SUBMISSION TO:

CIVIL JUSTICE REFORM WORKING GROUP

JUSTICE REVIEW TASK FORCE,

ON:

PROPOSED NEW RULES OF CIVIL PROCEDURE OF THE BRITISH COLUMBIA SUPREME COURT

ISSUED BY:

CANADIAN BAR ASSOCIATION
BRITISH COLUMBIA BRANCH
POVERTY LAW SECTION

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PREFACE

This submission was prepared by the membership of the Poverty Law Section of the British Columbia Branch of the Canadian Bar Association ("CBABC"). The comments expressed in this submission reflect the views of the Poverty Law Section only and are not necessarily the views of the CBABC as a whole.

Initially, the Poverty Law Section (the "Section") planned to simply contribute a segment to the CBABC's Supreme Court Rules Special Committee ("Committee"). However, the Section's draft became quite extensive and, naturally, focused on issues of particular concern to the Section. Accordingly, it was decided that the Section should make its own separate submission.

It should be noted that most of the major contributors to this submission are also employees of the Legal Services Society ("LSS"), and worked on LSS's submission to the Justice Review Task Force. Consequently, both submissions are based on the same materials and are very similar. Nonetheless, it was felt appropriate that each entity should make itself heard individually. While LSS and the Section have large overlapping areas of interest, they are nonetheless separate entities. This submission is made solely on behalf of the Section, and reflects the Section's particular point of view.

The Section is very pleased to have this opportunity to contribute to this comprehensive revision of the Supreme Court Rules, which presents a golden opportunity to introduce changes to help make access to justice and the Supreme Court a reality for all segments of British Columbian society.

INTRODUCTION

The members of the Section see examples every day in which the civil Rules of Court operate as a barrier to justice to low-income people who cannot effectively navigate its procedures.

While mere procedural reform cannot solve the problem of access to justice, it can go a long way to making our system of justice more inclusive.

While the Concept Draft does make a few minor changes that have the effect of making the Supreme Court more accessible, there is much more that needs to be done.

The balance of this submission will follow the organization of the Concept Draft.

PART 2 – PROCEEDINGS COMMENCED BY FILING A DISPUTE SUMMARY

Recommendation 1: Rules 2-1 and 2-3 should be changed to retain the use of the terms "Statement of Claim" and "Statement of Defence."

Rule 2-1 replaces the current "statement of claim" with a "dispute summary," and Rule 2-3 replaces the current statement of defence" with a "response."

There is no clear advantage to this change, and in fact it may be confusing. The term "dispute summary," for example, does not *per se* alert a defendant to receipt of notice of a legal claim, and may not be readily understandable to many people whose first language is not English. Furthermore, "dispute summary" is vague in that it could refer either to the commencement of a claim, or to a decision about the merits of a claim.

The terms "Statement of Claim" and "Statement of Defence" and "Claimant" and "Defendant" are common terms with which many lay people are already familiar, and are more readily understandable to many people whose first language is not English.

Recommendation 2: Rule 2-3 should give a respondent 28 days to file and deliver a Response, and provide that no court fee be charged for filing a Response.

Under the current Rule 14, a defendant served with a writ of Summons and Statement of Claim can advise the Court of their intention to defend the proceedings by filing an Appearance within 7 days. Rule 21 then provides a defendant an additional 14 days to file a Statement of Defence and, if applicable, a Counterclaim. Thus, a defendant has 21 days altogether to prepare and file a written defence to a plaintiff's claim.

It should be noted that the Appearance is a simple, one-page document that a lay person can easily prepare and file without having to pay a filing fee. It enables almost any lay litigant to respond to a lawsuit, without barriers created by lack of money or legal advice. It is therefore very important that these advantages not be lost in the simplification of the Rules and response processes.

Under the Rule 2-3, after being served with a Dispute Summary, a Respondent would have only 14 days to file and deliver a Response and Counterclaim, 7 days less than under the current Rules. The draft Rules do not set out what, if any, filing fee would be charged for filing a Response.

Furthermore, the Concept Draft does not permit the respondent to make a *pro forma* denial of the Claimant's claim. Instead the Respondent must admit or deny each fact as set out in the Dispute Summary. If the Respondent denies the Claimant's right to relief, the Response must set out a concise summary of the legal and factual basis for the denials.

