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BRITISH COLUMBIA'S NEW SUPREME COURT CIVIL RULES

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I. INTRODUCTION

On July 1, 2010, British Columbia's new *Supreme Court Civil Rules* (the "New Rules") came into effect replacing the *Rules of Court* (the "Old Rules"). How these new rules will be interpreted and the impact they will have on insurance litigation remains to be seen and will develop over time. However, the impetus behind the New Rules was to make the civil justice system more responsive, accessible, and efficient. To achieve this end the overriding factor of proportionality has been injected into the object of the New Rules. As a result, when applying the New Rules the court must keep in mind the amount at stake, the importance of the issues in dispute, and the complexity of the action.

For the most part the New Rules are a reorganized structure that follows a more logical and chronological flow, along with new, simplified terminology to modernize the rules. Although the New Rules are not a complete overhaul to the Old Rules there are significant changes that effect commencement of proceedings, scope of and time for discovery, delivery of documents, expert evidence, and fast-track proceedings, along with a new case planning regime. These changes have implications for not only lawyers but those in the insurance industry who handle litigated claims. While the New Rules have the potential to reduce the cost and increase the speed of litigation, it is important that insurers be aware of the increased demands on parties during the early stages of an action, coupled with the associated litigation expenses.

This paper serves as a primer on the changes in the New Rules that will have the most impact on insurance professionals when handling a litigated claim.

II. PROPORTIONALITY – THE UNDERCURRENT OF THE NEW RULES

The primary objective of the Old Rules was "to secure the just, speedy and inexpensive determination of every proceeding on its merits". To this the New Rules add the gloss of "proportionality". Consequently, when the courts attempt to secure the just, speedy and inexpensive determination of a proceeding it is to do so in ways that are proportionate to: (1) the amount involved in the proceeding, (2) the importance of the issues in dispute, and (3) the complexity of the proceeding. As is elaborated upon below, proportionality underscores the vast majority of the changes brought about by the New Rules.

With the new emphasis on proportionality the court is better equipped to approach a proceeding on a case-by-case basis. Gone are the days of the one-size-fits-all approach. This will allow for more streamlined procedures in those simpler cases involving lesser complexity and amounts. In the simpler cases one can now keep costs down by limiting the number of experts involved and placing limits on the length of oral discoveries and trial. The principle of proportionality ought to help prevent spiralling cost caused by slow, complex, and unnecessary court processes that were required or allowed by the Old Rules. For those cases requiring the complete arsenal of procedures available under the Old Rules one need only show such procedures are proportionate. Further, in the more complex cases one can utilize the court's powers under the case planning

regime to focus the issues sooner by having the opposing party identify the expert(s) they will employ, setting early dates for disclosure of expert reports, and requiring the exchange of witness lists sooner.

III. PLEADINGS GENERALLY

The New Rules change both the name and substance of the pleadings filed in a typical action. In an effort to make the process more accessible and efficient the New Rules simplify the initiation and response process by eliminating the filing of multiple court documents. With such changes the standard practices of the insurance industry must evolve to meet the new requirements.

A. Notice of Civil Claim

To commence an action a party files a Notice of Civil Claim. This is a merger of the Writ of Summons and the Statement of Claim. The Notice of Civil Claim is required to be divided into three parts consisting of:

Part 1 - a concise statement of the material facts giving rise to the plaintiff's claim;

Part 2 - the relief sought and the name of the defendant against whom the relief is sought; and

Part 3 - a concise summary of the legal basis on which the plaintiff intends to rely in support of the relief sought.

The time for service of a Notice of Civil Claim remains unchanged from the Old Rules. It must be served within 12 months of filing but can be renewed for up to two 12 month periods.

Drafters of the New Rules have indicated that the form of the Notice of Civil Claim is designed to force a plaintiff to provide a more detailed claim that is tailored to their specific case. The goal is to see an end to boilerplate pleadings ubiquitous under the Old Rules by requiring the plaintiff to provide more meaningful statements of the facts that are within their own knowledge.

