Construction Law

Jenkins Marzban Logan LLP
lawyers

The New Rules – New Tools for Construction Litigants

These materials were prepared by John Logan and David Mckenzie of Jenkins Marzban Logan LLP, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, April 2010.

Suite 900, Nelson Square Box 12144, 808 Nelson Street Vancouver, BC V6Z 2H2 Canada
Tel: 604 681 6564 Fax: 604 681 0766 www.jml.ca

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I. Introduction

As of July 1, 2010, a new set of Rules of Court will apply to Supreme Court proceedings in British Columbia. The new Rules differ substantially from the Rules currently in place and will have a significant effect on litigation in this province. The new Rules will apply to ongoing litigation commenced prior to July 1, 2010, with any party of record able to make a demand that a pleading filed before this date be amended by the party who filed it to make it accord with the new Rules.

The new Rules' stated purpose under Rule 1-3 is to "secure the just, speedy and inexpensive determination of every proceeding on its merits". The key to achieving this purpose is through proportionality: securing the just , speedy and inexpensive determination of the proceeding includes, so far as is practicable, conducting the proceeding in ways that are proportionate to the amount involved in the proceeding, the importance of the issues in dispute and the complexity of the proceeding.

II. Pleadings (Rules 2 and 3)

Under the new Rule 2-1, unless otherwise provided in an enactment or in the new Rules, all proceedings must be commenced by a Notice of Civil Claim, which replaces the former Writ of Summons and Statement of Claim. Claims for relief that are uncontested or that can be sought summarily may be commenced by Petition or Requisition under Rule 2-1(2).

The Notice of Civil Claim must do the following:

(a) set out a concise statement of the material facts giving rise to the claim;

(b) set out the relief sought by the plaintiff against each named defendant;

(c) set out a concise summary of the legal basis for the relief sought;

(d) set out the proposed place of trial;

(e) if the plaintiff sues or a defendant is sued in a representative capacity, show in what capacity the plaintiff sues or the defendant is sued;

(f) provide the data collection information required in the appendix to the form; and

(g) otherwise comply with Rule 3-7 (Content of Pleadings).

The proposed requirement in earlier drafts of the new Rules that every Notice of Civil Claim be signed by the Plaintiff has been dropped.

A Defendant must file a Response to a Notice of Civil Claim. Rule 3-3 sets out the required elements of the Response, which:

(a) must:

(i) indicate, for each fact set out in Part 1 of the notice of civil claim, whether that fact is

(A) admitted,

(B) denied, or

(C) outside the knowledge of the defendant,

(ii) for any fact set out in Part 1 of the notice of civil claim that is denied, concisely set out the defendant's version of that fact, and

(iii) 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,

(b) must indicate whether the defendant consents to, opposes or takes no position on the granting of the relief sought against that defendant in the notice of civil claim,

(c) must, if the defendant opposes any of the relief referred to in paragraph (b) of this subrule, set out a concise summary of the legal basis for that opposition, and

(d) must otherwise comply with Rule 3-7 (Content of Pleadings).

Rule 3-7 (19) states that in any pleading subsequent to the Notice of Civil Claim, parties must specifically plead any matter of fact or point of law that:

(a) the party alleges makes a claim or defence of the opposite party not maintainable,

(b) if not specifically pleaded, might take the other party by surprise, or

(c) raises issues of fact not arising out of the preceding pleading.

The Notice of Claim must be served within 12 months of filing, though the court may order a renewal for a further 12 months upon application by the Plaintiff before or after the expiration of the original 12 month period. Responses of persons residing in Canada must be filed within 21 days of service.

Third Party Notices must be filed within 42 days of service of the Notice of Civil Claim or leave of the court will be required. Once filed, the party so filing must promptly serve a copy of the Third Party Notice on all parties of record and has 60 days to serve the Third Party Notice along with copies of all filed pleadings served on the party issuing the Third Party Notice.

