Submission to

SUPREME COURT RULES
REVISION COMMITTEE

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

Issued by:

Canadian Bar Association
British Columbia Branch

Supreme Court Rules
Special Committee

and the

Automobile Insurance Committee

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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 has two parts. The first part was prepared by the CBABC Supreme Court Rules Special Committee. The second part was prepared by the Automobile Insurance Committee.

The CBABC Automobile Insurance Committee (the "Automobile Committee") is a standing committee of the CBABC with the mandate and expertise regarding issues related to auto insurance, the practice of personal injury law and insurance. The comments expressed in this submission reflect the views of the Automobile Committee only and are not necessarily the views of the CBABC as a whole.

The CBABC Supreme Court Rules Special Committee was 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

- H. William Veenstra, Chair;
- William G. MacLeod, Legislative Liaison;
- J. Cherisse Friesen, Legislative Liaison;

Vancouver Island

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

For the Insurance Law Section the following members participated:

- R. Nigel Beckmann, Chair;
- Kerry Grieve, Vice-Chair;
- Gaynor C. Yeung, 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
- Jan Christiansen.

For the Automobile Committee, the following members participated:

- Carla Bekkering, Chair;
- Stephen McPhee, Executive Liaison;
- Barbara Flewelling;
- Daniel Le Dressay;
- Jan Lindsay;
- Janis McAfee;
- Julie Mantini;
- Sonny Parhar;
- Patrick Poyner; and
- Mary-Helen Wright.

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.

Civil Justice Report

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]

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: http://www.cba.org\bc (the “Spring 2007 Submissions”).

Draft 2007 Supreme Court Rules

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/ (the “Draft Rules”).

In the Fall of 2007, the CBABC established the Supreme Court Rules Special Committee to provide submissions and recommendations to the Task Force about the Draft Rules. Those recommendations are available at the CBABC’s website: http://www.cba.org\bc (the “Fall 2007 Submissions”).

[4] Page 10 of the Report.
[5] Page 18 of the Report.

Supreme Court Rules 2008 Work-in-Progress Draft

In May 2008, the Civil Justice Reform Working Group of the Task Force released its May 2008 Work-in-Progress Draft (available at: http://www.bcrulesrevisioncommittee.ca/) (the "2008 Draft").

The 2008 Draft made changes to the Draft Rules as a result of submissions from stakeholders like the CBABC and as a result of a review by the judicial members of the Supreme Court Rules Revision Committee (the "Rules Revision Committee").

The consultation period on the Draft Rules was extended to December 31, 2008.

In September 2008, a decision was made to have consultations conducted by the Rules Revision Committee.

The Rules Revision Committee is composed of judges, masters, members of the Bar, legislative counsel, and representatives of Court Services of the Ministry of Attorney General. The Rules Revision Committee assists the Attorney General in making recommendations for rule changes regarding the conduct of Supreme Court litigation under the *Court Rules Act*, R.S.B.C. 1996, c. 80. The Rules Revision Committee maintains a website: http://www.bcrulesrevisioncommittee.ca.

The target implementation date for the new Supreme Court Rules continues to be January 2010. [6]

[6] Page 5 of the Civil Rules Fact Sheet (April 8, 2008) available at:www.bcjusticereviewforum.ca/civilrules/downloads/CivilRulesFactSheet.pdf.

CBABC SPECIAL COMMITTEE RESPONSE

These Committee submissions are shaped by the recommendations to the Draft Rules and the Report made previously in our Spring and Fall 2007 submissions.

Preliminary Matters

In its review of the 2008 Draft, the Committee stands by the recommendations made by the CBABC in its Spring and Fall 2007 Submissions.

As a general comment, the Committee repeats the Spring 2007 Submissions in that:

- the Civil Justice Reform Working Group (now to the Rules Revision Committee), 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 (now to the Rules Revision Committee), wherever possible, should 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 (now to the Rules Revision Committee), 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.

Proposed Supreme Court Rules

Proportionality

Regarding the objects of the Rules, the 2008 Draft changes the objects of the rules to be proportional to manage cases "justly on the merits." (Rule 1-3(1)).

Rule 1-3(2) in the 2008 Draft defines "justly on the merits" to include:

> so far as is practicable, conducting the proceeding in ways that are proportionate to the court's assessment of
>
> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

For Rule 1-3(2), the 2008 Draft no longer requires that the "importance of the issues in dispute" to be determined having regard to the jurisprudence of British Columbia and to the public interest.

While these qualifications clarify the role of the court, the concern remains that 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 and the complexity of the proceeding.
There has been much debate about whether the new proportionality concept is useful and if so, how it should be worded. Some members of the profession argue that

proportionality has dubious practical value, especially where it depends upon "the court's assessment" of what it appropriate.

To provide a constructive solution to this concern, it is suggested that Rule 1-3 in the 2008 Draft be amended. The current Rule 1-5 has the object of the rules "to secure the just, speedy and inexpensive determination of every proceeding on its merits." In Rule 1-3 in the 2008 Draft, it is a useful compromise to retain "just, speedy and inexpensive" with the proportionality principle added in as an additional value, but deleting the reference to "the court's assessment".

Rule 1-3 in the 2008 Draft is:

RULE 1-3 – OBJECT OF RULES

Object

(1) The object of these Supreme Court Civil Rules is to ensure that each proceeding is dealt with justly on the merits.