With the demise of the Writ of Summons, gone are the days when a party could relatively quickly and inexpensively file an endorsed Writ of Summons to merely protect the limitation period. The Notice of Civil Claim is parallel to a Statement of Claim, requiring much more detail than the basic information contained in a Writ of Summons. Consequently, more upfront litigation expenses will be incurred in subrogation actions due to the need for prompt investigation and assignment of counsel. That said, the New Rules do carry forward the one free amendment to a pleading prior to the delivery of a Notice of Trial or the holding of a Case Planning Conference. Therefore, if the situation calls for it, a barebones Notice of Civil Claim could be filed for the purpose of protecting a limitation period. Because the New Rules attempt to make pleadings more meaningful, barebones or boilerplate pleadings – particularly those that deal with large sums or complex issues – are more likely to be the subject of motions to strike.

B. Petitions

As with the Old Rules, under the New Rules a party can commence a proceeding by way of Petition. This is useful for situation where the issue at hand is the interpretation of an insurance policy.

C. Response to Civil Claim

To respond to a Notice of Civil Claim the defendant files a Response to Civil Claim. The Response to Civil Claim is a merger of the Appearance and Statement of Defence. As with the Notice of Civil Claim, the Response to Civil Claim is required to be divided into three parts consisting of:

Part 1 - the response to each of the facts alleged in the Notice of Civil Claim, stating whether the fact is (a) admitted, (b) denied or (c) outside the knowledge of the defendant. If the fact is denied, the defendant must “concisely set out the defendant’s version of that fact.” In addition, the defendant must “set out, in a concise statement, any additional material facts that the defendant believes relate to the matters raised by the notice of civil claim.” If a defendant does not specially respond to an alleged fact, it is deemed to be outside the knowledge of the defendant;

Part 2 - the defendant’s position with respect to the granting of the relief sought; and

Part 3 - a concise summary of the legal bases on which the defendant opposes any of the relief sought.

If the defendant resides in Canada, a Response to Civil Claim must be filed 21 days after the service of the Notice of Civil Claim; if the defendant resides in the USA, it must be filed 35 days after service; and if the defendant resides elsewhere, it must be filed within 49 days after service.

As with the Notice of Claim, the process of responding to a claim has been streamlined by merging the Appearance and Statement of Defence. Further, the additional substantive requirements for Response to Civil Claim are aimed at having parties draft pleadings that are case specific. No longer can a defendant merely file an Appearance to avoid default being taken. Given the time requirement of 21 days for Canadian defendants to file a Response, the insurance industry will need to be able to respond quicker than before either by retaining and instructing counsel faster or obtaining a written extension of time from the plaintiff. Undoubtedly litigation costs will increase on the front end with the added time required to provide a detailed Response to Civil Claim. However, if both the parties’ pleadings are done properly the issues in dispute should be much clearer than what typically occurred under the Old Rules.

D. Third Party Claims

Another significant change that insurance professionals must be aware of concerns Third Party Claims. Under the Old Rules a defendant could file a Third Party Notice up to 120 days before trial without leave of the court. Under the New Rules, a Third Party Notice must be filed within 42 days after service of the Notice of Civil Claim, unless leave is obtained. As with the new Notice of Civil Claim and Response to Civil Claim there will undoubtedly be increased front end litigation expense due to the requirement to file within 42 days after service of the Notice of Civil Claim as defence counsel will have to fully assess all facets of the case with an eye to identifying third parties. However, on the positive side, this new requirement may be beneficial as it will force the parties to be more focused and to develop the case at an earlier stage, thereby allowing for a more informed risk assessment by all parties.

As with the Notice of Civil Claim and Response to Civil Claim, the form of a Third Party Notice has changed and is divided into parts, mirroring these other pleadings.

As under the Old Rules, where the Third Party Notice claims only contribution or indemnity from an existing defendant, the third party is not required to file or serve a Response to Third Party Notice, and is deemed to have denied all of the facts alleged in the Third Party Notice.

IV. CASE PLANNING

Perhaps the biggest procedural shift under the New Rules occurs with the addition of Case Planning Conferences (“CPC”). CPC’s are a new tool in counsel’s arsenal to ensure an action proceeds in a timely and ordered fashion. CPC’s allow counsel to establish a game plan at an early stage of the litigation in which timetables and procedures are ordered by the court. CPC’s are not entirely new, as they are a fusion of procedures from the Old Rules for Case Management Conferences used in expedited actions under Rule 68 and actions which were set down for trials of 20 days or more.