While these changes may serve a greater good, they make it impossible to file a proper response without seeking and obtaining legal advice within 14 days, and, if a fee will be chargeable, paying that fee.

Thus the Concept Draft as it stands creates new obstacles for self-represented litigants.

Many self-represented litigants would have difficulty obtaining meaningful legal advice within 2 weeks of being served, and therefore risk being unable to respond within the proposed 14 day time limit. It takes time for these people to find and access sources of legal advice, such as pro-bono clinics, the LawLINE or the Lawyer Referral Service. It takes also time to set up the necessary appointments, and then to receive and act on the advice they receive.

These difficulties would be particularly felt by the working poor, to whom it is a hardship to take time off work, and by people who live in remote communities where legal advice may be unavailable. Those without access to computers, the internet, a telephone and/or fax machine may have great difficulty even obtaining the relevant court forms.

If there is a court fee for filing a Response, that fee would be an additional barrier to low-income self-represented litigants who want to defend an action.

In summary, 14 days is too short a period of time for a self-represented person to learn about sources of legal advice, access those resources, act on their advice and, if necessary, file an application for indigency status.

The consequence of failing to file a Response is significant; if a Respondent is unable to file a Response and Counterclaim because of inability to obtain legal advice or pay a filing fee, a Claimant may take default, making the legal process more complex and leaving the Respondent feeling more overwhelmed and further penalized.

The Section therefore recommends that, in order to make dispute resolution more accessible to all British Columbians, the time for filing a Response be increased to 28 days, and that there be no filing fee charged for a Response.

Recommendation 3: Rule 2-1 should include a local venue rule requiring Claimants to file their proceedings in the registry closest to where the respondent lives or carries on business, or where action of action arose.

Both the current rules and Concept Draft allow a plaintiff or petitioner to sue a defendant in any Supreme Court Registry in British Columbia, subject to either party applying to transfer the venue.

For self-represented defendants, especially low-income ones, the absence of a local venue rule in the current and draft rules creates serious barriers to defending themselves in the Supreme Court.

To give but a few examples, we are aware of cases in which:

- The BC provincial government sued a low-income person living east of Nelson, B.C. in New Westminster Supreme Court Registry, although the claim arose in Nelson. The plaintiff had counsel. New Westminster is not a fax filing Registry.

- The federal government sued a low-income student living in the Lower Mainland in the Kelowna Supreme Court Registry, although the claim did not arise there.

- A private bank sued a low-income person living in Cranbrook, B.C. in the Vancouver Supreme Court Registry, although the claim did not arise in Vancouver. Vancouver is not a fax filing Registry.

A low-income person sued in a registry far from home by a plaintiff with counsel faces not only a real power imbalance, but

significant barriers to accessing the dispute resolution process at all.

Many low-income respondents who are sued in a Registry far away from their community simply cannot afford to travel to the Registry. A person who cannot afford either to hire counsel or to travel to the Registry where the proceeding was filed cannot, in practice, make an application to transfer the file to another Registry that is more accessible to them. In those cases, a self-represented defendant's only choice is to try and defend themselves at a distance, which greatly complicates their situation. For example, because an application for indigent status must be made in person or through counsel, the lack of a local venue rule may result in some respondents simply being unable to defend themselves altogether, as they cannot afford the fee to file a Statement of Defence and cannot afford the cost of travel to make an indigency application.

It should also be noted that the Concept Draft can reasonably be expected to add more personal court appearances to the current dispute resolution process. For example, the requirement that litigants personally attend a case planning conference adds one such appearance to the current process, and the Concept Draft's provision for increased intervention by judges in case management can be expected to add more. This expected increase in court appearances under the proposed Rules makes it crucial that a local venue rule be added.

Good, practical examples of local venue rules exist in B.C. For example, section 21 of the *Law and Equity Act* provides for a local venue rule in foreclosure proceedings to ensure that a foreclosure proceeding is commenced in the registry closest to where the property (and presumably the defendant) is located.

Similarly, Rule 1(2) of the *Small Claims Rules* provides:

> *(2) A claimant must file a notice of claim and pay the required fee at the Small Claims Registry nearest to where*
>
> > *(a) the defendant lives or carries on business, or*
> > *(b) the transaction or event that resulted in the claim took place.*

Our experience indicates that the small claims local venue rule decreases barriers to the courts for defendants, and so we submit that it be adopted into the new Rules.

