



Submission to

CIVIL JUSTICE REFORM WORKING
GROUP

BC Justice Review Task Force

EFFECTIVE AND AFFORDABLE CIVIL JUSTICE

Issued by:

**Civil Justice Report Special Committee
Canadian Bar Association
British Columbia Branch
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PREFACE

The Canadian Bar Association nationally represents over 35,000 members and the British Columbia Branch (the “CBABC”) itself has approximately 6,000 members. Its members practise law in many different areas and the CBABC has established 67 different Sections to provide a focus for lawyers who practise in similar areas to participate in continuing legal education, research and law reform. The CBABC also establishes special committees from time to time to deal with issues of interest to the CBABC.

This submission was prepared by a special committee composed of members of the CBABC Civil Litigation Sections and the Legislation and Law Reform Committee (the “Civil Justice Report Special Committee”). The comments expressed in this submission reflect the views of the Civil Justice Report Special Committee only and are not necessarily the views of the CBABC as a whole.

For the Civil Litigation Sections the following members participated:

Okanagan

- Sean Travis Pihl, Chair;
- Leona V. Baxter, Legislative Liaison;



Vancouver

- Veronica P. Franco, Chair;
- Ben J. Ingram, Legislative Liaison;

Vancouver Island

- Kerry Lynn Simmons, Chair;
- Alana James, Legislative Liaison;

For the Legislation and Law Reform Committee, the following members participated:

- Paul Barclay, Chair;
- Katharina Byrne; and
- Sonny Parhar.

The Civil Justice Report Special Committee is pleased to make submissions on this important law reform project.

SUBMISSION

BACKGROUND

In 2002, the British Columbia Justice Review Task Force (the “Task Force”) was established on the initiative of the Law Society of British Columbia. The Task Force is a joint project of the Law Society, the Attorney General, the British Columbia Supreme Court, the British Columbia Provincial Court and the CBABC.

The Task Force worked on a review of the civil justice system in British Columbia. In 2006, the Civil Justice Reform Working Group of the Task Force released its report, Effective And Affordable Civil Justice (2006) (the “Report”).¹

The Report makes three recommendations.²

The first recommendation is to “create a central hub to provide people with information, advice, guidance and other services they require to solve their own legal problems.”³

¹ Copy available at: http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf.

² Page viii of the Report.

³ Page 1 of the Report.

The second is to “require the parties to personally attend a case planning conference before they actively engage the system, beyond initiating or responding to a claim.”⁴

The third is to “rewrite new Supreme Court Rules based on an explicit overriding objective that all proceedings are dealt with justly and pursuant to the principles of proportionality.”⁵

Specifically, the proposal is to:

- replace the current pleadings process with a new process requiring the parties to accurately and succinctly state the facts and the issues in dispute as well as the plan for conducting the case and moving to resolution;
- limit available discovery, while requiring early disclosure of key information;
- reduce expert adversarialism and limit the use of experts in accordance with proportionality principles;
- streamline motion practice by resolving issues at the case planning conference and by placing limits on the hearing process;
- empower the judiciary to make orders to streamline the trial process;
- consolidate all three regulations regarding the Notice to Mediate into one rule under the Supreme Court Rules;

⁴ Page 10 of the Report.

⁵ Page 18 of the Report.

- provide opportunities for litigants to resolve issues that create an impasse early and cost-effectively, but limit interlocutory appeals.⁶

CBABC RESPONSE

The Civil Justice Report Special Committee supports the objectives underlying the Report, and the need for changes to accomplish them. The submissions made herein are intended to provide a critique of the Report on the basis of the comments of various CBABC members, and the views of the Civil Justice Report Special Committee.

Preliminary Matters

The Civil Justice Report Special Committee makes these comments regarding some preliminary matters.

1. There has been concern expressed by some CBABC members that the consequences of the Report's recommendations may make fundamental changes to the traditional adversarial role of counsel and place judges in an inquisitorial role. This concern holds that there are both philosophical and practical (cost and practice of law) ramifications to

⁶ Pages 21 to 41 of the Report.

the proposed changes in the Report relating to changing roles of judges and counsel that do not appear to have been addressed, adequately or at all.