Although originally slated to be mandatory in all Supreme Court actions, the final version of the New Rules make CPC’s optional. Under the New Rules, once the pleading period has expired, any party of record may request that a CPC take place by filing a Notice of Case Planning Conference. If it is the first CPC in the action, the notice must be served on all parties at least 35 days before the hearing date. In the case of subsequent CPC’s, the notice must be served on all parties at least 7 days before the hearing date.

Once all parties have been served, they are then required to exchange Case Planning Proposals (“CPP”). The plaintiff must serve its CPP within 14 days after receipt of the Notice of Case Planning Conference, followed by every other party’s CPP 14 days later.

The New Rules mandate that the CPP contain a party’s proposal with respect to various procedural steps in the action, such as discovery of documents, examinations for discovery,

dispute resolution procedures, expert witnesses, witness lists, trial type, estimated trial length, and preferred periods for the trial date.

A party of record or the party's lawyer must attend the first CPC in person, unless otherwise ordered by the court. However, subsequent CPC attendance can be by telephone or other communication medium.

At the conclusion of the CPC the court will make a Case Planning Order ("CPO"). The New Rules permit the court to make a wide range of orders regarding the conduct of the action. Some of the more important orders the court can make are setting a timetable for steps to be taken such as oral discovery and exchange of expert reports, set limits on document discovery, set limits or expand time limits for oral discovery, have expert evidence be submitted by a jointly-instructed expert, restrict the number of experts a party may call, fix the length of trial, and set the trial date. What a court is not permitted to do at a CPC is hear an interlocutory application that needs affidavit evidence or make an order for final judgment unless the parties consent. Failure to comply with a CPO will likely result in costs penalties, but the New Rules do permit a court to dismiss a claim.

As with the new form of pleadings, the purpose behind CPC's is to address each action on an individual basis. It is through the use of CPC's and a well crafted and reasoned CPP, coupled with the new proportionality factor, that a defendant can in essence take the reins of a plaintiff's case to push the action forward towards an expeditious resolution. Strategic use of CPC's should prevent files from languishing due to inactivity by plaintiffs or their counsel. However, experience with case management in other jurisdictions shows that much depends on the sanctions for failure to comply with a schedule set out by a CPO. If the courts are content to issue a new schedule upon a failure to comply with the old schedule, then CPC's and CPO's will have little effect on the speed of resolution of claims. If the courts are more liberal with sanctions such as costs orders, which seem likely, then CPO's will be an effective tool.

V. DISCOVERY

A. Discovery of Documents

As it relates to discovery of documents there are two significant changes under the New Rules.

First, gone is the Demand for Discovery of Documents. Under the New Rules each party must serve a List of Documents within 35 days of the end of the pleading period, which typically will mean 42 days after filing and serving the Response to Civil Claim (the pleading period ends 7 days after the Response is served or a Reply is served).

The second change pertains to what documents need now be disclosed. Under the Old Rules the criteria for determining what documents must be produced was very broad. One used to be required to produce every document "relating to every matter in question". Under the New Rules the criteria is much narrower and a party need only produce and list:

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- (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial.

This new criteria draws attention to the increased importance on a party's pleadings, as the scope of production in most instances will turn on whether the document will prove or disprove a material fact in the case.

If, after delivery of a List of Documents, an opposing party believes that further documents should have been produced, that opposing party can serve a written demand for production, identifying the undisclosed documentation and the reason why such additional documents should be disclosed. After receipt of the written demand the party must deliver a Supplemental List of Documents within 35 days. If that party fails to deliver the Supplemental List the opposing party can bring an application to compel production.

What remains unchanged under the New Rules are the requirements to produce a supplemental list of documents if documents come into a party's possession after delivery of the initial List of Documents, to produce an insurance policy that may respond to the claim, and the procedures for claiming privilege over documents and for obtaining production of documents from non-parties.

Clearly the principle of proportionality lies behind the narrower scope of document production. Often under the Old Rules there was an exchange of voluminous irrelevant documents. As the majority of cases deal with low to moderate dollar figures and issues of limited importance and complexity, in theory the reduced scope of document production should equate to less expense. Although the critics are concerned that the narrower scope of production will hinder a party's ability to prosecute or defend a claim, the New Rules do contain provisions allowing a court to order more expansive document production when needed.

