



COURT OF APPEAL

**RESULTS OF CONSULTATION ON ELECTRONIC FILING OF FACTUMS AND STATEMENTS**

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**1. INTRODUCTION**

[1] The Court of Appeal’s consultation paper on electronic filing of factums and statements was released to the public on 3 February 2014. This paper provides a summary of the themes that emerged from the responses we received during the consultation period, which extended well past the proposed 30 April 2014 deadline. The Court appreciated all responses, which included several groups providing responses on behalf of their membership.

## 2. CONSULTATION THEMES AND THE COURT'S RESPONSE

[2] Responses were generally in favour of conducting further electronic filing. With the exception of one response, all were supportive of the Court's initiative "to access trustworthy, accurate and authentic electronic court records while paper is reduced over a number of years". The Court is committed to including these perspectives as we move to develop, within the Court's means, improvements and expansions in the way the Court receives electronic filings.

[3] Some of the most prevalent themes are discussed below.

### A. E-filing Process and Court Services Online (CSO) E-filing Functionality

[4] Many asked why the initiative was limited only to factums and statements. There was a clear desire to include other records, such as transcripts and appeal books as part of e-filings. At the same time, however, there were concerns about the functionality of CSO's e-filing module and its ability to achieve the Court's goals. Some found CSO's e-filing module slow and difficult to use.

[5] **Response:** Responses to the Court's consultation paper suggest that the Court Services Online (CSO) e-filing gateway could be significantly improved for both public and the court. Including improvements to the user experience, larger filings such as transcripts and appeal books are currently not accommodated. As of September 2014, the Ministry of Justice approved a project that will allow the Court to revisit and improve its e-filing gateway in the coming months. Though the budget is modest, it is hoped that this initiative will improve the Court's e-filing gateway through a series of small steps, specifically to eventually allow the filing of larger documents and more efficient filing of factums and statements. The project will follow User Experience Design (UXD) principles and a modern project management approach.

[6] Because this project may change the way the Court receives and processes factums and statements, the filing of factums and statements through the existing gateway will not be

pursued in January, 2015. Instead, the Court will instead wait for the more robust solution that is responsive to this feedback and the feedback of others.

#### **B. The Exclusion of Self-Represented Litigants from Mandatory E-filing**

[7] Participant’s submissions expressed concern that the exemption of self-represented litigants from mandatory e-filing would create a “two-tiered” system of rules and procedure for those with and without counsel. It was generally felt that self-represented litigants should be offered more support to fully participate in the same e-filing process as counsel and be bound by the same rules and obligations.

[8] **Response:** The Court does not wish to exclude self-represented litigants from e-filing; however, there are litigants who may see e-filing as another access barrier. As an example, inmates in provincial or federal institutions sometimes file their documents in handwritten format. They have no internet access and sometimes limited access to word processing. Other self-represented litigants require significant assistance in completing court forms. However, in light of the responses received the Court, the Court will review this issue in detail, including how the forms could be improved and technology leveraged to better support those who are self-represented.

#### **C. Education and Support**

[9] In a related theme, many emphasized the need to train those unfamiliar with the e-filing system and to help with the transition to a mandatory e-filing. For example, support for the legal profession in person and through webinars was provided when the Land Title and Survey Authority transitioned to mandatory electronic filing.

[10] **Response:** The Court will, within its means, work with government and private partners to develop an education strategy. The hope, depending on funding, is that the might include training and support for all participants including self-represented litigants. The Court will

remain open to suggestions about how to pursue this strategy, given the current funding climate.

#### **D. The Integrity of Court Records**

[11] Court of Appeal court records are archival and preserved permanently. Concerns were raised about how the Court will manage an authoritative record in a hybrid (paper and electronic) transitional period.

[12] **Response:** The Court's goal is to provide access to "trustworthy, accurate and authentic electronic court records while paper is reduced over a number of years". This significant shift will take some time to ensure the alignment of multiple people, processes, and technologies and include a digital preservation strategy for archival court records. The development of this strategy will involve cooperation between the Court's own resident archivist and the Ministry of Justice, which has the responsibility to manage, store, and archive court records.