PART 7 – PRE-TRIAL APPLICATIONS

Recommendation 4: Rule 7-1 should give a respondent to an application 14 days, not 7 days as proposed, to file and deliver a meaningful Application Response and supporting affidavits.

Under current Rule 44, the time limit for filing a Response and supporting affidavits in a chambers application is 8 days, unless the application is a for a Summary Trial in which case the time limit is 11 days.

The current time limits for responding to a chambers application are already insufficient for many self-represented litigants, for the same reasons they are insufficient for filing a Response to a Dispute Summary.

Rule 7-1 provides that, within 7 days of receiving a Notice of Pre-Trial Application and any supporting affidavits, the "responding person" has 7 days to file their "application response" along with any supporting affidavits, unless the application is for a summary trial, in which case the application respondent has 14 days to file these documents. In short, the new rule would provide a slightly longer reply period for responding to summary trial applications, but shortens the reply period by 1 day in regular chambers applications.

Rule 7-1(6) also provides that, where a respondent wishes to oppose an order sought, the application response must contain a summary of the factual and legal bases on which the orders sought should not be granted. In this way, the respondent would be required to provide more legal substance about their case at a much earlier stage than is required in the current Outline procedure.

Thus the proposal to shorten the reply period while at the same time increasing the degree of legal substance that a respondent must provide in that period would only exacerbate the difficulties that the average lay litigant already faces in attempting to prepare a meaningful and coherent response to a chambers application, and would make the dispute resolution process less accessible and efficient for self-represented litigants.

The Section therefore recommends that, in order to make dispute resolution more accessible to all residents of BC, the time for

filing an Application Response and supporting affidavits, be increased to 14 days.

PART 14 – PETITION PROCEEDINGS

General Comments

Judicial oversight of administrative authorities is the most important function of the Supreme Court for many low-income and financially disadvantaged people. In addition to foreclosure proceedings, the Supreme Court has exclusive jurisdiction to hear reviews of and appeals from administrative bodies such as the Residential Tenancy Branch, the Employment and Assistance Appeal Tribunal, and the Superintendent of Motor Vehicles.

With respect to chambers practice, the Concept Draft represents a slight, but not marked, improvement over the current Rules.

Under both the current and proposed Rules, the key provisions relating to judicial review practice are scattered over four rules:

- Rule 7-5 (Affidavits) is essentially the same as the current Rule 51 (Affidavits);
- Rule 7-6 (Application Procedures) is almost identical to the current Rule 52 (Chambers);
- Under the Concept Draft, the current Rule 10 (Originating Applications) is split between Rule 1-4 (Choosing the Correct Form of Proceeding) and the first part of Rule 14-1 (Petition Proceedings); and
- The balance of Rule 14-1 consists of a significantly simplified version of the old Rule 51A.

The proposed Rules’ simplification of the unnecessarily complex procedures currently set out in Rule 51A marks an improvement over the current Rules, and should serve to somewhat decrease current barriers faced by self-represented litigants in accessing the Supreme Court. However, further improvements can and should be made.

Recommendation 5: Rule 14-1 should be amended so as to read as a self-contained procedural code for petition proceedings.

As the Concept Draft stands, Rule 14-1 (Petition Proceedings) is not a complete code regarding judicial review. Currently, the proposed rules relating to affidavits and application procedure to be followed in petition proceedings fall under Part 7 "Pre-trial Applications." As the hearing of a petition is not a pre-trial hearing, this current arrangement is likely to confuse a self-represented litigant.

We recommend that Rule 14-1 expressly refer the reader to Rules 7-5 and 7-6 by adding subrules stating that Rules 7-5 and 7-6 apply to Petition proceedings. This should not only prevent the confusion caused by the heading of Part 7, but would make Rule 14-1 a self-contained procedural code for judicial review, thus making it far easier for a self-represented litigant to follow the correct procedures.

Finally, we recommend that proposed Rule 14-1 be further altered to incorporate a reference to the provisions regarding indigency applications, which we set out below be included in a new Rule 18-3.

Recommendation 6: Form 69 (Response to Petition) should be revised for greater clarity.

Rule 14-1(5) provides that a response to a petition must be in Form 69, which is largely the same as the current Form 124.