Proportionality

(2) Dealing with a proceeding justly on the merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to the court's assessment of

(a) the amount involved in the proceeding,

(b) the importance of the issues in dispute, and

(c) the complexity of the proceeding.

Object to be given effect to

(3)The court must consider and give effect to this rule when exercising a power under, or interpreting, any of these Supreme Court Civil Rules.

The suggested revision to Rule 1-3 is:

RULE 1-3 – OBJECT OF RULES

Object

(1) The object of these rules is to secure the just speedy and inexpensive determination of every proceeding on its merits.

Proportionality

(2) Dealing with a proceeding justly on the merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to

(a) the amount involved in the proceeding, and

(b) the importance of the matters in dispute.

Object to be given effect to

(3) The court must consider and give effect to this rule when exercising a power under or interpreting these rules.

Under the suggested revision to Rule 1-3, the main object remains the same as in the present Rules. Also, the proportionality principle is recognized.

Regarding proportionality in (2), "the court's assessment of" is deleted. This phrase, "the court's assessment", of what is proportional seems to be unnecessary, as the court decides

everything. Ultimately all issues are decided by the court, so what is the purpose of this phrase?

On the other hand, it may be that "the court's assessment" of what is proportional is there to indicate that the views of the parties are to have little or no weight. That interpretation is not expressly stated but would appear to be a logical interpretation. If that is the intent, then the Committee disagrees.

Regarding proportionality in (2)(b), "the importance of the issues in dispute" is changed to "the importance of the matters in dispute". Lawyers might be interested in "issues", but the litigants want their matters resolved.

Finally, regarding proportionality in (2)(c), "the complexity of the proceeding" is deleted. Parties can make a proceeding "complex" if they want to. Does this justify more expensive and lengthier proceedings? If the amount at issue is small and the matters in dispute are only of minor importance, then would "complexity" justify more elaborate proceedings? The reference to "complexity" as a basis for proportionality has a common sense attraction that does not stand up to analysis.

Regarding giving effect to the objects in (3), "these Supreme Court Civil Rules" is changed to "these rules". The current Rules use "these rules" and not "these Supreme Court Civil Rules".

Active Management by the Court

In the 2008 Draft, Rule 1-3(2) and (3) contemplates and Rule 1-4 requires active management by the court of proceedings.

As we observed in our Fall 2007 Submissions, the Draft Rules and 2008 Draft make a fundamental shift in the philosophy underlying civil litigation in the Province, where no longer do the parties control the proceedings as has been tradition. CBABC members have expressed widely differing views on the merits of this fundamental change.

In its review of the 2008 Draft, comment from some CBABC members has been that for the case planning conference rules to be effective, the court must manage cases throughout the length of the file. In this regard, those members would like to see the court actively set limits to numbers of witnesses and length of time for submissions. Some CBABC members in support of this active management also believe that the court should order more written submissions to ensure that the submissions are complete. Others are concerned that judges with time to gain only a superficial understanding of a case may not be able to appropriately determine when to ignore or override the views of legal counsel who are fully immersed in a case.

Other CBABC members have commented that personal injury matters are different from general litigation matters. Consequently, this difference should be reflected in the 2008 Draft and it is not. These members point to the common occurrence that, few, if any, health care professionals will give an expert opinion on a patient's/plaintiff's prognosis

(including future ability to work, do household chores and what future care the patient will need) until at least 2-3 years after the injury. If the injury resolves itself before that time then legal counsel can and do usually resolve the claim, because the health care professionals will have been able to give an opinion on the diagnosis and prognosis. However, for injuries lasting longer than 2-3 years or for permanent injuries, the health care professionals generally will not give such an expert opinion. The reason they commonly give to legal counsel is that that until after 2-3 years have expired after the injury they don't know if the patient's/plaintiff's injury symptoms will resolve or not. If the client/plaintiff still has symptoms after 2-3 years, it is likely that they will continue to have symptoms, but again, the health care professionals may want to wait another year or two before they will give their expert opinion on whether the injury will slowly improve with time or whether it will in fact be permanent. While plaintiffs generally want a fast(er) resolution to their claims, they also want a fair one. For these CBABC members, plaintiffs will not be getting fairly compensated for their personal injury and resulting losses unless they have an accurate medical opinion on their prognosis, future limitations and the future care needed.

Other CBABC members have expressed concern about necessary judicial resources. The 2008 Draft would require more judicial intervention, and therefore more judge time will be required. Without adequate judges there will be delays and increased costs to the parties and increased public distrust of the civil justice system.

One logical consequence of the 2008 Draft is that, to meet the objects of the Rules, there is required to be a strong and decisive court. The Committee is concerned that the

government should provide the necessary resources to ensure that the new Supreme Court Rules have the right number of judges to do the right amount of work at the right time.

Dispute Summary now Civil Claim

The 2008 Draft changes "dispute summary" to "Notice of Civil Claim" in Rule 2-1. The 2008 Draft change to "civil claim" is closer to the traditional "statement of claim" than "dispute summary". Some members of the Committee support this change as it is likely to reduce any potential confusion. Some members of the Committee do not support this change as they see no compelling reason to change the nomenclature and eliminate "statement of claim", "statement of defence", "plaintiff" and "defendant"; these terms are well understood, including by the public, and are very widely used.

