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A Practical Summary of the New Supreme Court Civil Rules for Clark Wilson LLP Insurance Clients

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A PRACTICAL SUMMARY OF THE NEW SUPREME COURT CIVIL RULES FOR CLARK WILSON LLP INSURANCE CLIENTS

On July 1, 2010 the new BC Supreme Court Civil Rules, BC Reg. 168/2009 (the "New Rules") came into effect replacing the previous BC Supreme Court Rules, BC Reg. 221/90 (the "Old Rules").

The New Rules contain a number of provisions that are identical to the equivalent provisions in the Old Rules, as well as some significant changes. Counsel throughout the province are adjusting to the New Rules and various potential problems with the New Rules will need to be ironed out over time.

One of the purposes of changing to the New Rules was to lessen the number of pleadings that parties are required to file, resulting in a faster litigation process. However, it is important to note that due to some of the changes, counsel will need to focus more time and energy on a lawsuit during its earlier stages than was necessary before.

The following is a brief summary of some of the key aspects of the changes under the New Rules and their significance for insurance litigation.

Rule 24 – Transitional Proceedings

The New Rules contain transitional procedures for actions started before July 1, 2010. The following are the key provisions:

- Pleadings under the Old Rules are deemed to be pleadings under the New Rules; and
- A party can serve a demand that the other party amend its pleadings to comply with the new Rules within 21 days of receipt of the demand.

Rule 1 – Interpretation

The object of the New Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merit. Significantly, the object of the New Rules recognizes proportionality in that, so far as is practicable, proceedings are to be conducted in a way that is proportionate to:

- The amount involved in the proceeding;
- The importance of the issues in dispute; and
- The complexity of the proceeding.

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Application: Proportionality is something that was often argued under the Old Rules by counsel in Chambers with respect to the issues of document production, independent medical examinations, and other aspects of litigation. The recognition of proportionality as a stated object of the New Rules will allow the Court to recognize that document production and various other aspects of litigation can be streamlined in litigation worth smaller amounts of money or involving claims of lower complexity. The flip side of this is that proportionality will still apply to larger, more complex matters, possibly allowing for broader document production or longer examinations for discovery (to be discussed under Rule 7).

Rule 3 – Pleadings

Notice of Civil Claim

The way an action is commenced has changed under the New Rules and rather than preparing a Statement of Claim parties must now prepare what is called a Notice of Civil Claim. A Notice of Civil Claim is longer and contains more of the details regarding a plaintiff's claims. A Notice of Civil Claim must:

- Set out a concise statement of the material facts giving rise to the claim;
- Set out the relief sought by the plaintiff against each named defendant;
- Set out a concise summary of the legal basis for the relief sought;
- Set out the proposed place of trial;
- 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;
- Provide the data collection information required in the appendix to the form.

A Notice of Civil Claim remains in force for 12 months. Before the 12 months are up, a plaintiff may make an application to have the Notice of Civil Claim renewed for a period of not more than 12 months, and then again for another period of not more than 12 months, if the defendant has still not been served.

Application: The Notice of Civil Claim will require plaintiffs to put more thought into the commencement of a proceeding. Plaintiffs are no longer able to simply file an endorsed Writ to preserve their right to litigation if a limitation date is fast approaching. Rather, plaintiffs are now obliged to produce a more concise, detailed summary of the actual claim being made against each defendant. The New Rules also do not appear to provide for more than two renewals of the Notice of Civil Claim.

Responding to a Notice of Civil Claim

Rather than filing a Statement of Defence, defendants must prepare and file what is referred to as a Response to Civil Claim. As with the Notice of Civil Claim, the Response is a more detailed document than the previous Statement of Defence. A Response to Civil Claim must:

- Indicate for each fact set out in the Notice of Civil Claim whether that fact is admitted, denied, or outside the knowledge of the defendant;

- For any fact set out in the Notice of Claim that is denied, the defendant must concisely set out the defendant's version of that fact;

- 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;

- Indicate whether the Defendant consents to, opposes or takes no position on the granting of the relief sought against the defendant in the Notice of Civil Claim; and,

- If the relief is opposed, a concise summary of the legal basis for that opposition must be set out.

The Response to a Civil Claim must be filed and served within 21 days of receipt of the Notice of Civil Claim. If the defendant resides in the United States, 35 days are allowed.

