

Community Legal Assistance Society

providing specialized legal assistance to promote social justice since 1971

COMMUNITY LAW PROGRAM

Please direct your reply to:

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February 17, 2012

Via Email - chantelle.bowers@fca-caf.gc.ca

Ms. Chantelle Bowers
Executive Assistant to the Chief Justice
Federal Court of Appeal
90 Sparks Street
Ottawa, ON K1A 0H9

Dear Ms. Bowers:

Re: Global Review of the Federal Court Rules

David Mossop, Q.C.
James Sayre
Leslie Anne Wall
Diane Nielsen
Frances Kelly
Alison Ward
Aleem Bharmal
Dan Soiseth
Rose Chin
Manjeet Chana
Lindsay Waddell
Jessie Hadley
Kevin Love
Scott Hicks
Kendra Milne
Devyn Cousineau
Kaity Cooper
(Articling Student)

Thank you for the opportunity to make submissions with respect to the global review of the *Federal Court Rules* (the "Rules").

Who we are?

The Community Legal Assistance Society (CLAS) provides legal advice and assistance to people who are physically, mentally, socially, economically or otherwise disadvantaged or whose human rights need protection.

Several of CLAS's practice areas fall under federal jurisdiction, most notably with respect to Employment Insurance, the Canada Pension Plan, and veteran's pensions. CLAS has also represented clients in federal human rights matters.

Our perspective

CLAS's work before the Federal Court and the Federal Court of Appeal is generally limited to judicial review of decisions made by federal tribunals. As a result, these comments will focus on the *Rules* governing applications (Part 5). CLAS deals with many clients attempting to represent themselves because they do not have the means to retain counsel. Ensuring these unrepresented litigants can access the court system is a concern for our organization.

CLAS will make submissions with respect to four of the topics raised in the discussion paper:

1. Court led vs. party led procedure;
2. Proportionality;
3. Trial vs. Disposition; and
4. The “architecture” of the *Rules*.

CLAS will also address three other points that arise from the *Rules* governing applications:

1. Service;
2. Tribunal records; and
3. Requisitioning hearings.

Court led vs. party led procedure

- The *Rules* governing applications (Part 5) should be revised to allow proceedings in which both parties are represented by counsel to be more “party led”.
- Cases involving unrepresented litigants raise special considerations and should be court led (“case managed”) to a greater extent than other applications.

The sub-committee has been asked to review whether courts or the parties should be primarily responsible for managing a proceeding. The difficulty with the current *Rules* governing applications is that neither the parties nor the Court have much control. Rather, applications are governed by very specific procedures and timelines set out in Part 5 of the *Rules*. Once an application is filed, the applicant must immediately pursue the application or else file a separate motion to stay the proceeding, even if the other parties all agree to “pause” the application.

While it is generally desirable to move an application to hearing quickly, there are many situations where it is much more efficient to allow the parties to control the process:

- Often a party files for judicial review simply to meet the very short limitation period and preserve their rights while they explore other avenues to resolve the dispute. For example, the parties may be waiting for a related decision that could render the application unnecessary. In these circumstances, it is a waste of resources for the parties to proceed with the application before they have determined if it is actually necessary.

- Litigants often need time to locate counsel, or at least get legal advice. This is particularly true for low-income clients who are seeking legal-aid or pro-bono services. It may take several weeks for a service provider to meet with a client and determine if they can assist. If the *Rules* force clients to proceed with their application before getting assistance, more work will be done by unrepresented litigants, without any legal advice, who are simply trying to meet the timelines.

In sum, greater flexibility is needed. For routine applications where the parties are represented by counsel, it seems inefficient and unnecessary to require case management in all cases. Rather, flexibility could be introduced by granting the parties more power to manage the proceedings by consent, beyond the limited extensions permitted under rule 7. There is little sense using additional resources from both the court and the parties through case management or unopposed motions if everyone agrees on purely procedural matters. Of course, either party could still apply to have the proceeding case managed if it was a compelling reason to do so.

The concern identified in the discussion paper regarding litigants who expend unnecessary time and money in the pre-trial process is not as prevalent with applications. Applications are generally limited to a review of the record. Time consuming processes concerning evidentiary issues, including document discovery, examinations for discovery or the creation of expert reports, are rarely an issue.

Cases involving unrepresented litigants raise special considerations that warrant more case management. Unrepresented parties may not be familiar with court process and procedure. They may have difficulty locating, reading, and understanding the *Rules* and practice directives. Relying on the parties to control the process by agreement is difficult because the unrepresented litigant may fear that counsel for the other party is seeking to exploit their lack of experience.