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. The 2008 Draft changes a "statement of truth" to a "statement of belief" in Rule 2-1(2). An option under consideration in the 2008 Draft is that a person only has a reasonable basis to assert the facts. The Committee sees this as an improvement from the "statement of truth" in the original Draft Rules. Unlike the "statement of truth", the "statement of belief" does not have to be certified by the person making it and the claim can be filed without the signed statement of belief as long as the claim is served with the statement.

Regarding personal injury matters, some CBABC members have commented that the 2008 Draft requires plaintiffs to sign the notice of civil claim, but not defendants who

have insurers. For these members, it does not seem fair and proper that plaintiffs are required to sign the statement saying it is true when they are simply relying on their legal counsel's expertise, but defendants don't; defendants can have their insurers, who are well-versed in the legalities, swear for them.

Service of Claim

In both the CBABC Spring and Fall 2007 Submissions, we recommended that the current 1 year time for service be maintained in order to account for limitation matters.

In Rule 2-2, the 2008 Draft increases the time for service from 60 to 120 days, with the right to apply for a 60 day extension.

The Committee reiterates its recommendation that the current 1 year time for service be maintained in order to account for limitation matters.

Case Planning Conference and Case Plan Orders

Part 4 of the Draft 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. Regarding trial management conferences, Rule 11-1(5) provides that Rule 4-4 (2) applies to trial management conferences.

The 2008 Draft provides exceptions for personal attendance of a party at a CPC. Rule 4-4(2)(c)-(e) permits insurers to attend in place of a party. Rule 4-4(2) eliminates the requirement to show "extraordinary" circumstances to be excused from attending in person.

These exceptions are to be welcomed since they meet some of the concerns expressed by CBABC members that requiring parties to personally attend CPCs will be awkward and costly.

As to cost of personal attendance for parties not covered by Rule 4-4(2)(c)-(e) for both case planning conferences and trial management conferences, some CBABC members point out the practical problems commonly experienced by parties who do not live close to the Court Registry where the action has been started. It may be that the party lives in a remote area and does not have access to legal counsel located closer to them. Or perhaps the party did not have legal counsel with the experience and credentials the party needs for the matter. Or sometimes parties move to other jurisdictions during the course of the

litigation. Regardless of why, if the party no longer lives close by to the Court Registry it will be a large expense to require that party to personally attend at these conferences. For example, at a minimum the party must pay transportation costs, but likely also accommodation and meal expenses too. For example, for parties in remote areas who make their living working seasonal jobs, such as logging or tree planting, if they are not able to work a certain day they will often have to miss their entire work rotation, which could be 2 to 4 weeks or even longer. Many of the matters to be discussed at these conferences are procedural. As a consequence, it seems unnecessary to require a party's attendance for procedural matters. For parties not covered by the exceptions in Rule 4-4(2)(c)-(e), it is submitted that if legal counsel has instructions from the party as the client, and legal counsel attends at these conferences, then the party's personal attendance should be optional, not mandatory.

Regarding parties who do not live close to the Court Registry where the action has been started, Rule 4-4(5)(a) of the 2008 Draft does permit a party to apply to the court for an order if the court considers that it is not reasonably possible for the person to attend given the distance the party has to travel for that attendance or the cost required for that attendance. The concern with Rule 4-4(5)(a) is that it requires the party to go to the time and expense of making a court application in order to get benefit of the Rule 4-4(5)(a).

Rules 4-5(1)(e) and (f) of the Draft Rules permit a case planning conference judge or master, whether or not on the application of a party, to make orders respecting discovery.

In our Spring 2007 Submissions, we 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.

With two exceptions, the 2008 Draft makes no changes to the orders a judge or master may make regarding discovery at a CPC under Rule 4-5(1)(e) and (f). In Rule 4-5(1)(e) the 2008 Draft adds discovery of electronically stored information. In Rule 4-5(1)(f) the 2008 Draft adds discovery of examination or inspection of persons or property.

Given the current trend in Canada to adopt best practices in order to manage electronically stored information, including the recent The Sedona Canada Principles Addressing Electronic Discovery[7], the Committee supports these two additions to Rule 4-5(1)(e) and (f).

Part 4 of the 2008 Draft governs case plan orders. A case plan order may be made by consent or in a case planning conference.

Some CBABC members have expressed concern regarding the practical results of Part 4. The concern is that the 2008 Draft in general and Part 4 in particular, favor "big businesses" such as insurance companies, large developers and banks. The requirements in the 2008 Draft are for frequent mandatory court appearances like the CPC and trial management conferences. Every court appearance costs money, not to mention the written work for legal counsel for witness summaries and working with opposing legal

[7] January 2008, available at: http://www.thesedonaconference.org/.

counsel on case management details. All these steps require significant time expended by both legal counsel and the parties, and, therefore the expenditure of money. The concern expressed by these CBABC members is that there has been no research to show that these steps actually result in earlier or more settlements. In fact, the experience of the Ontario courts has been that steps like these don't work. So while big businesses may be able to afford the costs of these steps, individuals and smaller organizations generally cannot. At the same time, the 2008 Draft limits discovery and access to documents and evidence that individuals and smaller organizations as litigants need to prove their cases.