[13] For signed documents, there are also statutorily required rules to deem a court order authentic. Under the *Canada Evidence Act*, an electronic signature must meet the requirements of the *Secure Electronic Signature Regulation (of the Personal Information Protection and Electronic Documents Act)*. To be authentic, the certification authority of the signature must be recognized by Treasury Board. Only two certification authorities are recognized - Public Works, and Government Services Canada and Canada Revenue Agency. If a digital signature is certified by one of these agencies. These certification authorities require a form of two-factor authentication that is highly secure.

#### **E. Suggested Filing Timelines**

[14] Suggestions were made about proposed timelines in the consultation paper, in particular, how the Court might handle deadlines for the receipt, rejection, and service of electronic records when they are e-filed.

[15] **Response:** The Court will re-examine these deadlines and consult with those that provided these suggestions (and others) to make sure that the rules around e-filing, as they develop, best serve the needs of as many as possible.

#### **F. Access to the Electronic Court Record**

[16] There were concerns about access to electronic factums when publication bans are in force.

[17] **Response:** As processes become more automated through the use of technology, there is a danger that information that is subject to a ban may be inadvertently published. Technology also provides opportunities for greater tracking of information, such as publication bans. The proper tracking and reporting of publication bans is critical to this process, which is presently a challenge that the three courts and the Court Services Branch are working to address.

### **3. SNAPSHOTS OF ANONYMIZED SUBMISSIONS, BY THEME**

#### **A. E-filing Process and Court Services On-line (CSO) E-filing Functionality**

##### **Submission A**

[18] Notices of appeal and transcripts share two important characteristics with factums. First, they are (almost) always prepared electronically. They could, therefore, just as easily be filed in text searchable form as factums. We should expect that a litigant would have little difficulty uploading to CSO a text searchable transcript of the trial proceedings, which he or she has obtained from the reporting agency. If the Court were in favour of this change but concerned about the integrity of the evidence, the Court could mandate that a certified copy of the transcript be made available at the hearing of the appeal, a requirement which would be analogous to Rule 12-5(57) of the Supreme Court Civil Rules.

- [19] Second, notices of appeal and transcripts, like factums, are discrete documents. This distinguishes them from those court forms, such as appeal records and appeal books, which are an aggregation of various documents. We recognise that the preparation of composite forms for e-filing will prove more technologically challenging than notices of appeal, transcripts and factums; however, we would encourage the Court to begin exploring methods for e-filing these more complex forms now. Ideally, once the mandatory e-filing of discrete forms were implemented, the Court would move (more or less immediately) to the next phase of the process, e.g., mandatory e-filing of affidavits, appeal records, appeal books and books of authorities. Once that were complete, the Court would turn its sights to motion/reply books and applications for leave to appeal, and so on.
- [20] Again, we recognise that e-filing of composite documents will pose technological challenges; however, these will almost certainly not prove to be insuperable – or, in all likelihood, particularly onerous. Thus the Court ought not to be daunted by the prospect of the inevitable challenges. Not only have other courts in this jurisdiction devised creative solutions to assisting litigants, including self-represented litigants, to create electronically fillable court forms (e.g., the small claims filing assistant), but there is a wealth of expertise amongst the many medium and large firms in Vancouver that the Court could draw on.
- [21] Although we appreciate the concerns set out at paragraphs 7 and 8 of the Consultation Paper, we think that by modestly increasing the scope of the initial mandatory e-filing project, the Court will significantly further the goal set out at paragraph 9 of the Consultation Paper (quote above) with little additional burden to the Bench or Bar. We should note, in particular, that having text searchable transcripts should greatly increase efficiency in those cases where conflicts in the evidence are material to the issues on appeal.

[22] At the end of the day, we are of the view that prolonging the move to a comprehensive e-filing regime would, in the long term, increase rather than decrease expense and inefficiency. Our hope is that within the next few years an appellant will have – at the very least – the option of navigating the entire appeal process, from notice of appeal to hearing, in a paperless environment.