However, one paragraph reads:

> *The factual and legal bases on which the relief sought in the petition should not be granted is as follows*:

This proposed wording is overly complex, indirect, and grammatically awkward. We propose the following alternate wording as being simpler and less confusing:

> *The facts and legal reasons why the court should deny the relief that the Petitioner seeks are as follows*:

Recommendation 7: Rule 14-1(4)(c) should give a Petition Respondent 28 days, not 14 days as proposed, to file and deliver a Response, and supporting affidavits.

Under the current Rules, a respondent served with a Petition must file an Appearance within 7 days of service and a Response within 8 days from the date of filing the Appearance. The Concept Draft would create a single deadline of 14 days from the date of service for the Response.

Simplifying two deadlines into one and making the time limit a multiple of weeks are improvements. However, the length of the proposed deadline for Response is too short. A respondent to a Petition must not only prepare a response, but also organize and secure all their evidence, usually in affidavit form. This may be from several sources, some of -which may not be readily available. These extra duties would pose a particular hardship to low-income people, who would also be faced with attempting to access such legal advice and representation services as may be available to them within this short time frame. We recommend the deadline be lengthened to 28 days.

Recommendation 8: Rule 14-1 should specify that petitioners and respondents in residential tenancy matters must file a petition, supporting affidavit, and response that are specifically developed for judicial review of RTB decisions. Those forms should be developed in consultation with stakeholders. Further, that proposed Rule 14-1 be altered to require and reference specialized forms for short leave applications for interim stays of RTB decisions.

Judicial review of Residential Tenancy Branch ("RTB") decisions, especially evictions is a matter of particular concern to the Section). Not only are the interests at stake in eviction cases urgent and of fundamental importance to low-income people, but the practical time frame in which a judicial review must be pursued is very short. Furthermore, in our experience, the quality of decision-making rendered by RTB is often seriously lacking or do not adequately observe the principles of natural justice. Access to judicial review in such cases is of the utmost importance to the affected tenants, who are often low-income.

The Administrative Tribunals Act sets a time limit of sixty (60) days in which to apply for judicial review of decisions of the RTB. However, in practice the time limit in eviction cases is

much shorter. This is because section 84(1)(b) of the *Residential Tenancy Act* ("RTA") provides that a decision of the RTB may be filed in Supreme Court and enforced as a judgment of that court after the time period to apply for an internal review of the RTB decision has expired. In eviction cases, section 80 of the RTA provides a limit of 2 clear days in which an application for internal review may be filed. Filing an internal review does not guarantee a stay of the decision in question, and the grounds for review are extremely narrow.

So in practice, a tenant whose landlord has served them with an Order of Possession (i.e. eviction order) issued by the RTB has an effective limitation period of as little as 2 clear days in which to file an application for Judicial Review with the Supreme Court, together with an application for an interim stay of a Writ of Possession, plus an application for short leave on the interim stay motion. If the application for judicial review is not filed within those 2 days, the tenant risks the landlord obtaining and executing a Writ of Possession against their home. Furthermore, within those 2 days, a low income tenant will also need to file an application for indigency status.

These extremely short deadlines support the adoption of specific forms and procedures in judicial reviews of RTB decisions, such that access to the courts is a practical reality for tenants.

Reviews of decisions of the RTB tend to concern a limited range of legal issues and facts that lend themselves well to standardized forms. In fact, it is our understanding that specific court forms for judicial oversight of decisions of the Rentalsman (as the RTB was then known) were used in the 1970s. We recommend that specific forms be created for judicial review of RTB decisions, much in the way that specialized forms exist for pleadings in family law matters (e.g. Forms 127, 127A, 128, 128A etc). We propose specific forms in the nature of partially completed templates which prompt the petitioner to, as it were, fill in the blanks. A specific form of petition should be developed so that it has contained within it a notice of motion and an application for short leave for interim orders. The current requirement that separate documents be completed for short leave applications and notices of motions is very cumbersome and time consuming for the average citizen facing eviction.

In developing Rule 14-1 and the specific forms, we recommend that the Civil Justice Reform Working Group consult directly with various stakeholders including judges, the staff of the Supreme

Court Self Help Information Centre, lawyers who work in this area, such as staff at CLAS and in LSS's Civil Law Practice Group and the Tenants' Rights Advisory Centre (TRAC). As a point of departure, we again recommend the resources disseminated by CLAS, which can be found at http://www2.povnet.org/interim stay. Such a consultation should also include the question of whether specific forms should be developed for judicial review of decisions of some other administrative tribunals, such as the Employment and Assistance Appeal Tribunal, whose decisions specifically affect low-income people.

