COURT OF APPEAL

Consultation Paper for Civil Rule Reform

1. INTRODUCTION

[1] The purpose of the British Columbia Court of Appeal's rule reform initiative is to simplify the rules, make appeal proceedings more affordable and address anomalies in the existing *Court of Appeal Act* and *Rules*.

[2] The Court of Appeal has consulted on civil rule reform both internally and externally over the past several months. The Court is grateful to the lawyers and members of the public who have taken the time to propose ideas and provide comments relating to potential changes to the *Act* and *Rules*.

[3] The purpose of this Consultation Paper is to present and request feedback from the public on an array of the suggested changes to the *Act* and *Rules*. The Court does not at this time endorse any particular reform ideas, but welcomes input from the bar, litigants and members of the public about the specific rule reform ideas compiled below.

[4] Please provide your submissions via email at BCCACivilRules@courts.gov.bc.ca by **March 18, 2016**. Anonymous submissions may be mailed to the Court of Appeal Registry, care of the Registrar. Please be as specific as possible in your comments and suggestions. As well, be aware that this rule reform initiative will deal only with the Court's civil rules; criminal rule reform is beyond the scope of this consultation.

2. REORGANIZATION OF THE ACT AND RULES

[5] The most common response to the consultation is that the *Court of Appeal Act* and *Court of Appeal Rules* need to be reorganized to improve coherence and consistency. There appears to be general agreement that, at the very least, the Court's *Act* and *Rules* could be organized more rationally and chronologically. A frequent complaint is that parties must look in several places to patch together information on a procedural step: *Act, Rules,* Practice Directives, Practice Notes, forms etc. There are currently 26 Civil & Criminal Practice Directives and Practice Notes.

[6] Specific suggestions resulting from the consultation include:

a) ensuring that there is a clear, single location to find the main procedural steps for conducting a civil appeal;

b) putting all of the powers (of the Court and of a single justice) in the *Act* and all of the procedural rules in the *Rules*; and

c) consolidating the three security for costs powers (appeal costs, trial costs and trial judgment) into a single provision.

3. LEAVE TO APPEAL

[7] For a minority of cases, litigants must seek the Court's permission to pursue their appeal in a process known as "leave to appeal." In May of 2012, the *Court of Appeal Rules* were amended to simplify the leave to appeal process by creating a list of orders requiring leave to appeal. The list of orders requiring leave replaced an older and more confusing legal test

requiring litigants to determine whether the order they wished to appeal was final or interlocutory.

[8] Since 2012, there has been a shift in the number of overall cases that proceed by leave to appeal and by right. In 2010 approximately 25 percent of civil appeals filed proceeded by leave to appeal, 23 percent in 2011, 24 percent in 2012, 17 percent in 2013 and 14 percent in 2014.

[9] Some suggestions were raised about adding to the list of orders from which leave to appeal is required (see Rule 2.1), including:

a) an order denying an application to strike pleadings (under Supreme Court Rule 9-5(1)); it was suggested that for an order allowing such an application, leave should not be required, based on the potential significance to the appeal;

b) an order allowing or denying an application to amend pleadings (under Supreme Court Rule 9-5(1));

c) an order denying an application for summary judgment (under Supreme Court Rule 9-6));

[10] It was also suggested that the Rules make it clearer what timelines apply upon a party obtaining leave to appeal.

4. FILINGS, DOCUMENT CONTENT AND DEADLINES

[11] The Court received several suggestions about the form of the Court's documents and the deadlines for service and filing. While there are many specific ideas, the overarching question is whether the Court could enhance the current process to make it less expensive and more efficient. Several responses highlighted the cost of transcripts as a major concern. Others suggested that the Court consider the use of more electronic documents and refer to paper only when absolutely necessary.

[12] Specific suggestions included:

a) adopting a single initiating document that both starts an appeal or starts an application for leave to appeal;

b) alleviating the burden and expense of requiring litigants to obtain a transcript from a private company by, for example:

    i. allowing litigants to rely on the audio recording, which would be accessible to the Court of Appeal from the court below;

    ii. allowing litigants themselves to transcribe extracts, subject to verification by the other parties;

    iii. allowing litigants not to file a transcript where the litigants do not intend to rely on the transcript;

    iv. requiring transcript extracts to be filed after the factum is filed instead of at the same time, so that the litigant can narrow the extracts to the portions relied upon in the factum;

    v. allowing a party to file daily transcripts in the Court of Appeal if they obtained them in the Supreme Court;

c) changing the filing deadlines so that parties can narrow the references in the appeal books and file only what they need for the purposes of the appeal;

d) changing the timelines for filing motion materials so that the applicant's submissions fall due after the respondent's materials are filed;

e) requiring all appeal materials to be filed at one time in an appeal: a process where the parties would exchange materials on a set timeline as usual and perhaps occasionally file a document indicating a step was complete, but would wait until they knew what was required for the appeal before filing most documents and

