



## **Questions and Answers for Justice System Professionals**

### **1. How were the new rules developed?**

Effective justice reform depends on bringing together various stakeholders, including the bench, bar and government. To this end, the Law Society of British Columbia, Canadian Bar Association, Ministry of Attorney General and others established the Justice Review Task Force (JRTF) in 2002. The JRTF includes senior representatives from the BC Supreme Court, BC Provincial Court, Law Society of BC, Canadian Bar Association, and the ministry. Its mandate is to identify a wide range of reform ideas and initiatives that may help us make the justice system more responsive, accessible and cost-effective.

In November of 2004, the Task Force created a 12-member Civil Justice Reform Working Group, to address the problems of cost, complexity and delay in our system of civil justice. Only two of the 12 members of the working group were employed by government -- Deputy Attorney General Allan Seckel and (at the time) Assistant Deputy Minister of Court Services, Helen Pedneault. The other members of the working group were co-chair Chief Justice Donald Brenner; a representative of the Legal Services Society; and experienced senior members of the judiciary and private bar. This working group's recommendations, together with the drafting process described below, resulted in the new rules.

### **2. Who wrote the new rules?**

The proposed rules are the result of joint working committees of experts from the bench, bar and government.

A drafting team including a Master of the Supreme Court, two private sector lawyers, a government legislative drafter and a government policy analyst created a first draft of the rules, with a strict mandate to implement the recommendations of the working group. The judges of the Rules Revision Committee (RRC) — a committee of private sector lawyers, judges, masters and a government legislative drafter — reviewed and commented on the draft, resulting in a number of revisions. The full RRC prepared the final draft and proposed new rules. These were presented to the Attorney General.

The Attorney General of British Columbia recommended new court rules to Cabinet and Cabinet issued an Order in Council to bring the new rules into force on July 1, 2010.

### 3. Were the changes made with input from working level lawyers and the public?

Yes, input from the public and the legal profession was extensive. Proposed changes were discussed at two major legal conferences; an online forum was visited more than 6,500 times; focus groups with lawyers were held in five cities; and over 50 presentations were made to service clubs, chambers of commerce and legal organizations. The new civil rules were the subject of consultations of unprecedented scope and length.

### 4. What will be the impact of the limitations on discovery?

In jurisdictions that have limited discovery, there have been no reports that it has created unfairness or any other problems. The Civil Justice Reform Working Group concluded that excessive document production and oral discovery are responsible for much of the delay and expense in civil litigation.

The working group determined that the 19<sup>th</sup> century decision in *Peruvian Guano*<sup>1</sup> that allows for the discovery of indirectly relevant evidence is no longer workable in the context of proliferating electronic information and the increasing complexity of modern litigation. The case is no longer followed in the jurisdiction where it originated—the UK:

*“The result of the Peruvian Guano decision was to make virtually unlimited the range of ... discoverable documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is a monumentally inefficient process....”*

Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, 1995, c. 21, para 17.

Oral examinations for discovery, with no limits placed on the examiner, are also problematic.

*Examinations for discovery is a useful procedure which enhances the quality of litigation. It can also be a procedure of oppression.... Often transcripts of interminable examinations for discovery are never looked at during the trial. This expense should be saved if litigation...is to survive the dangerous escalation of costs of the trial process. ...I venture to hope that the profession may find it possible to make discovery less of a siege than it often seems to be.*

The Honourable Chief Justice (as he then was) Allan McEachern  
*Allarco Broadcasting Ltd. v. Duke* (1981)

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<sup>1</sup> *The Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano* (1882), 11 Q.B.D. 55, 63.

The new rules provide a more reasonable approach to both document and oral discovery. A litigant must disclose all documents referred to in their pleadings, all documents they intend to refer to at trial and all documents that could be used to prove or disprove a material fact in the case. One may seek an order to extend this scope of discovery in any case where a party demonstrates a need to receive additional documents. For oral discovery, the new rules allow each party to conduct seven hours of questioning, unless the parties consent or the court otherwise orders.

**5. What impact will the rules have on small business and working people?**

Some have expressed concern that smaller interests will not have access to justice because the rules favour larger interests. The rules do not favour larger interests — in fact, the rules level the playing field. Currently, a financially stronger party is able to pursue procedures that “paper and process” the financially weaker party into submission. Procedural tools can be used as instruments of oppression, until the financially weaker party simply must give up and accept a less than favourable, or less than fair, outcome. Under the new rules, the financially stronger party will not have such freedom to pursue unlimited process. The financially weaker party may request a Case Planning Conference, in which the judge or master will ensure that the amount of process allowed in the case is proportionate to the value, importance and complexity of the case.

**6. Do the new rules significantly change the right to trial by jury?**

No. Judges have the power under the current rules to deny trial by jury. The current rules also provide for no jury trial for cases valued under \$100,000 that are filed under the Expedited Litigation Rule (Rule 68) and for cases filed under the Fast Track Rule, Rule 66. The new rules combine the Expedited Litigation Rule and the Fast Track Rule in a single Fast Track Rule. Cases falling under the new Fast Track Rule will not be entitled to a jury.

**7. Will the new rules add to the bureaucracy?**

No. Concern was expressed in the consultation that the proposal in the original Concept Draft, to apply the case planning regime to all cases, might result in the holding of unnecessary conferences and the creation of unnecessary costs and bureaucracy. To address those concerns, the new rules eliminate the requirement for case plan orders and do not require a case planning conference unless requested by one of the parties.