Discovery of Documents

Rule 6-1 governs discovery and inspection of documents. Rule 6-1(3)(b) determines the scope of a party's disclosure obligations – absent any order of the court with respect thereto – to include documents that the party intends to refer to at trial, and documents that "could . . . be used by any party at trial to prove or disprove a material fact." Rule 6-1(14) provides for parties to demand that other parties add to their lists of documents, documents of a certain type or class. Rule 6-1(5)(b) authorizes the court to order that a party include on its list of documents, documents additional to those listed in subrule (3) – including where appropriate those relating to "any or all matters in question in the action".

These rules represent a significant shift in the scope of document discovery from the traditional Peruvian Guano rule, under which in all actions the scope of disclosure

extends to documents "relating to any matter in question in the action".[8] This change results from a concern that compliance with the traditional rule is costly and not always unnecessary.

There is however merit to the broader disclosure rule in many cases – particularly those in which credibility is in issue. Documents that may not on their face meet the new proposed test may, when assembled and used in cross-examination, be essential to ensuring that a case is resolved justly on the merits. Rule 6-1(5)(b) gives the court the power to extend the scope of disclosure in appropriate cases and thereby ensure that all necessary documents are disclosed. However, it will be important that the courts show willingness to extend document production under this rule based on the nature of the case and the pleadings. It will be important to ensure that such applications are determined by a realistic review of the nature of each case, and not give too much deference to the default standard in Rule 6-1(3) or require too high an onus on the party applying for extended production.

A further risk is that, in an era in which low cost agencies are able to create large document databases in short periods of time, the cost of court applications and disputes over the scope of production may end up exceeding what it would have cost to comply with the Peruvian Guano rule in the first place.

The Committee does not support the move to eliminate the Peruvian Guano rule regarding document discovery. As noted above, in relation to issues of credibility, broad

[8] *Cie Financière et Commerciale du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55.

discovery is justified. In the 2008 Draft, there is the power for the court to order further discovery. But such applications will soon be encrusted with case law and principles. Also, such applications will be expensive and difficult. Similarly, for example, the current law on particulars is very complex and so could become the law of discovery under the 2008 Draft. So an application to court is an illusory remedy. It would be better to retain the current Peruvian Guano rule in the first place.

Examination for Discovery

Rule 6-2(2) of the 2008 Draft requires that examination for discovery must not exceed 3 hours or any greater period to which the person to be examined consents.

The exception for the parties to consent to a greater period of discovery is an improvement over the previous draft. To limit examinations to only 3 hours is too short. Given the variety and disparity among civil cases, it makes no sense for the Supreme Court Rules to impose an *a priori*, default, arbitrary time limitation.

In the CBABC Spring and Fall 2007 Submissions, we recommended against limits on discovery. As a result, the Committee recommends that this 3 hour limitation be eliminated. A compromise is that there ought to be no default limit, but that the parties or the court could set out initial limits on a case by case basis by way of the case management process.

Elimination of "Will Say" Statements

The 2008 Draft eliminates "will say" statements that were in Rule 6-3(1) of the Draft Rules. The Committee supports the elimination of "will say" statements by the 2008 Draft.

Interrogatories

While the Draft Rules eliminate interrogatories, Rule 6-3 of the 2008 Draft permits interrogatories only by consent of the parties or with leave of court. In the Fall 2007 Submissions we recommended that interrogatories be retained so the Committee supports the change suggested by the 2008 Draft in this regard.

One CBABC member links interrogatories to Rule 28 of the Supreme Court Rules. Rule 28 permits pre-trial examination of witnesses. This CBABC member submits that Rule 6-5 in the 2008 Draft seems to preserve Rule 28 pre-trial examination of witnesses and this should be preserved in the new Rules.

Experts

Rule 8-7(9)(b) of the Draft Rules 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).[9] The rule in *Vancouver Community College* is that there is an

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

implied waiver of solicitor-client privilege in an expert's report once the expert testifies in court.

The 2008 Draft no longer abolishes the rule in *Vancouver Community College*.

Regarding the *Vancouver Community College* rule, Rule 8-10 of the 2008 Draft requires production of expert's reports. Rule 8-6(10)(b) would require an expert to make the content of his or her file available for inspection at least 14 days in advance of trial - without excepting documents that might be subject to a claim of privilege.

A CBABC member submits that the ability for an expert to hide earlier drafts of reports (as seen in the previous draft rules) always seemed at odds with the concept that the expert's primary duty is to the court not to the party retaining them. It appears the 2008 Draft agrees that justice is best served by requiring the expert's file be disclosed. It is true that the concept that privilege over the expert's file is waived when the expert testifies or the report is entered into evidence would no longer be the law, but the change is from "no waiver" to "waiver once the report is served". For this member, this better serves the aspiration of having unbiased experts. With respect to the principle from *Vancouver Community College* that notes of counsel or party are also subject to disclosure, it is submitted that is back on the table as well given the change in language. While this member does not agree with the idea that solicitor-client communications should be disclosed, as done in *Vancouver Community College*, this member would agree the system should not be subject to manipulation preventing disclosure by having the contents of the expert's file in the hands of counsel rather than the expert.

As we stated in our Fall 2007 Submissions, the Committee agrees with the Draft Rules approach to abolish the *Vancouver Community College* rule.