### **Submission B**

[23] There is only mention of access to CSO with a BCeID account. It may be worth noting in future correspondence that CSO is also accessible via BC Online, as many lawyers and firms currently have BC Online accounts and/or choose a third party provider. For those that opt to “go direct” it would clarify that there would not be a need to undertake to open yet another account.

[24] It is suggested that the courts be very clear with the limitation on file size of Factums and statements as being no larger than 8MB per CSO’s system requirements. It has been our experience as CSO’s largest e-filer with volumes in excess of a few hundred documents a month that even files with less than 50 pages are frequently scanned as PDFs exceed 8MB. As such, we include in our monthly FYI (news and updates) to Litigation clients a reminder of CSO system limitations. Suggestion to provide instruction on document preparation by the courts for litigants who may be less tech savvy.

### **Submission C**

[25] In paragraph 15 of the Consultation Paper, the second last paragraph refers only to “hyperlink citations and internet authorities”. As I read the Consultation Paper, “hyperlinking” is limited to links to authorities; there is no mention of hyperlinking to supporting materials like the Appeal Record, Appeal Book, Transcript, Transcript Extract Book, or Condensed Book.

## **Submission D**

### *Factums or Statements Rejected for Electronic Filing by Registry*

- [26] One of the advantages of the current process of paper filing is that a party knows almost immediately if a document has been refused for filing by the registry. One of the problems with the proposed system is that there is no specification as to how long it will take registry staff to review a document that has been received by CSO.
- [27] The Group recommends that a process be instituted for quick review of documents received by CSO. In addition, the Group recommends that the registry should e-mail counsel when a document is accepted for filing rather than requiring counsel to check the CSO website every hour to see if counsel's document has been rejected for filing by the registry. That way, delays will be minimized and the risk of error reduced.
- [28] The Group recommends that a process be instituted for quick review of documents received by CSO. In addition, the Group recommends that the registry should e-mail counsel when a document is accepted for filing rather than requiring counsel to check the CSO website every hour to see if counsel's document has been rejected for filing by the registry.

### *Replies*

- [29] The proposed process set out in the Consultation Paper does not speak about Replies. The Group asks: Will an appellant filing a Reply incur another \$7.00 charge? The Group recommends that parties not be required to pay for filing a Reply through CSO.
- [30] The Group recommends that parties not be required to pay \$7.00 for filing a Reply through CSO.

## **Submission E**



[31] The proposed rule provides that an electronic factum or statement must be received (electronically) by Court Services Online (CSO) on the day it is due. The Registry staff will review the factum and, if it is accepted, date stamp it and will then be considered “filed” for purposes of time calculation. . .

[32] The proposed rule then provides that *counsel* will have to check the CSO, retrieve the factum and serve it *electronically or conventionally within (5 (five) business days* of the date it was date stamped.

[33] The concerns are as follows:

- The Registry should notify by email the party filing the document when the document is accepted by the Registry, rather than expecting counsel to check the CSO. Otherwise, counsel will have to keep checking the Registry, and perhaps contacting the Registry to find out if and why there is a delay in accepting or “uploading” the factum to the CSO. Also, it could lead to unnecessary delays in service, as counsel may not “check’ the CSO in a timely way. One email from the Registry to counsel at the end of accepting the document will notify the counsel that time is starting to run and service must be completed.
- The proposed rule provides for up to five days in which service can occur. This is potentially very problematic in sentence appeals as the Crown/respondent typically only has seven actual days to respond to an appellant’s sentence appeal statement. It may be that the Registry does not expect sentence appeal statements to be included, in which case this should be stated.
- The electronic factum may be served electronically or in hard copy – does this mean that an appellant is no longer required to provide the respondent with a hard copy? The Court is still asking for 4 (four) true or hard copies. The respondent should continue to get a hard copy, also.