In the case of unrepresented litigants, requiring at least one initial case management conference would allow the Court to create specific expectations and timelines, which can be given directly to the litigant. Procedural issues can also be addressed without forcing the unrepresented litigant to file a motion. The case management judge should have a very large discretion to create a process that will allow the application to be dealt with fairly and efficiently. The case management judge should also have the power to eliminate any steps or rules that are unnecessary (this ties into the notion of “proportionality”, addressed below). For example, in a very simple application concerning employment insurance benefits based entirely on the tribunal record that is already in court, it may not be

necessary to force an unrepresented litigant to file their own record. Simple written representations may suffice, especially if the Attorney-General intends to file a record. The case management conference could be held by teleconference to avoid unnecessary travel for the litigants.

This is the system used by the BC Court of Appeal with respect to unrepresented litigants appealing decisions rendered by the Mental Health Review Board. A provision at the end of the current practice directive requires an initial case conference in all cases involving an unrepresented litigant.¹ That practice directive is attached to these submissions.

Proportionality

- Proportionality should be a central goal of the *Rules*.
- “The nature of the dispute” should be a stand alone consideration when assessing costs, and not simply when considering costs for expert reports.

The current *Rules* governing applications are generally proportionate to the types of disputes that arise in CLAS’s practice areas. With respect to costs, the court’s effort to make cost assessments more flexible should be applauded. One small change could be made with respect to “the nature of the dispute”. Currently, “the nature of the dispute” is listed as a consideration in the subsection dealing with expert reports (Rule 400(3)(n.1)). However, the nature of the dispute should always be considered when assessing costs, even in cases where an expert was not retained. It is quite likely that the Court would simply consider this factor as an “other matter” under Rule 400(3)(o). However, it would be clearer to explicitly list “the nature of the dispute” as a relevant factor in all cases. This would also help clarify that the “nature of the dispute” is not necessarily the same as “the amounts claimed and recovered”, which is listed as a relevant factor under subsection 400(3)(b) of the *Rules*. For example, an Old Age Security pension may be worth hundreds of thousands of dollars over the life time of the pensioner, but the “nature of the dispute” is still a benefit designed to alleviate poverty.

Trial vs. Disposition

Dispute resolution is generally preferable to litigation and the *Rules* should encourage the parties to reach a just resolution to the litigation. CLAS has no specific recommendations because,

¹ It is our understanding that this practice directive is presently under a general review and may change in the near future. However, the focus on ensuring that unrepresented litigants can access the courts remains important.

unfortunately, there seems to be little that the *Rules* can do directly to promote settlement in most applications for judicial review. However, two other topics addressed in our submission, *Court led vs. party led procedure* and *Proportionality*, have an indirect effect on disposition or settlement before trial:

1. *Court led vs. party led procedure*: If proceedings are party led, the parties can pause the proceeding if it appears another disposition or settlement is possible. This would promote resolution before trial or a hearing.
2. *Proportionality*: The parties should resolve their dispute before trial or a hearing because the resolution is fair for all parties, not because the time, resources, or risk of court costs required to litigate is completely disproportionate to what is at stake.

The “Architecture” of the Rules

- The *Rules* should be written in plain language. Legal jargon should be avoided.

Making the *Rules* more accessible and “user-friendly” in terms of their layout and organization is certainly an excellent idea. However, it is more critical to ensure that, once a person finds what they are looking for, they can actually understand what is written. This is especially true for unrepresented litigants who do not have legal training.

Other Issues:

1. **Service**: The current *Rules* require proof of service for virtually every document before it can be filed. This creates extra work when service is usually not disputed. It is particularly difficult for unrepresented litigants who cannot swear a solicitor’s certificate of service, and must therefore rely on opposing counsel to promptly return an acknowledgment of receipt or else pay for an affidavit of service.

Also, there is currently no rule specifically addressing how to serve a tribunal. Given that a very large portion of cases involve a federal tribunal, a rule clarifying this point would be useful.

2. ***Certified Tribunal Records:***

- a. *Rules 317*: Currently, the applicant can request any material that is in the possession of the tribunal under review and not in the applicant's possession. In practice, most tribunals simply file the entire record. This ensures that the record before the court is complete and avoids the difficulty of determining exactly what is or is not in the possession of the applicant. Rule 317 should be amended to simply allow the applicant to request the entire record from the tribunal.
- b. The *Rules* should clarify that the applicant is not required to re-file the entire tribunal record in affidavit form if the tribunal has filed a certified record in court under Rule 317. This creates unnecessary duplication. To ensure the record is in a form that is convenient for the court, the tribunal could be required to number the pages (which they generally do already) and provide an index of the documents in the record.
- c. The applicant should not be required to copy the entire certified tribunal record (or an affidavit attaching the certified tribunal record) into the Applicant's Record under Rule 309(2)(d). The tribunal record is often bulky and if it has been bound separately in a convenient manner, copying the record creates unnecessary duplication.