2. Another concern raised by a CBABC member is that the philosophy of the Report does not seem to limit the scope of the change proposed. It is recommended that, to the extent there is evidence of a real problem, the least restrictive solution to that problem be implemented, before more drastic proposals are adopted.
3. A related concern is that the Report has not given sufficient weight to the goal of simplicity of procedure. It is suggested that, wherever possible, the Supreme Court Rules and accompanying procedures be simplified, rather than made more complex and hence expensive.
4. A related concern is that the Report lists a limited set of facts and assumptions. In the Report, very little data is given in support of the assumptions. Consequently, the accuracy of basic premises in the Report --whether there are problems, and how serious they are--is incapable of scrutiny. Assuming there are problems with the justice system, it is not apparent from the Report that the Civil Justice Reform Working Group has considered whether there are alternative explanations for problems. For example, in personal injury cases, the following factors could be, as much or as more responsible for failure to attain justice than any of the procedural issues raised in the Report:

- the high cost of jury fees;
- the operation of section 25 of the *Insurance (Motor Vehicle) Act* which requires the court to deduct at the end of a personal injury trial any rehabilitation benefits that have been paid and could be payable under Part 7 of the *Revised Regulations* passed under the *Insurance (Motor Vehicle) Act* and the requirement that all aspects of future care under this Part 7 be litigated separately;⁷
- the uneven operation of Rule 37 (Offer to Settle) of the Supreme Court Rules as between plaintiffs and defendants; and
- the effect of Rule 37 of the Supreme Court Rules in eclipsing the provisions of the *Negligence Act* which provides in section 3 that the liability for costs of the parties to every action shall be in the same proportion as their respective

⁷ See *Sovani v. Jin et al* 2005 BCSC 1285 (<http://www.courts.gov.bc.ca/jdb-txt/sc/05/12/2005bcsc1285.htm>) as a result of the application of section 25 of the *Insurance (Motor Vehicle) Act*, the plaintiff had nearly \$100,000 deducted from his tort claim.

liability to make good the damage or loss.⁸

If corrections are made to practices that are not problems, and not made to practices that are problematic, there will only be further disruption and distrust in the legal system.

Legal Hub

In the Civil Justice Report Special Committee, there is general support for the creation of a legal hub. One suggestion is that the Civil Justice Reform Working Group ensure that the legal hub on the Internet use identifiable, general, layperson terms, and not legal language or jargon so that the public and consumers can easily find and use the legal hub.

Another suggestion is for government to spend the necessary money in order to ensure success of the legal hub. The Report is silent on funding the legal hub. The concern is that the legal hub not be created and then underfunded so it cannot meet its goals.

⁸ See *Porto Seguro Companhia De Seguros Gerais v. Belcan S.A.* [1997] 3 S.C.R. 1278 (<http://scc.lexum.umontreal.ca/en/1997/1997rcs3-1278/1997rcs3-1278.html>), where the Supreme Court of Canada recognized that a distinction should be made between substantive laws and procedural rules. This case is authority for the proposition that, while the *Negligence Act* deals with substantive issues, and the Supreme Court Rules deal with procedural issues, the policy expressed in the *Negligence Act* should prevail over procedural concerns and not vice versa.

Another concern is that the legal hub not operate to conflict with current services already being provided to the public, such as the successful CBABC Lawyer Referral Service and Dial-A-Law program.