Rule 8-4(2) of the 2008 Draft requires experts to confer and sign a statement setting out the points of difference between or among them; legal counsel are not mentioned. Some CBABC members question how can the 2008 Draft purport to force experts to engage in such a meeting? The courts do not have the jurisdiction over third parties until they appear at trial. The exception being orders for third party documents, but even for those, the third party is first given an opportunity to argue why they should not have to comply with such an order. Experts are simply witnesses a party intends to call to give evidence of a matter that is outside the finder of facts area of proficiency. The parties have the right to call witnesses - lay or expert - and determine what evidence to lead from them. To require expert witnesses to confer and draft summaries of their evidence is a fundamental change of their role and the responsibilities and rights of parties, their legal counsel and the judiciary.

Another CBABC member has a different view. This member submits that the power of the court in Rule 8-4(2) is not new. The current Rule 35(4)(k) permits the court, whether or not on the application of a party, to order that experts who have been retained by the parties confer, on a without prejudice basis, to determine those matters on which they agree and to identify those matters on which they do not agree.

Some CBABC members have further concerns about the proposed meeting of the expert witnesses in Rule 8-4(2) of the 2008 Draft and the huge cost it will likely involve, especially in personal injury matters. In many personal injury claims, a major cost is obtaining expert opinion. The concern is that Rule 8-4(2) of the 2008 Draft will nearly double this cost. Standard general practitioner reports range in cost between $900 to $1,300. Specialist expert reports are often between $2,000 to $4,000. Doctors usually charge between $250 to $500 per hour for their time to attend meetings regarding their opinions. Obviously parties are not just going to have doctors attend the joint meetings without preparing first. This will require the experts to review their entire file and very likely meet with the expert first. The experts will then meet with each other and then produce the statement regarding the differences of their opinions. Often parties will have retained an expert who is not local. If so, the parties will then have to pay for and arrange for the expert to travel to meet with the opposing party's expert. All of this will result in a huge, unnecessary expense. A related concern in personal injury matters is that some experts may be stronger at advancing their opinions than others, because of experience, skills or qualifications. The interests of justice demand that clients' legal counsel be there to ensure that the expert they are relying on does not feel pressured to revise their opinion simply due to outside pressure from another expert.

Regarding personal injury matters, a CBABC member has a different perspective. Rule 8-4(2) differs for medical experts. Whereas for non-medical experts only the court can remove the requirement to confer while for medical experts there is an additional out in Rule 8-4(2)(b) because the parties can dispense with the requirement to confer by agreement. Further, in the discussion above reference is made to cost, including the

possible cost for out of town experts to travel to attend an in-person meeting. However, there is no requirement in Rule 8-4(2) that the experts meet in person or meet at all. All that is required is that the experts confer and prepare the statement described. It is submitted that this will be commonly done via telephone or e-mail so the cost of travel, in particular, in this member's view, is a bit of a fallacy. Finally, as noted above, there is a suggestion that lawyers are prohibited from being involved in the conferral process with the experts. That member is of the view that this is not so since Rule 8-4(2) does not expressly bar lawyers.

Some CBABC members believe it should not be necessary for experts to determine where and why their opinions differ - this is properly the function of legal counsel and the judiciary. In fact, this is what legal counsel and judges do regularly. If the cost of litigation is such a concern and the 2008 Draft is supposed to address this issue, then Rule 8-4(2) certainly seems to be going in the wrong direction. The added concern is that for some CBABC members, they think it improper to prohibit legal counsel from attending the proposed expert's meeting under Rule 8-4(2). Lawyers are the advocates for their clients and they have retained the expert in an attempt to advance and protect their clients' interests and claims. Legal counsel should therefore not be banned from attending the meeting of experts where they cannot advance and protect their clients' interests and claims.

Other Matters

In our Spring 2007 Submissions, we recommended that procedures similar to the existing Rule 66 (Fast Track Litigation Rule) be added to the proposed Supreme Court Rules.

The Draft Rules eliminate Rule 66. The 2008 Draft makes no change to the Draft Rules. Regarding Rule 66, the Task Force states that the proportionality principles cover all matters. [10]

As we stated in our Spring and Fall 2007 submissions, it is uncertain if the 2008 Draft 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 2008 Draft will provide for a trial date within 4 months as provided for in Rule 66(20).

A CBABC member identified that court costs have been inflating at a much greater rate than awards. The cap on general damages is increasing at Consumer Price Index rates. In this member's experience, court costs have risen at a much greater rate. A good example is the privatization of court reporting. This can add as much as $2,000.00 per day to the assessable disbursement account.
As a result, the risk reward balance has shifted from plaintiffs to defendants in the last 20 years.

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[10] Page 12 of the Comparison Between The Original Concept Draft and the May 15, 2008 Draft Rules (July 16, 2008) available at: http://www.bcrulesrevisioncommittee.ca/.

A CBABC member recommends that it would be helpful to the profession and the judiciary in the face of significant change to have examples of pleadings and as well examples of application of the proportionality rule. It has been suggested by many that the proportionality rule is less descriptive than the present speedy and
just test set out in Rule 1(5).

Since the 2008 Draft would make sweeping changes, the Committee recommends that, one year after the new Supreme Court Rules are in force, the Rules Revision Committee consult with the Bar in order to receive feedback and comments from profession so that necessary adjustments and amendments to the Supreme Court Rules can be made. In this regard, there should be a process of monitoring and evaluating the new Rules. This includes the express statement of actual goals, objectives, and targets.

