Submission to

CIVIL JUSTICE REFORM
WORKING GROUP

BC Justice Review Task Force

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

Issued by:

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Special Committee
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TABLE OF CONTENTS

PREFACE

The Canadian Bar Association nationally represents over 38,000 members and the British Columbia Branch (the "CBABC") itself has over 6,000 members. Its members practise law in many different areas and the CBABC has established 69 different Sections to provide a focus for lawyers who practise in similar areas to participate in continuing legal education, research and law reform. The CBABC also establishes special committees from time to time to deal with issues of interest to the CBABC.

This submission was prepared by a special committee composed of members of the CBABC Civil Litigation Sections, the Insurance Law Section and the Legislation and Law Reform Committee (the "Committee"). The comments expressed in this submission reflect the views of the Committee only and are not necessarily the views of the CBABC as a whole.

For the Civil Litigation Sections the following members participated:

Okanagan

- Sean Travis Pihl, Chair;
- Leona V. Baxter, Legislative Liaison;

Vancouver

- Veronica P. Franco, Co-Chair;
- William Veenstra, Co-Chair;
- Ben J. Ingram, Legislative Liaison;

Vancouver Island

- Charlotte Salomon, Chair;
- Alana Campbell, Legislative Liaison.

For the Insurance Law Section the following members participated:

- Stacey Boothman, Chair;
- Kerry N. Grieve, Legislative Liaison;
- Ken Armstrong;
- David Joyce;
- Wei Kiat Sun.

For the Legislation and Law Reform Committee, the following members participated:

- Michael Dunn, Executive Liaison; and
- Hermann C. Luitingh.

The Committee is pleased to continue to make submissions on this important law reform project.

SUBMISSION

BACKGROUND

In 2002, the British Columbia Justice Review Task Force (the "Task Force") was established on the initiative of the Law Society of British Columbia. The Task Force is a joint project of the Law Society, the Attorney General, the British Columbia Supreme Court, the British Columbia Provincial Court and the CBABC.

The Task Force worked on a review of the civil justice system in British Columbia. In 2006, the Civil Justice Reform Working Group of the Task Force released its report, Effective And Affordable Civil Justice (2006) (the "Report").[1]

The Report makes three recommendations.[2]

The first recommendation is to "create a central hub to provide people with information, advice, guidance and other services they require to solve their own legal problems."[3]

[1] Copy available at: http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf.
[2] Page viii of the Report.
[3] Page 1 of the Report.

The second is to "require the parties to personally attend a case planning conference before they actively engage the system, beyond initiating or responding to a claim."[4]

The third is to "rewrite new Supreme Court Rules based on an explicit overriding objective that all proceedings are dealt with justly and pursuant to the principles of proportionality."[5] Specifically, the proposal is to:

- replace the current pleadings process with a new process requiring the parties to accurately and succinctly state the facts and the issues in dispute as well as the plan for conducting the case and moving to resolution;
- limit available discovery, while requiring early disclosure of key information;
- reduce expert adversarialism and limit the use of experts in accordance with proportionality principles;
- **s**treamline motion practice by resolving issues at the case planning conference and by placing limits on the hearing process;
- empower the judiciary to make orders to streamline the trial process;
- consolidate all three regulations regarding the Notice to Mediate into one rule under the Supreme Court Rules;
- provide opportunities for litigants to resolve issues that create an impasse early and cost-effectively, but limit interlocutory appeals.[6]

[4] Page 10 of the Report.
[5] Page 18 of the Report.
[6] Pages 21 to 41 of the Report.

In the Spring of 2007, the CBABC established the Civil Justice Report Special Committee to provide submissions and recommendations to the Task Force about the Report. The Civil Justice Report Special Committee made written recommendations to the Task Force. Those recommendations are available at the CBABC's website: www.cba.org\bc.

In the summer of 2007, the Civil Justice Reform Working Group of the Task Force released draft Supreme Court Rules at its website: http://www.bcjusticereviewforum.ca/civilrules/.

Since the release of the draft Supreme Court Rules in the summer of 2007, Chief Justice Brenner and Deputy Attorney General Seckel, Q.C. have continued consulting with CBABC Sections, Bar Associations, law students and other organizations. As part of this continued consultation, focus groups have been conducted by the Task Force. These focus groups have included CBABC members.

The target implementation date for the new Supreme Court Rules is early 2010. [7]

[7] Page 5 of the Civil Rules Fact Sheet (October 5, 2007) available at:www.bcjusticereviewforum.ca/civilrules/downloads/CivilRulesFactSheet.pdf.

CBABC RESPONSE

These submissions of the Committee are intended to build on the recommendations to the Report made by the CBABC Civil Justice Report Special Committee. In addition, these submissions relate concerns and ideas that have been raised by the Committee and by CBABC members who have provided comments to the Committee.