For example, the CBABC Lawyer Referral Service is a very successful public service. The CBABC Lawyer Referral Service provides the public with an opportunity to consult with participating lawyers on legal matters for a nominal fee. In 2005-6, the CBABC Lawyer Referral Service received over 53,000 calls from the public all across British Columbia resulting in over 33,000 referrals to participating lawyers.⁹

The CBABC Dial-A-Law program is also very popular with the public. Dial-A-Law is a free public service. Dial-A-Law maintains a library of legal information covering a wide range of topics of practical interest to the public. The Dial-A-Law scripts are prepared by lawyers, who are specialists in their area of law. For the convenience of the public, scripts are available in English, Punjabi and Chinese. Dial-A-Law is available to the public by toll-free telephone or 24/7 from the CBABC's website: www.cba.org/bc. In 2005-6, over 300,000 British Columbians accessed Dial-A-Law scripts, from both telephone and the Internet, and from all over British Columbia.¹⁰

⁹ CBABC, "Annual Report 2005/2006" at page 5 (available at: http://www.cba.org/bc/pdf/annual_reports/annual_reports_2005_2006.pdf).

¹⁰ *Ibid.*

To ensure that existing successful and popular public services, like the CBABC Lawyer Referral Service and Dial-A-Law program, continue to provide needed public services, it is recommended that the legal hub not conflict with existing services already being provided to the public.

Unbundling of Legal Services

The Report recommends a move towards the unbundling of traditional legal representation to permit increased consumer choice and affordability.¹¹ That means that the consumer can obtain “legal advice on discrete tasks or portions of the problem rather than hand the entire problem over to a lawyer”.¹²

In response to unbundling of legal services, one comment is that arranging limited scope assistance is somewhat intimidating for counsel. This is because lawyers are understandably concerned about being sued for negligence. It has to be made clear in legislation that the legal profession can offer “unbundled” legal services without fear of being sued for failing to grasp the implications which may arise from other related issues in legal matters.

In practice, “unbundling” may be more difficult than it appears in theory. For instance, the legal trend is that parties are increasingly involved in multi-party, multi-issue litigation. For example,

¹¹ Page 7 of the Report.

¹² *Ibid.*

a contractor's interest in "leaky condo litigation" may be very minor. The contractors may have done a limited amount of work and seek a builder's lien. On the other hand, a builder's lien may, in the context of a 30, 90 or 180-day trial, relate to the failure of the waterproofing of the condominium as a whole. Lawyers should be able to assist the client in proving a builder's lien without being responsible for appearing in a 180-day trial or being worried about possible adverse implications for the resolution of the larger case which it may have.

Case Planning Conference

The Report recommends that a Case Planning Conference be required in order to settle matters faster and more cheaply and to enable those matters that need to go to trial to get to trial faster and more cheaply.¹³

One comment received is that many lawyers will think this requirement unnecessary, since they already consider narrowing issues, settlement possibilities, separating the relevant from the irrelevant and so on. On the other hand, for those lawyers that do not achieve these efficiencies before engaging the court process, a required Case Planning Conference may be significant in helping to define sensible directions for claims and achieving efficient resolution.

¹³ Page 10 of the Report.

One CBABC member favours the Case Planning Conference concept and believes that it has the potential to address the most significant driver of costs: delay. Further, the avoidance of delay would have another very significant benefit: quicker resolution will lead to greater satisfaction with the system by the public, who are the users of the justice system.

New Supreme Court Rules

Proportionality

The third recommendation of the Report is to rewrite new Supreme Court Rules based on an explicit overriding objective that all proceedings are dealt with justly and pursuant to the principles of proportionality.

There is general support for the concept of proportionality. Proportionality has attractive and sensible features, particularly where damages are relatively modest and/or where there is a significant imbalance in the relative strengths of the parties. However, in some situations, the party with greater resources will adopt a practice of overwhelming the opposing party with demands for documents.

A concern has been raised regarding the application of proportionality. The difficulty with proportionality is that when it is not tied to the amount of damages in question but rather based on other criteria, such as importance or complexity of the issues, there is no criteria which would

allow the court to determine importance and/or complexity on objective grounds. There also can be a significant subjective element in determining whether an issue is either important or complex.

