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WINDS OF CHANGE ARE BLOWING FOR SUPREME COURT PROCEEDINGS IN BRITISH COLUMBIA

BACKGROUND

For the last three years, a Civil Justice Reform Working Group, operating as part of The B.C. Justice Review Task Force has been working on an "overhaul" of the Supreme Court Rules. One of the stated goals of this project is to ensure that the cost and procedural complexity necessary to resolve a given dispute is proportionate to the value and complexity of the dispute.

The Concept Draft for Proposed New Rules for Civil Procedure operates as a significant overhaul of existing Supreme Court procedure, too extensive to be canvassed in detail within the confines of this newsletter. However there are some proposed changes that will be of interest to insurers.

DOCUMENT DISCOVERY AND EXAMINATIONS FOR DISCOVERY

Many will be familiar with the scope of production historically available dating back to the decision of *Cie Financiere du Pacifique v. Peruvian Guano*. That decision laid the foundation for production to include disclosure of documents provided it was not unreasonable to consider that they might contain information that would directly or indirectly enable the party seeking discovery to damage the case of its adversary or to advance its own case.

The proposed new Rule 6(3) provides for the listing of documents that could, if available, be used by any party at trial to prove or disprove a material fact.

The reference to proving or disproving a material fact would seem more restrictive than production to ascertain strengths and weaknesses of a party's own, or the adverse party's case.

The proposed new rules permit for a party to bring application for a class of documents that may fall within the realm of being useful to prove or disprove a material fact, but it seems probable that with the arguably narrowed scope of production, parties will need to be vigilant about the prospect of non-disclosure, or resistance to disclosure on the basis of an opposing party arguing that the information is collateral and not likely to assist in proving or disproving a material fact. Whether this rule, if brought into force as currently worded, will result in an appreciable restriction on disclosure remains to be seen.

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POLICY DISCLOSURE

Included in the proposed new rules is the recently introduced requirement in the existing Rules of Court that a party with insurance disclose the policy and limits of insurance and is subject to being examined on any policy that applies in the circumstances, as well as any denial of coverage by a party's insurer. Insofar as counsel in attendance at an examination for discovery with an insured is typically defence counsel, and given that questions of a coverage nature fall outside the scope of the relationship between defence counsel and an insured, it remains a troublesome technical issue how it is that defence counsel is able to represent and vet questions of a coverage nature within the context of an examination for discovery of the issues in a dispute as a whole.

EXAMINATIONS FOR DISCOVERY

The proposed new rule (Rule 6-2) provides that the totality of examinations for discovery of a party by all parties adverse to the first must not exceed two hours unless otherwise agreed to between the parties. Moreover, the proposed rules stipulate that unless a court orders otherwise, an examination for discovery of any party by all adverse parties must not exceed a total of 10 hours.

While this may have the effect of streamlining the discovery process in disputes involving smaller claims of damages arising from a simple factual matrix, in more complex matters, this conceivably will call upon counsel to apply to court and supply justification for lengthier examinations for discovery, particularly if opposing counsel will not agree to extend the time limit for examinations for discovery beyond the two hour dictate. While on the one hand, the rule will force counsel to be thoughtful and efficient with management of examinations for discovery, it seems likely that this proposed requirement will add to the cost of more complex matters by introducing a need for an application where none existed before.

USE OF EXPERTS

The proposed new rules are designed with the object of reducing "trial by dueling experts" and make provisions for jointly appointed experts, and court appointed experts. One expects that litigants are some distance from embracing the concept of joint experts in certain realms. Indeed, within the field of complex bodily injury, there are many experts whom either side of a dispute would never agree to accept as a "joint expert".

The proposed new rules provide that parties may secure their own experts (provided that notice of intention to use such an expert was given as required by the proposed new rules), but where there are two or more opposing experts on the same issue, the experts must meet and sign a statement

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setting out the points of difference among them.

This process, too, will add to the cost of complex litigation. No doubt the hope is that disputing parties will eventually come to see that there is a significant cost savings to be gained in the event the parties are able to agree upon a single expert as compared to having to pay their own expert to first provide an opinion and then meet with the opposing expert and have the experts produced the "joint statement". Whether this evolution will occur remains to be seen.

TIME FRAME FOR IMPLEMENTATION

The intention is that the new rules evolving from the existing process will come into force in early 2010. However, the consultation process vis-à-vis the public is open until October 31, 2007.

The Concept Draft of proposed new rules for civil procedure, along with a Concept Draft Guide and Concept Draft Overview are all available for public review at http://www.bcjusticereviewforum.ca/civilrules/index.cfm .

Anyone having an interest in this issue is encouraged to review the documents available at the above noted web site. There is a mechanism to submit comments and people are encouraged to raise any concerns they may have with respect to the content of the proposed new rules.

AUTHOR Kathleen S. Duffield
Direct Line: 604-891-0366 *E-mail:* kduffield@dolden.com

EDITOR Alex L. Eged
Direct Line: 604-891-0357 *E-mail:* aeged@dolden.com

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