Preliminary Matters

In its review of the draft Supreme Court Rules, the Committee stands by the recommendations of the CBABC Civil Justice Report Special Committee.

As a general comment, the Committee repeats the CBABC Civil Justice Report Special Committee recommendations regarding the Report in that:

- the Civil Justice Reform Working Group, to the extent there is evidence of a real problem, should implement the least restrictive solution to that problem, before more drastic proposals are adopted;

- the Civil Justice Reform Working Group, wherever possible, ensure that the Supreme Court Rules and accompanying procedures be simplified, rather than made more complex and hence expensive; and

- the Civil Justice Reform Working Group obtain as much data as reasonably possible concerning the nature and scope of the problems in the civil justice

system and share that data with stakeholders in consultations before changes are made.

Case Planning Conference

Part 4 of the draft Supreme Court Rules governs Case Plan Orders, including case planning conferences ("CPC"s). Rule 4-4 provides that a case planning conference must be conducted by judge or master. Rule 4-4(2) requires personal attendance of a party at a CPC.

In a focus group, CBABC members have reported concerns that requiring parties to personally attend CPCs will be awkward and costly. There is no rationale provided by the Task Force for the advantage to require parties to personally attend at CPCs.

In addition, the question of balance regarding CPCs was raised. In the Report, it is stated that:

> We struggled to achieve an appropriate balance between the desire to move the focus from the "litigation track" to resolution and the need to set a trial date at the CPC to provide focus for the parties.[8]

[8] Page 14 of the Report.

The concern raised is that the CPC may be trying to do too much by struggling to balance early settlement and trial management issues all in one procedure. The result may be that the CPC may not achieve in practice what its drafters intended.

Rule 4-5(1)(e) and (f) of the draft Supreme Court Rules permits a case planning conference judge or master, whether or not on the application of a party, to make orders respecting discovery. The CBABC Civil Justice Report Special Committee recommended that the necessity and length of examinations for discovery be determined at the initial CPC. The Judge could set limits on a case by case basis at that time, with liberty to amend the limits at later stages if appropriate. Rule 4-5(1)(e) and (f) is worded broadly and is capable of giving effect to the CBABC's recommendation.

Proposed Supreme Court Rules

Proportionality

Rule 1-3(1) of the draft Supreme Court Rules replaces the current objects of the Rules with a proportionality rule. Currently, Rule 1(5) states that "The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."[9] The proposed Rule 1-3(1) provides that the object of the Rules is to provide that all proceedings are dealt with justly and pursuant to the principles of proportionality as determined by the court.

[9] Supreme Court Rules (B.C Reg. 221/90) of the *Court Rules Act*, R.S.B.C. 1996, c. 80.

In a focus group, CBABC members have reported concerns that the proportionality principle in the draft Rules may not be as effective as the current object of the Rules for speedy and inexpensive determination of matters on their merits. Further, the draft Rules do not provide for the interest of the parties to determine what is a just determination of a dispute. Rule 1-3(1) and (3) requires the court, not the parties themselves, to determine that the amount of time and expense of the proceeding be proportional to the: amount involved in the proceeding, the importance of the issues to the jurisprudence of British Columbia, the public interest and the complexity of the proceeding.

Active Management by the Court

Rule 1-3(3) provides that the court must further the object of the Rules by actively managing proceedings, and provides the court with very broad powers in that respect.

This subrule represents a fundamental shift in the philosophy underlying civil litigation in the Province. Traditionally, the parties controlled the proceedings. The court intervened when requested, and then made the final decision based upon the evidence presented by the parties. In recent decades there has been a gradual shift to more active management by the court itself, through such things as the pre-trial conference Rule 35 and case management by the court for cases where the trial is expected to take 20 days or longer, by means of the case management practice directions.

In line with the new philosophy of active management by the court, the new rules include a requirement for a case plan order in every case, and a case planning conference in every case where there is not a consent case plan order.

The Committee endorses this philosophical change.

Dispute Summary

Rule 2-1 of the draft Supreme Court Rules replaces the statement of claim with a "dispute summary". Rule 2-1(3) requires the claimant to sign a statement certifying that the claimant believes that the facts set out in the dispute summary are true.

In a focus group, a CBABC member expressed concern that the change from the statement of claim to a "dispute summary" will be confusing for the public. For example, references to "statement of claim" are currently found outside the Supreme Court Rules in other British Columbia statutes, including the *Family Compensation Act* [10] and the *Libel and Slander Act*.[11] In addition to "statement of claim", other terms that are well-known to the public have been eliminated by the draft Rules: "statement of defence", "plaintiff" and "defendant". Like "statement of claim", these legal terms are also commonly found outside the Supreme Court Rules in other British Columbia statutes. In addition, these legal terms are commonly used in jurisdictions outside British Columbia

[10] R.S.B.C. 1996, c. 126, see section 4.
[11] R.S.B.C. 1996, c. 263, see sections 13 and 19.

such as in the United States and other countries. There is no demonstrated benefit for this change.