An observation has been made regarding the application of Rule 1(5) of the Supreme Court Rules. Currently, Rule 1(5) states that “The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.”¹⁴ It is the experience of some CBABC members that the Bench does not consistently apply the Supreme Court Rules within the context of the objects stated in Rule 1(5). Further, the civil justice system requires proportionality in all of its aspects, and not simply in the determination of a proceeding. Finally, it is not only counsel who need to be more focused on this objective, there needs to be more emphasis on this objective by the Bench. Judges understandably tend to be liberal in their approach to counsel’s requests and if there is any doubt about whether something is relevant or permissible or an additional reply is required, for example, it is generally allowed. That may be consistent with affording a full and complete hearing. It may not be consistent with the interpretation and application of the Supreme Court Rules in a manner that best attains justice in an efficient, timely and economic way. One solution is to re-emphasize the requirements of Rule 1(5) to call it proportionality and to require that such objectives need to be applied at each stage of the proceedings.

¹⁴ Supreme Court Rules (B.C Reg. 221/90) of the *Court Rules Act*, R.S.B.C. 1996, c. 80.

Service of Dispute Summary and Resolution Plan

The Report recommends that the 1-year period for service allowed under the current rules be limited to 60 days from filing. The Report's rationale is that the shorter time limit for service will avoid unnecessary cost, reduce delay and encourage early resolution.¹⁵

A CBABC member believes the Report's suggested amendments to pleadings practice will not lead to greater efficiency. This member believes they will have the opposite effect. In many cases there are very good practical reasons for the use of "boiler plate" pleadings, or broad and open-ended allegations. The main reasons are cost, and the unavailability of details of the facts at an early stage of proceedings, depending on the nature of the case.

Another CBABC member has a concern with shortening the time limit for service in those cases regarding limitation periods. Under the current rules, a lawyer can file a Writ for clients in order to preserve a limitation period. After filing, the lawyer then can take the time to look into the matter and see if it is worth pursuing. If the timelines for service are shortened so drastically to 60 days, persons who seek legal advice from a lawyer shortly before a limitation expires may not be able to find a lawyer willing to draft the Writ on their behalf. The reason is that a lawyer will be too wary of not being able to do the required work before the Writ needs to be served. To not be

¹⁵ Page 22 of the Report.

negligent, the lawyer may refuse to act on behalf of those persons. If this happens, then those persons may lose their cause of action all together by virtue of the limitation period expiring.

Limit Discovery

The recommendation in the Report to limit discovery is controversial. For many CBABC members, one day of discoveries is too short.

An issue that has been raised is that there needs to be focus on whether and when discovery is required. This focus should consider the different use of discovery by plaintiffs and by defendants. Discoveries sometimes seem to wander interminably with no apparent goal in mind. Unless time limits are imposed, it is hard to see how this is going to change.

Some CBABC members support the recommendation restricting the scope of discovery of documents. Some CBABC members are of the opinion that rule in *Peruvian Guano* is unwieldy and unworkable. They point out, that not so long ago, the prospect of producing lists of tens of thousands of documents was unthinkable but it is common-place today. If the courts are in doubt on an application to produce more documents, they will order more production.

A concern has been raised that the Report does not consider the effects of limiting discovery. A fundamental issue that must be determined, before considering how documentary and other

disclosure should operate, is the need to assess the importance and role of document and oral disclosure in the administration of justice. In some cases, both parties may have the evidence necessary to prove their own cases. In other cases, the parties may need to rely heavily on oral discovery and/or disclosure of the opponent's documents in order to establish their case. The Report does not appear to have considered this issue. The more critical it is to obtain disclosure of the other side's documents, the more reluctant we should be to remove rules of disclosure.

A similar concern that has been raised is obtaining discovery using the Freedom of Information statutes. In recent years, lawyers are increasingly using the Freedom of Information statutes to obtain access to documents. This practice may remove the need for direct document disclosure in some cases. However, if litigation processes have limited documentary disclosure and Freedom of Information disclosure is also limited, this would have a dramatic and adverse impact on the litigation process and on access to justice.