Amendments may be made once without leave of court any time before the earlier of the date of service of the notice of trial and the date the first Case Planning Conference is held. Given that the first Case Planning Conference may be held only 35 days after the expiration of the pleadings period (see below), this may significantly shorten the time to which counsel have grown accustomed for making amendments without leave of court. As the new Rules mandate an increased particularization of claims and defences, it will therefore be incumbent on each party and its counsel to be aware at a very early stage of the specific nature of the claims and defences the party wishes to pursue.

III. Discovery (Rule 7)

The new Rules will significantly affect parties' discovery rights and obligations.

(1) Document Discovery

The new Rules limit the scope of document production. Under the Rules as they currently stand, parties must list those documents "relating to every matter in question in the action." The existing test for whether a document "relates to a matter" is that stated in the well-known 127 year old *Peruvian Guano* decision (*The Compagnie Financiere et Commerciale du Pacifique v. The Peruvian Guano Co.* (1882), 11 Q.B.D. 55):

> It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may -- not which must -- either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.

The new Rules stipulate that a party's list need only set out all documents that could "be used by any party of record at trial to prove or disprove a material fact" in addition to "all other documents to which the party intends to refer at trial". Opposing parties may apply to court for further production as required. While the extent to which this new Rule will in fact decrease discovery obligations and affect current practices remains to be seen, even a relatively minor reduction in document production obligations will likely have some effect on construction law files, as these tend to be document intensive.

Unlike the current Rule 26, a party will not be required under the new Rules to deliver a formal Demand for Discovery of Documents or similar document in order to trigger another party's obligation to prepare and deliver its list of documents. Under the new Rule 7-1, each party will need to prepare and serve on all other parties of record a list of documents within 35 days from the close of the pleading period.[1]

(2) Examinations for Discovery

The time allowed for oral examination has been reduced under the new Rules. Whereas presently a lawyer may examine an opposing party for as long as the lawyer continues to ask new questions relating to the claims and defences in an action, each party will now be limited to 7 hours of examination for discovery of another party unless the party being examined consents or the court orders otherwise.

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[1] "pleading period" is defined in the Definitions as the time limited for filing a responding pleading to the pleading that was most recently filed in the action.

In an application to extend the examination for discovery period, the court must consider the following (Rule 7-2(3)):

> (a) the conduct of a person who has been or is to be examined, including
>
> > (i) the person's unresponsiveness in any examination for discovery held in the action,
> >
> > (ii) the person's failure to provide complete answers to questions, or
> >
> > (iii) the person's provision of answers that are evasive, irrelevant, unresponsive or unduly lengthy;
>
> (b) any denial or refusal to admit, by a person who has been or is to be examined, anything that should have been admitted;
>
> (c) the conduct of the examining party;
>
> (d) whether or not it is or was reasonably practicable to complete the examinations for discovery within the proscribed period;
>
> (e) the number of parties and examinations for discovery and the proximity of the various interests of those parties.

The common convention of counsel providing a letter response to outstanding requests from an examination for discovery has been formalized under the new Rules, such that the questions and answers set out in a letter response are deemed for all purposes to be questions asked and answers given under oath at the examination for discovery.

(3) Interrogatories

Under the new Rules, a party may only serve interrogatories where the other party consents or the court grants leave to do so (Rule 7-3).

IV. Experts (Rule 11)

The new Rules seek to address the view held by some that experts increasingly do little more than act as advocates for the parties hiring them. Rule 11-2 states that all experts, no matter how appointed, must assist the court and not be an advocate for any party. Rule 11-2 also requires each expert preparing a report to certify that he or she is aware of the aforementioned duty to the court, has prepared his or her report in conformity with said duty, and, if so required, will give testimony in accordance with the same duty.

Parties under the new Rules are free to appoint their own experts to tender expert opinion evidence (Rule 11-4). However, unless the court orders otherwise, if a case planning conference has been held in the action, expert evidence must not be tendered unless provided for in the case plan order. The court has been given a wide scope of authority to make the following types of orders with respect to experts in a case plan order:

> (i) that the expert evidence on any one or more issues be given by one jointly-instructed expert,
>
> (ii) respecting the number of experts a party may call,
>
> (iii) that the parties' experts must confer before the service of their respective reports,
>
> (iv) setting a date by which an expert's report must be served on the other parties of record, and
>
> (v) respecting the issues on which an expert may be called;

The court may also, on its own initiative at any stage of an action, appoint an expert. The consensual use of joint experts by parties has also been facilitated under Rule 11-3.