AUTOMOBILE INSURANCE COMMITTEE

The mandate of the CBABC Automobile Insurance Committee (the "Automobile Committee") is to:

- concern itself with issues related to auto insurance, the practice of personal injury law and insurance;

- identify issues of concern to the Bar in its relationship with ICBC and to liaise with ICBC and other concerned agencies;

- investigate and make recommendations to the Executive regarding auto insurance, insurance law and personal injury and the Bar's relationship with ICBC, and other concerned agencies.

The Automobile Committee is comprised of lawyers who represent plaintiffs, defendants, and insurers in vehicle accident claims.

The Automobile Committee points out that most actions commenced, settled and tried in the courts of British Columbia are vehicle accident claims. As such, the interests of parties involved in these cases should be given close and considerable attention.

Accordingly, the Automobile Committee believes it is important to express its views and concerns regarding the proposed changes to the rules of civil of procedure as they will have far reaching consequences to individuals involved in personal injury and insurance litigation.

Submissions That The Automobile Committee Endorses

The Automobile Committee generally endorses these recommendations of the CBABC Supreme Court Rules Special Committee (the "Committee"):

- to the extent there is evidence of a real problem, the Rules Revision Committee should implement the least restrictive solution to any such problems before drastic changes are made (Recommendation 1);

- the Civil Justice Reform Working Group (now to the Rules Revision Committee), should 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 (Recommendation 3);

- the government should provide the necessary resources to ensure that the new Supreme Court Rules have the right number of judges to do the right amount of work at the right time (Recommendation 5);

- the exception for the parties to consent to a greater period of discovery is satisfactory but to limit examinations to only 3 hours is too short and this 3 hour limitation should be eliminated (Recommendation 10);

- that the Committee supports the elimination of "will say" statements in Rule 6-3(1) of the 2008 Draft (Recommendation 11);

- interrogatories in Rule 6-3 of the 2008 Draft only by consent of the parties or with leave of court be permitted (Recommendation 12).

Submissions That The Automobile Committee Cannot Endorse

The Automobile Committee is gravely concerned that the 2008 Draft will not achieve its stated purpose, but will make litigation lengthier and more expensive for litigants and reduce access to justice for parties involved in personal injury actions.

The Automobile Committee **does not** endorse the following recommendations of the Committee that the:

- philosophical change of active management by the court is to be endorsed (Recommendation 5);

- 2008 Draft exceptions for personal attendance of a party for insurers and the elimination of the requirement to show "extraordinary" circumstances to be excused from attending in person be maintained (Recommendation 7); as noted below, the Automobile Committee, instead recommends that parties who are represented by counsel be allowed to appear through their legal counsel;

- the necessity and length of examinations for discovery be determined at the initial CPC (Recommendation 8); and

- the *Vancouver Community College* rule be abolished (Recommendation 13).

General Submissions Of The Automobile Committee

The Automobile Committee makes these general submissions:

- there is no empirical evidence that the civil justice system is failing the citizens of British Columbia so as to justify a major shift in the well established principle that parties maintain control of their litigation;

- the empirical evidence suggests that the current initiatives of Notice to Mediate, Rule 66 and Rule 68 and other procedural safeguards are working;

- the 2008 Draft will not achieve its stated purpose, but will make litigation lengthier and more expensive for litigants; experience in other jurisdictions has already established this;

- the 2008 Draft will result in reduced access to justice for many litigants;

- the preferred approach is to simplify and adjust the current Rules and accompanying procedures, rather than make them more complex and hence expensive; and

- the unintended consequence of the 2008 Draft is to provide a sliding scale of justice as set out in Rule 1- 3; this is contrary to the rule of law.

Specific Submissions Of The Automobile Committee

The Automobile Committee has identified the need for specific submissions in these areas:

- evidence for change;
- more delay;
- increased costs;
- reduced access to justice;
- experts; and
- review of Rules.

Evidence for Change

In the experience of the Automobile Committee, the fact that there are fewer personal injury trials is a sign that the current system **is working**.

With the implementation of alternative dispute resolution, most cases are resolved without the need for the time and expense of a trial. The cases that do proceed to trial are longer because they are typically more complex and need to be tried to achieve a resolution. While there are improvements that can be made to the current Rules, the Automobile Committee does not endorse a wholesale shift in the philosophical underpinnings of our justice system and is actively opposed to the idea.

More Delay

The 2008 Draft will create a logjam of cases requiring pre-trial procedures and applications and case planning conferences. A 2 hour CPC for even half of the 33,000 civil cases filed annually will require 33,000 judicial hours. There are already shortages of judges in rural areas and in many judicial districts, judges have to be brought in from Vancouver or other centres just to preside over trials.

Using the previous example, if 33,000 judicial hours are required for CPCs, a conservative estimate of the additional hours for preparation required by defence counsel will be 50,000 hours. This does not even include travel time. These expenses will be borne by the rate payers of British Columbia. While it may be suggested that there will be defence cost savings as a result of the CPC procedure, there is no evidence to support this view or to suggest specifically where these savings will come from. The increased defence costs will be disproportionately borne by the poorest of British Columbians.

