Questions and Answers for Justice System Professionals

1. Did the government require the preparation of the new rules?

No. Effective justice reform depends on bringing together various stakeholders, including the bench, bar and government. To this end, the Law Society of British Columbia 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 Ministry of Attorney General. Its mandate is 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 twelve 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 twelve 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 ten 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 current proposed rules.

2. Were the proposed court rules created by government?

The government did not create the proposed court 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— 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 Rules Revision Committee then met with the Chief Justice and Deputy Attorney General to finalize the current draft rules.

Ultimately, the Attorney General of British Columbia will recommend new court rules to Cabinet and, if Cabinet approves, an Order in Council will bring the new rules into force.

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

Input from the public and from the legal profession was extensive, including the following:

- Deputy Attorney General Allan Seckel, Q.C. and BC Supreme Court Chief Justice Donald Brenner discussed the proposed reforms and the principles behind the proposed reforms with approximately fifty groups across the province including local bar associations, CBA subsections, the judiciary, chambers of commerce, professional associations, law firms, media, Law Society Benchers, Law Society committees, the Faculties of Law at UBC and the University of Victoria, the BC Trial Lawyers Association, the Vancouver Board of Trade, the Union of BC Municipalities, Administrative Tribunals, and others.
- Several articles have appeared in the Advocate, BarTalk, and other journals explaining the concepts behind the rules and seeking input.
- Focus groups on the proposed rules were held with lawyers from various areas of practice in the following cities:
    - Victoria
    - Vancouver
    - Prince George
    - Nelson
    - Kelowna
- An on-line forum was created to help people provide comments on the proposed rules:
    - The site was visited 6500 times
    - The Concept Draft was downloaded over 1400 times
    - 90 submissions were received
    - The submissions web page was visited over 1500 times.
- 27 submissions were received by email and letter, including lengthy submissions by the CBA, the Law Society and the TLABC.
- 35 submissions were received by email and letter prior to the release of the Concept Draft.
- In June 2005, the Civil Justice Reform Working Group, the B.C. Ministry of Attorney General and the Continuing Legal Education Society of B.C. jointly sponsored the "Restructuring Justice" Conference in Vancouver, discussing the possibilities of civil justice reform. A notable part of that conference was a "Client Panel" which consisted of:
    - Audrey T. Y. Ho – VP Legal Services and General Counsel, Telus Communications Inc.
    - S. Noel Rea, Q.C. – formerly Senior Counsel, Imperial Oil Limited
    - Peter Jefferson – President and CEO of N. Jefferson Ltd., a small business with 25 employees
    - Diana Lowe – Executive Director of the Canadian Forum on Civil Justice (reporting on the results of the CFCJ's research into what the public needs from the justice system)

- In November, 2007, the Civil Litigation CLE, chaired by JJ Camp, QC, discussed the Concept Draft in detail.
- A revised Concept Draft of the rules was posted on the On-Line Forum in March 2008 to show the major changes to the original Concept Draft that resulted from the feedback received on the rules.

4. Will the limitations on discovery create unfairness?

In jurisdictions that have limited discovery, there is no evidence that it has created unfairness. 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 19th century decision in *Peruvian Guano*[1] 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....*
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> 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*
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> The Honourable Chief Justice (as he then was) Allan McEachern *Allarco Broadcasting Ltd.* v. *Duke* (1981)

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

The new rules provide a much more reasonable approach to both document and oral discovery. A litigant must disclose all documents referred to in their pleadings, all document 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 also seek an order to extend this scope of discovery in any case where a wider scope would be warranted.

The new rules allow only three hours of questioning in oral discovery, unless the parties consent or the court otherwise orders. These rules will allow a sufficient amount of discovery to be conducted, but will not force the exchange of truckloads of documents and days upon days of questioning in discovery.

5. Will the rules be fair to small business and working people?

Yes. Some have argued 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 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. They will only be allowed to pursue the amount of process that the parties agree or a judge determines to be proportional 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. Under the new rules jury trials will no longer be automatically excluded for cases under 100,000 that would have been filed under the Expedited Litigation Rule, or for cases which would have been filed under the Fast Track rule. Instead, a judge will use proportionality principles to determine if a jury is warranted.

7. Will the new rules add to the bureaucracy?

No. Some fear that the requirement in the new rules to create a plan for the litigation means more bureaucracy and processes that will slow down the justice system. The new rules do the opposite, by reversing the incentives in the system that permit delay.

The original Civil Justice Reform Working Group report recommended, as a centrepiece for the reforms, that Case Planning Conferences be held in every case between the parties, counsel and a judge. Consultation on the new rules, however, brought out that

the real objective is to encourage case planning by the parties — a case planning conference is only necessary where the parties cannot agree on the contents of the case plan.

Under the current rules, the starting point is unlimited process. If a litigant wants to stop unnecessary process, the litigant must bring on an application. The new rules reverse the onus. Counsel seeking more discovery, for example, must justify more discovery as part of an overall case plan. In sum, the new rules reverse the advantage for parties who want more process. The requirement to plan before going down a long costly litigation road will reduce expensive and time-consuming, adversarial wrangling.

8. Will the new rules reduce delay?

Yes. Under the current system, there are no deadlines for moving a case forward. A case can sit idle in the court files for years without any judicial involvement and without any plan. Under the new rules, the parties must get together and agree on timelines. If they cannot, they must attend a conference and the judge will set timelines.