# Judicial Models: Can we do better? Proposed Reforms to Civil Procedure in British Columbia

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## I. INTRODUCTION

The complexity, costs and delay associated with proceedings in the civil justice system have made the system increasingly inaccessible to most Canadians. Access to justice is a serious problem for the average Canadian because the justice system is frequently unaffordable to all but the wealthiest. As the Right Honourable Beverley McLachlin recently said, "The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve."[1]

British Columbia, like many other jurisdictions, is reforming its civil justice system to make it more responsive, accessible and efficient. The Ministry of Attorney General, responsible in government for the administration of justice and leadership in law reform, has been working with justice system stakeholders and community partners to build collaborative and innovative approaches to the various issues faced by our civil justice system. The Ministry's vision is a province governed by the rule of law with an effective justice system serving all British Columbians. Its goals are to not only improve access to the adjudication of rights, but to improve access to resolution, so that citizens can solve their legal problems more simply, quickly and inexpensively. The Ministry's fundamental reform strategy is to provide people with effective and affordable solutions to the legal problems that they may encounter.

## II. B.C. CIVIL JUSTICE REFORM

### A. JUSTICE REVIEW TASK FORCE

The Justice Review Task Force was established in March, 2002 as a joint project of the Law Society of B.C., the Ministry of Attorney

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[1] The Right Honourable Beverley McLachlin, P.C., "The Challenges We Face" (Remarks presented at the Empire Club of Canada, Toronto, 8 March 2007), online: Supreme Court of Canada <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp>.

General, the B.C. Supreme Court, the B.C. Provincial Court and the B.C. Branch of the Canadian Bar Association. The Task Force has the objective of identifying a wide range of reform ideas and initiatives to help make the justice system more responsive, accessible and cost-effective.[2]

## B. CIVIL JUSTICE REFORM WORKING GROUP

As part of that initiative, the Civil Justice Reform Working Group (CJRWG) was formed in November, 2004 to explore and make recommendations for fundamental change to the civil justice system spanning from the time a legal problem develops through to the completion of litigation in the B.C. Supreme Court.[3] In conducting its work, the CJRWG was asked to consider if there is a better way for the B.C. civil justice system to resolve disputes.

In answering this question, the CJRWG looked at the interests of the users of, and participants in, the legal system, in order to find options that meet as many of those interests as possible. The following goals were identified:

- Accessibility - dispute resolution processes, including trials that are affordable, understandable and timely.
- Proportionality - procedures that are proportional to the matters in issue.
- Fairness - parties to have equal and adequate opportunities to assert or defend their rights.
- Public Confidence - parties who are confident that the civil justice system will meet their needs, and consider that it is trustworthy and accountable.
- Efficiency - the civil justice system uses public resources wisely and efficiently.
- Justice - the truth, to the greatest extent possible, is ascertained and applied to produce a just resolution.

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2 See online: <www.bcjusticereview.org>.

3 Working groups have also been established to review issues concerning family law and street crime.

In conducting its work, the CJRWG needed to reconcile two fundamental but competing interests: comprehensive due process and affordable dispute resolution. Access to the courts and the trial system is fundamental to our society; our courts promote social order and public confidence by deciding the tough cases, establishing legal precedent, and protecting the vulnerable. The reality, however, is that very few cases go to trial. The system is overwhelmingly a dispute resolution system, not a litigation system, and most citizens are seeking early and fair dispute resolution, not a costly and prolonged adversarial trial.

## C. THE WORKING GROUP'S REPORT: "EFFECTIVE AND AFFORDABLE CIVIL JUSTICE"

The CJRWG issued its report, *Effective and Affordable Civil Justice,* in November, 2006.[4] In the report, the CJRWG expresses a vision of a civil justice system that provides access to justice to everyone, regardless of their means, so they can obtain just solutions to legal problems, quickly and affordably.

Five key principles are set out as the underlying basis of this vision:

- Proportionality - the amount of process used will be proportional to the value, complexity and importance of the case.
- Flexibility and matching - the process used will be designed to fit the needs of the case and the parties.
- Judicial intervention - judges and masters will take a more active role in the management and resolution of cases.
- An expanded role for lawyers - lawyers will use an expanded toolkit that reflects a multitude of process options to assist their clients in quickly arriving at just solutions.
- Preservation of the rule of law - the new system must support and be guided by the rule of law.

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[4] Online: <www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf>.