### **Submission F**

- [34] I provide these brief comments regarding the proposed compulsory e-filing of factums and statements. Mostly this is to register my opposition to the compulsory nature of the process. I am against it.
- [35] It is all too simple for bureaucrats on the receiving end of a Registry to suggest electronic filing. I am sure it saves time and resources but that would be at the expense of so many users who have a right to access the system.
- [36] As the committee recognizes many, probably most, Judges and lawyers work with paper. I personally am not skilled on computer operation because I find it cumbersome, difficult and inefficient for the nature of work done by counsel. Over time people like me will evolve out of the system and the value of paper will be lost. There are, of course, health issues associated with extensive use of computer screens. I note this survey also recognizes that the Court requires hard copies of factums for archival purposes and so it is difficult to see exactly what value there is to users of the system to have these records filed by others digitally for the convenience of Court staff.
- [37] I also do not understand the rationale of charging to file an e-document or to do a search when there is no value provided by the Registry and the work is all done by the user. Accordingly, since all of the parties who are actually working with documents relating to the Appeal process require hard copy to use it, compulsory e-filing simply adds an additional step and the associated expense to the users the Registry is to serve.

### **Submission G**

- [38] Here are some things that I do not like about e-filing in the BC Supreme Court through Court Services Online:
- There are extra fees. Paperless filing should be cheaper than paper filing.

- The service is slow. Even though most of the filing work is done by the user, the document takes a day or two to get filed and even longer to get posted on the system.
- The website is slow. It takes a long time to navigate between web pages.
- Some documents cannot be e-filed. This is annoying. It is especially annoying to navigate through all the pages, fill out forms, and then discover that the document cannot be filed.
- Some documents (affidavits) must be retained indefinitely by the user on paper. I want my office to be paperless and do not want the headache of storing paper indefinitely. If we are going to e-file, then the deemed original documents should be stored electronically in the court system, just as land title documents are stored in the Land Title Office.

#### **Submission H**

[39] First of all, I would like to say that I wholly support this initiative. I hope that the CA and trial courts go further to eliminate paper from court filings. Our clients and the public are moving in this direction. It is absolutely essential to our credibility in the broader community that we keep in step with trends that businesses and people are adopting, These technological trends essentially replace physical inputs to goods and services with information inputs. The information revolution is as important. Fundamentally, that is all paperless lawyering is.

#### *Factum Requirements*

[40] In my view, it would not be onerous to insist that only original PDFs be filed, as opposed to allowing OCR scans. It is very easy (and free) to convert any MS Word document to PDF and the quality is remarkably better. In fact, it takes less time and expertise to do so than to print, scan, OCR and save a paper copy. While the minimum requirement of 300

DPI in OCR scans is laudable, it is still a far cry in terms of resolution from a MS Word file converted directly to PDF. As above, I suspect that prohibiting OCR scans would improve readability and make the transition more palatable to users.

[41] The requirement that hyperlinks and bookmarks be used in PDFs is excellent.

#### *Service and Filing*

[42] As opposed to requiring that counsel serve a filed factum, it would be equally easy to enter opposing counsel's email in CSO and have a link sent directly to that person inviting them to download or print the filed factum, thereby effecting service. A notification could and should be sent to counsel filing the factum as to whether or not service was effected by this means. This would reduce costs to the profession and litigants.

### **B. The Exclusion of Self-Represented Litigants from Mandatory E-filing**

#### **Submission A**

##### *Assist Rather than Exempt Self-Represented Litigants*

[43] Without detracting from our support for the mandatory e-filing proposal, we are not in favour of the proposed exemption for self-represented litigants. Although no justification for the proposed exemption is provided in the Consultation Paper, we have no doubt that the Court is concerned about erecting technological barriers to access to justice. Whilst we share that concern, we do not believe that the appropriate solution is to create separate rules for different classes of litigants; rather, we believe the Court should look at ways to help self-represented access the necessary resources to successfully e-file their factums (and other court documents).

[44] There are a number of ways that these resources could be provided. For example, the Court could work with Courthouse Libraries BC and/or the Vancouver Justice Access

Centre to provide self-represented litigants with access to CSO. In another scenario, the Court could work with organisations such as Access Pro Bono to create a database of lawyers across the province who would be willing to e-file and retrieve documents as agent for self-represented litigants (at cost or a nominal fee). At the end of the day, we do not believe excluding self-represented litigants will improve either access to justice or court efficiencies in anything but the short term. On the contrary, by requiring self-represented litigants to seek assistance from counsel (or other advocates) for the ostensible purpose of filing factums, the Court may inadvertently foster an improvement in the quality of the filed materials.