material with the Court. If a deadline was missed, a party could apply in chambers for relief;

f) providing for early, possibly mandatory case management for all or for certain categories of appeals;

g) expanding the use of electronic filing generally, but also specifically by allowing the parties to file electronic documents in the place of paper documents, especially for the larger documents such as appeal records and transcripts. The parties may be able to file the full electronic copies of the appeal book and transcript, but rely on condensed paper versions for the purposes of the hearing;

h) require all electronically filed documents to be in word-searchable PDF format;

i) making it mandatory for lawyers to provide email addresses for service (in order to reduce costs associated with other methods of service);

j) requiring the parties to settle the contents of transcripts and appeal books before the Registrar if they exceed a particular size;

k) exempting self-represented litigants from electronic filing requirements;

l) requiring the filing of a joint appeal book to pre-date the filing of the factums, so that the factums may refer to the joint appeal book;

m) requiring factums to hyperlink to case law, exhibits or affidavits;

n) allowing factums to contain single-spaced footnotes so long as the footnote contains only citations to the record or to case authorities and not substantive argument;

o) allowing factums to contain a draft order, or to devise some other method to allow litigants to put a draft order before the Court;

p) eliminating the requirement to file both a certificate of readiness and a notice of hearing;

q) allowing greater leeway for the filing of non-compliant materials, in order to avoid a litigant's need to apply for an extension of time for materials rejected for a technical or formal irregularity.

5. VEXATIOUS LITIGANTS AND UNMERITORIOUS APPEALS

[13] Section 29 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77 provides that:

> If, on the application of any person, a justice is satisfied that a person has habitually, persistently and without reasonable cause commenced vexatious proceedings in the court, the justice may, after hearing that person or giving that person an opportunity to be heard, order that proceedings must not be brought or commenced in the court without leave of a justice.

[14] Some suggestions were raised about changes to the array of powers and orders available under section 29, including:

a) authorizing a justice to make a vexatious litigant order upon the justice's own motion (rather than only upon an application being brought);

b) authorizing a justice to order that unless leave has been obtained no further steps, other than a review application, may be taken by the person in any extant proceeding that was initiated by the person;

c) authorizing a justice to order that any extant proceeding that was initiated by the person be stayed on conditions, including the payment of costs;

d) authorizing a justice to dismiss the appeal of a litigant who a justice or the Court has declared vexatious where the appeal is without merit;

e) requiring a litigant who has been declared vexatious in any court to seek leave before commencing proceedings in this Court;

f) developing an administrative process for a single justice or the Registrar to refer vexatious litigants to the Court, as is done by the Supreme Court of Canada under Part 12 of its *Rules.*

6. POWERS OF A SINGLE JUSTICE IN CHAMBERS

[15] Some suggestions were raised about adjusting and expanding the powers that a single justice can exercise in chambers, including:

a) authorizing a single justice to dismiss an appeal as abandoned if the appellant has failed to comply with any order (not just an order extending or shortening time (s. 10(2)(e) or an order for security for costs (s. 24))

b) authorizing a single justice to vary types of orders of a justice (not just an order extending or shortening time under (s. 10(2)(d)) where there is a material change of circumstances; for example a single justice could have the authority to vary an order of a justice by the consent of the parties, or a single justice could have the authority to vary certain limited categories of orders, such as security for costs orders.

7. CHAMBERS PRACTICE

Some suggestions were raised regarding chambers practice, including

a) formalizing a short leave procedure for setting down urgent matters;

b) providing that certain types of applications, such as an extension of time, can be conducted entirely in writing; conversely it was submitted that the Court should not adopt the practice of conducting applications in writing;

c) authorizing the Registrar to conduct more informal case management of appeals and empowering him or her to make various orders where those orders do not require a decision on the merits of the appeal; and

d) adjusting the timelines for delivering written arguments.

8. COSTS

[16] In *Bradshaw Construction v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (S.C.) aff'd 73 B.C.L.R. (3d) 212 (C.A.), the Court stated that the objective of the tariff of costs (as revised in 1990) was to achieve 50% indemnity of the client's actual legal fees or at least 50% of special costs which often represent 80%-90% of a lawyer's bill.

[17] This is the case in many partial indemnity systems, although the rate does fluctuate somewhat by jurisdiction. Most Canadian jurisdictions aim for indemnity between 30%–60% of reasonable fees incurred: Alberta is 30–50%, Saskatchewan is 33%, Manitoba is 60%, Ontario is 60%, New Brunswick is 40%, Prince Edward Island is 60%, and both the Yukon and Northwest Territories aim for 50%. The rate in Australia and England tends to be much higher, between 60%–90%.

