

KEY FEATURES OF THE NEW CIVIL RULES, FAMILY RULES AND COURT FEES July 2009

A. Supreme Court Civil Rules

1. Proportionality (Rule 1-3)

The new object of the rules is to “secure the just, speedy and inexpensive determination of every proceeding on its merits.” That includes, so far as is practicable, conducting the proceeding in ways that are proportionate to:

- (a) the amount involved in the proceeding,
- (b) the importance of the issues in dispute, and
- (c) the complexity of the proceeding.

This new objective will provide judges with more authority to manage the adversarial process so as to reduce complexity, cost and delay.

2. Case Planning Conferences (Part 5)

The original concept draft of the new rules focused on upfront planning and agreement by the parties on pre-trial procedures. It required that each case have a case plan order before taking steps in the litigation process. The case plan order was to address dispute resolution options, dates for the exchange of documents, an electronic document protocol, the parameters of oral examinations for discovery, and basic information about the planned use of experts. If the parties were unable to agree on a case plan order, the order would have to be made through a case planning conference (CPC) before the parties could take steps in litigation.

Concern was expressed in the consultation that the proposal to require case plan orders before steps could be taken in the litigation might result in the holding of unnecessary CPCs and therefore the creation of unnecessary costs. To address those concerns, the new rules do not automatically require a case plan order and therefore do not include any provisions for consent case plan orders. Instead, the new rules use a party driven model, similar to the Notice to Mediate process. The party driven model does not require a CPC, but makes it available if one party to the litigation requests that a CPC be held, absent court order to the contrary. At the CPC, the judge or master will set the parameters of the litigation, guided by proportionality principles, and the results of the conference will be set out in a case plan order. The consultation produced additional objections about the requirement that clients be personally present at CPCs. This provision was therefore dropped so that clients who are represented by counsel are not required to attend the CPC.

3. Limits on Discovery (Part 7)

a. Reduced scope of document production (Rule 7-1)

The Civil Justice Reform Working Group (CJRWG) concluded that excessive document production is responsible for much of the delay and expense in civil

litigation. They determined that the 19th century “*Peruvian Guano*” case 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 UK, where it originated.

The new rules provide that parties only disclose those documents that could be used to prove or disprove a material fact at trial and any other documents that a party intends to refer to at trial. Parties may seek an order to obtain additional documents if warranted.

b. Limits on oral examinations for discovery (Rule 7-2)

Another significant cost factor in today’s litigation is excessive oral examinations for discovery, as the current rules place no limits on the examiner. The Honourable Chief Justice (as he then was) Allan McEachern, stated that oral examinations for discovery can be “a procedure of oppression” and that “often transcripts of interminable examinations for discovery are never looked at during the trial.” He said that the expense of oral discovery must be reduced if we are to “survive the dangerous escalation of costs of the trial process.”

The original concept draft of the new rules provided that no party would be subjected to more than three hours of questioning in discovery by all other parties, without consent or court order. Concern was expressed in the consultations that the total of three hours by all parties combined was insufficient. As a result, the new rules set a maximum (absent consent) of seven hours for each party conducting an examination for discovery. This provides for a reasonable amount of oral discovery, without allowing days upon days of questioning.

An informal process that sometime occurs in an examination for discovery is that the deponent does not know the answer to a question, but agrees to inform himself or herself and then provide the answer. Rather than appear at a subsequent examination for discovery, however, counsel frequently agree to have the new information sent to the requesting party. The new rules have formalized this process by allowing a letter answering the questions to be deemed to be questions and answers given under oath in the exam for discovery. (Rule 7-2 (23) and (24))

c. Interrogatories (Rule 7-3)

Interrogatories under the new rules are only allowed with consent or leave of court.

d. Witness lists (Rule 7-4)

The rules require the parties to exchange witness lists at least 28 days before trial or as set in a case plan order.

4. Experts (Part 11)

a. Duty (Rule 11-2)

Another significant issue found by the CJRWG was the increasingly adversarial nature of expert testimony. To address this issue, the new rules provide that an expert's duty is to assist the court and not to advocate for any party.

b. Reports (Rule 11-6)

Anyone wishing to tender an expert's report into evidence at trial must serve the report on the other parties at least 84 days (12 weeks) before trial. Anyone wishing to tender an expert's report in response to another expert's report, must do so at least 42 days (6 weeks) before trial. The information that must be in an expert's report has been expanded and is set out in Rule 11-6(1).

c. Joint experts (Rule 11-3)

While the rules do not require the use of joint experts, they facilitate the use of such experts by setting out a protocol for their use in Rule 11-3.

d. Experts conferring

The CJRWG's original recommendations provided for opposing experts to confer prior to trial in order to clarify the technical issues in dispute. The mandatory nature of this requirement, however, was subject to criticism in the consultation. As a result, the mandatory nature of this requirement has been dropped from the new rules, but a judge or master can order the experts to confer at either a CPC (Rule 5-3(1)(k)(iii)) or at a Trial Management Conference (Rule 12-2(9)(i)).

e. Disclosure of expert's file

Rule 11-6(8) clarifies the rules on producing the contents of an expert's file.

f. Direct exam of expert

Rule 11-7(5) clarifies the common-law rules on when an expert can provide a report and provide testimony on direct examination.