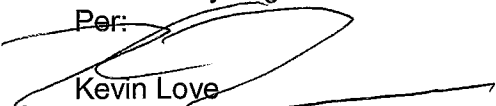
- 3. ***Allow the applicant to requisition a hearing at any time after their record is filed:*** Rule 314 requires the applicant to wait until the respondent has filed its record before requisitioning a hearing. However, a hearing date may not be available for several weeks or months after the requisition is filed. If there is going to be a significant delay between the date the requisition is filed and the date of the actual hearing, the parties might as well use this time to complete the pre-hearing process. The current process forces the parties to wait a significant amount of time after the records are filed before they get to hearing.

Thank you once again for the opportunity to make submission. Please do not hesitate to contact me with any questions or concerns.

Yours truly,

Community Legal Assistance Society

Per:



Kevin Love
Barrister & Solicitor
KL/ws

British Columbia Court of Appeal**Practice Directive (Criminal)****Title: Mental Disorder Appeals****Issued: 19 September 2011****Effective: Immediately****Cite as: *Mental Disorder Appeals* (Criminal Practice Directive, 19 September 2011)**

This directive applies to all appeals filed pursuant to s. 672.72 of the *Criminal Code*. The intent of this Directive is to expedite appeals and to identify any unusual circumstances that require special attention from the Court of Appeal. It is intended that appeals under this section of the *Criminal Code* shall be concluded within 5 months of the decision made by the Review Board. This Directive is to serve as a guideline only. Individual matters shall be dealt with by a pre-hearing justice.

1. An appellant shall file at least five copies of a Notice of Appeal in Form 1 within 15 days of receiving a copy of the reasons for disposition from the Review Board or the Court (s. 672.72(2) of the *Criminal Code*.)
2. The appellant shall serve the Notice of Appeal on all respondent(s).
3. Unless otherwise noted, the appellant shall file four copies of all material for the court and one copy for each counsel. The appellant is responsible for delivering a copy of the filed material to the respondent(s).
4. An appellant shall file in the Court of Appeal a skeleton Appeal Book and any transcript of evidence of proceedings before the Court or Review Board. This material shall be filed within 30 days of the filing of the Notice of Appeal.
5. A skeleton Appeal Book shall contain the disposition of the Court or Review Board, any reasons for disposition and the Notice of Appeal.
6. A transcript may be filed in electronic format. If this is done, the appellant shall file only one paper copy of the transcript with the Court. The appellant shall also provide the respondent(s) with an electronic copy of the transcript, or a paper copy on request.
7. Pursuant to s. 672.74 of the *Criminal Code*, the Supreme Court or Review Board will transmit the entire file to the Court of Appeal, including exhibits and disposition or placement decision.
8. The appellant shall file a factum 30 days after the skeleton Appeal Books and Transcript have been filed with the Court of Appeal. In the factum, references to the exhibits shall be to the Review Board Exhibit numbers, which shall be sequentially tabbed according to their order of reference in the factum. On delivering the factum to the respondent(s), the appellant shall include a list of exhibits, including the tab or page number of the exhibits in the supplementary appeal book, which are referred to in the factum.
9. On the filing of the appellant's factum, the appellant may obtain a date for the hearing of the appeal.
10. The respondent(s) may request a full set of exhibits from the appellant and the appellant shall supply the exhibits within a week of the request.
11. The respondent(s) shall file a factum 30 days after the appellant's factum is filed. The respondent(s) shall deliver to the appellant the factum and a list of any additional exhibits, which were referred to in the factum and which need to be added to the supplementary appeal book.
12. The appellant shall then prepare a supplementary appeal book consisting of all the exhibits referred to in the factums filed by the appellant and respondent(s).

13. Within two weeks of the respondent's factum being filed, the appellant shall file a reply factum and the supplementary appeal book. This should be done at least two weeks before the hearing of the appeal.
14. A Justice in chambers or a pre-hearing justice may abridge the times set out in this directive.

In Person Appellants

Where the appellant is unrepresented by counsel, a pre-hearing justice shall be appointed by the Chief Justice. A pre-hearing conference should be arranged as soon as possible. The Crown will prepare a list of issues, which should be canvassed at the time of the pre-hearing conference.

The Honourable Chief Justice Finch
for the Court of Appeal of British Columbia

History:

Replaces the criminal Practice Directive titled *Mental Disorder Appeals*, dated 2 March 1998.