Application: Defendants are no longer able to file an Appearance notifying a plaintiff who defence counsel is and requesting that default judgment not be taken. As with the commencement of a proceeding, the defence of a proceeding will now require more time and thought during its initial stages. Insurers will want to get their file materials along to defence counsel as soon as possible so that a statement of defence can be prepared within the 21 days. Plaintiffs may still agree not to seek default so as to allow more time for a defence to be filed, but it remains to be seen whether this will become standard practice.

Third Party Notice

Under the New Rules, a Third Party Notice must be filed within 42 days after service of the Notice of Civil Claim. If a party wishes to file a Third Party Notice after the 42 days, the party may apply for leave of the court. The form of the Third Party Notice itself has also changed and mirrors the Notice of Civil Claim.

If the Third Party Notice claims only contribution or indemnity from a defendant already named in the action, the third party is deemed to have denied all of the allegations, and is not required to file a Response to Third Party Notice.

Application: Parties will need to consider the possibility of adding any other parties to the action much earlier than was previously required (under the Old Rules, a party had until 120 days prior to trial to issue a Third Party Notice). In practice, the issue of adding additional parties as third parties to an action should be canvassed when the file materials are first received and the Response to Civil Claim is drafted. It will become more important to ensure that counsel have all of the available materials as early as possible in order to properly assess a claim and the potential liability of any additional parties.

Rule 4 – Service

The New Rules specify that a party must have an "accessible address" as an address for service. "Accessible address" is defined as an address that describes a unique and identifiable location in British Columbia that is accessible to the public during normal business hours for the delivery of documents.

Another change under the New Rules is that parties may now include in their address for service an e-mail address. This is a codification of the practice that has developed of serving materials by e-mail.

The New Rules contemplate two different types of service: ordinary service and personal service. Ordinary service is for the service of court documents after the action has already been commenced, or what was previously referred to as delivery. Ordinary service can be affected by mail, fax or e-mail. Personal service is for all court documents that initiate a process, such as a Notice of Civil Claim, Petition, Third Party Notice or Counterclaim.

Application: The biggest practical change with respect to service is the ability to serve documents by e-mail. If a party lists an e-mail address for delivery, it will be important to ensure that the e-mail address is properly checked and responded to even when counsel is out of the office. In effect, this should be no different than service through fax or mail, but will require counsel to be diligent about checking e-mail.

Rule 5 – Case Planning

A Case Planning Conference ("CPC") is mandatory for all actions under Rule 15, the new rule for fast track litigation. The Case Planning provisions do not apply to proceedings started by Petition. For all other proceedings, a CPC is not required to set a trial date. However, if after the pleadings have closed, a party sets down a CPC, or a Judge or Master directs that one takes place, attendance of all parties is mandatory. The party requesting the CPC must serve a Notice on all other parties 35 days before the first CPC, and seven days before all subsequent CPCs.

Once a CPC is set, parties are required to exchange Case Planning Proposals. Regardless of who has requested the CPC, the plaintiff's Proposal is to be served on the other parties within 14 days of the notice of the CPC, and the other parties are to serve theirs 14 days later. The Proposals should contain each party's proposal regarding:

- Discovery of documents;
- Examinations for discovery;
- Dispute resolution procedures;
- Expert witnesses;
- Witness lists; and

- Trial type, length and preferred time period.

All parties must attend the first CPC in person, but if a party is represented by counsel, only counsel need attend. Subsequent CPC's can be attended by teleconference or other "communication medium". Presumably, this refers to some form of video-conference.

At a CPC, the court may make various Orders, including:

- Setting the timetable for the steps to be taken;
- Requiring amendments to pleadings to provide details of the facts, relief sought, or legal basis on which the relief is sought or opposed;
- Respecting discovery of documents;
- Setting limits on, or expanding upon examinations for discovery;
- Respecting interrogatories;
- Restricting the number of experts; and
- Setting the trial date.

Application: A CPC can be used as a tool to move a matter through the litigation process faster. Proportionality should be a consideration of the court in making any Order in a CPC.

Rule 6 – Amendment of Pleadings and Change of Parties

The procedure for amending pleadings under the New Rules has effectively not changed.

However, it is important to note that under the New Rules, parties are able to amend their pleadings once without leave or consent up until service of the Notice of Trial or the date of the first Case Planning Conference, whichever occurs first. Parties are still able to amend after this time with leave of the court or the consent of the parties.