### **Submission C**

[45] I resist the suggestion to exclude self-represented litigants (SRLs) from mandatory e-filing. This runs the risk of creating a two-tiered system and also administrative and technical confusion. Further, given the large percentage of cases involving SRLs, much of the benefit of e-factums will be lost if SRLs are excluded.

[46] Rather than exclusion from e-filing, I would prefer to see more resources provided to SRLs to prepare e-factums. There are several legal service providers (e.g. Access Pro Bono, Amici, Self Help) who could play a role. Their involvement may also permit SRLs an opportunity to access substantive assistance that could have beneficial effect for opposing counsel and the Court (Justices and Registry).

[47] It may also be appropriate to approach the commercial service providers (e.g. Appeals Unlimited, United Reporting, The organization, etc.) to see if they would offer some pro bono technical assistance to SRLs.

### **C. Education and Support**

#### **Submission B**

[48] As we experienced with the Land Title and Survey Authority's ("LTSA") move from optional to mandatory e-filing in 2012, time as well as education is key to helping litigants and the profession become familiar with any new process. The year allotted to do so seems sufficient, since the Courts have already allowed limited Appeal document e-filing via CSO since 2012. The LTSA was able to have an individual available to train and provide information to the legal profession in person, as well as provided webinar training to address the rules and requirement around specific document filing. With the courts' limited resources and budget, this may not be an option. We strongly recommend enlisting companies &/or associations to assist in this area.

#### **D. The Integrity of Court Records**

##### **Submission A**

###### *Phasing-in a Comprehensive Electronic Filing Regime*

[49] We wholeheartedly support the Court's plan to implement mandatory e-filing of all factums and statements for civil and criminal appeals through CSO. Indeed, the Court's goal "to have access to trustworthy, accurate, and authentic electronic court records while paper is reduced over a number of years" is laudable and deserving of ongoing support. Consistent with that general proposition, we believe that, if anything, the present proposal does not go far enough. In our view, the Court ought to consider phasing-in mandatory e-filing of all court forms, without exception. In line with that position, we would respectfully suggest that the court expand the pilot project now under discussion to include mandatory e-filing of notices of appeal and transcripts.

##### **Submission C**

[50] I suggest that much of the benefit of e-filing and e-factums comes from reducing the paper-burden related to the Appeal Record, Appeal Book, Transcript, and Transcript Extract Book. Accordingly, the initiative should clearly express this range.

### **Submission D**

- [51] The Group agrees unanimously with mandatory electronic filing for factums or statements.
- [52] The Group recommends that an electronic copy of appendices be attached to the electronic factum or statement. Further, the Group recommends that not all of these three Internet authorities noted in the Consultation Paper be required to be included in electronic factums or statements.
- [53] The Group recommends that registry staff should date stamp the document with the date it was “received” and not with the date it was “accepted” so that the time frames set out in the *Court of Appeal Act* are not eroded.

### **Submission H**

- [54] Paper copies of factums should not be filed at all under the proposed regime, as seems to be required by para. 19 of the Consultation Paper. It seems to me that this is counter-productive if e-filing is to be a true cost and time saving for the bench, bar, and litigants. Should judges want paper copies for their own use, then I suspect that the administrative savings by not accepting paper factums should allow court resources to be directed to printing factums for judges on an ad hoc basis. Indeed, there are a number of print shops, including PostNet and Resolution Reprographics, that are close to the courthouse that are familiar with CA factum rules and can print factums sent to them by email or File Transfer Protocol and deliver them to the court. The cost of doing so is roughly the same as cost allowances under the Supreme Court tariff, if not less.