Under Rule 11-6, any expert report tendered for trial must set out the following:

> (a) the expert's name, address and area of expertise;
>
> (b) the expert's qualifications and employment and educational experience in his or her area of expertise;
>
> (c) the instructions provided to the expert in relation to the proceeding;
>
> (d) the nature of the opinion being sought and each issue in the proceeding to which the opinion relates;
>
> (e) the expert's opinion respecting each issue and, if there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range;

(f) the expert's reasons for his or her opinion, including

(i) a description of the factual assumptions on which the opinion is based,

(ii) a description of any research conducted by the expert that led him or her to form the opinion, and

(iii) a list of every document, if any, relied on by the expert in forming the opinion.

Service of an expert report must be made at least 84 days before the scheduled trial date, with response reports to be served at least 42 days before the trial date. The file of any expert whose report is tendered to be used at trial must be made available for review and photocopying prior to the scheduled trial date (Rule 11-6(8)).

V. Case Planning Conferences (Rule 5)

Under the new Rules, provided the pleading period has expired, any party of record will be able to request a case planning conference ("CPC") where the court may make orders in accordance with the proportionality principle to guide the conduct of the litigation. In the original draft of the new Rules, CPCs were to be mandatory for all proceedings, as was client attendance. The final version of the new Rules addresses concerns from the bar that mandatory CPCs and client attendance in every case could result in unnecessary costs in certain proceedings.

A CPC may be requested through a Notice of Case Planning Conference. A party seeking the initial CPC in a proceeding must provide at least 35 days' notice (Rule 5-1(3)(a)), unless that time is abridged by consent or order. A party will only have to provide seven days' notice for subsequent CPCs (Rule 5-1(4)). Prior to the initial CPC, parties will need to file and deliver their Case Planning Proposals (Rule 5-1(5)) in Form 20. Each Case Planning Proposal must indicate a party's proposal with respect to oral and document discovery and dispute resolution procedures, expert witnesses, witness lists and the type of, estimated length of and preferred period for trial.

At the CPC, the court may make a whole host of procedural orders, some of which are currently obtained through chambers applications. A party seeking such an order simply indicates on its Notice of Case Planning Conference the order that it seeks. Pursuant to Rule 5-3, the types of procedural orders available through the CPC include:

(a) setting a timetable for the steps to be taken;

(b) amending a previous case plan order;

(c) any order referred to in Rule 22-4 (2);

(d) requiring amendment of a pleading to provide details of

(i) the facts,

(ii) the relief sought, or

(iii) the legal basis on which relief is sought or opposed

set out in that pleading;

(e) respecting the length and content of pleadings;

(f) respecting discovery, listing, production, preservation, exchange or examination of documents or exhibits, including, without limitation, orders

(i) respecting electronically stored information, and

(ii) that discovery, listing, production, exchange or examination be limited or otherwise conducted as ordered;

(g) respecting discovery of parties or the examination or inspection of persons or property, including, without limitation, that discovery, examination or inspection be limited, expanded or otherwise conducted in the manner ordered;

(h) respecting interrogatories;

(i) respecting third party claims, including imposing terms on any third party procedure to limit or avoid any prejudice or unnecessary delay that might otherwise be suffered by the plaintiff as a result of that third party procedure;

(j) respecting witness lists;

(k) respecting experts, including, without limitation, orders

(i) that the expert evidence on any one or more issues be given by one jointly-instructed expert,

(ii) respecting the number of experts a party may call,

(iii) that the parties' experts must confer before the service of their respective reports,

(iv) setting a date by which an expert's report must be served on the other parties of record, and

(v) respecting the issues on which an expert may be called;

(l) respecting admissions;

(m) respecting offers to settle;

(n) respecting the conduct of any application, including, without limitation, that an application may be made by written submissions under Rule 8-6;