The CJRWG proposes two broad strategies to achieve its vision:

- Provide integrated information and services to support those who want to resolve their legal problems on their own before entering the court system; and
- Provide a streamlined, accessible Supreme Court system where matters that can be settled are settled quickly and affordably, and matters that need a trial get to trial quickly and affordably.

## D. THE WORKING GROUP'S RECOMMENDATIONS

The CJRWG report made three key recommendations for implementing the identified strategies.

1. The first recommendation involved the introduction of a "hub," a single place where people can go to get the information and services they require to solve legal problems on their own. A hub would:

- coordinate and promote existing legal-related services;
- provide legal information;
- establish a multidisciplinary assessment/triage service to diagnose the legal problem and provide referrals to appropriate services; and
- provide access to legal advice and representation if needed through a clinic model.[5]

2. The second recommendation was that parties to Supreme Court actions be required to attend a Case Planning Conference (CPC) before they engage the system beyond simply initiating and responding to a claim. A CPC would address:

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[5] The new term for these "hubs" is "Justice Access Centres." A Justice Access Centre for family law matters is already operational. The Nanaimo Family Justice Services Centre pilot project, recently established through the co-ordinated efforts of the Ministry of Attorney General and the Legal Services Society, offers information, assessment, advice, mediation, and referrals to members of the public respecting family law issues. The Centre is a single point of entry where people can obtain information about how to solve their problem outside the courts or about how to work their way though the courts. See online: <www.nanaimo.familyjustice.bc.ca>.

- settlement possibilities and processes;
- narrowing of the issues;
- directions for discovery and experts;
- milestones to be accomplished;
- deadlines to be met; and
- setting of the date and length of trial.

3. The third recommendation proposed a rewrite of the Supreme Court Rules, with an explicit overriding objective that all proceedings be dealt with justly and pursuant to the principles of proportionality.[6] In applying the new rules to an action, the court would be called on to consider the case's:

- monetary value;
- importance with respect to the public interest; and
- complexity (for example, the number of parties and the nature of the issues).

The principles that the report suggested to be applied in the rewrite of the *Supreme Court Civil Rules* were:

- proportionality;
- simplicity;
- matching; and

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[6] There are numerous examples of proportionality being incorporated in justice reform initiatives. In British Columbia, the *Expedited Litigation in Supreme Court – Rule 68* reflects the proportionality principle, setting out an expedited, simplified proceeding for cases where the amount at issue is less than $100,000. In the United Kingdom, proportionality is a central feature of the *Civil Procedure Rules*, r. 1.1, online: Ministry of Justice <www.dca.gov.uk/civil/procrules_fin/contents/parts/part01.htm>.

Under the UK rules all civil matters are guided by the "overriding objective" of enabling the court to deal with cases justly. "Justly" is defined to include a number of parameters, including proportionality. In Quebec, *Code of Civil Procedure*, R.S.Q. c. C-12, s. 4.2, the court rules place the burden of ensuring proportionality on the parties: "Parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute."

- early resolution.[7]

The report recommended that the new rules:

- abolish the current pleading process and instead adopt a new case initiation and defence process that requires the parties to accurately and succinctly state the facts and the issues in dispute and to provide a plan for conducting the case and achieving a resolution;
- limit discovery, while requiring early disclosure of key information;
- limit the parameters of expert evidence;
- streamline motion practice;
- provide the judiciary with power 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 quickly resolve issues that create an impasse; and
- limit interlocutory appeals.[8]

## III. NEW B.C. SUPREME COURT CIVIL RULES: THE CONCEPT DRAFT

A "Concept Draft" of the proposed new rules was released in July of 2007. The mandate of the drafting group was to create a draft set of rules that would reflect the report's recommendations for new court rules, guided by the consultation on the report. After the Concept Draft was released, there was extensive consultation (outlined below) resulting in a number of substantial amendments. The following is a brief summary of some of the key features of the proposed rules:

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[7] The Family Rules Working Group, which includes representatives from the Ministry of Attorney General, the Provincial and Supreme Courts and the private bar, has also rewritten the rules and forms for Supreme Court family law cases, to incorporate the same principles as have been applied in the rewrite of the *Supreme Court Civil Rules*—proportionality, simplicity, matching and early resolution.

[8] After consultation with the Court of Appeal, it was decided that this recommendation would not be implemented.