Another concern is that the Report's proposals will actually increase costs, instead of saving costs. In most cases, the examination for discovery process works well and accomplishes its objectives. However, if arbitrary restrictions are imposed, then there will be the necessity for new rules, opinions to clients, tactical use of the new rules, applications to court concerning the limits on discovery that have been created and the creation of jurisprudence concerning the new rules. As a result of all of these new rules, procedures and court applications, there is a serious

question to be answered whether there will be an overall gain in terms of efficiency and affordability.

A CBABC member suggests the Report should recognize that every case is different. There may be a case where most of the significant facts are known, or can be discerned from the documents. In another case, the opposite may be true. How does a limit set out in the rules and based upon pre-determined arbitrary limits address that sort of question? For example, two cases both "worth" \$100,000 may be far different in relation to the need for examination for discovery. This factor is even more significant if one adds in other "importance" criteria. A more practical approach to examination for discovery limits would be to address the necessity and length of examinations for discovery at the initial Case Planning Conference. The Judge could set limits on a case by case basis at that time, with liberty to amend the limits at later stages if appropriate.

“Will Say” Statements

In the Civil Justice Report Special Committee, there is general support for “will say” statements. As recommended, “will say” statements will eliminate much of the concern which could arise from a limitation of discoveries and the prospect of being ambushed by the other side.

Rule 18A (Summary Trials) and Impasse Issues

One CBABC member has observed that Rule 18A applications can be a useful way to resolve impasse issues. Currently, *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, [1989] B.C.D. Civ. 3651-13 (C.A.) is authority for the proposition that Rule 18A is to be applied in a vigorous manner. This CBABC member is of the opinion that the law in *Inspiration Management, supra*, seems to have been progressively whittled away and it is more difficult, and somewhat hit-and-miss, to proceed on a Rule 18A application with any confidence that a court will approach the problem aggressively and consider whether, in reality, the “safeguards” of a full trial are really required. It is this member’s experience that the Bench tends to refer matters to the trial list when a judge is not sure and it is easy to say that it is not in the interests of justice to have a matter determined by summary trial. This member would like to see an appeal from a Rule 18A be more in the nature of an appeal *de novo*. Unless it becomes easier to appeal a finding on a Rule 18A that an issue or proceeding is not appropriate for summary trial, the reinvigoration of Rule 18A and the resolution of impasse issues is going to be problematic.

Interrogatories

The Report recommends that interrogatories be eliminated.¹⁶ This is controversial.

One CBABC member observed that if discoveries are greatly reduced and interrogatories eliminated, then plaintiff's counsel faces a very significant problem. For example, in a motor vehicle case, how does plaintiff's counsel question the owner as to whether or not the motor vehicle in question was being driven with either the owner's express or implied consent?

In complex scientific and technical cases, counsel's expert can draft a technical interrogatory to be sent to the other side. This can result in a meaningful response which a party would never obtain on oral discovery. Sometimes such discovery and response are necessary for expert analysis. For example, in aviation cases or other cases where one is attempting to determine what has gone wrong in a highly complex piece of machinery or what has happened in a complex construction project, for a lawyer to attempt to elicit by cross-examination the necessary technical data to do an analysis may be completely impractical. Indeed, it may be completely impractical for the other party to try to explain through one person the finer points of, for example, the working of a jet engine, tolerances, speed and pressure limits, the reasons there are speed and pressure limits. The practical way to elicit such technical information is often for the expert to set forth the information which the expert requires, turn it into an interrogatory and to get a response under oath. Eliminating interrogatories denies the needed relevant evidence being produced before the court. The Civil Justice Reform Working Group may wish to review the

¹⁶ Page 26 of the Report.

experience in England, where interrogatories are referred to as “Requests for Further Information”. These “Requests for Further Information” provide a mechanism where written questions can be made to the other side and the other side is required to answer those questions in writing.

Other Matters

One CBABC member views the recommendations in the Report as having many similarities to the existing Rule 68 (Expedited Litigation Project Rule) under the Supreme Court Rules. For example, both the Report and Rule 68 require attendance at a case management/planning conference.