(o) requiring the parties of record to attend one or more of a mediation, a settlement conference or any other dispute resolution process, and giving directions for the conduct of the mediation, settlement conference or other dispute resolution process;

(p) authorizing or directing the parties of record to try one or more issues in the action independently of others;

(q) fixing the length of trial;

(r) respecting the place at which any step in the action is to be conducted;

(s) setting the action for trial on a particular date or on a particular trial list;

(t) adjourning the case planning conference;

(u) directing the parties to attend a further case planning conference at a specified date and time;

(v) any orders the judge or master considers will further the object of these Supreme Court Civil Rules.

It will likely take a number of decisions to flesh out the scope of Rule 5-3(1)(v). Of some interest to construction lawyers is the court's authority to make orders dealing with mediation under Rule 5-3(1)(o). Long before the enactment of the Notice to Mediate - (Residential Construction) Regulation, B.C. Reg. 152/99, which allows parties in residential construction disputes to initiate compulsory mediations, the mediation process was being used by the British Columbia construction bar as an effective tool to resolve construction disputes. The new Rules' increased focus on mediation ensures that its use to resolve both construction and general commercial disputes will continue to grow.

VI. Chambers (Rule 8)

Notices of Motions have been replaced by Notices of Application. The Notice of Application may not exceed 10 pages and must:

(a) set out the orders sought,

(b) briefly summarize the factual basis for the application,

(c) set out the rule, enactment or other jurisdictional authority relied on for the orders sought and any other legal arguments on which the orders sought should be granted,

(d) list the affidavits and other documents on which the applicant intends to rely at the hearing of the application,

(e) set out the applicant's estimate of the time the application will take for hearing,

(f) set out the date and time of the hearing of the application,

(g) set out the place for the hearing of the application in accordance with Rule 8-2, and

(h) provide the data collection information required in the appendix to the form.

An Application Response must not exceed 10 pages in length and must

(a) indicate, for each order sought on the application, whether the application respondent consents to, opposes or takes no position on the order, and

(b) if the application respondent wishes to oppose any of the relief sought in the application,

(i) briefly summarize the factual and legal bases on which the orders sought should not be granted,

(ii) list the affidavits and other documents on which the application respondent intends to rely at the hearing of the application, and

(iii) set out the application respondent's estimate of the time the application will take for hearing.

The Notice of Application and the supporting affidavits must be filed prior to serving the other parties. If the application is estimated to take more than 2 hours, the date and time of hearing must be fixed by a registrar. For all applications except summary trial applications, service of the filed Notice of Application and supporting affidavits must be made at least 7 days before the date set for the hearing and Application Response materials must be filed within 5 days after service applications and served at least 2 days before the date set for the hearing. Reply materials must be filed and served no later than noon on the day before the hearing date.

Rule 8-1(16) states that unless an application is estimated to take more than 2 hours, no party to the application may file or submit to the court any written argument other than that included in the party's Notice of Application or Application Response.

VII. Fast Track (Rule 15)

The Rules' focus on proportionality can be seen in the new Rule 15-1 – Fast Track Litigation, which applies to proceedings if any of the following apply:

(1) the only claims are for one or more of money, real property, builder's lien and personal property in a total amount of under $100,000;

(2) the trial of the action is expected to last less than three days;

(3) the parties consent; and

(4) the court, on its own motion or on application of any party, so orders.

Under the fast track Rule, the duration of the oral examinations for discovery of each party of record may not exceed two hours in total by all adverse parties of record unless the examinee consents or the court orders otherwise. Examinations must be completed at least 14 days before trial unless the parties consent or the court orders otherwise. The amount of costs recoverable by a party under the fast track Rule is limited to $8,000 for a one day trial, $9,500 for a two day trial, and $11,000 where the trial lasts three days or more, unless the parties consent or the court orders otherwise. These limits on recovering costs will apply to any proceeding in which the successful party is awarded less than $100,000 or the trial lasts three day or less.

The fast-track provisions are intended to make smaller claims more cost-effective, and may prove useful on smaller residential construction and builders lien claims.