Based upon their own experiences, the members of Automobile Committee are of the view that a CPC would be beneficial to the parties in less than 5% of motor vehicle personal injury cases. Furthermore, any benefit flowing from a CPC would be best determined in the later stages of the litigation when both the substantive and the procedural issues have crystallized. The members of the Automobile Committee find the procedures afforded by the present case management conference and pre-trial conference rules and procedures meet the needs sought to be addressed by the proposed CPC.

Increased Costs

The Automobile Committee does not endorse the 2008 Draft requirement that parties (not represented by insurer or other institutional bodies) personally attend a CPC. The change to the 2008 Draft removing the requirement that a party must show "extraordinary" circumstances is a step in the right direction but does not go far enough.

For example, consider the case of a plaintiff who resides in Fort Nelson, B.C. and is represented by counsel in another city such as Prince George or Vancouver. That plaintiff would be required to apply for an order that she be exempted from the requirement to personally attend a CPC. Even if attendance is allowed by telephone conference, she would not have the benefit of having her counsel by her side during a CPC or, alternatively, her counsel would have to travel to Fort Nelson and also attend by telephone conference.

The Automobile Committee does not endorse the Committee's recommendation that the necessity and length of examinations for discovery be determined at the initial CPC (Recommendation 8). The 2008 Draft provides that limits be set early on with liberty to apply later to vary, and will result in additional layers of court procedure and increased cost to the parties. Additionally, this is often unworkable in personal injury cases as the true extent and impact of an injury is often unknown in the early stages of an action and therefore the length of time required for an Examination for Discovery is impossible or very difficult to estimate.

The Automobile Committee is very concerned that the 2008 Draft will add numerous additional layers of procedures and multiple pre-trial applications which will result in increased cost and delay to litigants. These layers of procedures will not provide any new remedies but will only grant access to procedures that already exist.

Reduced Access to Justice

People who have been injured have been able to maintain control over their litigation, within the current Rules and procedures. Personal injury litigants have a peculiar vulnerability which must be protected. Often their injuries are not understood at the outset of litigation. A forced speedy resolution of their case set to someone else's timetable will not result in a just resolution of those person's cases. Furthermore, it is a fundamental right that an injured person may choose to be represented by legal counsel who acts in his or her best interests. The 2008 Draft takes control of the litigation from the hands of legal counsel who is in the best position to assess and make decisions about the litigation on behalf of his or her client.

Experts

Rule 8-4(2) of the 2008 Draft requires experts to attend a meeting without the presence of legal counsel. This is extremely worrisome in the context of personal injury litigation. Expert medical opinion is always necessary in these cases. Physicians of varying degrees of experience and reputation may have more persuasive "edge" simply by virtue of the thickness of their *Curriculum Vitae* rather than the soundness of their position. An

example is a case in which a General Practitioner has rendered an opinion which is not supported by a specialist Orthopaedic Surgeon. A General Practitioner may well be inclined to agree with the specialist who may have seen his patient only once. As legal counsel are not present, no one, not event the injured person, will know how or on what basis an agreement was reached regarding the facts or opinions in issue.

This process allows a non judicial official to set the parameters of litigation which should be set by the pleadings and the litigants subject to the direction and rulings of the Trial Judge. It is contrary to the rule of law to permit the fettering of the Trial Judges' discretion in this manner.

The rule that an expert's file could be produced at trial for cross examination is an extremely important process to ensure fairness to the parties. Rule 8-6(8)(b) of the 2008 Draft would provide that no other part of the expert's file be produced. As a result, the expert who was produced for cross examination would not have to disclose the full contents of the file for cross examination. This prevents an open trial. This prevents an open trial <u>and the ability to explore the soundness of an opinion in the pursuit of the truth</u>.

Review of Rules

The Automobile Committee agrees in principle with the Committee's recommendation that one year after the new Supreme Court Rules are in force, the Rules Revision Committee consult with the Bar in order to receive feedback and comments from profession so that necessary adjustments and amendments to the Supreme Court Rules can be made (Recommendation 14).

The Automobile Committee recommends that any new rules be implemented as a pilot project for one year only and that extensive consultations with the Bar take place before they apply on a permanent basis.

Conclusion

The Automobile Committee has grave concerns about the consequences of the 2008 Draft to those involved in insurance and, particularly, personal injury litigation. There are other means of resolving and addressing ways to make the current system more efficient and less costly. The Automobile Committee requests that the Rules Revision Committee enter into more consultations with stakeholders, in particular, the Plaintiff and Defence Personal Injury Bar about how those goals can be justly achieved.

The Automobile Committee is of the view that management of a case should be left in the hands of parties and their legal counsel so as to achieve equal access to justice in a timely and efficient manner within the current philosophical framework, and in accordance with our obligation as lawyers to uphold the rule of law.

The Automobile Committee welcomes any communications from the Rules Revision Committee respecting these submissions. Any communications can be directed to: **Carla A. Bekkering,** Chair of the CBABC Automobile Committee (c/o Armitstead & Company, 206-2692 Clearbrook Road, Abbotsford, BC V2T 2Y8)(Tel: (604) 864-9011 and Email: carla@armitco.com).