Another concern raised by a CBABC member is that the requirement for claimants to sign the statement of truth is, in practice, a hollow exercise; this requirement does not advance the object of the Supreme Court Rules. In addition, the requirement for claimants to sign will cause a number of unnecessary delays and expenditures of time and money in these circumstances:

- ensuring claimants who have a disability sign as required;
- having it be impractical for claimants to attend at their lawyers' offices in order to sign the statement of truth;
- clients signing will become a fertile ground for cross-examination by the other side in the action.

Service of Dispute Summary and Resolution Plan

Rule 2-2 of the draft Supreme Court Rules requires that the dispute summary be served within 60 days after filing.

The CBABC Civil Justice Report Special Committee recommended that the proposal to limit period of service from 1 year to 60 days from filing be reconsidered in light of situations where persons who seek legal advice shortly before a limitation period expires, may not be able to find a lawyer willing to draft the Writ on their behalf and, as a result,

they may lose their cause of action by virtue of the limitation period expiring. The provisions in Rule 2-2(3)-(5) extending this 60 day period are insufficient to meet the concerns of the CBABC Civil Justice Report Special Committee regarding limitation periods. As a result, the Committee repeats the recommendation that the 60 day period should be extended to the current 1 year time for service to account for limitation matters.

Limit Discovery

Rule 6-2(2) of the draft Supreme Court Rules requires that examination for discovery must not exceed 2 hours.

In a focus group, a CBABC member raised the concern of lack of data used to justify this controversial change to limit discovery to 2 hours. One of the reasons to limit discovery in the Report was that "discovery is also a major element in the cost of litigation". [12] In the Report, this reason was based on the findings of a 1995 Ontario Civil Justice Review report.[13] The CBABC member reported that the 1995 data was outdated; the Ontario data did not accurately reflect the British Columbia litigation environment. This CBABC member reported that the Task Force had available a wealth of relevant and timely data in the Supreme Court Registry files that the Task Force could access in order to determine an accurate estimate of the true cost of litigation in British Columbia and whether or not discovery was truly a major element in the cost of litigation in British Columbia.

[12] Page 25.
[13] Page 25, listed as footnote 51.

To limit examinations to only 2 hours is too short. The Committee recommends that this 2 hour limitation be eliminated. The issue of length or limits of oral discovery is better addressed on a case by case basis at the CPC.

"Will Say" Statements

Rule 6-3(1) of the draft Supreme Court Rules requires that the parties exchange "will say" statements by providing witness lists and a summary of the evidence of witnesses.

The Civil Justice Report Special Committee reported that there is general support for "will say" statements.

However, the wording of the draft Rule 6-3 raises uncertainties. What are the consequences for a party who fails to provide a "will say" statement as required? What if the "will say" statement that is provided contains insufficient detail? Is it permissible to call an adverse party in interest without notice as it currently provided under Rule 40(17)-(20) of the existing Rules? What are the consequences of a party swearing a false affidavit or filing negligent pleadings? Can a party contradict the contents of a "will say" statement at trial? When these situations arise in practice, will further court applications be required to resolve them with the ensuing increase use of time and money?

At this time, it is difficult to evaluate whether "will say" statements in Rule 6-3 will save time and money.

Pretrial Applications

Rule 7-1 of the draft Supreme Court Rules revises motion practice under the current Rule 51A of the Supreme Court Rules. Rule 51A applies to originating and interlocutory applications.

In a focus group, a CBABC member reported that Rule 7-1 revising motion practice under Rule 51A was received well by the lawyers attending the focus group and there is general support for this change.

Rule 18A (Summary Trial)

Rule 9-8 (Summary Trial) of the draft Supreme Court Rules permits a similar procedure to the current Rule 18A (Summary Trial).

The Committee generally supports the goal of having summary trials to reduce delays in the civil justice system, reduce costs to the parties and reduce public distrust of the legal system in order to, among other things, address the maxim that "justice delayed is justice denied".

Unlike the current Rule 18A, the proposed Rule 9-8(1) requires parties to meet the precondition of having the summary trial authorized by a case plan order. There is debate as to whether or not the requirement to have a case plan order authorizing a summary trial is necessary or helpful.

Interrogatories

The draft Supreme Court Rules eliminates interrogatories.