This CBABC member, who practises personal injury litigation, would like the Civil Justice Reform Working Group to consider adding procedures similar to Rule 66 (Fast Track Litigation Rule) under the Supreme Court Rules. In this member’s experience, Rule 66 is effective in avoiding unnecessary costs, reducing delays and encouraging settlement without the need for a trial.

This member suggests that by adding procedures similar to Rule 66:

- there still would be no interrogatories;
- there would be limited discovery;
- more than one expert would be permitted (without consent of the parties), as long as the expert evidence can fit with the other witness evidence into two days (which has the effect of making lawyers pause and consider what experts are truly needed);
- these procedures would force parties to book and have the trial quickly; and
- there would be required a Case Management Conference.

Under Rule 68, this CBABC member's experience is that Rule 68 matters take longer than Rule 66 matters. This is because the parties need to resolve witness will-say statements, attend the Case Management Conference and obtain any needed orders and then have the Trial Management Conference.

In this CBABC member's experience, the one exception to Rule 68 matters taking longer than Rule 66 matters is in Low Velocity Impact (LVI) cases. In this member's practice, representing



plaintiff claims against the Insurance Corporation of British Columbia (“ICBC”), the Case Management Conference has encouraged settlement in cases where ICBC has deemed the claim to be LVI. For LVI cases, current ICBC practice is to only permit insurance adjusters authority to make a settlement offer if “a person in authority” has stated that the plaintiff would get compensation at trial. In LVI cases under Rule 68, the member’s experience is that if the Master, as a result of the Case Management Conference, determines that a plaintiff will likely get some compensation at trial then that encourages settlement with ICBC. Often settlement is then reached without the need for a trial.

RECOMMENDATIONS

The Civil Justice Report Special Committee recommends that:

1. the Civil Justice Reform Working Group, to the extent there is evidence of a real problem, should implement the least restrictive solution to that problem, before more drastic proposals are adopted;
2. the Civil Justice Reform Working Group, wherever possible, ensure that the Supreme Court Rules and accompanying procedures be simplified, rather than made more complex and hence expensive;
3. the Civil Justice Reform Working Group obtain as much data as reasonably possible concerning the nature and scope of the problems in the civil justice system and share that data with stakeholders in consultations before changes are made;
4. the legal hub on the Internet use identifiable, general, layperson terms, and not legal language or jargon so that the public and consumers can easily find and use the legal hub;

5. the legal hub be given the necessary funding by government so that the legal hub meets its stated goals;
6. the legal hub operate so as not to conflict with current services already being provided to the public, such as the CBABC Lawyer Referral Service and Dial-A-Law programs;
7. the legal profession offer “unbundled” legal services without fear of being sued for negligence for matters which may arise from other related issues;
8. the existing requirements of Rule 1(5) of the Supreme Court Rules regarding proportionality be re-emphasized and it be required that such objectives be applied at each stage of the proceedings;
9. the proposal to limit period of service from 1 year to 60 days from filing be reconsidered in light of situations where persons who seek legal advice shortly before a limitation period expires, may not be able to find a lawyer willing to draft the Writ on their behalf and, as a result, they may lose their cause of action by virtue of the limitation period expiring;

10. the one day limit of discoveries is too short;

11. the Civil Justice Reform Working Group consider requiring that the necessity and length of examinations for discovery be determined at the initial Case Planning Conference.
The Judge could set limits on a case by case basis at that time, with liberty to amend the limits at later stages if appropriate;

12. an appeal from a Rule 18A be permitted and be more in the nature of an appeal *de novo* in order to resolve impasse issues;

13. the Civil Justice Reform Working Group, regarding interrogatories, consider the use of “Requests for Further Information” as is used in England so that there is a mechanism where written questions can be made to the other side and the other side is required to answer those questions in writing; and

14. the Civil Justice Reform Working Group consider adding procedures similar to the existing Rule 66 (Fast Track Litigation Rule) under the Supreme Court Rules.

CONCLUSION

The Civil Justice Report Special Committee would welcome the opportunity to provide further input and dialogue with the Civil Justice Reform Working Group respecting these submissions.

Any communications can be directed to:

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