As an alternative to placing these special provisions regarding judicial reviews of RTB decisions under Rule 14-1, they could be put into a new rule under Part 19 (Special Rules for Certain Proceedings). In our view, however, it is preferable to these rules within Rule 14-1 itself, so that it remains a complete code regarding the judicial review process.

PART 18 – SPECIAL RULES FOR CERTAIN PARTIES

Recommendation 9: Part 18 should include a specific rule and forms governing applications for indigent status, and exempting recipients of welfare benefits from paying court registry fees, without the need to apply for indigent status.

Neither the current nor proposed Supreme Court rules contain specific rules or forms regarding applications for indigent status. This is an anomaly since the Court of Appeal has specific rules (Rules 38 and 56) and a specific form (Form 19) for such applications.

For the Supreme Court to be accessible to British Columbian there must be a clear and easily understandable process for low-income individuals to apply for indigent status. At present, a layperson looking at either the current or proposed Supreme Court Rules would have no idea that such a thing exists, as neither set of rules makes any reference to indigent status.

As applying for indigent status currently requires fairly extensive paperwork, it is a requirement that may act as an obstacle to court access for some low income people. It seems that recipients of welfare benefits can logically be presumed to meet the financial requirements for indigency status, so we recommend that they be exempted from the requirement to apply for indigency status. In such cases, court registry staff could

simply waive court registry fees upon written proof that a person receives welfare benefits.

We recommend that Part 18 (Special Rules for Certain Parties) be altered to include the following:

Rule 18-3 – People who cannot afford to pay court registry fees

(1) A person who receives of welfare benefits from the Ministry of Employment and Income Assistance is exempted from paying court registry fees;

(2) If having to pay court registry fees is a hardship to any person not referred to in subparagraph (1) above, that person may, either before or after a proceeding is started, apply to be exempted from paying those fees.

(3) An application under this rule shall be made in Form N, and supported by an affidavit in Form N+1.

(4) If a judge [master or registrar] finds that the person is unable to pay registry fees, the person must be exempted from paying fees, unless the judge finds that the case the person is arguing is without merit or an abuse of the process of the court.

We suggest two sources for samples of forms that could be further simplified and used for indigent status applications in Supreme Court:

- the affidavit (in form 19) prescribed by the Court of Appeal rules for use in indigency applications; and
- precedents posted in a publication of the Community Legal Assistance Society ("CLAS") entitled "Judicial Review: Residential Tenancy Act: Interim Stay with Notice Indigent Status Vancouver Registry." These are available on the internet at: http://www2.povnet.org/interim stay. The sample Requisition for Indigency Status, and affidavit for Indigency Status found at Tabs 3 and 4 of that publication are attached for reference.

Incidentally, we note that "indigent" is not a word that is commonly understood by lay people, so the forms and rules should not make use of it.

RULE 20-4 – CHANGE OF LAWYER

Recommendation 10: Rule 20-4 should include a subrule with corresponding, specialized forms to recognize and permit the provision of legal representation through unbundled legal services and limited retainers, and to allow lawyers providing these services to go on and off the record in an expedited manner.

The current rules do not give any recognition or status to lawyers who provide limited legal services to litigants, and this creates difficulties for these lawyers and their clients.

Judges often require lawyers to attend court who were hired only for a specific purpose such as drafting pleadings, and this tends to discourages lawyers from providing of unbundled legal services.

In addition to being dragged into work they did not intend to commit to, there is also the opposite problem of lawyers facing obstacles in carrying out work which they have committed to, such as being unable to access their clients' court files.

Official recognition of limited retainers in the Rules would also benefit the court and opposing counsel by clarifying what can be expected from a lawyer with a limited retainer. It would also clarify for opposing counsel where, when and with whom it is most appropriate to communicate.

It is our understanding that the Unbundling of Legal Services Task Force of Law Society of British Columbia has also decided to make recommendations along these lines after examining the use of similar initiatives in the United States.

In summary, having limited appearance forms would allow opposing counsel and the court to have a clearer understanding of a lawyer's limited retainer, and would allow lawyers greater comfort in accepting limited retainers. This in turn means that more people will have greater access to legal advice.

CONCLUSION

The Poverty Law Section would welcome the opportunity to discuss these submissions with the Civil Justice Reform Working Group and provide further input.

Any communications can be directed to:

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