[18] Some suggestions were raised about adjusting the Court's costs regime, including:

a) increasing the tariff rate in Appendix B, which is currently $60/unit for the default value (Scale 1) to approximately $110, scale 2 to $145 and scale 3 to $180;

b) changing the name of the tariff scales (currently Scale 1, 2 and 3) to be consistent with the name of the Supreme Court tariff scales (Scale A, B and C);

c) changing the default tariff to Scale 2, in order to (i) allow for a standardized procedure to decrease the costs award for very simple matters, and (ii) to make the Court's costs regime consistent with the BC Supreme Court's regime, which uses Scale B as the default;

d) authorizing the Registrar to set costs in consideration of offers to settle or to authorize the Registrar to make a determination on the divided success of the parties to an appeal;

e) explicitly providing the Court with the power to order costs on a lump sum basis;

f) reducing or removing the requirement to appear before the Registrar for an assessment of costs by requiring parties to exchange and file proposed bills of costs complete to the day before hearing (with an estimate for the hearing itself), so that the Court can make a costs award (including quantum) within the reserve judgment;

g) increasing the Court's authority to impose costs sanctions in a variety of circumstances (e.g. evidence has been transcribed unnecessarily);

h) increasing the costs amount available for an appearance before the Registrar so that it is equal to an amount for an appearance in chambers;

i) removing or limiting the Registrar's authority to award a range of units for particular tariff items by establishing set amounts for each tariff item; and

j) making administrative changes to certain tariff items to better convey their meaning. For example, changing tariff item 1 from, "Advising appellant or respondent on appeal, application for leave to appeal or cross-appeal" to, "Advising appellant or respondent on bringing an appeal, application for leave to appeal, or cross-appeal"

9. FREQUENTLY CITED AUTHORITIES

[19] Some suggestions were raised about changing or eliminating the Civil & Criminal Practice Note, 21 October 2011, *Frequently Cited Authorities*, which requires the parties to reproduce only the headnote and passage relied upon. If the Court were to eliminate this Practice Note, it would be up to the parties to determine which cases do not warrant reproduction in full, having regard to Rule 40(7), which reads:

> If an authority exceeds 30 pages in length, the party or parties on whose behalf the book of authorities is filed may, instead of including the full version of the authority in the book of authorities, include a copy of the headnote, together with a copy of the page or pages referred to in the factum or motion book, as the case may be.

10. CODIFICATION OF UNWRITTEN PRACTICES

[20] Some suggestions were raised about creating written rules about elements of Court practice which currently are not addressed in the *Act*, *Rules* or the Practice Directives and Practice Notes, including:

a) the filing of a consent order for transcripts containing the submissions of counsel;

b) the test for when the Court will sit as a five-justice division on an appeal; and

c) how to request an expedited appeal.

11. MISCELLANEOUS

[21] Some suggestions falling outside the above headings include:

a) the Court setting out the terms of its order within its reasons for judgment, so that parties can avoid the time and expense of settling the order with opposing counsel or before the Registrar;

b) removing the requirement that orders state, "It is further ordered that…" for each term of an order, and instead require separate terms to be numbered;

c) removing the "All parties have agreed to comply hereafter with the time limits…" clause from Form 26 (Consent Order);

d) allowing parties to put draft orders in the appeal book if the draft order is so lengthy that it cannot be fully described in Part 4 of the factum;

e) the Court sending a "pre-appeal" memorandum to counsel outlining any preliminary concerns in an appeal so litigants come to Court prepared to address the Court's issues in argument, saving time, effort and anxiety;

f) the Court communicating with the parties when it reserves it reasons for judgment to give lawyers and their clients some idea of how long they may have to wait;

g) the Court considering when reasons for judgment are required, limiting the publication of reasons to where there is a "public dimension" to the appeal.

12. SUGGESTIONS BEYOND THE SCOPE OF THE COURT'S CIVIL RULE REFORM INITIATIVE

[22] Some suggestions raised ideas that are beyond the scope of the Court's civil rule reform initiative, including:

a) creating an initial appeal process to take place at the courts below;

b) require video recording of proceeding in the courts below;

c) extending the Registry's hours of operation so that it is open on some evening or weekend periods;

d) hiring an intake officer to assist self-represented litigants; and

e) simplifying the information provided on the Court's website to assist self-represented litigants.

[23] Regarding (a) and (b), this rule reform initiative cannot encompass changes to the lower courts' procedures. Regarding (c) and (d), registry services are provided by the government of British Columbia (Court Services Branch). Being a separate and independent entity, the Court does not determine the Registry's hours of operation or its staffing. Regarding (e), while the Court will take into consideration the suggestion to simplify its website, the website is a separate topic from the rule reform initiative; please note also that in partnership with the BC Justice Education Society the Court maintains a self-represented litigant online guide (www.courtofappealbc.ca) complete with video, flowcharts, definitions and detailed guidebooks for both appellants and respondents.