### **Submission I**

- [55] With respect to paragraph 10 of the Consultation Paper: “However, the court will still require 4 (four) true paper copies of factums for archival purposes (long term preservation) and

for use by Judges.” What is considered the original or authoritative document? Is this document preserved as an official court record?

- Are one or more paper copies transferred to the archives upon filing?
- Does the Court keep its own archives?
- When are files transferred to the Provincial Archives?
- What is the long-range plan for preserving electronic records?
- Is the electronic or the paper considered the authoritative copy in the case of a dispute or for reference?

[56] With respect to paragraph 11, the CSO is the Court’s electronic registry

- How are entries fixed and their integrity protected?
- What metadata is added and for what purpose, and how is that metadata fixed or related to the record, and preserved?
- Is there a retention/disposition schedule?

[57] With respect to paragraph 13, outsourcing filing to a third party

- Will the third party keep copies of what is filed?
- Will the third party be bound by records policies of the Court, particularly with respect to security, privacy, and retention and disposition schedules?
- If the 3<sup>rd</sup> party keeps copies, are these available to the Court?
- Do they add metadata to the records and if so, who owns that metadata?
- Can the Court access that metadata?

[58] With respect to paragraph 15,

- How will the authenticity of the factums be protected – i.e. will the BCeID of the filer be preserved with the file in order to authenticate in the absence of a signature?



- How will the presence and content of appendices attached to the paper copies be reflected in the electronic version?
- What, if any, standards or requirements are set on quality/type of PDF and OCR other than resolution?
- If hyperlinks are present in the electronic version, then this changes the record and its functionality – which is ‘original’ or authoritative?

[59] All the questions above seek clarification of recordkeeping practices that ensure authentic, reliable and accurate records can be created, maintained and preserved for as long as needed, regardless of medium.

#### **E. Suggested Filing Timelines**

##### **Submission B**

[60] It is suggested that the service time be extended from 5 to 7 or 10 business days. Although we trust that the Court of Appeal will make every effort to file and return documents to litigants in an expedient manner, so that they will have ample time to deliver hard copies to the courts and serve their filed Factums and statements on opposing counsel, it has been our extensive experience with Provincial Civil and Supreme Court e-filing that this is not always possible. Unforeseen circumstances, such as staffing shortages and volume, etc. may cause a delay in the return of e-filed documents from the courts to the litigant, possibly causing frustration, increasing pressure and eventual resistance to a new process.

##### **Submission D**

###### *Extending Time Limits in Event of CSO Failure*

[61] The Group recommends that there should be a process for extending time limits in the event there is failure of CSO. If, for reasons of CSO system failure, parties cannot access

the network, they should not have to apply for an extension of time to file. The CSO technical staff should be able to indicate there was a system wide failure for a certain number of hours on a certain date and documents due for filing on that date should get an automatic extension of one or more days, depending on the length of time the system was inoperative. This is a complication that does not arise under a paper system but will almost certainly arise under an electronic system.

#### **Submission D**

[62] The Group recommends that counsel serve the electronic factum or statement filed with CSO within 5 (five) business days of the date it was accepted.

[63] The Group recommends that there should be a process for extending time limits in the event of a failure of CSO and that documents due for filing should get an automatic extension of one or more days, depending on the length of time the CSO system was inoperative.

#### **F. Access to the Electronic Court Record**

##### **Submission E**

[64] With respect to publication bans, it is not uncommon, notwithstanding the existence of a publication ban in the trial court, that appellant's factums will use the full name of a witness whose identity has been made subject to the ban. In other cases, the full name of the appellant is used in circumstances where the daughter or step-daughter of the appellant is the complainant and whose identity is protected. In such cases, it is often necessary to use initials to identify not only the protected witnesses but the appellant as well.

[65] The concern has been expressed about how careful the vetting is going to be before a factum is made available to the public. There is a risk that the names of complainants or

undercover officers may slip through because their names appear in the appellant's factum. Perhaps the Paper can more clearly state that criminal factums will not be publicly accessible if the registry is aware that a publication ban is in place, if that is the intent. If the intent is to make factums which adequately respect any publication bans publicly accessible, our concern about screening comes to the fore.