Rule 7 – Procedures for Ascertaining Facts

List of Documents

There is an obligation under the New Rules to provide a List of Documents within 35 days of the close of pleadings. It is no longer necessary to issue a Demand for Discovery of Documents and Notice to Produce.

The documents which must be listed in the List of Documents itself are set out under the New Rules and include:

- 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,

- All other documents to which the party intends to refer at trial.

Specifically, an insurance policy under which an insurer may be liable to satisfy the whole or part of a judgment must be produced although the policy must not be disclosed to the Court unless it is relevant to an issue in the action.

The obligation to produce and list documents continues throughout the litigation obliging parties to provide Amended Lists of Documents as needed.

Parties may still bring Chambers applications for documents they believe exist, but the process for doing so now requires more time. If a party believes that documents exist which the other party has not listed, the party may serve a written demand for production requiring the other party to deliver a Supplemental List of Documents within 35 days, after which the party may proceed with a Chambers application to compel production.

Application: Since parties are no longer obliged to list all documents relating to every matter in question, there was some discussion leading up to the implementation of the New Rules that the new guidelines for listing documents may enable parties to hide documents. It will take time to see if this concern actually plays itself out and what the Court will do about it. In theory document production under the New Rules should be streamlined which will result in a cost savings to all parties. It is also important to note that if a party has not listed a document, that party will not be allowed to rely on the document at trial.

Examinations for Discovery

The New Rules also contain new guidelines for examinations for discovery, with the most significant change being a 7 hour time limitation on the total of all examinations conducted of one party by all other parties, unless the parties consent otherwise. Parties may apply to the court for an extension of the time limitation placed on discoveries.

In addition there are some minor changes under the New Rules including:

- The New Rules no longer stipulate that all examinations for discovery must be completed at least 14 days before trial;

- An Appointment setting a discovery must now be served on the applicable party 7 days prior to the date of the discovery; and,

- An examining party may ask that all requests made at the discovery be answered by way of letter, avoiding the necessity of a further discovery.

Application: The biggest change is the limit on the time allowed for discovery. Seven hours can pass very quickly in cases involving a large amount of information, such as personal injury files involving catastrophic injuries. It is more important for counsel to ensure that they have all of

the documents possible before conducting an examination for discovery and more time may be required to effectively prepare for a discovery.

Interrogatories

A party may serve interrogatories on another party *if* the party to be examined consents, or with leave of the court. If the party needs to apply for leave of the court, the court may place limitations on the interrogatories with respect to their content and length.

Application: In some instances parties may consent to interrogatories in order to save time or expense. However, counsel may want to enter into discussions as to the scope of the interrogatories before consenting in order to avoid wasting time on lengthy, possibly irrelevant, interrogatories.

Witnesses

Each party is obliged to provide a list naming all witnesses that the party intends to call at trial, excluding experts and adverse witnesses. However, a party is not obliged to actually call all of the witnesses listed. The list must be filed and served at the time of the trial management conference, or 28 days before trial, whichever is earlier.

Application: The requirement to provide witness lists at least 28 days before trial will require counsel to commence trial preparation more than a month before trial.

Rule 8 – Applications

There are some minor changes regarding applications under the New Rules. It is important to be aware of the following points:

- Hearings are now set by the party bringing the application and notification of the date of the hearing must be sent with the application materials at least 8 business days before the hearing;
- The Notice of Application and the Response must set out the factual basis for the application;
- The applicant must file an Application Record, by 4:00pm on the day that is 2 business days before the hearing, which contains the following:
    - a title page;
    - an index;
    - a copy of the filed Notice of Application;
    - a copy of the filed Application Response; and

- a copy of every filed affidavit, pleading and written argument (if over two hours) to be relied on;

- Short Leave applications may now be brought by way of Form 17, without notice and in a summary way.

Application: While little has changed, the materials required to bring an application will require more preparation time under the New Rules. It is important to take this into consideration and ensure that sufficient time is allowed for the preparation and serving of materials.

Rule 11 – Experts

Duty of Expert

Expert reports must now contain the following certification:

- that the expert is aware that his/her duty is to the court (i.e. not to the party that has retained him/her);

- that he/she has made his/her report in conformity with that duty; and

- if called on to give oral or written testimony that his/her testimony will be in conformity with that duty.