## A. THE OBJECT OF THE RULES

Under the proposed new rules, the court must deal with all cases "justly on the merits." The phrase, "justly on the merits" includes "so far as is practicable," conducting "the proceeding in ways that are proportionate to the court's assessment of the amount involved in the proceeding,

a) the importance of the issues in dispute; and

b) the complexity of the proceeding." (Rule 1-3).

## B. THE CASE INITIATION/RESPONSE PROCESS

The proposed rules change the way in which proceedings are commenced and responses are made. The Writ and Statement of Claim are replaced by a single document, the "Notice of Claim," and the initiating party is called the "Claimant" (Rule 2-1). The Notice of Claim contains all of the items previously required in the Statement of Claim, but must be submitted in Form 1 and must separately set out:

- a summary of the material facts giving rise to the claim;
- the relief sought by the claimant; and
- a summary of the legal basis for the relief sought.

The Claimant must personally sign a statement in the Notice of Claim, indicating that the Claimant believes, on a reasonable basis, that the facts set out in the Notice of Claim are true. The Notice of Claim may be filed without a signed statement of belief. The Notice of Claim must be served with the signed statement of belief within 120 days after filing.

There is no Appearance. The party being sued is called the "Respondent" and, to avoid default judgment, must file a Response under Rule 2-3. The Response must indicate, for each fact set out in the Notice of Claim, whether that fact is admitted, denied or outside of the Respondent's knowledge. For any fact denied, the Response must set out the Respondent's version of that fact and a concise summary of any additional relevant facts. Respondents must also state that they believe, on a reasonable basis, that the facts set out in the response are true. If the Respondent denies the Claimant's right to relief, the response must set out a concise summary of the legal basis for the denials.

The process for counterclaims and third party notices observes the new Notice of Claim/Response process.

## C. CASE PLANNING

The proposed rules provide that, after the exchange of the initiating documents, the parties must not take any further steps in the proceeding until a Case Plan Order is made. There are several exceptions to this rule, including dealing with jurisdictional disputes, applying for default judgment or summary judgment, delivering notices to admit or offers to settle, engaging in negotiation and mediation, dealing with urgent matters, and as otherwise set out in Rule 4-1(2).

A Case Plan Order may be made by consent or through a Case Planning Conference (CPC). If made by consent, the parties negotiate the terms of a Consent Case Plan. The Consent Case Plan Order then simply states, "This Court orders that the parties comply with the attached Consent Case Plan." The items that must be in the Consent Case Plan include the parameters for:

- document production;
- oral examinations for discovery;
- expert witnesses;
- lay witnesses; and
- trial.

Information about experts may be deferred as long as the plan indicates when the information will be supplied.

If the parties are unable to consent to a Case Plan Order, either party (likely the party who wants to take a step in the proceeding) may request a CPC under Rule 4-3. If a CPC is requested, the parties, starting with the Claimant, must exchange "Case Plan Proposals" under Rule 4-3(5). The Case Plan Proposal (Form 22) must, in a summary manner, indicate the parties' proposal on the following:

- discovery of documents;
- examinations for discovery;
- dispute resolution procedures;

- expert witnesses;
- witness lists;
- trial type, estimated trial length and preferred periods for the trial date

The parties must attend the CPC personally, unless the court grants leave to excuse personal attendance. The application to be excused from personal attendance is made by filing a requisition, supported by a letter. A CPC judge or master must not, at a CPC, hear any application supported by affidavit evidence. The CPC must result in a Case Plan Order that may include:

- setting a timetable for the steps to be taken in the action;
- striking case records;
- requiring amendment of an originating case record to provide more detail;
- items respecting discovery;
- items respecting witness lists and evidence summaries;
- items respecting experts;
- items respecting offers to settle;
- giving directions for the conduct of any pre-trial application;
- requiring the parties to attend mediation or other dispute resolution process; and
- setting the action for trial.

No order for final judgment may be made at a CPC, except by consent or for non-compliance with proposed Rule 4-5(2).

## D. ASCERTAINING FACTS: DOCUMENTS, ORAL DISCOVERY, INTERROGATORIES AND WITNESS STATEMENTS

Under proposed Rule 6-1, each party, within 7 days after request from another party of record, must deliver copies of any documents referred to in the listing parties' pleadings. The new rules modify the

present *Peruvian Guano*[9] scope of document discovery. Once a Case Plan Order has been made the initial list of documents must be supplemented, within the time set out in the Case Plan Order, with a list of all documents:

- referred to in the listing party's pleadings,
- that are or have been in the party's control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
- all other documents which the party intends to refer to at trial.