B. Oral Discovery

Another significant change in the New Rules pertains to the examination for discovery process. Under the New Rules a 7 hour time limit has been placed on the total of all examinations conducted by one party of another party, subject to leave of the court or consent of the parties. No longer must all examinations for discovery be completed at least 14 days before trial. The reason behind this lies within the new case planning regime in which such issues as scheduling and length of oral discovery are dealt with.

The procedure for dealing with outstanding discovery requests has also been changed under the New Rules. Under the Old Rules a party would respond to outstanding examination for discovery requests by letter; whereas the formal procedure was that a witness had to respond to the outstanding request at a follow-up examination for discovery. The New Rules recognize the

informal practice and the examining party can now request that responses to outstanding requests be given by letter, with those responses being deemed to have been given under oath.

Although the 7 hour time limit on examinations for discovery to many seems to be one of the most significant changes under the New Rules, in practice few discoveries require more time. Ultimately, this new limitation will require counsel to be better prepared and more focused in questioning. The hope with this change is to force more efficient and productive witness examinations. Gone are the days of irrelevant tangential questioning, or what some refer to as “fishing expeditions”. It is questionable whether this change will have any appreciable effect on reducing litigation costs.

C. Witness Lists

Under the Old Rules there had been a Practice Direction obligating each party to file and serve a witness list at the Pre-Trial Conference. The purpose behind this was to prevent parties being caught by surprise resulting in unnecessary trial adjournments. The list would name each witness that the listing party might call at trial. Expert and adverse witnesses need not be listed. There was no obligation for the listing party to call the witness at trial, nor would there be an adverse finding for merely failing to call a listed witness. The New Rules codify this requirement and add a continuing obligation to keep the list accurate and complete. Unlike the Old Rule 68, there is no requirement under the New Rules to provide a written summary of the witness’s anticipated evidence.

Under the New Rules, filing and service of the witness list hinges on whether there has been a CPC. If so, service is dictated by the CPO. If not, the list must be filed and served before the earlier of the trial management conference and 28 days before trial. Witness lists are another important area to cover off at the CPC. Early disclosure of the other party’s witnesses will assist with full investigation of the claim and risk assessment and may encourage earlier settlement.

D. Interrogatories

Under the New Rules, interrogatories are no longer available as of right. Instead, interrogatories are available only when the party to be examined consents or the court grants leave. When granting leave the court will scrutinize the proposed interrogatories as to the number or length, and the matters the interrogatories are to cover. The procedure of answering interrogatories remains mostly unchanged.

For the most part this change will reduce litigation expense as it will eliminate those lengthy and often irrelevant interrogatories. In the typical case the information to be gleaned from interrogatories can be ascertained via oral discovery. If interrogatories are appropriate for a given case, their use can be addressed at the CPC.

VI. FAST TRACK

Under the New Rules there is only one simplified fast track litigation procedure. This new procedure is a merger of the Old Rules 66 (fast track litigation) and Rule 68 (expedited litigation). Drafters of the New Rules assert that the new fast track procedure is a refinement of the best aspects of the old procedures.

The new fast track litigation procedure applies if:

1. the claim is for \$100,000 or less, exclusive of interest and cost;
2. the trial can be completed in 3 days or less;
3. the parties consent to the Rule applying; or
4. the court orders that the Rule will apply.

As under the Old Rules, to fall under the fast track procedure a party need only file a Notice of Fast Track Action or endorse a pleading accordingly. Further, any party may apply to have the case removed from the fast track procedure or the court may do so on its own motion. Under the New Rules the court also retains the power to award damages in excess of \$100,000.

Under fast track certain aspects of the litigation are limited; oral discovery of a party is limited to 2 hours unless an examined party consents and trial is without a jury. As was the case under the Old Rules, if a party applies for a trial date within 4 months of the action falling under fast track, the registrar must set a trial date within 4 months.