Joint Experts

The New Rules contain a protocol for the use of joint experts. This may be useful in some actions and where used the Rule mandates that the issues with respect to the appointment of the expert be settled including: the identity of the expert, the issues for the expert to resolve, the facts and assumptions agreed by the parties, any facts and assumptions not agreed to by the parties, when the report is to be prepared, and the responsibility for the fees of the expert. If the parties cannot agree on the terms of the appointment of a joint expert, either party can apply to the court to settle the terms.

Requirements of Reports

The information that must be in an expert's report has been expanded on from the Old Rules. In addition to the certification set out above, an expert's report must set out the following:

- The expert's name, address and area of expertise;

- The expert's qualifications, work and educational experience in his/her area of expertise;

- The instructions provided to the expert;

- The nature of the opinion being sought and each issue in the matter to which the opinion relates;

- The opinion of the expert with respect to each issue;
- The expert's reasons for his/her opinion including the factual assumptions on which it is based, a description of any research conducted, and a list of every document relied on.

Exchange of Reports

Possibly the biggest change is with respect to the deadline for serving expert reports. Expert reports must now be exchanged at least 84 days (12 weeks) before the scheduled trial date. If a joint expert is used, each party that intends to rely on the report at trial must serve the report. Responding expert reports must be served at least 42 days (6 weeks) before the scheduled trial date.

Supplementary Reports

If the expert's opinion changes, he/she must prepare a supplementary report which must be promptly served.

Production of Documents

Opposing parties are entitled to pre-trial disclosure of an expert's working file and materials. A party who serves a report must promptly serve on a requesting party:

- any written statement of facts on which the expert's opinion is based;
- a record of any independent observations made by the expert;
- any data compiled by the expert; and
- the results of any tests/inspections conducted by the expert if the expert has relied on the results.

If asked, a party must make available for review and copying the contents of an expert's file 14 days before the scheduled trial date.

Objection to an Expert's Report

Any objection to an expert's report must be done by the date of the trial management conference, or 21 days before the scheduled trial date, whichever is earliest. However, any demand for the expert to attend at trial for cross-examination must be made within 21 days of receipt of the report. If an expert has been required to attend at trial for cross-examination and the court is of the opinion that the cross-examination was not of assistance, the party that required the expert's attendance may be ordered to pay costs in an amount the court deems appropriate.

Application: While most of the changes under the New Rules with respect to experts will not have a big impact on the handling of a matter, the ability to retain joint experts could be a cost saving measure in appropriate cases. The earlier service of expert reports will require a change

in the way that parties prepare for trial, necessitating the expense of obtaining and serving a final report earlier, which may promote earlier settlement negotiations.

Rule 12 – Trial

The procedure for setting a trial date under the New Rules is basically the same.

It is important to note that if a party on whom a Notice of Trial is served objects to the trial date, the party has 21 days to request a Case Planning Conference or make an application to the court to have the trial rescheduled.

Rule 15 – Fast Track Litigation

The New Rules have combined some of the features of Rules 66 and 68 under the Old Rules and created one form of fast track litigation proceeding. Rule 15 is available for cases in which:

- The claim is not more than $100,000;
- The trial will not be longer than 3 days;
- The parties consent to the Rule applying; or
- The court orders that the Rule applies.

A party can elect fast track litigation by filing a Notice of Fast Track Litigation and serving it on the other party. A party may apply to the court to have the action removed from fast track litigation.

As under the Old Rules, fast track litigation under the New Rules is intended to streamline the process resulting in a faster resolution of the matter. Certain aspects of fast track are worth noting:

- There are no juries;
- Examination for discovery is limited to 2 hours, unless the parties consent;
- If a party applies for a trial date within 4 months of Rule 15 applying, a trial date must be scheduled within 4 months of the date being requested;
- Court applications can only be made after a case planning conference has been held; and
- Unless the court otherwise orders, the costs a party may claim are limited to $8,000 for a one day trial, $9,500 for a two day trial, and $11,000 for a trial that is more than two days.

Application: Most of the difficulties under Rules 66 and 68 under the Old Rules have been dealt as parties used the Rules. It should be an easy transition from the Old Rules to the new form of fast track litigation and the new Rule 15 will remain an attractive choice for certain matters.

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