifying the key areas of dispute, there is likely a better way of achieving this objective. At the very least, counsel must be present at the experts' conference. Counsel's presence at such a conference will serve to provide the conference with structure, and to ensure the validity of the process. Otherwise, this New Rule will likely result in the production of joint statements that are skewed to the view of the expert who is more senior, more aggressive, or who is the more accomplished writer. Further, counsel's attendance at this conference will assist with counsel's ability to more fully prepare for trial, as well as their ability to focus on the key issues. Preventing counsel from attending such a meeting is comparable to proceeding with discoveries without counsel, and forcing counsel to later attempt to determine what happened and how the evidence will come out later at trial.

In addition, the expert's conference is only practical when dealing with local, professional experts. If the key issue is one that is not commonly litigated, and the experts used are newcomers to the judicial process, it is difficult enough to get these experts to prepare reports that are compliant with Court requirements without constant assistance and instruction from counsel. Further, time and cost consequences will increase if this New Rule is pushed in cases with international experts, and in multi-party cases.

As a whole, Part 8 of the New Rules creates a situation where parties and counsel are deprived of too many freedoms with respect to their desired use of, and control over experts. Parties incur significant costs with respect to experts and expert evidence. Parties, and not the Court, should maintain the current levels of freedom and control that they have over their experts.

7. **Revised Motion Practice (Part 7)**

Maritime law litigation often involves conflicts of law and jurisdictional arguments that must be set out clearly and concisely in order to assist the court. A requirement that the party summarize in not more than one page, the factual and legal basis upon which an order should or should not be granted may be of little assistance to the court and the parties who ought to have a full analysis and disclosure of authorities by all participants in advance of the hearing.

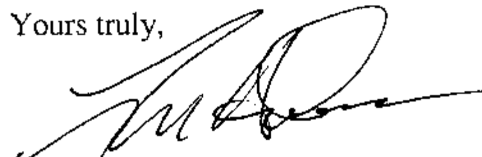
Admiralty Matters

The admiralty jurisdiction in the B.C. Supreme Court, currently Rule 55, is set out under Proposed Rule 19-1. This rule provides that actions *in rem* may be commenced against vessels in the B.C. Supreme Court and further that the court has jurisdiction to issue warrants for arrest of vessels. The B.C. Supreme Court is the only superior court in Canada that has *in rem* jurisdiction. In all other jurisdictions *in rem* jurisdiction can only be exercised in the Federal Court of Canada.

The Maritime Bar has welcomed the ability to bring maritime actions in the B.C. Supreme Court and our concern is that the Proposed Rules do not negatively impact on the ability of claimants and defendants to commence and conduct maritime litigation expeditiously and efficiently in the court.

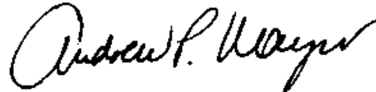
The Maritime Section wishes to thank the Task Force for the opportunity to set out comments and concerns in respect to these important proposed changes to the Rules.

Yours truly,



Thomas S. Hawkins
Chair, Proposed New Rules Committee
Maritime Law Section, B.C. (CBA)

Yours truly,



for: Kim Wigmore
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