Unlike the Old Rules, the New Rules do not contain specific requirements or restrictions regarding document disclosure or expert witnesses; the non-fast track Rules apply to those issues. That said, keep in mind that fast track actions also allow for CPC's and one can address restricting document disclosure and use of experts accordingly. Given the lower value and/or complexity of the vast majority of fast track actions, the new principle of proportionality should tip the scales in favour of at least some form of restrictions on those aspects of an action.

Like the fast track procedures under the Old Rules, the New Rules have provisions restricting costs. Unless the court orders otherwise, the amount of costs that can be claimed by a party are fixed at \$8,000 for a trial that is one day or less, \$9,500 for a trial that is two days or less but more than one day, and \$11,000 for a trial that is more than two days. Fixed costs under fast track creates some certainty and reduces the expense of negotiations and assessing Bills of Costs.

VII. EXPERTS

Another noteworthy change under the New Rules concerns the use of expert witnesses and the content and timing for disclosure of their reports. Changes have been made regarding the duty of experts, appointment of joint experts, form and content of the expert's report, and production of

the expert's file. If a CPC has been held, expert opinion evidence must not be tendered at trial unless provided for in the CPO, unless the court orders otherwise.

All of the changes regarding expert reports, service of such reports, and production of the expert's file aim to curtail trial by ambush, avoid unnecessary adjournments, and assist with earlier resolution of actions prior to trial.

A. Duty of Expert Witnesses

The case law is clear that an expert has a duty to assist the court and not be an advocate for any party. Under the New Rules an expert must certify in any report that he or she is aware of this duty to the court, has made the report in conformity with that duty and will, if called on to give oral or written testimony, give that testimony in conformity with that duty. Drafters of the New Rules have indicated that the purpose behind the express inclusion of the duty to the court is to curtail adversarial bias and cause experts to give pause before stating their opinions.

B. Appointment of Joint Experts

Although not prohibited under the Old Rules, the practice of using a joint expert was foreign to most counsel. Under the New Rules, two or more parties who are adverse in interest can agree or be ordered by the court to appoint a joint expert. The New Rules contain detailed provisions regarding the appointment of joint experts. In general, when adverse parties using a joint expert are unable to agree on the identity of the expert, or the terms of the expert's appointment, any party may make a court application to resolve those issues. If a joint expert is used, he or she is the only expert who may give opinion evidence in the action on the issue appointed for. However, all parties, including the appointing parties, have the right to cross-examine the joint expert at trial.

We expect there will be great resistance to the use of joint experts and only rare situations where this rule will be employed. However, inclusion of this new rule strongly indicates a desire by the courts to promote changes in the use of expert witnesses at trial.

C. Appointment of Own Experts

The New Rules maintain a party's right to appoint their own experts to tender expert opinion evidence on an issue. Although the New Rules do not expressly limit the number of expert witnesses a party may call, utilizing the new proportionality factor, limits can be imposed at the CPC.

D. Appointment of the Court's Own Expert

The court's ability to appoint its own experts to tender expert opinion evidence on an issue continues under the New Rules. Before doing so a court will consult with all parties as to the

identity of an appropriate expert. Although this is not a new power, it will be interesting if the court will utilize this power more often given the new emphasis on proportionality.

E. Expert Reports

(i) Form and Content

Whether the expert is a party's own expert, jointly appointed, or court appointed, the form and content requirements for the expert's report remain the same.

The requirements for the form and content of an expert's report have been expanded under the New Rules to include the following:

1. the expert's name, address and area of expertise;
2. the expert's qualifications and employment and educational experience in his or her area of expertise;
3. the instructions provided to the expert in relation to the proceeding;
4. the nature of the opinion being sought and each issue in the proceeding to which the opinion relates;
5. the expert's opinion respecting those issues;
6. the expert's reasons for his or her opinion, including:
 - a. a description of the factual assumptions on which the opinion is based,
 - b. a description of any research conducted by the expert that led him or her to form an opinion, and
 - c. a list of every document, if any, relied on by the expert in forming the opinion.

(ii) Service of Expert's Report

Insurance professionals need to be aware that under the New Rules the dates on which expert reports must be served has changed. Previously a party had to serve an expert report 60 days prior to it being *tendered in evidence*. Now a party has to serve an expert report they intend to rely upon at trial at least 84 days (12 weeks) before the *scheduled trial date*. Under the Old Rules the deadline for the service of an expert report would in essence be shortened in long trials because the date of service was tied to the date the expert was expected to testify. This loophole has now been closed under the New Rules as the service deadline is based on the trial's scheduled start date.