The court has the power to require more limited or more extensive document production.

The proposed rules on conducting oral examinations for discovery set limits on the amount of time that parties may be examined. Unless the court otherwise orders or the person to be examined consents, examinations for discovery of a person, by all parties who are adverse in interest, must not, in total, exceed 3 hours.

Interrogatories are only allowed by leave of court. The proposed rules require each party, within the time set out in the Case Plan Order, to deliver a list of the witnesses the party intends to call at trial.

## E. EXPERTS

Under the proposed rules, the parameters for the use of experts will be set out in the Case Plan Order (whether by consent or through a CPC). The parameters will include the number and type of experts that may be called by each party and whether joint experts may be required. If the parties each call their own experts, those experts must confer and produce a report outlining the points of disagreement between them (Rule 8-4(2)). Medical practitioners may agree not to meet.

If the use of a joint expert is agreed to or ordered by the court, the rules set out a procedure for appointing the joint expert (Rule 8-3). In those situations, unless otherwise ordered, a joint expert is then the *only* expert permitted to give evidence on an issue. After receiving the joint

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[9] *The Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano* (1882), 11 Q.B.D. 55, 63.

expert's report, the court may allow additional experts to be appointed, if necessary, as set out in Rule 8-3(9). The court may also appoint its own expert under Rule 8-5.

Expert reports are categorized in the proposed rules as either assertive or responsive. "Assertive report" means a report of an expert's opinion if the report is tendered by a party in relation to a claim brought by the party. "Responsive report" means a report of an expert's opinion if the report is tendered by a party in relation to a claim brought against the party.

The timing for the exchange of expert reports will be set out in the Case Plan Order, subject to the dates mandated in the rules. Those mandates are as follows: Reports of joint or court-appointed experts must be filed no later than 12 weeks before trial. When parties appoint their own experts, assertive reports must be delivered no later than 12 weeks before the date scheduled for trial. Responsive reports must be delivered no later than 7 weeks before the date scheduled for trial (Rule 8-6(5)). Reports not delivered within the time limits are not admissible and the testimony of the expert is also inadmissible, unless the court orders otherwise.

The report of an expert may be tendered as evidence without the expert appearing at trial (unless demand is made for cross-examination). Experts may give direct oral evidence at trial only if direct examination of the expert is necessary to clarify terminology in the report or to otherwise make the report more understandable.

The proposed rules set out that an expert appointed under the rules has a duty to assist the court and is not to be an advocate for any party or any position of any party. (Rule 8-2(1)). The expert must, in any report he or she prepares, certify that he or she is aware of that duty, has made the report in conformity with that duty, and will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

## F. MOTION PRACTICE

Subject to the exceptions set out in the rules (for such things as applications made by consent, without notice, for summary trial, etc.) the proposed rules prescribe the following process for all pre-trial applications: A party must file a notice of application (Form 34) which sets out the orders sought, the jurisdictional authority relied on, a list of

the affidavits and other documents on which the applicant intends to rely, a brief summary of the factual and legal bases on which the orders sought should be granted, and the applicant's estimate of the time for hearing. Copies of affidavits and documents not previously filed must be filed and delivered along with the notice.

The application response (Form 35) must indicate, for each order sought, whether the pre-trial application respondent consents to, opposes or takes no position on the order. If the application respondent wishes to oppose any of the relief sought in the application, they must list the affidavits and other documents on which the pre-trial application respondent intends to rely, set out the estimate of the time required for hearing, and summarize the factual and legal bases on which the orders sought should not be granted.

To set the matter for hearing, the applicant must file a notice of hearing in Form 36 at least 3 clear days before the date set for the hearing of the application. If the hearing is expected to last over two hours, the date and time of hearing must be fixed by the Registrar.

If an application is to be opposed, the applicant must provide to the registry, no later than noon on the day before the date set for the hearing, an application record containing the items listed in Rule 7-1(15), which includes, for example, copies of the application, response, affidavits, documents, etc.

If an order is made at a CPC that an application may be made by written submissions, the CPC judge or master must give directions at the time of the CPC respecting the application and those directions govern.

## G. SUMMARY JUDGMENT AND SUMMARY TRIAL

The proposed rules on summary judgment provide that the party responding to an application for summary judgment may not rest on mere allegations or denials in his or her case records, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial. If the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court must grant summary judgment (Rule 9-7(5)).