RECOMMENDATIONS

The Committee recommends that:

1. the Civil Justice Reform Working Group (now to the Rules Revision Committee), 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 (now to the Rules Revision Committee), 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 (now to the Rules Revision Committee), 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. Rule 1-3 be amended to retain (from the current Rule 1-5) that the object of the Supreme Court Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits with the proportionality principle added in as an additional value;

5. the philosophical change of active management by the court is to be endorsed if the government provides the necessary resources to ensure that the new Supreme Court Rules have the right number of judges to do the right amount of work at the right time;

6. we reiterate our recommendation in our Spring and Fall 2007 Submissions that the current 1 year time for service of the claim be maintained in order to account for limitation matters;

7. the 2008 Draft exceptions for personal attendance of a party for insurers and the elimination of the requirement to show "extraordinary" circumstances to be excused from attending in person be maintained;

8. 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; the additions in the 2008 Draft of discovery of electronically stored information in Rule 4-5(1)(e) and discovery of examination or inspection of persons or property in Rule 4-5(1)(f) should be included;

9. the Committee does not support the move to eliminate the Peruvian Guano rule regarding document discovery and recommends that it would be better to retain the current Peruvian Guano rule;

10. the 3 hour limitation on examination for discovery should be eliminated; a compromise is that there ought to be no default limit, but that the parties or the court could set out initial limits on a case by case basis by way of the case management process;

11. the elimination of “will say” statements in Rule 6-3(1) of the 2008 Draft is endorsed;

12. interrogatories in Rule 6-3 of the 2008 Draft only by consent of the parties or with leave of court be permitted;

13. as we stated in our Fall 2007 Submissions, the Committee agrees with the Draft Rules approach to abolish the *Vancouver Community College* rule;

14. one year after the new Supreme Court Rules are in force, the Rules Revision Committee consult with the Bar in order to receive feedback and comments from profession so that necessary adjustments and amendments to the Supreme Court Rules can be made.

The Automobile Committee is of the view that:

15. there is no empirical evidence that the civil justice system is failing the citizens of British Columbia so as to justify a major shift in the well established principle that parties maintain control of their litigation;

16. the empirical evidence suggests that the current Rules coupled with the initiatives of the Notice to Mediate provisions, Rule 66 and Rule 68 and other procedural safeguards are working;

17. the 2008 Draft will not achieve its stated purpose, but will make litigation lengthier and more expensive for litigants; experience in other jurisdictions has already established this;

18. the 2008 Draft will result in reduced access to justice for many litigants;

19. the preferred approach is to simplify and adjust the current Rules and accompanying procedures, rather than make them more complex and hence expensive;

20. the unintended consequence of the 2008 Draft is to provide a sliding scale of justice as set out in Rule 1- 3 and this is contrary to the rule of law;

21. while there are improvements that can be made to the current Rules, the Automobile Committee does not endorse a wholesale shift in the philosophical underpinnings of our justice system and is actively opposed to the idea;

22. the 2008 Draft will create a logjam of cases requiring pre-trial procedures and applications and case planning conferences;

23. the Automobile Committee does not endorse the 2008 Draft that requires personal attendance of individuals at the CPC, even though they are represented by counsel. (Recommendation 7); the 2008 Draft grants the right to appear through counsel for institutional parties and the same benefit should be given to individuals;

24. the Automobile Committee does not endorse the Committee's recommendation recommends that the necessity and length of examinations for discovery be determined at the initial CPC (Recommendation 8); the 2008 Draft provides that limits be set early on with liberty to apply later to vary, will result in additional cost to the parties and additionally, this is often unworkable in personal injury cases as the true extent and impact of an injury is often unknown in the early stages of an action;

25. the Automobile Committee is very concerned that the 2008 Draft will add numerous additional layers of procedures and multiple pre-trial applications which will result in increased cost and delay to litigants; these layers of

procedures will not provide any new remedies but will only grant access to procedures that already exist;

26. the 2008 Draft takes control of the litigation from the hands of legal counsel who are in the best position to assess and make decisions about the litigation on behalf of their clients and, as a result, reduces access to justice;

27. Rule 8-4(2) of the 2008 Draft requires experts to attend a meeting without the presence of legal counsel and this is extremely worrisome in the context of personal injury litigation since this process allows a non judicial official to set the parameters of litigation which should be set by the pleadings and the litigants subject to the direction and rulings of the Trial Judge; it is contrary to the rule of law to permit the fettering of the Trial Judges' discretion in this manner;

28. The rule that an expert's file could be produced at trial for cross examination is an extremely important process to ensure fairness to the parties and Rule 8-6(8)(b) of the 2008 Draft would provide that no other part of the expert's file be produced; as a result, the expert who was produced for cross examination would not have to disclose the full contents of the file for cross examination; this prevents an open trial and the ability to explore the soundness of an opinion in the pursuit of the truth;

29. the Automobile Committee agrees in principle with the Committee's recommendation that one year after the new Supreme Court Rules are in force, the Rules Revision Committee consult with the Bar in order to receive feedback and comments from profession so that necessary adjustments and amendments to the Supreme Court Rules can be made (Recommendation 14); the Automobile Committee recommends that any new rules be implemented as a pilot project for one year only and that extensive consultations with the Bar take place before they apply on a permanent basis.

CONCLUSION

The Committee would welcome to continue to provide further input and dialogue with the Rules Revision Committee respecting these submissions.

Any communications can be directed to:

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