A responding expert report, commonly referred to as a rebuttal report, must be served at least 42 days (6 weeks) before the scheduled trial date.

(iii) Production of Expert's File

The New Rules also legislate the pre-trial production of the expert's file if an expert report has been served. There are different production requirements depending on what portion of the

expert's file is being requested. Either the information must be produced "promptly" or at least 14 days before the scheduled trial date.

The documents that must be produced promptly upon being requested by the opposing party include:

- i any written statement or statements of facts on which the expert's opinion is based;
- ii a record of any independent observations made by the expert in relation to the report;
- iii any data compiled by the expert in relation to the report, and
- iv the results of any test conducted by or for the expert, or of any inspection conducted by the expert, if the expert has relied on that test or inspection in forming his or her opinion.

The expert's complete file relating to the preparation of the opinion set out in the expert's report, once an expert report is served, and if requested by the receiving party, must be produced at least 14 days before the scheduled trial date. Under the Old Rules this area was not addressed. Rather, the case law held that the expert's file was not producible until the expert took the witness stand, which could result in lengthy trial delays.

(iv) Objecting to the Admissibility of an Expert Report

Under the New Rules a party that intends to object to the admissibility of an expert report must serve on every party a written notice objecting to the report. This written objection must be served on the earlier of the Trial Management Conference or 21 days before the scheduled trial date.

(v) Cross-examination of Expert

Under the New Rules, once an expert report has been served, a party of record has 21 days to demand that the expert attend trial for the purposes of cross-examination. Under the Old Rules there was no specific time period. Instead, such a demand was to be made only "within a reasonable time after delivery". It will be important to add these new deadlines into the litigation Bring Forward System.

F. When the New Rules may not Apply

A court has the power to dispense with the new requirements in a broad set of circumstances, including the catch-all, if the interests of justice require it. Other circumstances in which a court may allow evidence, whether or not on terms and conditions, are if facts have come to the knowledge of a party which could not, with due diligence, have been learned in time to be included and if the non-compliance is unlikely to cause prejudice.

VIII. TRANSITION

As of July 1, 2010, the New Rules apply to all civil, non-family actions in B.C. It does not matter if the action was commenced pre or post July 1, 2010. However, there are specific transitional provisions that apply to those actions commenced prior to July 1, 2010.

First, pleadings filed under the Old Rules are deemed to be pleadings under the New Rules. For example, a Writ of Summons or a Writ of Summons and a Statement of Claim are now deemed to be a Notice of Civil Claim. An Appearance with or without a Statement of Defence are deemed to be a Response to Civil Claim. However, a party can demand another party amend a pleading to make it accord with the New Rules. A party receiving such a demand has 21 days to amend. Failure to amend is ground for striking out the pleading. Given the significant changes to the format and content of the new form of pleadings, it is likely that a defendant who must file a Response to an action will require the plaintiff to amend a Statement of Claim filed under the Old Rules into a Notice of Civil claim.

Second, if a step in a proceeding is taken before July 1, 2010, the Old Rules apply to any right or obligation arising out of or related to that step if and to the extent that the right or obligation is to have effect before September 1, 2010. Good examples are oral discoveries and interrogatories. If prior to July 1, 2010, a party delivered an Appointment to Examine for Discovery setting the discovery for a date before September 1, 2010, then that examination would not be subject to the new 7 hour time limit. Further, although under the New Rules interrogatories are not available as of right, if a party had delivered interrogatories before July 1, 2010, they must be answered.

IX. CONCLUSION

The New Rules impose significant changes to both the form and content of our rules of court. It is too early to say which changes will have the greatest effect on the actual practice of personal injury and insurance litigation. However, the New Rules do provide litigants with new and better tools to resolve disputes in a more efficient, timely and hopefully less expensive manner. Of course in order to take best advantage of these changes and to avoid being caught afool of the New Rules, all insurance professionals must take the time to ensure they have a good understanding of these changes so they can adjust their file handling and litigation practices accordingly.