If the party bringing the application obtains no relief on the application, and the court determines the application was not reasonable, the court may assess costs to be paid within a time period set by the court

(Rule 9-7(7) and (8)). In addition, the court may assess special costs against a party to an application for summary judgment who acts in bad faith or primarily for the purpose of delay (Rule 9-7(9)).

An application for Summary Trial (formerly Rule 18A) is considered a "step in the proceeding" and therefore may not be made unless a Case Plan Order (either by consent or by a CPC) has been made authorizing the application.

### H. THE NOTICE TO MEDIATE

All three of the existing regulations on the Notice to Mediate process (General, Motor Vehicle and Residential Construction) have been consolidated and are now found in Rule 9-3.

### I. TRIAL MANAGEMENT

A trial management conference (TMC) is to be held between 14 and 28 days before the day set for the start of the trial. Each party attending a trial management conference must file a trial brief, with the items listed in Form 48. These include, for example, a summary setting out the issues in dispute and the party's position on those issues, the witnesses to be called and those to be cross-examined, time estimates, a list of the expert reports, etc. Unless excused by the court, parties must personally attend the TMC.

The judge hearing a TMC may make orders respecting trial scheduling, juries, amendment of case records, admissions of facts or documents, time limits, and other matters listed in Rule 11-2(9). If reasonably practicable, the judge who presided at a trial management conference is to preside at the trial of the action.

## IV. CONSULTATION

### A. CONSULTATION ON THE REPORT

After the release of the CJRWG report, Chief Justice Donald Brenner and I toured British Columbia, presenting the report's recommendations, hearing comments and answering questions. A great deal of feedback was received from individual lawyers, bar associations, CBA sections, Chambers of Commerce, service clubs, law schools and

other organizations. The most positive feedback was received from people who have used the civil justice system as parties to litigation. All of the feedback has been extremely valuable. The concerns relating to the recommendations have been incorporated into the on-going reform work and the drafting of proposed new rules.[10]

## B. CONSULTATION ON THE CONCEPT DRAFT

The release of the Concept Draft was followed by additional consultation, including focus group sessions with lawyers in Victoria, Vancouver, Castlegar, Prince George and Kelowna. The Concept draft was posted on an Internet site which was visiting 6500 times and the Draft was downloaded over 1400 times. The rules went through a detailed review by the Rules Revision Committee—a committee of private sector lawyers, judges, masters and a ministry legislative drafter. The judges of the Rules Committee were given three months off of the rota to devote full time to reviewing the proposed rules. The judges conducted an extensive, line-by-line analysis of the proposed rules. The full Rules Revision Committee reviewed the proposed rules, culminating in a 2 ½ day retreat for final consideration at the end of April, 2008. Subject to only one dissent, the full Rules Revision Committee approved the proposed rules.

The Law Society of BC, however, suggested that the bar may still have concerns about the proposed rules, and therefore the consultation period was extended to December 31, 2008. The Rules Revision Committee is handling the consultation and comments may be made to their website at http://www.bcrulesrevisioncommittee.ca/. (Background information on the proposed rules is also available at: http://www.bcjusticereviewforum.ca/civilrules.)

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[10] For example, one of the adopted suggestions is to reject the report's recommendation to eliminate oral discovery without leave or consent in cases valued at $100,000 or less. Instead, the proposed rules permit 2 hours of examination as of right, with up to a maximum of 2 days by consent, regardless of the value of the case. Many other suggestions of the bar have been adopted, including those regarding case initiation, experts, document production and case planning.

## VI. IMPLEMENTATION

The target implementation date for the new Civil Rules is summer, 2010. This date allows time for further drafting based on the consultation feedback, the Cabinet approval process, forms development, complex business process changes involving Court Services and the judiciary, staff training and legal education.

## VI. CONCLUSION

An accessible justice system provides the necessary foundation for social order and democracy. The time has come for comprehensive action so that all components of our civil justice system work justly, efficiently and effectively for all British Columbians. The Ministry of Attorney General has been very fortunate in being joined by other key justice system participants in British Columbia who, together, are providing strong leadership in justice reform initiatives. The Ministry recognizes that to effect real and fundamental change to B.C.'s justice system, it is essential to work collaboratively. We are very fortunate in Canada to have one of the very best justice systems in the world; however, the justice system must become more accessible, relevant and responsive to the needs of society if we are to strengthen the public trust and confidence that underpins a healthy, stable and prosperous society.