In some Committee members' practices, the use of interrogatories has saved time and money. The Committee suggests that some form of interrogatories be retained, perhaps styled as "requests for written information" so that the Rules contain a mechanism whereby written questions can be provided to another party who is compelled to answer them in writing.

Experts

Rule 8-2 of the draft Supreme Court Rules regulates appointment of joint experts. Rule 8-4 permits the court to appoint experts.

In a focus group, one CBABC member reported that it is unlikely that parties will agree to have joint experts. Agreeing to have a joint expert raises important questions. How will instructions to the expert be given? Will the parties be required to provide their consent for these instructions? What evidence will be given to the expert? Will the parties be required to provide their consent for the evidence to be given to the expert?

Under the current Supreme Court Rules, Rule 32A provides for the court to appoint experts. Rule 32A is rarely used. Given the current practice for Rule 32A, it is likely that the draft Rules 8-2 and 8-4 will be rarely used.

Rule 8-7(9)(b) abolishes the rule in *Vancouver Community College* v. *Phillips, Barratt*, [1988] B.C.J. No. 980; 28 C.L.R. 277 (and [1987] B.C.J. No. 3149, 20 B.C.L.R. (2d) 289).[14] The rule in *Vancouver Community College* is that there is an implied waiver of solicitor-client privilege in an expert's report once the expert testifies in court. As a consequence, it is common for parties to retain multiple experts. In this way, two experts are retained. The first expert will not appear at trial, so that legal counsel can have expert advice and also preserve solicitor-client privilege. The second expert will appear at trial and thus lose solicitor-client privilege in the expert's report once the expert testifies in court. The existing rule also artificially and unduly restrains counsel in their dealings with experts.

The Committee agrees with the abolition of the *Vancouver Community College* rule.

Other Matters

The CBABC Civil Justice Report Special Committee recommended that procedures similar to the existing Rule 66 (Fast Track Litigation Rule) be added to the proposed Supreme Court Rules.

[14] See analysis in the Report at page 33.

Under the draft Rules, Rule 66 is eliminated. The existing Rule 66(1) provides that the object of Rule 66 is to provide a speedier and less expensive determination of actions which can be completed within 2 days. The existing Rule 66(20) provides for a trial date within 4 months.

It is uncertain if the draft Rules will accomplish the same objective in Rule 66(1) and result in speedier and less expensive trials that can be completed in 2 days. It is also uncertain if the draft Rules will provide for a trial date within 4 months as provided for in Rule 66(20).

RECOMMENDATIONS

The Committee recommends that:

1. the Civil Justice Reform Working Group, to the extent there is evidence of a real problem, should implement the least restrictive solution to that problem, before more drastic proposals are adopted;

2. the Civil Justice Reform Working Group, wherever possible, ensure that the Supreme Court Rules and accompanying procedures be simplified, rather than made more complex and hence expensive;

3. the Civil Justice Reform Working Group obtain as much data as reasonably possible concerning the nature and scope of the problems in the civil justice system and share that data with stakeholders in consultations before changes are made;

4. the necessity and length of examinations for discovery be determined at the initial CPC. The Judge could set limits on a case by case basis at that time, with liberty to amend the limits at later stages if appropriate. Rule 4-5(1)(e) and (f) is worded broadly and is capable of giving effect to the CBABC's recommendation;

5. the philosophical change of active management by the court is to be endorsed;

6. the proposed limit of service to 60 days from filing be extended to the current 1 year time for service to account for limitation matters. The Committee reiterates

the recommendations by the CBABC Civil Justice Report Special Committee regarding this limitation period;

7. the proposed 2 hour limitation for discoveries be eliminated. The issue of length or limits of oral discovery is better addressed on a case by case basis at the CPC;

8. the wording of the draft Rule 6-3 raises uncertainties and, at this time, it is difficult to evaluate whether "will say" statements in Rule 6-3 will save time and money;

9. while the Committee generally supports the goal of having summary trials to reduce delays in the civil justice system, costs to the parties and reduce public distrust of the legal system, there is debate as to whether or not the requirement to have a case plan order authorizing a summary trial is necessary or helpful;

10. that some form of interrogatories be retained, perhaps styled as "requests for written information" so that the Supreme Court Rules contain a mechanism whereby written questions can be provided to another party who is compelled to answer them in writing;

11. currently, Rule 32A of the Supreme Court Rules permitting the court to appoint experts, is rarely used. Given the current practice for Rule 32A, it is likely that the draft Rules 8-2 and 8-4 will be rarely used;

12. that the *Vancouver Community College* rule be abolished by the proposed Rule 8-7(9)(b).

CONCLUSION

The Committee would welcome the opportunity to provide further input and dialogue with the Civil Justice Reform Working Group respecting these submissions.

Any communications can be directed to:

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