5. New fast track litigation (Part 15)

The new fast track rule combines the existing expedited litigation rule (current Rule 68) and the fast track rule (current Rule 66) to provide a single simplified and fast procedure when the amount in controversy is \$100,000 or less or when the trial of the action can be completed in three days or less. If the matter fits the fast track criteria, either party may put the case into the fast track. Either party can apply to have the case removed from the fast track (or the court may do so on its own).

In a fast track action, the parties cannot file contested applications without first attending a case planning conference. Oral discovery in fast track actions are (absent consent)

limited to two hours combined by all parties adverse in interest. Costs in fast track actions are limited to \$8,000 for one day trials, \$9,500 for two day trials and \$11,000 for trials lasting three or more days.

Most importantly, if a plaintiff recovers judgment of \$100,000 (or less) or a trial is completed in three days (or less) the limited cost provisions apply. This will provide an incentive to ensure that cases that should be in the fast track are put into the fast track.

6. Trial Management Conferences

To ensure that trials proceed smoothly, trial management conferences will be held between two and four weeks before trial.

7. Miscellaneous

- a. Case initiation and response:
 - i. New forms will facilitate a clearer statement of the claim and response and appendices to the forms will facilitate better data collection.
 - ii. The Writ and Appearance have been eliminated as unnecessary.
 - iii. The filing of a counterclaim is now required to be filed with the response.
 - iv. Third party notices are now required to be filed (absent leave) within 42 days of being served with a claim or counterclaim (3-5(4)).
- b. Application process
 - i. Simplified from rule 51A.
 - ii. Clearer rules on urgent applications (Rule 8-5).
 - iii. Summary judgment process refined (Rule 9-6).
 - iv. Data collection improved (Appendices to form for filing applications).
- c. Better organization.
 - i. The new rules have a reorganized structure to allow for a more logical and chronological flow, along with new terminology to update the rules to modern standards.
 - ii. Time periods are set in multiples of seven for easy calculation in weeks.

B. Supreme Court Family Rules

1. A separate set of rules for family cases

There is now a separate set of Supreme Court rules that apply to family cases. Previously family rules were a combination of general civil rules and specific family rules. The new family rules stand alone and are organized in logical and chronological order, which will be easier to use.

2. User friendly forms

The main forms have been completely revised to make them more user-friendly. They are modeled on Provincial Court forms and are intended to be easier to understand and fill out.

3. Terminology and clarity

The new Family Rules use plainer language and even rules that have not been substantively changed have been redrafted to improve clarity and readability.

4. Family specific objects and proportionality

The Supreme Court Family Rules reflect some of the values of the Family Justice Reform Working Group (FJRWG) report and provide that the object of the Family Rules is to help families resolve the legal issues that arise from family break-up fairly and in a way that will minimize conflict, promote cooperation between the parties and take into account the impact that the conduct of the case may have on a child.

In the family law context, proportionality is defined as conducting the case in ways that are proportionate to the court's assessment of

- (a) the needs and interests of any child affected,
- (b) the family's financial resources,
- (c) the complexity of the case, and
- (d) the importance of the issues in dispute to the law applicable to British Columbia.

5. Judicial Case Conference

The Judicial Case Conference (JCC) remains a key feature of the rules. The judge's powers at a JCC have been expanded. Under the new rules the judge or master at a JCC has the power to refer parties to a family justice counselor or child support clerk, to a parenting after separation program, or, with the consent of the parties, to a private mediator.

6. Discovery in family cases

The family rules have new limits on document production and oral exams for discovery, similar to the civil rules. The family rules provide a right to five hours of examination for discovery. Further discovery is allowed with the consent of the parties or on application to the court.

7. Experts in family cases.

The key change with respect to experts is that if a party wishes to present expert evidence on a "financial issue", which is defined in the rule, the parties must appoint a joint expert. The court may appoint an additional expert if necessary to ensure a fair trial.

8. Costs

The costs rule has been simplified, reducing the number of tariff items to very few.

C. Supreme Court Filing Fees

Court users pay fees at various steps in the court process. For example, a fee is charged for starting a claim, for each day of trial and for many steps in between. The fee schedule has been revised to match the new rules and processes. The new fee schedule reduces the number of fee categories and ensures that similar procedures trigger the same fee. In sum, the new fees are much simpler and easier to understand.

In order to increase access to trials, the new fee schedule eliminates hearing day fees for the first three days of trial. Further, to encourage the use of mediation, the fees for filing or responding to a claim will be eliminated for parties that mediate prior to commencing a civil action. Last, the new fee structure provides for automatic adjustments for inflation.